IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.,* 2013 BCSC 2071

Date: 20131115
Docket: S132760
Registry: Vancouver

In the Matter of an Application under the *Trustee Act*, R.S.B.C. 1996, c. 464, s. 86

Between:

Philip K. Matkin Professional Corporation

Petitioner

And

Northmont Resort Properties Ltd.

Respondent

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Petitioner:	W. B. Milman
Counsel for the Respondent:	J. E. Virtue C. Pearce
Counsel for the 300 Owners:	L.R. Leblanc L. J. Alexander
Counsel for the 112 Owners:	M. Geldert K. Hamilton
Counsel for the 243 Owners:	W. S. Klym
Place and Date of Trial/Hearing:	Vancouver, B.C. October 8-10, 2013
Place and Date of Judgment:	Vancouver, B.C. November 15, 2013

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[1] This special case relates to a time share resort property formerly known as Fairmont Vacation Villas and now known as Sunchaser Vacation Villas. The petitioner Philip K. Matkin Professional Corporation holds beneficial title in trust for the time share owners and the respondent Northmont Resort Properties Ltd. ("Northmont"), according to their respective interests. The hearing of this special case arises from the petition filed by the petitioner under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464 for the court's advice and direction relating to the respondent's proposed restructuring and realignment of the resort. The proposed restructuring and realignment, the petition, and the special case affect the rights, obligations, and liabilities of both the respondent who is the successor in interest to the developer of the resort, as well as approximately 14,500 time share owners who have entered into approximately 18,600 vacation interval agreements.

[2] The proceeding also concerns R. 1-3 of the *Supreme Court Civil Rules* which sets out the object of the *Rules* as follows:

> **Object**
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> **Proportionality**
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

I. BACKGROUND

A. Fairmont Resort Properties Ltd.

[3] From 1990 to 2009 Fairmont Resort Properties Ltd. ("Fairmont") constructed, marketed, and developed in phases, a time share resort property in Fairmont Hot Springs. The resort consists of three separate developments known as Riverside Villas, Hillside Villas, and Riverview Villas. The Riverside Villas are 80 villas in eight three-storey buildings that were constructed between 1990 and

1995. The Hillside Villas are 138 villas in eight three and four-storey buildings that were constructed between 1995 and 2002. The Riverview Villas are 32 villas in a four-storey building that was constructed in 2004. All of the buildings are generally of wood-frame construction, clad with face-sealed stucco, and built on slab-on-grade foundation. The three developments make up 17 multifamily buildings demised into 478 units operated as 228 two-bedroom units and 22 one-bedroom Terrace units. The resort also includes various maintenance structures and a swimming pool water park amenity. The total area of the resort is approximately 34 acres.

B. Vacation Interval Agreements

[4] Fairmont leased vacation intervals or time shares in the resort. There are basically two types of vacation interval agreements: (a) agreements entered into prior to 2009 by which vacation interval owners acquired a 40-year leasehold interest; and (b) agreements entered from 2009 forward which create co-ownership interests. Since 2009 vacation interval owners who had leasehold interests, were given the option of entering into a co-ownership interest agreement. There are approximately 18,950 time share vacation intervals registered in the name of owners who have each executed standard forms of vacation interval agreements that have changed over time. Each agreement sets out particulars of the owner’s interest, including:

(a) the type of vacation property or villa, including the number of bedrooms;

(b) whether the agreement is an annual or biennial arrangement; and

(c) the “season” of the time share interest, that is, whether it is “prime”, “prime golf”, “golden” or “leisure” season.

[5] Each agreement contains a floating option by which the vacation interval owner surrenders the right to use and occupy the specified vacation interval interest in return for a floating option on the same villa type in the same season.

Each agreement also contains a right of unilateral change in favour of the Fairmont, and now Northmont.

[6] Although there have been various forms of vacation interval agreements over the years, the owners (including Fairmont, and now Northmont, to the extent that it is also the owner of vacation interval agreements) are subject to a yearly maintenance fee to cover the budgeted cost for maintenance of the resort.

[7] During the hearing, the vacation interval owners were sometimes referred to as “owners” and at other times “leaseholders” or “co-owners”, depending I suppose, on their respective interests. I will refer to them as owners, as that is the term most frequently used, and nothing in this proceeding turns on which term is used.

C. Northmont takes over for Fairmont

[8] From in or about 2005 to 2007 FRPL Finance Ltd. raised over $41.5 million through the sale of various bonds and the funds were advanced to Fairmont and secured by Fairmont’s assets. In 2009 Fairmont became insolvent and defaulted on the loans. By the March 30, 2009 order of the Alberta Court of Queen’s Bench, Fairmont obtained creditor protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] and Ernst & Young Inc. was appointed monitor. Pursuant to the *CCAA* proceedings, the approximately 800 to 850 bondholders converted their debt into units of Northwynd Properties Real Estate Investment Trust.

[9] Pursuant to the terms of the Foreclosure Agreement dated June 15, 2010 between Fairmont and Northwynd Limited Partnership (“Northwynd”), and an Asset Transfer Agreement between Northwynd and Northmont, Fairmont’s rights in the resort were foreclosed and transferred to Northmont. On June 22, 2010 the Alberta Court of Queen’s Bench granted an order allowing the vesting of and transfer of title to the various foreclosed assets in accordance with the terms of the Foreclosure Agreement.

[10] Both Northwynd and Northmont are wholly owned, directly or indirectly, by Northwynd Properties Real Estate Investment Trust. The bondholders initially had no intention of owning the resort, but decided that the continued operation of the resort under proper management was the only viable way to recover their investment in the Fairmont bonds. While the bondholders through Northmont are now manager of the resort, Northmont has subcontracted some of its operational and managerial responsibilities to Resort Villa Management.

D. The Petitioner Philip K. Matkin Professional Corporation

[11] Pursuant to the Amended and Restated Trust Agreement ("Trust Agreement") dated July 6, 2010, the petitioner holds beneficial title to the resort in trust for the owners and the respondent according to their respective interests. Legal title to the resort is registered in the name of a trustee, Carthew Registry Services Ltd., which hold title as nominee, agent and bare trustee for the benefit of present and future owners – to the extent of their interest in the resort lands and the respondent, as to its residual interest in the resort lands.

[12] Pursuant to s. 6 of the Trust Agreement, Philip K. Matkin, the principal of the petitioner, maintains a register of vacation interval agreements and records in the register specific information relating to each agreement including:

(a) the date of execution of each agreement;

(b) the type of villa (i.e. a lock off villa, terrace villa, or other type of villa);

(c) the specified weeks or time periods in the specific villa;

(d) if applicable, the season, the date of commencement of the season and the number of weeks in such season leased by the owner;

(e) the name and address of the owner (or its permitted assignee) as furnished by the owner (or its permitted assignee) initially and from time to time;

(f) permitted assignments of vacation interval agreements; and

(g) permitted mortgages or like encumbrances, and discharges.

E. Current State of the Resort

[13] Fairmont never established or maintained a reserve or replacement fund to deal with long term anticipated repairs, such as roof replacement, deck replacement, and similar repairs that are generally referred to as capital repairs because they occur less frequently than regular day to day maintenance. When Northmont took over the resort, the resort suffered from deferred maintenance and deficient upkeep, there were no as-built plans, and no files relating to the infrastructure and historical property maintenance in general. Although the largest issue was the resort's operating deficit, the first priority was to stabilize the resort, then minimize the operating deficit, and move forward. The total deficit at the end of 2012 was $4,356,129. Of that amount roughly $2.7 million was the cost to repair the foundation of the building known as Hillside Villas building 7000 ("building 7000").

[14] Doug Frey is executive vice-president of Northwynd, vice-president of development of Northmont and has been with the company since June 2010. By June 2010, through the *CCAA* proceedings, Northwynd had assumed responsibility for Fairmont's resort in Fairmont Hot Springs, as well as a resort in the Okanagan, and other resorts in the United States and Mexico. As "the files were virtually nonexistent for all of the resorts", Mr. Frey's first order of business was to familiarize himself with the resort. He toured the resort with the resort general manager, and was made aware of significant maintenance issues that needed to be addressed, including:

a) roof and deck deterioration;

b) exterior staircase and patio problems;

c) exterior building envelope or membrane of the property;

d) areas of negative drainage and site erosion;

e) failure of parking and asphalt drive surfaces;

f) chronic leakage of plumbing in 14 of 17 of the buildings and the recreation building; and

g) functional obsolesce of fixtures and furniture with little or no replacements.

[15] Mr. Frey learned from the resort maintenance manager that since 2004 deficiencies were prioritized and limited to the most pressing structural matters and health and safety issues, such as repair and limited replacement of failed plumbing, failed decks, failed foundations, repair and replacement of certain roofs and remediation of building code violations. There was no long-term proactive capital repair plan in place due to underfunding as a result of insufficient annual maintenance fee assessments.

[16] There appears to be no dispute amongst the owners that Northmont inherited what has been referred to by some of the owners as a “dilapidated” resort.

F. Resort Remediation and Renovation

[17] In the fall of 2011 Mr. Frey was tasked with evaluating a resort wide remediation to deal with the problems, and the following third party professionals or consultants were retained to assist:

(a) McElhanney Engineering Group Ltd., a structural engineering firm;

(b) MMM Group Ltd., a civil engineering firm;

(c) Leslie Engineering Corp. and Integral Group Consulting (BC) LLP, mechanical engineering firms;

(d) Aqua-Coast Engineering Ltd., a building envelope engineering firm;

(e) W&R Foundation Specialists Ltd., a foundation and geotechnical engineering firm; and

(f) Focus Engineering Partnership, a survey engineering firm.

[18] Over the course of approximately six months, the consultants identified and established a general renovation scope which forms the basis of the renovation program currently being undertaken and referred to in the resort realignment proposal. The general renovation scope covers four key areas of remediation:

(a) Replacement of Polybutal ("Poly-B") Domestic Water Piping

(i) The construction of the initial 14 buildings in the resort used Poly-B plumbing pipe which at the time was permitted under the BC Building Code. Use of Poly-B has been discontinued in Canada and its CSA certification removed as a result of wide spread failures.

(ii) The 14 buildings have and continue to experience frequent water leaks from failed Poly-B piping, many of which have resulted in catastrophic damage.

(iii) The Poly-B piping is behind walls and ceilings, and smaller non-catastrophic leaks cause mould and fungal growth, due to the length of time it takes to discover these type of pinhole leaks.

(iv) The resort risks losing insurance coverage for water leaks due to the continued presence of Poly-B, and the mechanical engineering consulting firm recommends that all Poly-B piping be removed and replaced.

(b) Exterior Building Envelope and Decks/Patios

(i) The exterior envelope of all of the buildings is compromised and exterior stucco was installed to a depth of 1/2 inch rather than to the current construction practice of 3/4 inch which is more resistant to damage and water penetration.

(ii) Repair of the exterior decks and cladding components of the building envelope is required as a result of areas of moisture ingress which has resulted in areas of building envelope failure.

(iii) Moisture penetration contributes to mould and fungal growth, a known health issue.

(c) Civil Repairs

(i) Storm water infrastructure is inadequate and must be addressed through the installation of an additional storm water pipeline, additional catch basins, and the tie-in of perimeter drainage from the buildings.

(ii) Parking and drive surfaces are beyond their designed life and must be replaced. This can be done in conjunction with the storm water work as it occurs above or adjacent to these surfaces.

(d) Furnishings, Fixtures and Equipment

(i) The interior of the units is original dating from 1990-2004. Replacements have been sporadic on an “as needed” basis. There are issues of functional obsolescence as well as wear and tear.

(ii) Large areas of the exterior and interiors of the buildings must be demolished in order to deal with the water penetration, mold, and removing and replacing the Poly-B piping. The required demolition creates an opportunity to update the interior design of the resort during reconstruction of the demolished areas.

(iii) Samantha Pinksen Design and Décor was retained to develop a scope of refurbishment to deal with obsolete design and colour as well as new functional requirements of modern electronic amenities. Information gathered from surveys of vacation interval owners conducted by the resort manager was used in the proposed updating of in-suite amenities.

(v) Care has been taken to replace "like with like" adjusted to 2013 specifications by using mid-quality materials such as vinyl wrapped cabinetry, tile and counter top selections, flooring materials, plumbing fixtures and the reuse of other components such as railings and doors.

G. Project Renovation Budget

[19] The preliminary scope and budget for the general renovation scope was presented to Northmont's Board of Directors in November 2012, formal evaluations were received, and the scope of the repair work was determined between December 2012 and February 2013. On December 10, 2012 a detailed letter was sent to the owners notifying them of the proposed renovation project and estimated high-level budget range, as well as the reasons why the project was necessary for the long term health of the resort.

[20] The final budget of $40,844,342 was established on March 9, 2013 and assumes that all of the buildings at the resort will be renovated. The budget was established on a building by building basis and is scalable depending on the number of buildings that remain on completion of the proposed resort realignment proposal. The budget is allocated as follows:

Civil Works (storm water management, physical infrastructure)	$3,424,120
Structural (building envelope, decks, roofs)	$6,174,433
Mechanical (Poly-B removal and plumbing installation)	$2,905,077
Interior Upgrades	$14,725,803

Furniture, fixtures & equipment	$3,500,000
Soft costs (variable labour costs of contractor and sub trades	$4,938,157
Contractor contingency	$2,316,483
Recreation building	$1,000,000
PST	$1,860,260
TOTAL	$40,844,342

[21] In February 2013 a CCDC-3 form of construction contract was entered into with VVI Construction Ltd., a general contractor, to establish a fixed upside budget and oversee the work. Northmont has also commissioned and received a Lender Quantity Surveyor Report by LTA Consultants Inc., professional quantity surveyors and construction cost consultants who reviewed the adequacy of the project renovation budget, and will be reporting monthly on the payment of invoices for work completed and the cost to complete. On March 23, 2013 the renovation and repair work began and has been progressing.

II. THE RESORT REALIGNMENT PROPOSAL

[22] I can do no better describing the resort realignment proposal than to set out portions of the April 15, 2013 affidavit of Kirk Wankel, a chartered accountant, director of Northmont, and chief executive officer of Northwynd. In his affidavit Mr. Wankel describes a short history of the resort, in general terms the vacation interval agreements, attaches two sample leasehold agreements from 1998 and 2005, and a sample form of vacation lease conversion agreement. At paragraphs 23 to 38 he deposes (exhibits omitted):

> Current State of the Resort
>
> 23. The Resort suffers from deferred maintenance and deficient upkeep. There is no reserve to remedy the situation.
>
> 24. Northmont believes that in the absence of restructuring, any maintenance fee adequate to place the Resort on a secure footing would cause a significant number of Vacation Interval Owners to default on their obligations. This would, in turn, obligate the remaining Vacation Interval Owners to cover the defaults, resulting in further defaults, and the eventual collapse of the Resort structure.

25. To avoid this situation, and for the benefit of all present and future Vacation Interval Owners, Northmont has developed the Resort Realignment proposal that is at the heart of this Petition.

The Restructuring Proposal (Resort Realignment)

26. Restructuring and refurbishment are essential to the continued existence of the Resort. The scope of the required refurbishment has been determined by Northmont after an extensive evaluation and the Vacation Interval Owners were notified of the requirement in December 2012 pursuant to the annual maintenance fee budget communication (the “Communication”). The Communication discussed the current condition of the Resort and outlined the repairs and refurbishments that are required. Attached hereto and marked as Exhibit "G" is a copy of the Communication.

27. In addition, Northmont is in the process of adding substantial additional information onto the www.sunchaservillas.ca website (the “Resort Website”) to provide greater information to the Vacation Interval Owners.

28. The Resort Realignment is a realistic and achievable plan to generate maintenance fees and restructure the Resort to allow Northmont, as manager, to carry out the necessary repairs and refurbishments. Broadly speaking, the Resort Realignment assumes there will be a significant reduction in the number of villas at the Resort and this will make it necessary to reassign Vacation Interval Interests among the villas best suited to refurbishment based on all the circumstances. Refurbishment of those villas will be accomplished using maintenance fees charged to the Vacation Interval Owners pursuant to the Agreements. This will be done in a number of steps.

Step 1: Assessment of Refurbishment Costs

29. Northmont proposes to invoice Vacation Interval Owners for a maintenance fee (the “Renovation Project Maintenance Fee”) in accordance with the Vacation Interval Agreements, more specifically Section 10 [OPERATING COSTS AND RESERVE FOR REFURBISHING] (and the similar clauses in the other Agreements). Northmont anticipates the Renovation Project Maintenance Fee will be sufficient to carry out the refurbishment of the Resort pursuant to the Resort Realignment.

Step 2: Election by Vacation Interval Owners

30. Northmont is hopeful that most Vacation Interval Owners will be supportive of the refurbishment and Resort Realignment and will consent to the actions needed to effect the consolidation of the Vacation Interval Owners' interests, but also recognizes that there may be Vacation Interval Owners who, for various reasons, are unwilling or unable to pay the Renovation Project Maintenance Fee.

31. Northmont is prepared to relieve Vacation Interval Owners who are not willing or able to pay the Renovation Project Maintenance Fee of their

future obligations by cancelling their Agreement on payment to Northmont of:

(a) a cancellation fee (the "Cancellation Fee"); and

(b) any previously invoiced but outstanding maintenance fees, promissory notes or other costs, if any, excluding the Renovation Project Maintenance Fee.

32. Vacation Interval Owners who elect to pay the Cancellation Fee will be required to enter into a separate agreement by which they will surrender their Vacation Interval Interest to Northmont in exchange for Northmont releasing such Vacation Interval Owners from all future liability' under their Agreements.

33. Vacation Interval Owners who are otherwise in good standing and elect to pay the Renovation Project Maintenance Fee will, of course, continue to enjoy the use of the refurbished Resort as contemplated in their Agreements.

Step 3: Amendment of the Agreements

34. Based on the number of Vacation Interval Owners who choose to cancel their Agreements, Northmont will determine the number and type of Vacation Interval Interests that remain outstanding. This information will then be used to determine the final number and type of villas and amenities at the Resort which are to be refurbished under the Resort Realignment.

35. Agreements made with Vacation Interval Owners who continue to hold Vacation Interval Interests in those villas which are to be refurbished do not require amendment. Agreements made with Vacation Interval Owners holding Vacation Interval Interests in villas that are not to be refurbished as part of the Resort Realignment will be amended by mutual consent where possible, or where that is not possible, by unilateral direction of Northmont, swapping the Vacation Interval Interest set out in the Vacation Interval Owner's Agreement for a Vacation Interval Interest in a villa which will be refurbished which is owned by Northmont or acquired by Northmont from a Vacation Interval Owner who has elected to pay the Cancellation Fee.

Step 4: Reducing the Size of the Resort

36. A critical step in the Resort Realignment will be for Northmont to direct the Trustee to transfer to Northmont fee simple title to the portions of the Resort on which villas that will not be refurbished are located. It is not economically feasible for Northmont to allow Vacation Intervals Owners to cancel their agreements if it cannot remove the excess villas created by the cancellations from the Resort.

37. Upon consolidation of Vacation Interval Agreements belonging to Northmont in villas which are not to be refurbished, those villas, associated lands and the Vacation Interval Interests previously attributable thereto, will no longer form part of the Resort for purposes of the Trust Agreement and it will be the intention of Northmont to apply

for subdivision approval allowing those portions of the Resort to be separately titled in the name of Northmont or its nominee.

38. Northmont regards the refurbishment of villas and the exclusion of surplus buildings from the Resort as a net benefit to all remaining and future Vacation Interval Owners because, without such a program, the villas and amenities at the Resort will prematurely reach the end of their useful life and the Resort will fail. In contrast, a refurbishment and reduction in the Resort size, coupled with proper budgeting for future repairs and replacements, as envisioned in the Resort Realignment, will ensure continued viability of the Resort for the foreseeable future.

[23] By letter dated April 8, 2013 Northmont wrote to the petitioner setting out in detail the reasons for and purpose of the resort realignment proposal, the law, and requesting that the petitioner cooperate in:

(a) amendment of the Vacation Interval Agreements, by mutual consent wherever possible, or, where that is not possible, by unilateral direction from Northmont, to consolidate Vacation Interval Interests within certain buildings on the Lands; and

(b) transfer to Northmont of portions of the Lands which have been thereby rendered free of Vacation Interval Agreements.

III. THE PETITION AND ORDERS SOUGHT

[24] On April 16, 2013 the within petition was filed by the petitioner, as trustee, along with the April 15, 2013 affidavits of Philip K. Matkin and Kirk Wankel. The petition sets out that the petitioner's application is brought under s. 86 of the *Trustee Act* for advice and direction from the court respecting certain requests by the respondent of the petitioner, in its capacity as trustee of the resort properties.

[25] The petitioner and Northmont also sought the court's direction regarding the procedure for giving notice of the petition to owners who choose to make submissions, and the scheduling of the hearing of the petition to permit the participation of interested owners.

IV. ORDERS

[26] On April 18, 2013 Master Scarth made the following orders:

1. The Respondent may provide notice of this proceeding (including the Petition, the Response and any other materials filed herein) to vacation interval lessees and co-owners (the "Owners" and each an "Owner") at the

> Sunchaser Vacation Villas at Riverside, Hillside and Riverview in Fairmont, British Columbia (the "Resort") by the following means:
>
> (a) mailing a copy of this Order (less the schedules) together with the materials in the forms attached hereto as Schedules A-l and A-2 to the Owners by no later than April 30, 2013 at the last known address on file with the manager of the Resort; and
>
> (b) posting filed copies of the following documents on the Resort website (www.sunchaservillas.ca):
>
> (i) the Petition;
>
> (ii) Matkin Affidavit sworn April 15, 2013;
>
> (iii) Wankel Affidavit sworn April 15, 2013;
>
> (iv) Petition Response; and
>
> (v) this Order.
>
> 2. Any Owner wishing to respond to the Petition or make submissions at the hearing on June 20, 2013 (or such later date to which it is adjourned) shall file and serve on the Petitioner and Respondents of record, on or before May 31, 2013, their Response in Form 67 and any affidavit or other materials upon which they intend to rely at such hearing.
>
> 3. Notice provided in accordance with Paragraph 1 is hereby declared to be good and sufficient notice of these proceedings to any Owner who has not filed and served a response in Form 67 to the Petition;
>
> 4. Notice of any other documents, pleadings or materials to be filed in these proceedings after the date of this Order to any Owner who has not filed and served a Response in Form 67 may be provided to such Owner by posting a copy thereof on the Resort website indicated in paragraph 1(b);
>
> 5. Provided notice has been duly given in accordance with paragraph 1, the Petitioner may set down an application to this Court for further directions on June 20, 2013 or such later date as the Petitioner and Respondents of record may consent to.

[27] Schedule A-1 to the order is the form of the letter dated April 12, 2013 addressed to the owner and entitled FREEDOM TO CHOOSE, REASON TO STAY. The letter was sent to each owner, along with each owner's applicable share of the renovation project fee invoice. The letter is single spaced and four pages in length, and explains that the Freedom to Choose, Reason to Stay program was developed to allow owners to assess whether they wanted to pay the renovation project fee and stay in the resort, or pay a cancellation fee to terminate their vacation interval agreement and avoid future obligations. It explained that

there was more information on the resort's website, or if they had no internet access, a hard copy of the information could be mailed to them.

[28] Portions of the April 12, 2013 letter provide:

> WHY TWO ALTERNATIVES?
>
> An expense of this magnitude in isolation was likely to create a large level of default from our Timeshare Members. Since that default must be covered by the remaining members, trying to restore the Resort to a reasonable standard would have resulted in a vicious circle of invoices causing defaults causing higher invoices ultimately causing the Resort to collapse on itself. We recognized that restoring the Resort would only succeed if we accepted that it had to get smaller. There had to be a mechanism to allow our satisfied Timeshare Members to contribute to a healthy Resort while our unsatisfied members had a fair option to cancel their Vacation Interval Agreements.
>
> FREEDOM TO CHOOSE
>
> We appreciate that not all of our Timeshare Members want to continue with their Vacation Interval Agreement for any number of reasons including age, cost, or changes in life circumstances. These Timeshare Members no longer view their Timeshare Interval as an asset, but rather a yearly liability because they no longer use it or no longer use it effectively.
>
> In order to allow Timeshare Members to cancel their Vacation Interval Agreements, we developed a cancellation option that fairly compensates the Developer for the lost property management fees, ensures the deficit at the Resort is properly recovered, and recovers some of the administrative and trustee costs of the process.
>
> …
>
> The cancellation fee represents approximately 11% of the future maintenance fee obligation (assuming a 3% annual increase in maintenance fees) for a Timeshare Member with 20 years remaining on their Vacation Interval. This is a very fair alternative for those owners who wish to be relieved of their obligations while at the same time trying to ensure their departure does not disadvantage our Timeshare Members who want to stay.
>
> …
>
> REASON TO STAY
>
> <u>General information:</u>
> We have placed a substantial amount of information on the <u>www.sunchaservillas.ca</u> website. Important items that you should review to help understand the need for the renovation, the cost of completing it, and how your Resort will look once it is complete include a budget comparison, renovation presentation, third party contractor bio's, and unit improvement plans and drawings.
>
> <u>Behind the wall costs:</u>
> The primary concern raised to date by Timeshare Members is the extent of the Renovation. This is understandable given that a substantial amount of the

renovation costs are what we describe as "behind the wall" costs as determined by independent third party engineering reports. These are problems that you might never see when you visit the Resort. They are hidden behind walls, under buildings, under roads, in service rooms, etc. It is hard to appreciate the scope of these costs because there is no visible flaw. The core underlying behind the wall issues with the buildings and common areas encompass the majority of the renovation cost. Please review the extended communication for a detailed explanation of these costs.

Vacation experience costs:
Our project designer, Samantha Pinksen, has done a great job evaluating the Resort and the units with the understanding that our objective is renovating a timeshare appropriate Resort, not creating a lavish or overly expensive property. To that end, her primary focus has been on in-suite use and Resort durability.

A major issue with the Resort has been the lack of functionality in the B side units at Riverside. As such, we are changing the layout to increase the living space to permit a full-service kitchen and seating for four people. In addition, all renovated units will include new flat screen televisions, appliances, cabinetry and millwork, furniture, fixtures, linens, beds, and smallwares (plates, pots, etc.). In conjunction with the structural external work, the exterior of the buildings will receive a facelift comprising repair or replacement of decks and patios, remediation of the stucco, painting of all buildings to a common scheme and replacement of railings.

…

RESORT REALIGNMENT

In order for Freedom to Choose, Reason to Stay to succeed, the Resort has to be shrunk in size. Please review the extended communication for a detailed explanation of the need for this change and the steps necessary to execute it. In order to facilitate the realignment, we are enclosing a renovation program response form that asks you to approve the following:

1) To change your Vacation Interval to a different unit of the same season and type within the timeshare program.
2) To provide your consent for the removal of units from the timeshare program.
3) To change your Vacation Interval from a biennial odd to biennial even or vice versa upon notice to you.
4) Alternatively, to elect to surrender your Vacation Interval.

We have asked the Trustee to cooperate in this process and, at our request; the Trustee has filed a petition in the Supreme Court of British Columbia seeking advice and direction confirming that Northmont can authorize the realignment of the Resort. Copies of the petition and all other documents filed in connection with the petition will be posted on our website at www.sunchaservillas.ca/owners/petition. Notice of the hearing date (likely in June, 2013) will be included in this package if available at the time of mailing, or we will give notice of the date on the above website and as the court may otherwise direct. If you wish to support the process, you can do so by

> returning the renovation program response form to us or by selecting the Freedom to Choose cancellation option, which includes the relevant authorizations in the cancellation agreement by May 31st, 2013. In addition, you can obtain independent legal counsel to advise you on additional options, including attending and supporting at the hearing. If you wish to oppose the realignment, we recommend that you obtain independent legal counsel to advise you on your legal options including attending and dissenting at the hearing.

[29] Schedule A-2 to the order of April 18, 2013 is the Renovation Program Response Form, by which each owner indicates whether they accept the resort realignment proposal and the form of payment, whether they consent to what is described as “Biennial Odd/Even Migration (Optional)”, or whether the owner selects what is described as Election to Surrender (Optional).

[30] On May 30, 2013 the order of Master Scarth was amended so that the date of “May 31, 2013” in paragraph 2 was replaced with: “a date to be set by this Court on or after June 20, 2013.”

[31] Based on the tenor of the many responses, Northmont scheduled a case planning conference.

[32] The first case planning conference took place on June 25, 2013. In addition to the petitioner and Northmont, there were a number of law firms representing a total of approximately 643 owners. Cox Taylor of Victoria represented 300 owners; Docken Klym of Calgary represented 223 owners; Geldert Law of Vancouver represented 35 owners, and Ms. Hamilton indicated that she represented “about 80, 85 nearing 100”, and that she had just filed a class action (*Lee Charles Merriman v. Northwynd Limited Partnership*, Vancouver S134766).

[33] While Part 5 of the *Supreme Court Civil Rules* or Rules 5-1, 5-2, and 5-3 relating to Case Planning Conferences contemplate a case planning conference applying to an action, rather than a proceeding commenced by petition, no issue with respect to the suitability of a case planning conference was raised by any of the owners.

[34] It was apparent at the outset that the two main issues related to the renovation project fee and to the cancellation fee. It was generally agreed that the issues had to be determined expeditiously and inexpensively, as both time and money were running out, and the resort may not be able to continue to operate. It was agreed that the parties and interested owners would review and revise the case planning proposal to narrow the issues and the applications, and return for a second case planning conference on July 12, 2013.

[35] By the second case planning conference on July 12, 2013 the number of owners represented by counsel from the first case planning conference had increased to approximately 698 owners. It was agreed that those who had not filed a response to the petition would not be required to file a response, but instead the issues relating to the renovation project fee and cancellation fee would be determined by way of a statement of special case under R. 9-3. A case plan order ordered that the parties comply with the case plan proposal with respect to the dates and manner by which cross-examination on the affidavits filed by Northmont and by the owners would take place. The case plan order also ordered that:

> …
>
> 4. the issues set out in a Statement of Special Case to be agreed upon by the parties in accordance with the attached Case Plan Proposal shall be heard by this Court;
>
> 5. there will be a three day hearing of the Special Case on October 8, 9 and 10, 2013;
>
> …
>
> 7. The determinations made arising out of the hearing of the Special Case are binding on all of Leaseholders and Timeshare Owners who have been served;
>
> 8. Service of this Order and of all Orders or proceedings in this matter is deemed to be effective by posting on the website (www.sunchaserresort.com) and by service on counsel for the Respondents or by service in the manner specified in filed Responses.

[36] At the third case planning conference on September 3, 2013, the firm of Cox Taylor raised for the first time, an issue relating to the validity of the vacation interval or time share agreements, and by agreement, paragraph 19 was added to

the statement of special case to provide that for the purpose of the statement of special case, and without prejudice, the court may assume that the agreements are valid and enforceable contracts.

[37] The owners must be commended for selecting three representatives to file affidavits in support of the statement of special case, rather than requiring the court to review potentially hundreds of affidavits, particularly when the issue relating to the renovation project fee relates to an interpretation of the vacation interval agreements.

V. STATEMENT OF SPECIAL CASE PURSUANT TO RULE 9-3

[38] I set out in full the statement of special case (without reproducing the exhibits):

STATEMENT OF SPECIAL CASE PURSUANT TO RULE 9-3
OF THE BCSC RULES

To: The Petitioner, Philip K. Matkin Professional Corporation

And To: The Leaseholders and Co-Owners (the "Timeshare Owners") of the time share resort properties known as Sunchaser Vacation Villas at Riverside, Hillside and Riverview in Fairmont, British Columbia, at the addresses for service contained in their Responses to Petition, filed herein.

THIS SPECIAL CASE STATED by the consent of all represented Parties to the within Petition and authorized pursuant to the Case Planning Orders of Madam Justice Loo made July 12 and September 3, 2013 (the **"Case Planning Orders")**

THIS SPECIAL CASE seeks the determination of the Supreme Court on the question(s) of fact, law or mixed fact and law set out below, arising out of the relevant agreed facts and the evidence contained in the filed affidavits and any cross examination thereon as set out in Part 3 of the Statement of Special Case:

Part 1: RELEVANT AGREED FACTS

The following facts have been agreed upon by the Parties and are relevant to the questions to be determined by the Supreme Court.

<u>The Parties, the Resort and the Petition Proceedings</u>

1 The time share property at issue in this Petition consists of residential vacation properties and amenities known as Sunchaser Vacation Villas at Riverside, Hillside and Riverview in Fairmont, British Columbia (the “**Resort**”). Vacation intervals in the Resort were marketed and sold to buyers in the form of leasehold or co-ownership interest agreements (the “**Vacation Interval Agreements**”).

2. In 2009, Fairmont Resort Properties Ltd., then the owner of the Vacation Interval Agreements related to the Resort, entered into *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. C-36, as amended protection. On June 22, 2010, the Honourable Madam Justice B.E.C. Romaine granted an Order in this matter (the "**June 22 Vesting Order**"). Attached as Exhibit F to the First Affidavit of Kirk Wankel is a copy of this Order. In granting the June 22 Vesting Order, Madam Justice B.E.C. Romaine followed a previous Order of Madam Justice B.E.C. Romaine dated June 4, 2010 (the "**June 4 Order**"). The June 4 Order is attached as Exhibit A to the First Affidavit of Frances Pantilag, along with a sworn affidavit of service which is attached as Exhibit B to the First Affidavit of Frances Pantilag.

3. Pursuant to the June 22, 2010 Order, and the Asset Transfer Agreement approved therein, the Respondent, Northmont Resort Properties Ltd. is the manager of the Resort. Northmont Resort Properties Ltd. has subcontracted some operational and managerial responsibility to Resort Villa Management Ltd. ("**RVM**"), (collectively, "**Northmont**").

4. Carthew Registry Services Ltd. (the "**Nominee**"), holds title to the Resort as nominee, agent and bare trustee for Philip K. Matkin Professional Corporation, the Trustee (collectively, the "**Trustee**").

5. The Respondents are lessees or unit interest co-owners that have entered into Vacation Interval Agreements (the "**Vacation Interval Owners**").

6. Upon filing of the Petition, there were approximately 14,500 Vacation Interval Owners representing approximately 18,600 Vacation Interval Agreements.

7. In November, 2012, Northmont prepared a business plan marked as Exhibit 2 in the Questioning of Kirk Lawson Wankel by Mr. W. Klym held July 16, 2013.

8. On April 8, 2013, Northmont wrote to Philip K. Matkin and requested that the Trustee cooperate in:

   "(a) amendment of the Vacations Interval Agreements, by mutual consent wherever possible, or, where that is not possible, by unilateral direction from Northmont, to consolidate Vacation Interval Interests within certain buildings located on the Lands; and

   (b) transfer to Northmont of portions of the Lands which have been thereby rendered free of Vacation Interval Agreements."

Attached as Exhibit C to the Matkin Affidavit #1 is a copy of the Northmont April 8, 2013 letter.

9. Northmont advised the Vacation Interval Owners of the planned renovation of the Resort within its annual maintenance fee circular in December, 2012 and provided another communication in April, 2013 with the renovation project fee invoices. Attached as Schedule "A-1" to

the Order of Master Scarth dated April 18, 2013 is a copy of the April, 2013 communication entitled "Freedom to Choose, Reason to Stay" (the “**Freedom to Choose, Reason to Stay Communication**”)

The Vacation Interval Agreements

10. Each Vacation Interval Owner executed a Vacation Interval Agreement, the form of which changed over time. However, fundamentally, there are two types of agreements:

    (a) Agreements prior to 2009, which created leasehold interests; and

    (b) Agreements from 2009 forward, which created co-ownership interests.

    Attached to Wankel Affidavit #1 and marked as Exhibits “**A**” and “**B**”, respectively, are sample leasehold Vacation Interval Agreements from 1998 and 2005. Attached to Wankel Affidavit #1 and marked as Exhibit “**C**” is a sample co-ownership Vacation Interval Agreement.

The Cancellation Fee

11. In the Freedom to Choose, Right to Stay Communication, Vacation Interval Owners were presented with an offer by Northmont, to cancel the Vacation Interval Agreements in exchange for payment of a fee (the “**Cancellation Fee**”). The Cancellation Fee is referred to in the Freedom to Choose, Reason to Stay Communication.

12. Under the offer by Northmont, Vacation Interval Owners who elect to pay the Cancellation Fee will also be required to enter into a separate agreement by which the Vacation Interval Owner will surrender its Vacation Interval Agreement to Northmont in exchange for Northmont releasing the Vacation Interval Owners from all future liability under its Agreement.

The Renovation Project Fee

13. Northmont has invoiced Vacation Interval Owners a fee. This fee was referred to on the invoices as the “Renovation Project Maintenance Fee” and has been referred to in other [correspondence] as a "Renovation Project Fee" (the “**Renovation Project Fee**”).

14. Northmont has asserted that Vacation Interval Owners who do not accept the offer to cancel the Vacation Interval Agreements in exchange for the payment of the Cancellation Fee have an obligation to pay the Renovation Project Fee. The Renovation Project Fee is referred to in the Freedom to Choose, Reason to Stay Communication.

The Dispute

15. Some Vacation Interval Owners dispute the legality, validity and enforceability of the Cancellation Fee both under the Vacation Interval Agreements and at law; further dispute the contractual entitlement of Northmont to levy the Renovation Project Fee in whole or in part, pursuant to the Vacation Interval Agreements or otherwise; and further

dispute the validity and enforceability of the Vacation Interval Agreements by Northmont against the Vacation Interval Owners.

Further Relevant Facts and Evidence

16. Further facts and evidence, which may be disputed by the parties, but relevant to the determination of this dispute are contained in the filed affidavits and any cross examination thereon as set out in Part 3 of the Statement of Special Case.

17. The Parties agree that the Court may find facts necessary to address the Statement of Special Case from the evidence set out in Part 3 of this Statement of Special Case.

Part 2: QUESTIONS OF LAW, FACT OR MIXED FACT AND LAW

18. The questions to be determined by the Supreme Court are as follows:

    (a) Is Northmont entitled to charge or levy the Cancellation Fee?

    (b) Is Northmont entitled under the Vacation Interval Agreements to levy the Renovation Project Fee, in whole or in part?

19 The Parties agree that for the purposes of this Statement of Special Case, and without prejudice, the Court may assume that the Agreements are valid and enforceable contracts.

Part 3: EVIDENCE

20. The evidence relevant to the stated case is as follows:

    (a) Affidavit of Mr. Philip K. Matkin sworn April 15, 2013 and filed April 16, 2013 in the within proceedings (Matkin Affidavit);

    (b) Affidavit of Mr. Kirk Wankel sworn April 15, 2013 and filed in the within proceedings on April 16, 2013 (Wankel Affidavit #1);

    (c) Affidavit of Mr. Kirk Wankel sworn June 24, 2013 and filed June 25, 2013 in the within proceedings (Wankel Affidavit #2);

    (d) Questioning of Mr. Kirk Wankel on his Affidavits sworn April 15, 2013 and June 24, 2013 by Mr. Klym, held July 16, 2013 and to be filed on October 4, 2013 in the Record of Pleadings and Evidence (Wankel Questioning #1);

    (e) Further Questioning of Mr. Kirk Wankel on his Affidavits sworn April 15, 2013 and June 24, 2013 by Ms. LeBlanc, held July 17, 2013 and to be filed on October 4, 2013 in the Record of Pleadings and Evidence (Wankel Questioning #2);

    (f) Further Questioning of Mr. Kirk Wankel on his Affidavits sworn April 15, 2013 and June 24, 2013 by

Ms. Hamilton, held July 17, 2013 and to be filed on October 4, 2013 in the Record of Pleadings and Evidence (Wankel Questioning #3);

(g) Affidavit of Mr. Doug Frey sworn June 24, 2013 and filed June 16, 2013 in the within proceedings (Frey Affidavit);

(h) Questioning of Mr. Doug Frey on his Affidavit sworn June 24, 2013 by Mr. Klym and Ms. LeBlanc, held July 16, 2013 and to be filed on October 4, 2013 in the Record of Pleadings and Evidence (Frey Questioning #1);

(i) Questioning of Mr. Doug Frey on his Affidavit sworn June 24, 2013 by Ms. Hamilton and Mr. Klym, held July 16, 2013 and to be filed on October 4, 2013 in the Record of Pleadings and Evidence (Frey Questioning #2);

(j) Affidavit of Mr. Matthew Godfrey sworn July 26, 2013 and filed July 30, 2013 in the within proceedings (Godfrey Affidavit);

(k) Questioning of Mr. Matthew Godfrey on his Affidavit sworn July 26, 2013 by Mr. Virtue, held August 16, 2013 and to be filed on October 4, 2013 in the Record of Pleadings and Evidence (Godfrey Questioning);

(l) Affidavit of Frances Pantilag sworn August 27, 2013 and filed August 27, 2013 in the within proceedings (Pantilag Affidavit);

(m) Affidavit of James Belfry sworn September 12, 2013 and filed September 16, 2013 in the within proceedings (Belfry Affidavit);

(n) Questioning of Mr. James Belfry on his Affidavit sworn September 12, 2013 by Mr. Virtue, held September 18, 2013 and to be filed on October 4, 2013 in the Record of Pleadings and Evidence; and

(o) Such other Affidavit evidence as is properly filed in the within proceedings, in accordance with the timelines set forth in the Case Planning Order or as permitted by the Court, including cross-examination on such affidavit evidence already filed.

Date: September 19, 2013 Per: (SGD) JUDSON E. VIRTUE
Counsel to the Respondent
Northmont Resort Properties Ltd.

Address for service of the person requesting the Special Case:

NORTON ROSE FULBRIGHT CANADA LLP
3700, 400 Third Avenue SW
Calgary, AB T2P 4H2

…

THE FOLLOWING COUNSEL APPROVE THE FORM AND CONTENTS OF THIS NOTICE OF SPECIAL CASE:

____
Signature of Lindsay R. LeBlanc
Lawyer for approximately 300 Leaseholders and Timeshare Owners

____
Signature of Michael Geldert
Lawyer for approximately 112 Leaseholders and Timeshare Owners

____
Signature of William Klym
Lawyer for approximately 243 Leaseholders and Timeshare Owners

____
Signature of Kellie Hamilton
Lawyer for approximately 334 Leaseholders and Timeshare Owners

____
Signature of Warren B. Milman
Lawyer for Philip K. Matkin Professional Corporation, Petitioner

[39] It is necessary to refer to the vacation interval agreements in order to deal with arguments raised by the owners in response to the first question and to answer the second question. The following agreements or forms of agreements were relied on in argument by the owners:

(a) July 1997 Vacation Villa Lease;

(b) April 3, 2004 Vacation Experience Lease (Exhibit "A" to the James Belfry affidavit);

(c) Fairmont form of Vacation Experience Lease and Co-Ownership Agreement (Exhibit "B3" to Matkin affidavit); and

(d) Northmont form of Vacation Interval Agreement (Exhibit "B4" to the Philip K. Matkin affidavit).

[40] Some copies of the agreements are difficult to read, so I will set out certain provisions from the July 1997 Vacation Villa Lease, recognizing that as a principle of contract interpretation, agreements must be construed as a whole:

NOW THEREFORE in consideration of the premises, covenants and agreements contained herein the parties agree as follows:

1. DEMISE: The Lessor hereby demises and leases to the Lessee and the Lessee leases from the Lessor a specified Villa for a specified week either annually or biennially as described on the first page of this Lease, together with the right of ingress and egress thereto over the Lands, TO HAVE AND TO HOLD during the Term (as defined in paragraph 4 of this Lease) in accordance with the terms and conditions set out in this Lease.

2. FLOATING OPTION: Notwithstanding paragraph 1, the Lessee hereby surrenders the right to use and occupy a specified Villa for a specified week as contemplated by that paragraph in consideration for a right to use and occupy for the duration of the Term an unspecified Villa of the type specified in paragraph 1 for a floating week, either annually or biennially as designated in paragraph 1, within the Season designated In paragraph 1. However, for the purposes of recording the Lessee's leasehold interest, the Trustee will record this Lease as a demise to the Lessee of the specific Villa for the specific week designated on page 1. This option, and the agreement created by this exercise of this option by the Lessee, is an exchange right collateral to, but independent from, the Lease.

…

4. LEASE TERM: The term of this Lease is for a period of forty (40) years commencing from the first day of the first week in the Season of the calendar year designated by the Lessee on the first page of this Lease.

…

8. FURNISHINGS: Each Villa is fully furnished and particulars of the furnishings have been described In the Prospectus. …

9. OPERATING COSTS AND RESERVE FOR REFURBISHING: In addition to the Management Fee described in paragraph 10 of this Lease, the Lessee shall be responsible for his proportionate share of all administration, maintenance and repair costs (the "Operating Costs") and replacement costs incurred with respect to the Project and the refurbishment of the Villas including, without limiting the generality of the foregoing, the following:

   (a) property taxes;

   (b) water and sewer rates;

   (c) lighting and heating;

   (d) insurance;

   (e) clearance of walks and roadways from snow and debris;

   (f) housekeeping services, on a hotel standard basis, including the provision of towels, linens, bathroom soap and paper products (i.e. normal housekeeping encompasses linen changes and general clean up following the termination of a week period, and any services in addition are classified as special

housekeeping services and are subject to a special charge);

(g) painting and redecorating as required;

(h) garbage disposal;

(i) repairs to both the exterior and interior of the Villas;

(j) service fees and costs to the Trustee;

(k) maintenance staff and equipment;

(l) administrative staff;

(m) office space and equipment;

(n) accounting costs;

(o) furniture and equipment replacement costs; and

(p) all expenses incurred by the Lessor in the management of the Villas (i.e. see paragraph 10 of this Lease).

…

10. MANAGEMENT BY THE LESSOR: The Lessee hereby appoints the Lessor as the manager (the "Manager") of the Project and the Lessor agrees to provide management services subject to the terms and conditions herein set forth. The Lessor shall be entitled to subcontract management services to an independent corporation. The Manager shall manage and maintain the Project in a prudent and workmanlike manner. Its duties shall include dealing with the items described in paragraph 9 of this Lease. In addition, the Manager shall:

(a) maintain records of its management showing all receipts and expenditures relating to the Project;

(b) in each calendar year (usually by November 30th), prepare a budget of the estimated Operating Costs for the succeeding calendar year (the "Estimated Operating Costs") and calculate an amount it deems necessary to enable furnishing and fixture replacements to be made when required (the "Replacement Reserves");

(c) prior to the 31st of March in each calendar year, send to the Lessee:

(i) a notice of assessment (the "Notice of Assessment") setting forth Lessee's share of the Management Fee, the Estimated Operating Costs and the Replacement Reserves, together with such adjustments and carry forwards and other costs as may be contemplated by this Lease; and

(ii) an audited statement (prepared in accordance with standard accounting procedures) showing the receipts and expenditures incurred in the preceding

calendar year, including the actual Operating Costs (the "Actual Operating Costs"), Management Fee and Replacement Reserves, and the Lessee's share of such expenses, together with an accounting of all trust monies held by the Trustee.

(d) in the event that there is a cumulative operating surplus either:

(i) credit the Lessee with such excess on subsequent assessments; or

(ii) maintain any case surplus in an interest bearing account to be credited toward future assessments, including special assessments.

(e) in the event that there is a cumulative operating deficit, add the amount of such deficiency to subsequent assessments;

(f) hold all monies received by it from a Lessee pursuant to the Notice of Assessment in trust for the payment of the Management Fee, Operating Costs and Replacement Reserves and at all times keep and maintain monies paid by the Lessee separate and apart from the Lessor's own money, and deposited in interest bearing accounts whenever practical;

(g) open two separate bank accounts, one entitled "Operating Trust Account" and the other entitled "Replacement Reserve Trust Account", and all monies received relative to Operating Costs shall be placed in the Operating Trust Account and all monies received in connection with Replacement Reserves or collected as described in paragraph 9(d)(ii) of this Lease shall be placed in the Replacement Reserve Trust Account; and

(h) be entitled in the event that it uses its own money in the course of carrying out its obligation hereunder to reimburse itself from monies received from the Lessee provided that the Manager gives the Lessee a full accounting of such reimbursement.

As compensation for its services the Manager shall be entitled to an annual fee (the "Management Fee") equal to fifteen per cent (15%) of the aggregate of the Replacement Reserves and the Operating Costs assessed in each calendar year with respect to the Project. The amount of the Management Fee shall be included as a separate amount in the Notice of Assessment and shall be based upon the Estimated Operating Costs.

…

13. DEFAULT OF THE LESSEE IN ANY PAYMENT REQUIRED UNDER THIS LEASE: In the event that the Lessee should default in making any payment required to be made by the Lessee hereunder, within the time stipulated for *payment*, then the Lessee agrees that the Lessee's right to occupy a Villa shall be suspended until such time as all payments due have been duly paid.

    In the event that default in payment is not remedied within sixteen (16) months from the date of such default, then the Lessee shall be deemed to have offered to sell the Lessee's leasehold interest to the Lessor for an amount equal to fifty per cent (50%) of:

    (a) one-fortieth (1/40th) of the Purchase Price for an annual Lease; or

    (b) one-twentieth (1/20th) of the Purchase Price for a biennial Lease.

    each, as the case may be, multiplied by the number of lease years then remaining in this Lease, less all monies then owing under this Lease to the Lessor. If the Lessor accepts the deemed offer as aforesaid, the Lessor shall be entitled to the Lessee's leasehold interest for the duration of this Lease and upon presentation of proof of payment to the Trustee, shall be entitled to be recorded as the registered holder of this Lease.

14. LESSOR'S LIABILITY FOR OPERATING COSTS: In the Event that less than fifty-one (51) week period in any calendar year have been leased by the Lessor for each of the Villas, then for the purpose of the sharing of the Management Fee, Operating Costs and Replacement Reserves as provided for herein, the Lessor shall be deemed to be the holder of the week periods not leased (save and except for the week period reserved for maintenance) and shall be responsible for payment of the portion of the Management Fee, Operating Costs and Replacement Reserves required to be paid to the same extent as if the Lessor were a lessee.

…

19. LESSEE'S ASSOCIATION: The Lessee covenants and agrees to help create, organize, establish and thereafter maintain membership in an association of lessees of the Villas, which association shall be formed and organized to promote a means of practicable communication with the Lessor and lessees relative to the resolution of problems as between lessees and as between lessees and the Lessor. …

20. REMOVAL OF MANAGER: The Leases In conjunction with other holders of leasehold interest in the Project totalling not less than fifty-one per cent (51%) of all leaseholders of Villas shall be entitled to terminate the services of the Lessor as Manager, provided that

    (a) not less than sixty (60) days' notice is given, duly signed by [at] least fifty-one per cent (51%) of the leaseholders on record with the Trustee;

    (b) the Lessor's fees and charges are fully paid and satisfied or provided for to the date of such termination; and

> (c) the lessees have produced to the Lessor an executed management agreement with a new manager in like terms to the management provisions in this Lease and the Lessor is a party to such agreement as a lessee or deemed lessee.
>
> …
>
> 38. MODIFICATIONS TO LEASE: The Lessor reserves the right to adjust or modify this Lease from time to time for the benefit of existing and future lessees, provided that any such adjustment or modification will not in any way materially prejudice the rights of existing lessees.

[41] Over the years the forms of agreements have changed slightly. By the time of the April 3, 2004 Vacation Experience Lease, para. 13 had changed to provide:

> 13 DEFAULT OF THE LESSEE IN ANY PAYMENT REQUIRED UNDER THIS LEASE: In the event that the Lessee should default in making any payment required to be made by the Lessee hereunder, within the time stipulated for payment, then the Lessee agrees that the Lessee's right to occupy a Vacation Property shall be suspended until such time as all payments due have been duly paid.
>
> If a default in any payment required to be paid according to this lease has not been remedied within 90 days from the date of such default, and the Lessee has been given a minimum of one written notice of such default, the Lessor may terminate this Lease upon written notice to the Lessee, and from the date of such notice all of the Lessee's rights to the Vacation Property pursuant to the provisions of this Lease shall be terminated. Furthermore, from the date of such notice of termination, the Lessor shall be entitled to the full and exclusive right to use and occupy the Vacation Property free and clear of all rights of the Lessee pursuant to this Lease or otherwise and Lessor may grant the right to use the Vacation Property during the week period to which the Lessee is entitled hereunder to another person or may retain it for any other purpose. The monies received by Lessor on account of rights of occupation or otherwise following such default or termination shall be retained by the Lessor as its sole and exclusive property as liquidated damages and not as a penalty. In the event of termination or hereinbefore provided, the Lessee shall, following such termination, be released from all obligations hereunder except for any monies then owing to the Lessor, or any other liabilities then outstanding of the Lessee, under this Lease.

[42] However, the paragraphs relating to Operating Costs and Management By the Lessor generally remained the same.

VI. ARGUMENT

[43] Counsel for the owners must also be commended for the manner in which they agreed to argue the hearing of the special case: the argument of Mr. Alexander would be common to all of the respondents, Mr. Geldert had additional argument, and Mr. Klym had an argument relating to the appropriateness of the petitioner seeking directions under s. 86 of the *Trustee Act.*

A. Appropriateness of the Special Case

[44] Before I deal with the questions set out in the special case, I will deal with the owners' preliminary argument that it is inappropriate to determine the questions on the basis of the special case.

[45] Rule 9-3 of the *Supreme Court Civil Rules* provides:

> **Statement of special case**
>
> (1) The parties to a proceeding may concur in stating a question of law or fact, or partly of law and partly of fact, in the form of a special case for the opinion of the court.
>
> **Court may order special case**
>
> (2) The court may order a question or issue arising in a proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be stated in the form of a special case.
>
> **Form of special case**
>
> (3) A special case must
>
> (a) be divided into paragraphs numbered consecutively,
>
> (b) state concisely such facts and set out or refer to such documents as may be necessary to enable the court to decide the questions stated, and
>
> (c) be signed by the parties or their lawyers.
>
> **Hearing of special case**
>
> (4) On the hearing of a special case, the court and the parties may refer to any document mentioned in the special case, and the court may draw from the stated facts and documents any inference, whether of fact or law, that might have been drawn from them if proved at a trial or hearing.
>
> **Order after hearing of special case**

> (5) With the consent of the parties, on any question in a special case being answered, the court may grant specific relief or order judgment to be entered.

[46] The owners concede in argument that no one disputes that the Poly-B piping must be replaced, and that building envelope must be repaired. However, the owners specifically oppose the cost of the structural repairs of building 7000 and the proposed work and plans prepared by Samantha Pinksen and rely primarily on the affidavit of James Belfry.

[47] With respect to the proportion of the renovation project fee that relates to building 7000, the owners rely on statements in various reports of the monitor Ernst & Young (which Mr. Belfry obtained from the Ernst & Young Restructuring Document centre website), the affidavit of Gary Bentham filed in the *CCAA* proceedings, and the orders made in those proceedings, and maintain that Northmont accepted responsibility for the $4.3 million structural repair costs of building 7000.

[48] With respect to the cost of the interior upgrades, the owners argue that based on Mr. Belfry's evidence, Northmont is intending to turn the buildings "from a state of simply finished and modest to upscale and luxurious at our expense" or from a Motel 6 kind of resort into a Hyatt Regency kind of resort, and the plans of the interior designer, Samantha Pinksen, do not fall within the operating or maintenance costs provision of the agreements.

[49] The owners contend that to answer the second question requires the court to accept one party's evidence over another party's evidence which is inappropriate for a special case. They rely on *Tsilhqot'in Nation v. British Columbia*, [2004] B.C.J. No. 1552, a decision of this court where the central issue was whether the Tsilhqot'in Nation had aboriginal rights and title to the certain claims area in the western interior of the Province. After setting out the special case proposed by the defendant Province, Mr. Justice Vickers decided that it was inappropriate to proceed by way of special case and stated at para. 5:

> [5] The foregoing proposal would have the court consider a special case on an assumption that there are Crown lands in British Columbia that are subject to aboriginal rights and aboriginal title. There was a difference of opinion expressed by counsel as to whether these questions could have proceeded in the absence of an agreement on some facts. The applicability of the forestry legislative scheme in British Columbia to lands subject to aboriginal rights and aboriginal title is an important issue in this case. However, I have concluded that it would not be helpful to have that issue determined without an answer to the central question, namely, do aboriginal rights and aboriginal title exist for Tsilhqot'in people anywhere in the claim area. An answer to that question involves complex findings of fact which have not been agreed upon, even for a discrete area forming only a fraction of the entire claim area.

[50] What followed was a trial that was heard for 339 days over a span of five years, followed by an appeal. As noted by the Court of Appeal (indexed at 2012 B.C.J. No. 1302, 2012 BCCA 285 at paras. 26 and 27) the central issue relating to aboriginal rights and title was very complex and difficult litigation, as well as a massive undertaking for the parties, their counsel, and the trial judge.

[51] In my view, the facts, issues, and the way in which *Tsilhqot'in Nation* proceeded is quite distinguishable from this petition. The issues raised by the petition are quite narrow, and are limited to the petitioner's request for advice and direction with respect to Northmont's request that the petitioner as trustee cooperate in the resort realignment proposal. That has raised the two questions in the special case.

[52] Mr. Belfry suggests that there are things that were not done by either Fairmont or Northmont, and that the project renovation fee covers damage caused by lack of maintenance in the past and contends that the owners are not liable for damage caused by lack of maintenance. However, Mr. Belfry cannot say what damage might have been caused by lack of maintenance, or what ought to have been done and was not done by Fairmont or Northmont, and the owners concede that Mr. Belfry is not an expert, that this is not the proceeding in which they are required to file expert reports, and those issues cannot be determined in these proceedings.

[53] The owners recognize that the issues raised by the petition are narrow, and is not the proceeding in which they can raise issues relating to alleged breaches or enforceability of the vacation interval agreements. They contend that those issues should be determined in an action commenced by Northmont against an owner for non-payment of the renovation project fee, and in that event, an owner may claim set-off for negligence, or damages for breach of contract. Conceivably, this would require Northmont to commence hundreds – if not thousands – of separate actions against owners who do not pay the renovation project fee. That would take an enormous amount of time, expense, and involve many in unnecessary litigation. But time is running out, and money is running out. The object of the *Supreme Court Civil Rules* is proportionality: to secure the just, speedy, and inexpensive determination of every proceeding on its merits.

[54] On October 8, 2013, the first day of the hearing of the special case, the Action Committee on Access to Justice in Civil and Family Matters, Ottawa, Canada released its report "Access To Civil & Family Justice, A Roadmap for Change". In the executive summary, the Honourable Thomas A. Cromwell begins by stating:

> **There is a serious access to justice problem** in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.

[55] There are approximately 14,500 owners, and of these, roughly 755 were represented at the hearing of the special case and oppose either the renovation project fee, the cancellation fee, both, or simply want out of their agreements. As of June 20, 2013 Northmont had processed 3,019 cancellation agreements representing 15.1 percent of the 12,750 total annualized weeks of inventory, and 502 cancellation agreements had been received and were yet to be processed. Approximately 200 to 300 additional cancellation agreements remained outstanding pending the correction of deficiencies. As of June 20, 2012,

renovation project fees from 2,805 owners or 23.5 percent of the invoiced owners had been processed.

[56] It is fair to assume from the evidence that there are thousands of owners that are likely waiting for the outcome of the petition to decide whether to pay the cancellation fee or the resort renovation fee. Both Northmont and the owners need an answer, so they know what steps to take next.

[57] The resort realignment proposal – on which the trustee seeks the direction of this court – proposes what Northmont says are three critical components, or three legs of a stool, all of which are required in order for the resort to survive or the stool to stand: 1. the renovation plan is required to correct the existing deficiencies and update the resort to current standards; 2. recognizing the existing significant owners' delinquency in the payment of their fees, and anticipating increasing delinquencies because of the size of the renovation project fees, Northmont proposed the cancellation fee. While Northmont is liable to pay the proportionate renovation project fee and other fees for cancelled agreements, it does not have sufficient financial resources to pay if hundreds or more refuse or are unwilling or unable to pay. It recognizes that for whatever reasons, a significant number of owners will want out of their agreements, but there is no provision within the agreement for termination or cancellation of the agreement; and 3. the resort will have significantly fewer owners and need to shrink in size. Northmont therefore seeks the ability to consolidate the time share interests into villas that are free of time share interests that would be closed and not renovated. The number of villas that would be removed from the resort will depend on the number of owners that elect to pay the cancellation fee.

[58] Northmont claims that the renovation project fee and the cancellation fee are two legs of the three legged stool, and if any of the legs are removed, the stool will fall. There appears to be no dispute that if Northmont is unable to proceed with the resort realignment proposal within the next while, the resort will close.

[59] Northmont has provided to the owners the reports from the consultants, the renovations plans, and anything else they have sought. While some suggest that they want to know what Fairmont did with all of the funds that were advanced to it and why the resort is in the poor state it is in on account of Fairmont, those are not questions that Northmont can or is required to answer in this proceeding, or as a result of the *CCAA* proceedings.

[60] I conclude that there is sufficient evidence and agreed facts such that it is appropriate for this Court to answer the questions set out in the special case.

B. The law relating to interpretation of contracts

[61] The owners' argument arising out of the first question, and the second question, involve an interpretation of the vacation interval agreements. I summarize the applicable principles set out in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415; *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at paras. 19 to 24; and *Perrin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at para. 23:

1. courts must give effect to the intention of the parties as expressed in their written agreement as a whole;
2. words and provisions in an agreement must be interpreted not standing alone, but in light of the agreement as a whole;
3. courts will deviate from the plain meaning of words, only if a literal interpretation leads to an absurdity or to a result that is clearly repugnant to the parties' intentions;
4. absent any ambiguity in the words of an agreement, the intention of the parties must be determined objectively by attributing to the words a meaning that would be conveyed to a reasonable person having the background knowledge that would have reasonably been available to the person at the time they entered into the contract;
5. terms may not be implied into a contract unless it can be said that "it goes without saying"; and terms may not be implied that contradict any express term of the agreement.

C. The questions to be determined

1. Is Northmont entitled to charge or levy the Cancellation Fee?

[62] Northmont has never maintained that it is entitled to charge or levy the cancellation fee under the terms of the agreements. It maintains that it is entitled to charge or levy the cancellation fee to those owners who elect the cancellation option on the basis that those owners are voluntarily entering into a valid collateral contract or agreement, separate and apart from the agreements.

[63] Parties are entitled to enter into a collateral contractual agreement that terminates a contract that they have previously entered into. In *The Law of Contract in Canada*, G.H.L. Fridman [*The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 561] states:

> By a subsequent agreement between the parties, the original agreement can be terminated.

[64] Similarly in *Chitty on Contracts*, 31st ed, vol 1 (London, UK: Thompson Reuters) at 22-025*:*

> Where a contract is executory on both sides, that is to say, where neither party has performed the whole of its obligations under it, it may be rescinded by mutual agreement, express or implied.

[65] The owners argue that the first question should be limited to whether Northmont is entitled to charge or levy the cancellation fee under the express terms of the agreement, and as there is no such provision, the answer to question one should be simply “no”. However, that brief answer serves no useful purpose.

[66] It is agreed that the agreements contain no provisions for termination, and the owners cannot escape future liability under the agreements simply by defaulting on the payment of any required fees. The owners are liable to pay their share of operating costs for the duration of their 40 year leases or for the duration of their ownership.

[67] Northmont contends that the cancellation fee is a benefit to the owners who want out of their agreements and is on average 11 percent of the future liabilities under the remaining term of an agreement.

[68] The owners argue that the purpose of the cancellation fee is to generate as much as $9 million, or more – depending of course on the number of owners that pay the cancellation fee – that will go straight to the investors or bondholders, and has nothing to do with the leg of any stool. While the evidence is insufficient to establish that will occur, there is nothing nefarious about an investor wanting to recover a return on an investment.

[69] In my view, the cancellation fee is an offer by Northmont to the owners, which if accepted, leads to a collateral contract, and affords an opportunity to the owners to terminate their vacation interval agreements and future liabilities. There is no suggestion that the cancellation fee if accepted, leads to a harsh or unconscionable bargain that the court should not enforce.

[70] Next, the owners argue that "based on past practice", and on the basis that Northmont as the resort manager has "a fiduciary-like obligation" to the owners, Northmont is obligated to "default" the owners under the default provisions of the agreements, take back the owners' interest, and thereby shrink the resort. They argue that by interpreting the agreements as a whole, there was a promise by a fiduciary to the owners that the owners would not have to worry about any other owners not paying their proportionate share of fees, because Fairmont (and now Northmont) promised that it would operate the resort in a prudent manner: it would default any owner who had not paid fees, step into the shoes of that owner, and pay all of the unpaid fees.

[71] However, that argument is flawed because there is no evidence to suggest that Northmont is or can be held to be a fiduciary or *ad hoc* fiduciary (see *Alberta v. Elder Advocates of Alberta Society*, [2011] S.C.J. No. 24, 2011 SCC 24 at paras. 27 to 36), and the argument offends one of the cardinal principles of contract interpretation that all of the words in a contract should be given effect; not

just select words and phrases. The default provisions of the agreement are clearly permissive on the part of Northmont. They are not mandatory.

[72] While the wording of the first question posed on this special case might have been framed differently, the essence of the issue is whether anything in the agreements prohibits Northmont from charging or levying the cancellation fee on those owners who choose to cancel their agreements and be relieved of their future obligations under those agreements.

[73] In answer to the first question, I conclude that there is no impediment to Northmont charging or levying the cancellation fee to those owners who elect to cancel their agreements, and it is entitled to do so.

2. Is Northmont entitled under the Vacation Interval Agreements to levy the Renovation Project Fee, in whole or in part?

[74] The question of whether Northmont is entitled to charge the renovation project fee is a matter of contractual interpretation.

[75] Northmont says that it is entitled to levy the renovation project fee as an aspect of its obligation to manage the resort in a prudent and workmanlike manner, and that the owners are obliged to pay their proportionate share of the renovation project fee pursuant to their obligation to pay a *pro rata* share of the resort's operating and refurbishing costs. Northmont relies on the "*Management by the Lessor*" provision and the "*Operating Costs and Reserve for Refurbishing"* provision of the agreements. Although the form of these provisions has changed slightly over time, in substance they have remained similar.

(a) Northmont's obligation to manage the resort in a prudent and workmanlike manner

[76] The *Management by the Lessor* provision sets out the obligations of the Lessor in relation to the operation and management of the resort. At para. 40 of these reasons I set out certain provisions of the July 1997 Vacation Villa Lease, but for convenience, repeat para. 10:

> MANAGEMENT BY THE LESSOR: The Lessee hereby appoint the Lessor as the manager (the Manager") of the Project and the Lessor agrees to provide management services subject to the terms and conditions herein set forth. The Lessor shall be entitled to subcontract management services to an independent corporation. The Manager shall manage and maintain the Project in a prudent and workmanlike manner. Its duties shall include dealing with the items described in paragraph 9 of this Lease (OPERATING COSTS AND RESERVE FOR REFURBISHING).
>
> [Emphasis added.]

[77] Following the general wording of this provision is a list of specific duties of the Manager, including maintaining records, preparing annual budgets, providing notices of assessment to owners, and calculation and assessment of the amount required for replacement reserves.

[78] The agreements do not define what constitutes managing the resort "in a prudent and workmanlike manner" but Northmont submits that it is inherent in this clause that the Manager is expected to exercise reasonable judgment in operating the resort.

[79] Strata properties are different than time share interests and are not regulated by the same legislative authority, but Northmont argues that two decisions dealing with the conduct of condominium boards and strata councils are instructive in what they have said about the standard of reasonable judgment: *Taychuk v. Strata Plan LMS 744*, 2002 BCSC 1638 and *Leclerc v. Strata Plan LMS 614*, 2012 BCSC 74.

[80] In *Taychuk*, Madam Justice Gray observed at para. 30:

> [30] The obligation to repair and maintain must be interpreted with a test of reasonableness. I quote from *Wright v. Strata Plan No. 205* [1996 CanLII 2460] (1996), 20 B.C.L.R. (3d) 343, [1996] B.C.J. No. 381, (B.C.S.C.) aff'd [1998 CanLII 5823 (BCCA)] (1998), 43 B.C.L.R. (3d) 1 (B.C.C.A.), at paras. 29 and 30:
>
>> As appears from the record of its proceedings the Council was at all times alive to its repair and maintenance responsibilities; and throughout the period of the plaintiff's ownership of her strata lot took steps to remedy the defects which she drew to its attention...
>>
>> The defendants are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying

> out their statutory duty; and therein lies the test to be applied to their actions.
>
> [Emphasis added.]

[81] Similarly, in *Leclerc*, Mr. Justice Brown in discussing the legal duty of a strata council, stated:

> [55] In *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784 [CanLII], Josephson J. neatly summarized the relevant legal principles regarding the duty of a strata corporation to repair and maintain common property:
>
>> [23] There is little issue regarding the law. The respondent has a fundamental duty to repair and maintain its common property: s. 72 of the *Act*; *Royal Bank of Canada v. Holden*, 7 R.P.R. (3d) 80, [1996] B.C.J. No. 2360 (S.C.). In performing that duty, the respondent must act reasonably in the circumstances: *Wright v. Strata Plan No. 205*, 20 B.C.L.R. (3d) 343, [1996] B.C.J. No. 381 (S.C.), aff'd (1998), 103 B.C.A.C. 249, 43 B.C.L.R. (3d) 1032. Furthermore, the starting point for the analysis should be deference to the decision made by the strata council as approved by the owners: *Browne v. Strata Plan 582*, 2007 BCSC 206 [CanLII], 2007 BCSC 206, 70 B.C.L.R. (4th) 102.
>>
>> ...
>>
>> [28] In resolving problems of this nature, there can be "good, better or best" solutions available. Choosing an approach to resolution involves consideration of the cost of each approach and its impact on the owners, of which there is no evidence before the court. Choosing a "good" solution rather than the "best" solution does not render that approach unreasonable such that judicial intervention is warranted.
>>
>> [29] In carrying out its duty, the respondent must act in the best interests of all the owners and endeavour to achieve the greatest good for the greatest number. That involves implementing necessary repairs within a budget that the owners as a whole can afford and balancing competing needs and priorities: *Sterloff v. Strata Corp. of Strata Plan No. VR 2613*, 38 R.P.R. (3d) 102, [1994] B.C.J. No. 445 and *Browne*.
>
> [Emphasis added.]

[82] I agree with Northmont's submission that its contractual responsibility to manage the resort in a prudent and workmanlike manner, does not impose on it the obligation of an insurer, and necessitates only that it acts reasonably.

[83] When Northmont assumed management of the resort in 2010 following the *CCAA* proceedings, it was in a dilapidated state. Maintenance by Fairmont had been deferred and upkeep was deficient. Only limited capital repairs had been

undertaken by Fairmont as part of an annual refurbishment program. No long term proactive capital repair plan was in place.

[84] Northmont initiated a thorough assessment of the required maintenance and repair work; it retained several third party consultants; it relied on the recommendations of those experts to develop a remediation plan and determine the general renovation scope. It is not up to the court to make an independent determination of what the scope of renovation should be, or how the renovation should proceed.

[85] The owners concede that Northmont is entitled impose a renovation project fee and acknowledge that many of the proposed renovations are essential. The crux of the dispute centers on what costs are properly included in the renovation project fee and whether, under the terms of the agreement, the owners are contractually bound to pay all of the costs comprised in the renovation project fee.

(b) Owners' obligation to pay operating costs and refurbishing cost, including administration, maintenance, repair and replacement costs

[86] The owners agree that the Poly- B piping must be replaced and that building envelope issues must be fixed. However, the owners specifically oppose the fourth component of the general renovation scope, namely the interior upgrades and replacement of furnishings, fixtures and equipment, which are described in the work and plans of Samantha Pinksen, the interior designer retained by Northmont.

[87] The owners argue that these upgrades totaling $14,725,803 (based on renovations of all of the buildings) extend "well beyond regular maintenance" and are intended to turn the buildings "from a state of simply finished and modest to upscale and luxurious at our expense".

[88] Although the owners' characterization of the upgrades as extending "well beyond regular maintenance" may be accurate, the owners' contractual liability is not limited to payment of only maintenance costs. Under the terms of the agreements, the owners are obligated to pay operating costs as well as

replacement and refurbishment costs. Operating costs are defined to include "all administrative, maintenance, repair and replacement costs".

[89] The relevant contractual wording is exemplified by clause 9 of the July 1997 Vacation Villa Lease and reproduced below for convenience:

> 9. OPERATING COSTS AND RESERVE FOR REFURBISHING: In addition to the Management Fee described in paragraph 10 of this Lease, the Lessee shall be responsible for his proportionate share of all administration, maintenance and repair costs (the "Operating Costs") and replacement costs incurred with respect to the Project and the refurbishment of the Villas including, without limiting the generality of the foregoing, the following:
>
> (a) property taxes;
>
> (b) water and sewer rates;
>
> (c) lighting and heating;
>
> (d) insurance;
>
> (e) clearance of walks and roadways from snow and debris;
>
> (f) housekeeping services, on a hotel standard basis, including the provision of towels, linens, bathroom soap and paper products (i.e. normal housekeeping encompasses linen changes and general clean up following the termination of a week period, and any services in addition are classified as special housekeeping services and are subject to a special charge);
>
> (g) painting and redecorating as required;
>
> (h) garbage disposal;
>
> (i) repairs to both the exterior and interior of the Villas;
>
> (j) service fees and costs to the Trustee;
>
> (k) maintenance staff and equipment;
>
> (l) administrative staff;
>
> (m) office space and equipment;
>
> (n) accounting costs;
>
> (o) furniture and equipment replacement costs; and
>
> (p) all expenses incurred by the Lessor in the management of the Villas (i.e. see paragraph 10 of this Lease).
>
> In as much as each Villa is under a common roof and has common walls with other Villas, all maintenance and repairs to the Project will be apportioned equally between the lessees in accordance with the number of weeks and the type of Villa

> they lease. The portion of the Operating Costs borne by a master suite will be 50% less than that borne by a two bedroom suite and that portion borne by a one bedroom suite will be 25% less than that borne by a two bedroom suite.
>
> A yearly assessment shall be made of the furnishing and fixtures to permit replacement as required.
>
> [Emphasis added.]

[90] Northmont contends that it is reasonable to undertake upgrades to the units concurrently with the replacement of the Poly-B piping as the latter will involve considerable deconstruction of the units and demolition of walls and ceilings. It would make no sense for the contractors to remove a 1990's kitchen to facilitate the plumbing repair, only to reinstall a 1990's kitchen. In undertaking the proposed upgrades and repairs, it is replacing "like with like" adjusted to 2013 specifications, the objective being to renovate "a timeshare appropriate resort, [rather than create] a lavish or overly expensive property".

[91] Northmont refers to *Fudge v. Strata Plan NW 2636*, 2012 BCPC 409 in which the court acknowledged that the word "repair" can incorporate the notion of "improve":

> 55 As Gray J. observed in *Taychuk*, the word "repair" as employed in the *Strata Property Act* is a term of somewhat broad and flexible signification. It takes in, *inter alia*, the notion of "making good," whether or not the object requiring repair was ever good or sound before: see paras. 29-30.
>
> 56 The authorities also acknowledge that the word "repair" can incorporate the notion of "improve": see the discussion of the statutory definition for "repair" under the Ontario *Repair and Storage Liens Act*, R.S.O. 1990, c. R. 25 in *858579 Ontario Ltd. v. QAP Parking Enforcement Ltd.*, [1995] O.J. No. 517 (Ont. Div. Ct.).

[92] I do not accept the owners' contention that Northmont is proceeding as if it has an unfettered discretion to decide what constitutes 'maintenance' or 'repair' or 'operating costs', or that it seeks to transform the resort into an upscale and luxurious one at the owners' expense. Northmont acknowledges its obligation is to follow a reasonable course of action and meet a standard of prudent and workmanlike management and all of the renovations it proposes are recommended by the consultants retained.

[93] While the scale of renovation and repair reflected in the renovation project fee is of an order of magnitude greater than the scale of work that has been done historically, it is not of a wholly different character.

[94] In years' past, repairs and upgrades that have improved and enhanced the resort have been invoiced to and paid by the owners. Northmont cited various examples, including major exterior deck repairs and replacements, resurfacing of tennis courts, recreation center repair, wifi internet, dvd players, replacement of the awning on the recreation center, purchase of barbeques, replacement of playground equipment, and replacement of exercise equipment in the recreation center.

[95] I am satisfied that the renovation plan reflects a reasonable course action on the part of Northmont in the discharge of its duty to manage the resort in a prudent and workmanlike manner, and that the costs associated with it fall within the contractual obligations of the owners.

[96] The next issue is whether the renovation project fee is properly reduced by the costs associated with deferred maintenance and the repair of building 7000.

(c) Damage caused by deferred maintenance

[97] The owners argue that to the extent that deferred maintenance contributed to the damage to the resort, the owners are not responsible for costs that relate to the repair or remediation of that damage.

[98] However, I agree with Northmont that there is no evidentiary or legal basis before me to found the argument that deferred maintenance has resulted in damage. Such expert evidence as is before the court with respect to aspects of damage to the resort, cites improper design, construction defects, or failure of materials, but makes no reference to damage arising from deferred maintenance.

[99] For example, the consultant's report on the building envelope suggests that damage to the cladding on the villas was caused by improperly designed or

installed gutters. The report relating to the damage pertaining to the Poly-B piping cites leaks and excessive moisture caused by defects in the piping itself.

[100] The owners do not cite any legal basis to found the argument that they are relieved of the obligation to pay for repair costs associated with failure to maintain, or a deferral of maintenance. The only case that the owners refer to, *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 S.C.R. 245, is not apposite. That case deals with an insurer's duty to defend and coverage provisions, and has no bearing on the present facts.

[101] No basis is made out on the facts or the law for any deduction from the renovation project fee charged to owners to account for deferred maintenance.

(d) Building 7000 structural repairs

[102] The owners further argue that the portion of the renovation project fee relating to the structural repair of building 7000 (approximately $4.3 million) should not be charged to the owners, as Northmont accepted liability for these costs.

[103] In support of this argument, the owners rely on statements in various reports of the monitor Ernst & Young (which Mr. Belfry obtained from the Ernst & Young Restructuring Document centre website), and the affidavit of Gary Bentham filed in the *CCAA* proceedings.

[104] On review of the relevant documents, it is apparent that the responsibility assumed by Northmont in relation to the building 7000 repair was not to pay the cost of the structural repairs. Rather, it was to continue the program initiated by Fairmont to make a minimum contribution of $400 from the sale of each vacation interval agreement until the amount contributed to the building 7000 Fund reaches $4,240,000. This is confirmed in paragraph 2.3.1 of the Consolidated Disclosure Statement attached as Exhibit Y to the affidavit of Mr. Belfry. That paragraph further states explicitly, that to the extent that Fairmont had any liability for the costs of repair of building 7000, Northmont has not assumed that liability.

[105] The owners reviewed a succession of documents and references to building 7000 in support of the argument that Northmont is liable for the costs of repair. However, this review did not address the provisions of the Vesting Order of the Alberta Court of Queen's Bench granted June 22, 2010 and the Foreclosure Agreement dated June 15, 201 approved by the Vesting Order.

[106] Without deciding the issue, it appears to me that the legal effect of the Vesting Order and the Foreclosure Agreement is to insulate Northmont from any pre-*CCAA* claims or liabilities of Fairmont. Several terms of the Vesting Order and of the Foreclosure Agreement, as well as defined terms of the Foreclosure Agreement are relevant.

[107] Paragraph 4 of the Vesting Order approves the transfer and vesting of the "Foreclosed Assets" as that term is defined in the Foreclosure Agreement, to Northwynd. Paragraph 7 of the Vesting Order provides that the Foreclosed Assets vest absolutely in Northwynd, free of all claims.

[108] The Foreclosure Agreement contains several important definitions, the relevant segments of each are set out following:

a) "Foreclosed Assets" is defined in 1.1(jjjj) of the Foreclosure Agreement as:

> **"Foreclosed Assets"**: means, collectively, the Fairmont Foreclosed Assets, the LOR V Foreclosed Assets and the LOR Foreclosed Assets;

b) "Fairmont Foreclosed Assets" is defined in 1.1(pp) of the Foreclosure Agreement as:

> "**Fairmont Foreclosed Assets**" means, collectively, ….the Fairmont Foreclosed Assets (Northmont).

c) "Fairmont Foreclosed Assets (Northmont)" is defined in 1.1(rr) of the Foreclosure Agreement as:

> "**Fairmont Foreclosed Assets (Northmont)"** means:
>
> (i) to (iv) [omitted]
>
> (v) the **Fairmont Timeshare Agreements**, ….the Building 7000 Trust Fund, …

(vi) [omitted]

but does not include …**Fairmont Retained Liabilities**

d) "Fairmont Retained Liabilities" is defined in 1.1 (zzz) of the Foreclosure Agreement as:

> "**Fairmont Retained Liabilities**" means each and every obligation, indebtedness (including all of the debt obligations, trade payables and other liabilities related to the ownership or operation of the Fairmont Foreclosed Assets, to Fairmont or to the Fairmont Business) or other liability or accrued liability of Fairmont and whether existing or contingent, in tort or by way of any contract, permit licence or other agreement, any deed or instrument, any judgement order of a court or other authority having jurisdiction, any statute, regulation, order-in-council, bylaw, policy or other decision or act of any Authority, any rule or operation of law or in any other way arising, whether similar to any of the foregoing or otherwise, but excludes any liabilities expressly assumed by the Creditor pursuant to section 2.3(c). [Emphasis added.]

[109] Under s. 2.3 (c) of the Foreclosure Agreement, Northwynd assumes liability for payment of suppliers from the date of the *CCAA* Order to the Vesting Date.

[110] Clause 2.5 of the Foreclosure Agreement provides: "[f]or greater certainty, [Northwynd] shall not assume any Retained Liabilities of any nature or kind."

[111] It appears to me that Northmont acquired the Foreclosed Assets – including the vacation interval agreements – free and clear of any pre-existing liabilities of Fairmont or any claims that the owners may have had against Fairmont.

[112] I see no basis to accede to the owners' argument that costs referable to the repair and renovation of building 7000 are for the account of Northmont rather than the owners.

(e) Issues raised by Docken Klym

[113] The petitioner generally took no position except in response to an issue raised by the owners represented by Docken Klym concerning the propriety of the petition proceedings. These owners submit that:

a) the petition proceedings were improperly initiated and should be dismissed with costs; and

b) the petitioner stands to receive a windfall in fees for processing cancellations if Northmont succeeds in obtaining the directions it seeks.

[114] They argue that it is improper for the petitioner to seek directions under s. 86 of the *Trustee Act*, because this is not a customary circumstance insofar as the petitioner's relationship with the Developer/Manager is "different from the traditional trustee's role". They also rely on the fact that the petitioner's law firm formerly acted as legal counsel for Northmont and Fairmont.

[115] The petitioner notes that it is called upon to play a narrow and limited role in the administration of the trust. As the bare trustee holding title to certain lands on behalf of the developer and the owners, the petitioner is required to maintain a current register of those interests. In the context of the resort realignment proposal, Northmont proposes to reduce the size of resort through the consolidation of the agreements within certain buildings, and the transfer to Northmont of those villas which through cancellation are rendered free of the agreements and will not be refurbished. As the resort realignment proposal will require changes to the register, the petitioner, as trustee, seeks advice and direction from the court as to whether Northmont's interpretation of the agreements is correct.

[116] The seeking of legal advice on legal issues arising in connection with the trustee's obligations is an appropriate category of application under s. 86 of the *Trustee Act* and I am satisfied that the petition was properly initiated (see *Mansbridge and Roulston (In the Matter of)*, 2004 BCSC 1605).

[117] I do not find it necessary to address the second issue raised by Docken Klym, except to note the petitioner's statement that its fee for processing applications is to compensate the petitioner for that service.

VII. CONCLUSION

[118] My conclusions on this special case are as follows:

a) Northmont is entitled to levy the Cancellation Fee;

b) Northmont is entitled to levy the Renovation Project Fee.

"Loo J."

The Honourable Madam Justice Loo