COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.,* 2017 BCCA 38

Date: 20170125
Docket: CA43568

Between:

JEKE Enterprises Ltd.

Appellant
(Plaintiff)

And

Northmont Resort Properties Ltd.

Respondent
(Defendant)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated March 8, 2016 (*JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.*, 2016 BCSC 401, Vancouver Docket S154134)

Counsel for the Appellant:	D. Wotherspoon R. Coad
Counsel for the Respondent:	J.E. Virtue V. Naranjo
Place and Date of Hearing:	Vancouver, British Columbia October 24, 25, 2016
Place and Date of Judgment:	Vancouver, British Columbia January 25, 2017

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Goepel

Summary:

JEKE appealed the trial judge's dismissal of its claim alleging breach of contract in connection with its time share interests at a resort. It alleged that Northmont breached its vacation interval agreements by charging to lessees a renovation project fee that included certain capital costs, and by charging delinquencies and its legal expenses. The trial judge found that the agreements permitted Northmont to charge these amounts as "Operating Costs" such that there was no contractual breach. Held: appeal dismissed. The trial judge's contractual interpretation is subject to review on a palpable and overriding error standard. She made no such error in her analysis or findings. The contractual language clearly contemplates Northmont charging the costs associated with the proposed renovations, delinquent accounts of other owners and lessees, and its legal expenses. Nothing in the surrounding circumstances detracts from the unambiguous contractual language.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Introduction

[1] Before the courts of British Columbia the purchaser, as lessee, of two time share units in a large development in the beautiful Columbia Valley of this province seeks to avoid the effect of relatively clear language in the governing contractual documents with its new lessor. These provisions assign responsibility for all costs incurred in the operation, continuing maintenance and repair of the resort to the purchasers/lessees of the units. The appellant would ignore the plain words of the contract and impose on the lessor a duty to always provide a fit and proper resort and to spend the significant sums to make this so.

[2] No provisions in the applicable documents expressly so provide. No provisions in the applicable documents qualify the clear responsibility on the lessees to pay their way in the enjoyment of their resort community. My reasons for so concluding and finding no reversible error in the trial judge's analysis follow.

Facts

[3] The appellant, JEKE Enterprises Ltd. ("JEKE"), is a holding company owned by the Belfry family. It holds two time share interests in a resort known as "Sunchaser Vacation Villas" located in Fairmont Hot Springs, BC (the "Resort").

[4] Fairmont Resort Properties Ltd. (“Fairmont”) developed the Resort over a number of years, but ultimately sought creditor protection pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36. In June 2010, Fairmont entered into a foreclosure agreement which led to the respondent, Northmont Resort Properties Ltd. (“Northmont”), acquiring all interests held by Fairmont in the Resort.

[5] Time share interests in the Resort are governed by the terms of vacation interval agreements (“VIAs” or, when used in the singular, “VIA”). There were approximately 14,500 owners holding time share interests in the Resort pursuant to the terms of VIAs. Prior to signing the VIAs, JEKE received a prospectus from Fairmont. It also signed a consumer protection agreement (the “CPA”). Key to the present appeal is clause 9 of the JEKE VIAs, which reads:

> 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 Vacation Resort and the Vacation Properties including, without limiting the generality of the foregoing, the following:
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> (a) property taxes;
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> (b) water and sewer rates;
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> (c) lighting and heating;
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> (d) insurance;
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> (e) clearance of walks and roadways from snow and debris;
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> (f) housekeeping services, on a hotel standard basis, including the provision of towels, linens, bathroom soap and paper products (ie., 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);
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> (g) painting, redecorating and refurbishing as required;
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> (h) garbage disposal;
>
> (i) repairs to both the exterior and interior of the Vacation Properties;
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> (j) service fees and costs of the Trustee;
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> (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 Vacation Properties (i.e., see paragraph 10 of this Lease).
>
> All maintenance and repairs to the Vacation Properties will be apportioned equally between the lessees in accordance with the number of weeks and the type of Vacation Property specified on page 1 of this Lease. …
>
> A yearly assessment shall be made of the furnishing and fixtures to permit replacement as required.
>
> [Emphasis added.]

[6] Northmont is the successor in interest to Fairmont's rights and obligations under the VIAs.

[7] When Northmont took over there were significant financial and maintenance issues associated with the Resort. In late 2012, Northmont determined that it was necessary to raise funds from the time share owners and lessees to carry out extensive renovations and repairs and resolve outstanding financial deficits. It levied a renovation project fee ("RPF") upon owners and lessees in April 2013. At the same time, it gave owners and lessees the option to surrender their interests and terminate the VIAs on payment of a cancellation fee. The majority of interest holders have either paid the RPF or surrendered their interests to Northmont. As of the date of the trial judgment, around 25% had done neither.

[8] JEKE is in the group that has done neither. It has also refused to pay annual maintenance fees. It commenced this litigation in October 2014, alleging that Northmont is in breach of the VIAs as a result of, among other things, insisting on payment of the RPF or cancellation fee.

[9] Northmont has commenced thousands of superior and provincial court actions against owners and lessees who have refused to pay. These actions have been stayed pending the outcome of this action. JEKE has had some success in garnering support for its position from other interest holders and described its case as a "test case" in the court below.

Related Litigation

[10] There are two other proceedings related to the present appeal. In April 2013, Northmont wrote to the Trustee holding beneficial title to the Resort on behalf of owners and lessees, requesting his cooperation in implementing a 4-stage "realignment plan" (the "Plan"). The Plan involves assessing the RPF, providing the cancellation option, amending VIAs by agreement, and reducing the Resort by removing units transferred to Northmont. The Trustee filed a petition seeking advice and direction from the court regarding whether Northmont can remove properties from the Resort as contemplated by the Plan. This proceeding is being held in abeyance pending the resolution of this action by order of Justice Fitzpatrick dated 19 May 2015.

[11] The second related proceeding is this Court's decision in *JEKE Enterprises Ltd. v. Philip K. Matkin Professional Corp.*, 2014 BCCA 227. This was an appeal of a special case on interpretation issues arising under the VIAs — namely, Northmont's ability to levy the cancellation fee and the RPF. This Court held that it was inappropriate to determine the issues by way of special case. It therefore overturned Justice Loo's decision that Northmont was entitled to levy the fees at issue (*Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071) ("*Special Case* (BCSC)").

Decision Under Appeal

[12] At trial, JEKE sought a declaration that Northmont is in breach of the VIAs, and that its breaches are fundamental and constitute a repudiation of the VIAs such that it is relieved from any further obligations under the VIAs. It claimed the remaining value of its interests and amounts it alleged Northmont improperly charged to it.

[13] Justice Fitzpatrick was not persuaded by JEKE's interpretation of the VIAs. In the course of her exhaustive reasons, indexed as 2016 BCSC 401, she considered the nature of the interests held by JEKE; the role of Northmont as

developer/lessor/manager; whether Northmont is in breach of the VIAs; and whether repudiation is available if such breaches are found.

[14] On the issue of JEKE's interest, the trial judge concluded that JEKE did not acquire any specific interest in the Resort's real property but rather acquired a time share interest to be used generally in conjunction with other time share owners and lessees.

[15] As it relates to Northmont's role, she found that, as the developer, Northmont retains a residual interest in the Resort after the term of any lease. The developer also holds various units from time to time in which case it is treated the same as any other owner or lessee in sharing operating expenses. As manager, Northmont is required to maintain the Resort in a reasonable fashion and deal with maintenance issues. This includes addressing required repairs left behind by Fairmont.

[16] As it relates to contractual interpretation and the alleged breaches, the trial judge resolved the interpretation issues within the four corners of the contract based on the plain meaning of the words in the context of the VIAs. At trial, both JEKE and Northmont argued that this was the proper interpretive approach because the wording of the JEKE VIAs is clear and unambiguous. The trial judge concluded that costs for delinquent accounts, capital expenses and Northmont's legal fees all fall within the meaning of "Operating Costs" in clause 9. With respect to capital costs, she noted the difficulties associated with JEKE's interpretation, including that there is no reference to "capital costs" in the VIAs. She reasoned that it would defy logic that the parties failed to turn their minds to who would pay for significant maintenance issues. She further concluded that even if she had found ambiguity in the terms of the VIAs such that she could consider extrinsic evidence, that extrinsic evidence supported her interpretation.

[17] The trial judge also found that Northmont did not err in calculating the management fee or its proportionate share of operating expenses. She also rejected JEKE's submissions regarding a number of alleged wrongful acts and omissions committed by Northmont in managing the Resort. On appeal, JEKE does not take

issue with these findings and instead focuses on the liability for delinquencies, capital costs and legal fees.

[18] In light of her finding that Northmont acted in accordance with its obligations under the VIAs, the trial judge concluded that repudiation was not available to JEKE. Even if it was available, she held that JEKE failed to communicate to Northmont its election to accept the repudiation within a reasonable period of time, or at all.

Grounds of Appeal

[19] JEKE seeks to have this Court set aside the trial judge's order and substitute a declaration that JEKE has no further obligations under the VIAs. Alternatively, it asks that the matter be remitted to the Supreme Court to be decided in accordance with this Court's judgment.

[20] JEKE alleges a number of errors concerning the trial judge's interpretation of the VIAs. It says the trial judge erred in:

1. interpreting clause 9 of the VIAs;
2. concluding that Northmont had not fundamentally breached and repudiated the VIAs; and
3. concluding that JEKE was not entitled to accept Northmont's repudiation of the VIAs.

[21] JEKE argues that the first two grounds of appeal reflect errors of law. It says the third ground of appeal concerns an error in principle or, alternatively, a palpable and overriding error of fact.

[22] If this Court finds that the first ground of appeal fails then it is unnecessary to consider the remaining grounds of appeal.

Submissions

Interpretation of the VIAs

[23] JEKE submits that the standard of review for the trial judge's contractual interpretation is correctness due to two extricable errors of law: the trial judge's failure to consider the parties' intentions and the circumstances at the time the agreement was made; and the trial judge's reliance on incorrect and irrelevant factors as context for the interpretation of the VIAs. At the hearing of this appeal, JEKE noted the recent decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, but acknowledged that it had not pleaded that the VIAs are standard form contracts such that the new standard of review test applicable to such contracts does not apply.

[24] JEKE submits that the trial judge failed to consider relevant surrounding circumstances at the time of contract formation. It says the trial judge focused on Northmont's position after its acquisition of the Resort and reasoned backward to determine whether the renovations and Plan were reasonable. This led her to consider irrelevant factors.

[25] JEKE argues that on a proper construction it is not responsible for the RPF, the delinquent accounts of other owners or lessees, or legal fees incurred by Northmont. It says this interpretation is supported by the plain language of s. 9, read in the context of the entire agreement and the proper factual matrix, and business efficacy.

[26] Northmont submits that the appropriate standard of review is whether there is a palpable and overriding error. It says appellate courts should be cautious in identifying extricable questions of law in issues of contractual interpretation.

[27] Northmont argues that the trial judge made no error in applying the principles of contractual interpretation to the VIAs. The trial judge properly considered s. 9 within the context of the entirety of the VIAs, the factual matrix, and what reasonably ought to have been within the common knowledge of the parties at the time of

execution. Northmont says the alleged ignored circumstances were all addressed by the trial judge. The irrelevant factors alleged by JEKE were post-contract events that the trial judge considered in determining whether Northmont had complied with its duties as manager and not in interpreting the contract.

[28] Northmont further submits that JEKE's interpretation fails to account for the tripartite relationship the VIAs create between a time share interest owner, other owners and lessees, and the developer/manager. It says the trial judge properly found that all costs relating to repairs proposed in the RPF fell within the language of clause 9.

Fundamental Breach

[29] JEKE submits that the trial judge's ruling that there was no fundamental breach flowed from her mistaken interpretation of the VIAs, which was an error of law. It says her flawed analysis of the parties' rights and obligations led her to conclude, in the alternative, that JEKE was not deprived of the benefits of the bargain it had struck. JEKE says the alleged breaches are fundamental; if it refuses to pay the fees then it loses its ability to benefit from the use right. This deprives it of the entire benefit of the VIAs.

[30] Northmont responds that the trial judge correctly determined that it had not breached, or fundamentally breached, the VIAs by assessing delinquency costs and legal fees to owners and lessees, and in levying the RPF. It says JEKE's interpretation distorts the plain meaning of clauses 9, 13 and 14 of the VIAs.

[31] Northmont says JEKE's position on delinquency costs would effectively designate Northmont as guarantor of any owner in default. It says that legal expenses, the RPF and any associated "capital costs" are all Operating Costs of the Resort. Whether a replacement or repair cost is "capital" does not determine whether it is chargeable under clauses 9 and 10 of the VIAs.

[32] In the alternative, Northmont argues that a mere breach of contract does not terminate the contract. The VIAs create a long-term relationship for which the

insistence of a payment beyond what a party is entitled to cannot constitute a fundamental breach. Moreover, the disputed invoice is with Northmont as manager and not as lessor.

[33] Northmont says even if the breaches were proven; they do not fundamentally change the bargain. JEKE could still get the benefit of its time share interest if it were not in default of the maintenance fees owing under the VIAs.

Acceptance of Northmont's Repudiation

[34] JEKE submits that the trial judge erred in holding that JEKE failed to give prompt notice of its acceptance of Northmont's repudiation. JEKE says it has never resiled from its position since receiving notice of Northmont's intentions in December 2012, and that it has communicated its position to Northmont throughout that time.

[35] In the alternative, JEKE submits that it communicated its acceptance of Northmont's repudiation when it participated in the Trustee's petition and the special case; and when it filed its notice of civil claim in the present case. It says it was entitled to assess its circumstances and options before electing to accept Northmont's repudiation.

[36] Northmont submits that JEKE did not elect to disaffirm at the time of the alleged breaches. Throughout the proceedings JEKE has said different communications formed its acceptance of Northmont's repudiation. It notes that the notice of civil claim was not issued until several years after the alleged breaches. JEKE is not entitled to "wait and see" what suits it best—it must promptly communicate its acceptance of the repudiation.

Analysis

[37] The issue before us on appeal centers on the trial judge's interpretation of the contract between the parties. The standard of review to be applied in our consideration of the disposition by the judge is at the threshold of that enquiry.

[38] To advance that consideration we must first determine just what the contract includes, orally or in writing. The trial judge discussed this issue at paras. 32–38 of her reasons. She concluded (I take it as a matter of fact or at least mixed fact and law) that the VIA and the CPA constituted the entirety of the contract in place between the parties. The latter document (the CPA) is one page in length and it summarizes the essential terms of the VIA. It includes this as clause 14 in bold print:

> **14. I understand that the salesperson is not authorized to make written or verbal offers which represent modifications, alterations or additions to the Lease Agreement or Consumer Protection Agreement, and that work sheet number** 103978 **includes all agreements and considerations which I based my purchase decision on.**

[39] The trial judge did not agree with JEKE that the prospectus was part of the written contract between the parties but did allow that it was part of the factual matrix to which resort may be had in the interpretation exercise before the court (reasons for judgment at para. 32). JEKE accepts this conclusion on appeal but maintains that the so-called "Owner's Album" is part of the prospectus. Northmont disagrees with the latter point but nothing really turns on it.

[40] The judge eventually turned to discuss the "applicable principles of contract interpretation" (at paras. 228–233) and adopted Justice Loo's summary of the principles in the *Special Case* (BCSC) at para. 61, as follows:

> 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.

[41] The judge of course cited and discussed the decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. *Sattva* discussed the court's ability to look to the factual matrix – the surrounding circumstances – in play at the time of the contract's formation. While the surrounding circumstances can be considered "they must never be allowed to overwhelm the words of that agreement…" (at para. 57).

[42] *Sattva* also, importantly, addressed the standard of review to apply to a trial judge's interpretation of a contract. It is a standard of deference; contractual interpretation involves issues of mixed fact and law. Questions of law are subject to review on a standard of correctness. There is room for that standard to apply in a matter of contract interpretation where one can (cautiously) find an extricable question of law (*Sattva* at para. 53):

> Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[43] *Sattva* was distinguished by the majority in *Ledcor*. There, Justice Wagner said (at para. 24):

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

[44] Before us, JEKE specifically declined to adopt *Ledcor* as guiding the standard of review here; it specifically stated that this was not a case of a standard form contract.

[45] Rather, JEKE maintained that there are here extricable errors of law in the trial judge's analysis which are subject to review on a standard of correctness, namely:

(1) a failure to consider the parties' intentions and the circumstances at the time the agreement was made; and

(2) reliance on incorrect and irrelevant factors including Northmont's circumstances and intentions, as context for the interpretation of the VIAs.

[46] I disagree. In my view, there are no extricable errors of law in the trial judge's analysis and it is, accordingly, subject to review on the palpable and overriding error standard. It is certainly arguable that this is a "standard form contract" case where the result, given the number of outstanding cases awaiting disposition by provincial and superior courts, will have significant precedential value. But that was not the position put before us. That said, it is the duty of the court in most circumstances to determine the standard of review, not for the parties to dictate it. However, in the result, it is not necessary to definitively resolve the issue as even applying the correctness standard of review, I can identify no error in the trial judge's analysis.

[47] I advance then to the issue of contractual interpretation.

[48] The trial judge began her analysis by considering various provisions in the VIA in order to determine the nature of JEKE's interest in the Resort. I have related above the judge's conclusion in this regard. She rejected JEKE's submission that its position under the contract was akin to that of a commercial lessee who would not normally enjoy responsibility for capital costs associated with "common areas" (although no authority was cited for this proposition). The trial judge concluded (at paras. 112–115):

> [112] All of the above provisions confirm the fundamental nature of a time share plan in creating an interest that is not specific, but is to be used generally in conjunction with other time share owners. This, in essence, creates not only a relationship as between the lessor and lessee, but one

> between all of the time share owners, whose interests are to be managed in a manner that gives effect to their collective interests.
>
> [113] That these are long-term contractual relationships is more than evident; the leases are for 40 years and later VIAs would create permanent ownership interests. In addition, the VIAs provide only limited circumstances in which a lessee's responsibilities can be terminated and do not provide for any right of a lessee to unilaterally terminate the VIAs. This, of course, became an important aspect of the VIAs that, in part, led to the Resort Realignment Plan being proposed by Northmont in April 2013.
>
> [114] Mr. Belfry would have been well-aware of this by his careful reading of the Prospectus, which states, by way of a capitalized and bolded statement on the first page of that document:
>
> > **TIME SHARING INVOLVES A CONTINUING RELATIONSHIP WITH A SUBSTANTIAL NUMBER OF OWNERS OF EACH TIME SHARE INTEREST** ...
>
> [115] In summary, JEKE's interest, under the JEKE VIAs, is not that of a commercial tenant, but is a part of a substantial number of other interests in the Resort which are to be collectively managed for the benefit of all owners or lessees.
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> [Emphasis added.]

[49] JEKE does not apparently take issue with these conclusions on appeal. The critical issue of contractual interpretation involves determining where responsibility lies for payment of the costs associated with the renovation program proposed by Northmont: the RPF. To answer this question it is necessary to describe these "renovations" in more detail.

[50] The trial judge accepted Justice Loo's summary of the proposed remediation and renovation planning set out in the *Special Case* (BCSC) at para. 18 thereof:

> (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.

[51] The RPF contemplated a budget of some $40.8 million; added to this was the operating deficit for the Resort of approximately $4.3 million. JEKE's assessed share of the RPF (before taxes) was $5,992.77 (and without interest since).

[52] This brings us to the VIA and specifically clause 9, the opening words of which are very broad indeed. I reproduce that portion of the clause below for ease of reference:

> 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 Vacation Resort and the Vacation Properties including, without limiting the generality of the foregoing, the following: …

[53] JEKE seeks to restrict the generality of these words through a number of submissions. First, it says that nothing in clause 9 makes mention of "capital costs". JEKE seizes on the phrase "Operating Costs" in clause 9 and submits that "operating costs" are by definition distinct from capital costs. English authority is cited to suggest this is so. But this is an erroneous take on the interpretation exercise. The VIA in clause 9 does not use the phrase "operating costs" *simpliciter* and thereby possibly leave its meaning to be determined by commercial or accounting usage. It rather simply uses the phrase as a defining term for "all administration, maintenance and repair costs". To put it another way, "Operating Costs" in the VIA are not necessarily "operating costs" in commercial or accounting parlance.

[54] Contracting parties are free to define words or phrases in a manner that differs from their ordinary usage. Where they have clearly done so, a court need go no further than this unambiguous language in interpreting the meaning of that word or phrase (*Belsat Video Marketing Inc. v. Astral Communications Inc.* (1999), 86 C.P.R. (3d) 413 at paras. 7, 8 (O.N.C.A.)).

[55] In any event, as the trial judge lamented, JEKE led no expert evidence, in particular from a construction expert, analyzing the capital cost issue (at para. 265):

> [a]t best, JEKE's counsel was only able to give their own opinions on what constituted a "capital cost" or not, submissions that were largely unhelpful.

[56] The judge continued (at para. 266):

> [a]t bottom, JEKE did not provide any analysis on this issue beyond admitting that some of the work contemplated in the Renovation Plan was properly chargeable to the owners. That led to the submission that since some charges were "capital" in nature, the entirety of the Renovation Project Fee is not payable by the owners. I see no basis for such a bald statement. JEKE argues that this Court should declare the amount that is properly chargeable to the owners as part of the Renovation Project Fee, without absolutely any evidence being introduced or submissions made as to what that amount is and why it is chargeable or not. I can only conclude from this approach that JEKE has chosen not to spend the time and effort in pre-trial procedures available to it to prove its case on this point. It is hardly the responsibility of Northmont to address the issue for the benefit of JEKE, which is exactly what JEKE suggests it should have done.

[57] Before us, counsel for JEKE (who was not counsel at trial) went even further. In his submission none of the RPF falls to JEKE under the VIA. JEKE's fluid position on this elementary point does not assist it before the court. Even if "capital costs" are to be distinguished from "operating costs", there are surely many repair costs in the renovation project that would come within the rubric of "operating costs".

[58] Then JEKE has resort to the principle of *noscitur a sociis* – or the associated words rule – which states that the generality of a term can be limited by a series of more specific terms which precede or follow it. True, the application of this principle may result in the scope of the broader term being limited to that of a narrower term (*McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58 at para. 31). However, that narrowing is dependent on whether the specific terms indicate just how the broader term should be narrowed. Justice Bastarache, dissenting but not on this point, explained the interpretive principle this way in *Marche v. Halifax Insurance Co.*, 2005 SCC 6 at paras. 67, 70:

> [67] It is a well-known rule of interpretation that a term or an expression cannot be interpreted without taking the surrounding terms into account. "The

> meaning of a term is revealed by its association with other terms: it is known by its associates"…
>
> …
>
> [70] When applying the *noscitur a sociis* rule (associated words rule) to a term that is part of a list, one must look for a common feature among the terms, "the meaning of the more general being restricted to a sense analogous to the less general"…
>
> [Emphasis added, citations omitted.]

[59] In the present case, the problem with this submission is that the specific items listed in clause 9 after the general words are so varied that no *genus* can be said to have been created to effectively limit the general words to expenses of a like matter and kind.

[60] Even in the specific list we find broad descriptions of costs that are the responsibility of the lessees. For example, clause 9(i) describes costs incurred in respect of "repairs to both the exterior and interior of the Vacation Properties"; and in clause 9(p) "all expenses incurred by the Lessor in the management of the Vacation Properties (i.e. see paragraph 10 of this lease)". Clause 10, in turn, charges the manager to "manage and maintain the Vacation Resort in a prudent and workmanlike manner". The trial judge found as a fact (and no issue is taken with this finding on appeal) that the projects to be funded by the RPF are necessary and reasonable (at paras. 402, 404):

> [402] JEKE's counsel, while conceding that some work was necessary, argued that the entire Renovation Plan did not need to be done. That may technically be the case, but this decision is one that was made reasonably within the managerial discretion afforded to Northmont under the JEKE VIAs. JEKE has produced no evidence to indicate that some other course of action was reasonably available to the Manager and should have been selected. Again, JEKE could have engaged a construction expert to inspect the Resort to review the proposed Renovation Plan and inspect the ongoing repairs. No such evidence was tendered in support of any argument against the reasonableness of the Renovation Plan, whether in whole or in part.
>
> …
>
> [404] In conclusion, I am satisfied that the Manager does have the ability to impose the Renovation Project Fee on the owners and that, in these circumstances, it was a necessary and reasonable course of action to address the significant maintenance issues facing the Resort.

[61] Where, as here, the Manager complies with its clause 10 duty in managing and maintaining the Resort, expenses incurred to repair and manage the Resort are properly chargeable to lessees under clause 9.

[62] Moreover, JEKE's submission on this point also ignores the words that precede the listing in clause 9:

> … including, without limiting the generality of the foregoing, the following…

[63] This would seem to expressly oust the operation of the associated words rule to narrow the meaning of Operating Costs.

[64] JEKE then goes beyond clause 9 of the VIA in its efforts to limit the general words therein to some concept of "operating costs" as distinct from "capital costs". It asks this Court to find that Operating Costs takes on a different meaning when considered in the context of the contract as a whole.

[65] For example, JEKE points to clause 17 of the VIA which deals with damage to the Vacation Properties (as that term is defined in the VIA):

> If during the term of this Lease, a Vacation Property is destroyed or damaged by fire or other hazards for which insurance is carried, then the proceeds of insurance shall be used to rebuild or replace the Vacation Property and, during the period of rebuilding, the Lessee will not be entitled to any claim for loss of occupancy; provided, however, that the Lessor shall use reasonable efforts to provide the Lessee with an alternative Vacation Properties at rates to be negotiated by the Lessor with the Lessee. The Lessor agrees to rebuild, repair or replace the Vacation Property provided insurance proceeds are available for such purpose.

[66] JEKE makes the general submission, which I will address below, that Northmont, as lessor, has a duty to pay capital costs associated with maintaining the Resort to a level such that JEKE always would enjoy access to what it bargained for: useable, prudently maintained units in a functioning resort. This duty being present, JEKE then submits that the implication in clause 17 becomes clear: by expressly contracting out of its duty to rebuild, repair or replace in the circumstances set out in clause 17 beyond the total of insurance proceeds received, Northmont implicitly has

not otherwise limited its general duty to be responsible for capital costs incurred in rebuilding, repairing or replacing the Vacation Property.

[67] Such an argument is really two-edged, it can just as readily be said that the express reference to this limited duty on the lessor in clause 17 is an implicit indication that the lessor does not otherwise have a duty to rebuild, repair or replace at its expense.

[68] In any event, I do not credit the submission that the essential obligation the lessor took under the VIA was to provide merchantable units throughout the term of the lease at its cost. That is not said anywhere expressly in the VIA. Indeed, to the contrary, where ongoing costs are contemplated, clause 9 makes it clear that they "all" are the responsibility of the lessee. This is again illustrated by the responsibility for management costs. Clause 10 of the VIA imposes a duty on the lessor to "manage and maintain the Vacation Resort in a prudent and workmanlike manner". The lessor's expenses incurred in this regard – "all expenses" – are expressly the responsibility of the lessees under clause 9(p).

[69] Again, this was not the position taken by JEKE at trial. Indeed, JEKE's submission that the contract did not call for it to pay such costs led the trial judge to state (at para. 277):

> It defies logic that the parties intended any uncertainty regarding who would pay to fix the Resort buildings and infrastructure when faced with maintenance issues of this magnitude. If JEKE is right, but the Lessor was unable or unwilling to pay and contribute to such expenses (assuming no express liability), then no one would pay to repair the resort, which would inevitably result in a decline in the Resort. I do not accept that this was what the parties intended. The JEKE VIAs were intended to set out the responsibility for these very expenses in paragraph 9.

[70] JEKE adds to its submission by referring to the prospectus where, for example, it states in clause 2.06(5):

> The price of the Vacation Lease paid at the time of purchase is fixed and will not change throughout the duration of the Vacation Lease. The maintenance cost will increase only as actual costs of operation increase.

[71] JEKE also refers to clause 10 of the CPA:

> I understand that the annual maintenance fee is currently 463 + GST per week of ownership. Said fee shall cover maid service, utilities, insurance, taxes, refurbishing and general maintenance. Fees are subject to increases as costs increase.

[72] And to this question and answer in the "Owner's Album":

> Q. Will the maid/maintenance fees go up in the future?
>
> A. Your annual maintenance charge will increase or decrease only in direct relation to actual expenses. Each year's charge is based on an estimate of the total annual cost of operation. This total includes maintenance of the facility, replacement of furniture and equipment, taxes, utilities and other expenses.

[73] None of these statements that form part of the factual matrix blunt the very general words in clause 9 of the VIA — "all administration[,] maintenance and repair costs". I repeat my earlier statement of principle that the surrounding circumstances "must never be allowed to overwhelm the words of that agreement" (*Sattva* at para. 57).

[74] JEKE finally resorts to "commercial efficacy" in aid of its submission that the trial judge's view of cost responsibility under the VIA lacks commercial efficacy from the perspective of the lessees. In considering this submission, it is instructive to look at another question and answer in the Owner's Album, which points to an important factor when considering the business efficacy of JEKE's bargain; namely, the fact that the interests of the lessees are theirs to sell. We find this in the Album (as of the date of JEKE's purchase):

> Q. Will my Villa appreciate in value?
>
> A. The value of the vacation leases at Fairmont have more than doubled since 1979. It is reasonable to assume that the future value will vary with the future value of rentals in luxury accommodations.

[75] Today, there is apparently no secondary market for these units. But there apparently was one historically and when we talk of "commercial efficacy" one could note the possibility at the time of purchase (based on the experience to that date) that lessees might enjoy appreciation in the value of their units. Commercial efficacy

is not served if JEKE has all of the upside benefits of that potential appreciation and none of the downside costs to maintain and replace the vacation properties during the term of the lease.

[76] Moreover, the first page of the prospectus provides, in bold print, the following statement that further assists in evaluating the commercial efficacy of JEKE's bargain:

> **THE PURCHASE OF A TIME SHARE INTEREST SHOULD BE BASED ON ITS VALUE TO THE PURCHASER AND NOT THE PROMISE OF FUTURE EXCHANGE RIGHTS, RESALE OR INVESTMENT POTENTIAL.**

[77] Key then is "the value to the purchaser". It is consistent with this purpose to require owners and lessees to pay the manager's costs to make necessary and reasonable repairs such that the Resort maintains its "value".

[78] In my view, after applying the above principles of contractual interpretation, the invariable conclusion is that JEKE is responsible for its proportionate share of what it has termed "capital costs" included in the RPF.

[79] JEKE also takes issue with the trial judge's conclusion that delinquencies and Northmont's legal fees are to be borne by lessees under clause 9 of the VIA. The delinquencies arise out of other owners and lessees failing to pay their assessments. The trial judge concluded (at para. 240):

> Delinquency refers to the failure of some owners and lessees to pay the costs assessed to them. Mr. Wankel testified that delinquency is a typical and anticipated cost of operating the Resort. Common sense would dictate, and Mr. Wankel, as a chartered accountant confirms, that if you anticipate having expenses of $100 for the ensuing year and only collect $90, you will have a deficit. The JEKE VIAs expressly contemplate that, as a result of the budgeting process, deficits or surpluses may occur. In my view, such delinquencies do constitute part of the "Operating Costs" referred to in paragraph 9 of the JEKE VIAs and are chargeable to the lessees and owners.

[80] JEKE refers to clauses 13 and 14 of the VIA and submits that they clearly make Northmont responsible for these costs. Clause 14 has no application to the case of the delinquent lessee. It makes Northmont responsible for costs as though it

was a “Lessee” in respect of weeks (units) not sold in any year (except for the one week maintenance period). The unit of the delinquent lessee of course has been sold to that individual (at least until it is, if ever, assumed by the lessor under clause 13).

[81] Clause 13 of the VIA provides:

> **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 as 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.

[82] Clearly, clause 13 gives Northmont an option in the circumstances noted. If it terminates the lease, it steps into the shoes of the lessee and is responsible for ongoing costs in respect of that unit. But if it does not, Northmont takes no responsibility for those costs; that responsibility continues to rest on the defaulting lessee. Absent payment by such lessee, delinquencies are chargeable to non-defaulting lessees as Operating Costs under clause 9. Of course, this does not absolve the defaulting lessee of its responsibility to repay these amounts to the

manager on behalf of its fellow lessees. In my view, the trial judge committed no error in her conclusion on this issue.

[83] I reach the same conclusion with respect to Northmont's litigation expenses relating to the *Special Case*, both in the Supreme Court and in the Court of Appeal. The trial judge held that these were costs arising from the management of the Resort by Northmont and properly chargeable under sub-clause 9, in particular under clause 9(p) thereof. In this regard, JEKE points to clause 38 of the VIA. It provides:

> 38. **INDEMNITY:** The Lessee covenants with the Lessor to indemnify and save harmless the Lessor from any and all actions[,] suits, claims, liabilities, damages, costs, losses and expenses incurred or sustained by the Lessor arising from or connected with:
>
> (a) any breach, violation or non-performance of any covenant, agreement, condition or proviso in this Lease set out and contained on the part of the Lessee to be fulfilled, kept, observed and performed[;]
>
> (b) any damage to any Vacation Property or other part of the Vacation Resort by the Lessee or the Lessee's agents, sublessees, licensees or invitees;
>
> (c) any injury to the Lessee or any agent, sublessee, licensee or Invitee of the Lessee, including death resulting at any time therefrom, occurring in or about the Vacation Property or the Vacation Resort, or
>
> (d) any other act or omission of the Lessee.

[84] JEKE submits that the trial judge failed to consider this provision as a limit on Northmont's right to indemnity for costs caused by the default of a lessee. I disagree. The fact that Northmont may be able to look to individual lessees for indemnification in some cases does not take away from the fact that the expenses are properly within clause 9(p). Northmont, in making chargebacks, would obviously give credit for any sums collected under clause 38.

Conclusion

[85] Applying a standard of deference in my review of the trial judge's interpretation of the provisions of the agreement before this Court, no error has been demonstrated. Indeed, in my view, applying a standard of correctness yields the

same result. In light of this conclusion, it is not necessary to consider JEKE's argument on the issues of fundamental breach and whether JEKE accepted Northmont's alleged repudiation.

[86] I would dismiss the appeal. The parties apparently wish to make further submissions on costs in this Court and in the Supreme Court proceedings. I would grant leave to do so. I would trust that counsel will come to an agreement on an appropriate schedule for the exchange of submissions.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Goepel"