# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.,* 2016 BCSC 401

Date: 20160308
Docket: S154134
Registry: Vancouver

Between:

**JEKE Enterprises Ltd.**

Plaintiff

And

**Northmont Resort Properties Ltd.**

Defendant

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

| | |
|---|---|
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| Place and Date of Trial: | Vancouver, B.C.<br>January 4-8, 11-15, 18-22, 2016 |
| Place and Date of Judgment: | Vancouver, B.C.<br>March 8, 2016 |

**I. INTRODUCTION .... 4**
**II. BACKGROUND FACTS .... 6**
1) Fairmont Develops the Resort .... 6
2) Vacation Interval Agreements (VIAs) .... 6
3) The JEKE VIAs .... 8
4) Post VIA Purchase Events to 2009 .... 11
5) The *CCAA* Proceedings .... 12
6) Post-*CCAA* Resort Analysis .... 13
7) Resort Renovation Planning .... 15
8) The Resort Realignment Plan .... 20
i) Step 1 .... 22
ii) Steps 2 and 3 .... 22
9) Trustee's Petition for Directions .... 24
**III. ISSUES .... 26**
**IV. THE NATURE OF JEKE'S INTEREST .... 26**
**V. FAIRMONT AS DEVELOPER/LESSOR .... 31**
**VI. FAIRMONT AS MANAGER .... 34**
1) Appointment of Fairmont .... 34
2) Standard of Management .... 37
**VII. NORTHMONT BECOMES LESSOR / MANAGER .... 40**
1) Factual Background .... 40
2) Effect of the Transfer/Vesting Order on the VIAs .... 46
**VIII. THE BUILDING 7000 EXPENSES .... 51**
**IX. CONTRACT INTERPRETATION / BREACH ISSUES .... 59**
1) Chargeback of Delinquent Accounts .... 63
2) Charging of Capital Costs .... 67
3) Calculation of the Management Fee .... 81
4) Calculation of the Proportionate Share .... 82
5) Miscellaneous Management Issues .... 88
i) Deferred Maintenance .... 88
ii) Failure to Collect Delinquent Accounts .... 90
iii) Head Office Overhead Charges .... 91
iv) Recovery of Deficits on Subsequent Assessments .... 92
v) The Northmont Sales Office .... 93

vi) Litigation Expenses ........................................................................ 94
**X. RENOVATION PROJECT FEE / RESORT REALIGNMENT PLAN ............... 95**
1) Renovation Project Fee Issues .................................................................... 95
(i) Non-Payment of the Renovation Project Fee ............................................. 95
(ii) Is the Renovation Project Fee a “Special Assessment”? ............................ 96
(iii) Necessity / Scale of the Renovation Project Fee ....................................... 97
(iv) Advance Billing ........................................................................................ 101
(v) Northmont’s Use of Renovation Project Fees ........................................... 102
(vi) Management Fees ..................................................................................... 102
2) Resort Realignment Plan Issues ................................................................. 103
**XI. REPUDIATION RELIEF ........................................................................... 108**
1) The Breach Must Deprive the Bargain ....................................................... 109
2) The Innocent Party Must Elect to Terminate the Contract ........................... 110
**XII. CONCLUSIONS .......................................................................................... 113**

## I. INTRODUCTION

[1] The plaintiff, JEKE Enterprises Ltd. ("JEKE"), holds certain time share interests in a resort known as "Sunchaser Vacation Villas", located in Fairmont Hot Springs, British Columbia (the "Resort"). The Resort was developed some years ago by Fairmont Resort Properties Ltd. ("Fairmont"). There were approximately 14,500 owners holding time share interests in the Resort which were documented in what have been described in the litigation as vacation interval agreements, or "VIAs".

[2] Fairmont became insolvent in 2009 and, ultimately, sought creditor protection in Alberta pursuant to the *Companies' Creditors Arrangement A*ct, R.S.C. 1985, c. C-36 (the "*CCAA*"). In June 2010, Fairmont, and its secured creditors, entered into a foreclosure agreement which led to the defendant, Northmont Resort Properties Ltd. ("Northmont"), acquiring all interests held by Fairmont in the Resort, including those held under the VIAs.

[3] Even before taking over from Fairmont, Northmont had been aware that there were significant financial and maintenance issues relating to the Resort. After further investigation and consideration of the issues, in late 2012, Northmont decided that it was necessary to raise funds from the owners under the VIAs for the purpose of undertaking extensive renovations and repairs and resolving financial deficits. This resulted in Northmont assessing a renovation project fee upon the owners in April 2013. Alternatively, Northmont proposed that owners could surrender their time share interests and terminate their obligations under the VIAs upon payment of a cancellation fee. The majority of the VIA owners have now either contributed the renovation project fee or surrendered their interests to Northmont. At present, some 25% of the owners have not responded to the proposal in either fashion.

[4] JEKE objected to Northmont's proposal, taking the position that Northmont could not unilaterally impose these expenses under the VIAs. JEKE also raised other issues about how Northmont had managed the Resort since 2010. For some years now, JEKE has refused to pay, not only the renovation project fee, but also the regular maintenance fees payable under its VIAs.

[5] This is not the first time that issues between JEKE and Northmont have been considered by this Court. In October 2013, Justice Loo heard a special case as to certain interpretation issues arising under the VIAs; however, that decision was subsequently overturned in June 2014 based on the Court of Appeal's view that it was not appropriate to decide those issues by way of a special case: see *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071; rev'd *JEKE Enterprises Ltd. v. Philip K. Matkin Professional Corp.*, 2014 BCCA 227 (the "*Special Case* (BCSC) and (BCCA)").

[6] This action was commenced by JEKE in October 2014. JEKE alleges that Northmont is in breach of the VIAs executed by JEKE and Fairmont. Further, JEKE alleges that these breaches are fundamental to the VIAs and constitute a repudiation of them such that JEKE is relieved from any further obligations under the VIAs. In that event, JEKE claims the remaining value of its interests and amounts which it says Northmont improperly charged to it.

[7] In the alternative, JEKE seeks orders to clarify Northmont's obligations under the VIAs in respect of payment of certain costs and expenses relating to the Resort, including those relating to the renovation and repairs.

[8] JEKE has had some success in garnering support for its position from a number of other owners. While JEKE is the only plaintiff in this action, and the amounts in issue are relatively small, it describes this as a "test case".

[9] Arising from JEKE and other owners' continuing refusal to pay the annual maintenance fees and contribute to the renovation costs, Northmont has commenced literally thousands of superior and provincial court actions against these owners, both in British Columbia and Alberta. It is my understanding that these other actions have been stayed by agreement or court order pending the outcome of this trial on the basis that the outcome may affect issues arising in those other actions. As such, this decision may have implications for other owners in the Resort and is, most certainly, a significant decision for Northmont in that context.

## II. BACKGROUND FACTS

### 1) Fairmont Develops the Resort

[10] The "Fairmont Group" was a collection of private companies which were in the business of acquiring, developing and operating resorts in a time share format. Fairmont was a member of the Fairmont Group.

[11] From 1990 to 2009, Fairmont constructed, marketed, and developed the Resort, then known as "Fairmont Vacation Villas", in phases. The Resort consists of three separate residential developments known as:

1) the Riverside Villas: 80 villas in eight three-storey buildings constructed between 1990 and 1994. These are referred to as Buildings 100-800;

2) the Hillside Villas: 138 villas in eight three- and four-storey buildings constructed between 1994 and 2002. These are referred to as Buildings 1000-8000. Building 7000 raises certain distinct issues in this action; and

3) the Riverview Villas: 32 villas in a four-storey building constructed in 2004. This is referred to as Building 8100.

[12] All of the buildings are generally of wood-frame construction, clad with stucco, and built on slab-on-grade foundation. The three developments make up 17 multi-family residential buildings demised into 250 units operated as 228 two-bedroom units and 22 one-bedroom terrace units. The resort also includes a recreation building, which includes the swimming pool and hot tub. There are other maintenance structures and amenities, such as a water park, corner store, and volleyball court. The total area of the Resort is approximately 34 acres.

### 2) Vacation Interval Agreements (VIAs)

[13] Fairmont leased (and then later sold) 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 into from 2009 forward

which create co-ownership interests. In addition, from 2009, vacation interval owners who held leasehold interests were given the option of entering into a co-ownership interest agreement.

[14] There were approximately 18,950 time share vacation intervals registered in the name of owners who each executed standard forms of vacation interval agreements (VIAs) that have changed over time. Each VIA sets out particulars of the owner's interest, including:

(a) the type of vacation property or villa, including the number of bedrooms, and reference to a specific unit;

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

(c) the "season" of the time share interest, that is, (in descending order of desirability) "Golden", "Prime Golf", "Prime" or "Leisure".

[15] Relevant to the resort realignment plan discussed below, there are two private condominium buildings located close to the Resort, and there is some cost sharing as between these developments and the Resort.

[16] The responsibility for the operating and maintenance costs of the Resort is the major issue that arises in this litigation. However, generally speaking, the owners (including Fairmont, and now Northmont, to the extent that it is also the owner of vacation interval interests), have typically been assessed a yearly maintenance fee at the end of a calendar year to cover the budgeted operating and maintenance costs of the Resort forecasted for the upcoming year.

[17] Vacation interval owners are sometimes referred to as "owners" or "lessees", depending on the type of their respective interests. As I will describe below, JEKE's interest is as a lessee. I will generally refer to them as "owners", although these two terms are used by me interchangeably and without distinction in these reasons.

### 3) The JEKE VIAs

[18] JEKE is a holding company owned by the Belfry family. The directors of JEKE are a married couple, James and Elsie Belfry. Since 1996, the Belfrys have used JEKE for the purpose of holding various real estate investments from time to time.

[19] Mr. Belfry is a now retired real estate agent who had some experience in commercial real estate matters. He considers himself well-versed in financial matters.

[20] In April 2004, the Belfrys stayed at the Resort. At that time, there were 16 buildings, and the last building (the Riverview Villas) was under construction. The Belfrys stayed in one of the Riverside Villas during their visit, which Mr. Belfry noted was dated in many respects. Mr. Belfry was told by the sales staff at the time that refurbishment of some of the units were intended to be undertaken within the next few years.

[21] After from a sales presentation and a tour of the facilities, the Belfrys decided to buy, through JEKE, two time share interests.

[22] On April 3, 2004, JEKE and Fairmont entered into two VIAs of the leasehold variety (the “JEKE VIAs”):

1) Lease H71905PR for vacation property #7019 for a two-bedroom lock-off unit on an annual basis, commencing in 2005 for 40 years in the Prime season for a purchase price of $17,000; and

2) Lease H71706PRBO for vacation property #7017 for a two-bedroom lock-off unit on a biennial basis, commencing in 2005 for 40 years in the Prime season for a purchase price of $4,935.

[23] In the JEKE VIAs, JEKE is described as “lessee” who has acquired a 40-year leasehold interest that allows it certain rights of use of the Resort over that period of time. As I will discuss in more detail below, Fairmont is described as the “Lessor” and also the “Manager” of the Resort in the JEKE VIAs.

[24] Mr. Belfry indicated that JEKE's interests were in one of the Hillside Villas, being Building 7000. At the time of the purchase, he understood that Building 7000 was four years old. I will discuss the nature of the interest purchased by JEKE later in these reasons.

[25] In addition to signing the JEKE VIAs on April 3, 2004, JEKE also executed a consumer protection agreement (the "CPA").

[26] Finally, JEKE acknowledged receipt of a prospectus (the "Prospectus"), provided by Fairmont, as the "Developer", as part of the required disclosure under the relevant legislation at the time.

[27] Mr. Belfry indicated that these particular time share interests were valuable to him and his family in two respects: firstly, they were in the "Prime" season, meaning the first 18 weeks of the year, excluding Easter Week; and, secondly, the lock-off feature meant that the unit could be split into two separate one-bedroom units upon payment of a lock-off fee.

[28] In addition, the Belfry family's decision to buy was significantly influenced by the fact that the interests could be traded for other time share interests in other properties around the world through an exchange programme with Interval International. The designated season (ie. Prime) and the lock-off feature factored into what trade would be allowed by Interval International.

[29] However, the documentation provided to JEKE makes clear that Fairmont gave no assurance as to what exchange rights might be available to purchasers from Interval International. Paragraph 39 of the JEKE VIAs provided only that Fairmont agreed to "cooperate" in respect of any such programme. The Prospectus addressed this in the preamble and stated that JEKE's purchase should be based on its value to the purchaser and not the promise of future exchange rights. The Prospectus also specifically states:

> 2.08(1) … Neither the Developer nor Interval International is an agent of the other and the Developer makes no representations as to the future or current services provided by Interval International. …

[30] Mr. Belfry's evidence was that the Belfry family did not intend to use the Resort itself but, rather, to trade the interests for time in other resorts. Indeed, the Belfry family never stayed at the Resort (other than on the first visit prior to the purchases), and they only utilized the trading value of the interests going forward.

[31] Mr. Belfry was well-aware that under the relevant legislation, JEKE had a right of rescission in respect of the JEKE VIAs provided that such right was exercised within seven days of purchase. Mr. Belfry used those seven days to review all the documentation, including the JEKE VIAs, the CPA and the Prospectus, in detail. No such right was exercised.

[32] As I will discuss below, both parties referred to the Prospectus on the issue of the interpretation of the JEKE VIAs, particularly on the issue as to responsibility for renovation and repair costs. JEKE contended that the Prospectus was part of the written contract between the parties. I do not agree. It certainly represents representations that were made by Fairmont to prospective lessees, such as JEKE, but it is not incorporated into the JEKE VIAs in any fashion. The Prospectus does, of course, stand as part of the factual matrix at the time of the signing of the JEKE VIAs, to the extent that resort to that factual matrix is needed in the interpretation exercise.

[33] In any event, I do not consider that any of the statements in the Prospectus are inconsistent with the JEKE VIAs on any issue.

[34] Accordingly, I conclude that the VIAs and the CPA contain the entirety of the written contract in place between JEKE and Fairmont. Indeed, the CPA expressly provides in, section 14, that no written or verbal communications from any sales person modifies, alters or adds to the JEKE VIAs and the CPA. The Prospectus states in section 2.02(1) that the purchase is "pursuant to the terms of a vacation lease agreement …"

[35] The Prospectus included a listing of furnishings in the two-bedroom Villas, including coverings, plumbing and appliances, electrical services and detailed items

in each room. Also included was a statement of operating projections for the year ending December 31, 2003 which included figures for both 2002 and 2003. This document indicated that refurbishing amounts had been allocated at $510,510 for 2002 and $535,260 for 2003. The document also indicated total operating projections for 2003 of $3.6 million resulting in an annual fee for 2003 of $462.12 for a two-bedroom unit, based on 9,732 units. Mr. Belfry acknowledged having specifically reviewed this document.

[36] Mr. Belfry was well-aware that JEKE's right to use the time share interests under the JEKE VIAs, whether by way of actual use or trading value, was dependent on: firstly, JEKE paying the required fees charged by the manager of the Resort (JEKE VIAs, paragraph 13); and, secondly, JEKE reserving the time in advance of the start of the designated season (JEKE VIAs, paragraphs 5, 20).

[37] Finally, there are no termination provisions to be found in the JEKE VIAs which can be unilaterally exercised by JEKE as a lessee.

[38] The form of the JEKE VIAs is reproduced in Schedule "A" to these reasons. I will refer to specific provisions of the JEKE VIAs throughout these reasons.

**4) Post VIA Purchase Events to 2009**

[39] After purchasing the time share interests under the JEKE VIAs, the Belfrys used those interests from time to time by exchanging them for use at other resorts through Interval International.

[40] Commencing in late 2004 and continuing to late 2008, JEKE received Fairmont's yearly communication at the end of every year. Fairmont used Columbia Villa Management Ltd. ("CVM"), to provide certain management services to the Resort. Christopher Van der Deen became an employee of CVM and the general manager of the Resort in 2005, and would send these yearly reports and budgets from that time forward.

[41] CVM's report would typically contain updates on the past year's operations and the anticipated projects for the upcoming year, together with any other matters of interest. The report would be accompanied by a budget for the upcoming year, with a calculation of the required maintenance fee to be paid.

[42] As I will describe below, the communications in this period of time (and even beyond), would advise the owners of substantial repairs, upgrades, and replacement of property in the Resort that either were, or were intended to be, undertaken over that period of time.

### 5) The *CCAA* Proceedings

[43] As I will discuss in more detail below, Fairmont became insolvent in 2009 and sought creditor protection in Alberta pursuant to the *CCAA*.

[44] While Fairmont was under creditor protection, the stakeholders made efforts to rationalize Fairmont's businesses, including the Resort, and consider what restructuring alternatives were available.

[45] In the meantime, Fairmont's operations at the Resort continued until mid-2010 when the *CCAA* proceedings resulted in Fairmont's secured creditors, through a new ownership structure, which included Northmont, taking over the assets of Fairmont. These assets included Fairmont's interests under the JEKE VIAs.

[46] Also as part of these transactions, a new trustee, Philip K. Matkin Professional Corporation (the "Trustee"), was appointed pursuant to an Amended and Restated Trust Agreement dated July 6, 2010. As did the previous Trustee in Fairmont's time, the Trustee holds beneficial title to the Resort in trust for the owners and Northmont according to their respective interests. Legal title to the Resort is registered in the name of Carthew Registry Services Ltd., as nominee, agent, and bare trustee for the benefit of present and future owners – to the extent of their interest in the Resort's lands and for the benefit of Northmont, as to its residual interest in the Resort.

### 6) Post-*CCAA* Resort Analysis

[47] There is no dispute that Northmont inherited a Resort with significant maintenance and structural issues. The evidence at this trial on this issue was similarly before Loo J. in the *Special Case* (BCSC). What Northmont did to identify and address these issues are set out in detail by Loo J. at paras. 13-16.

[48] There is also no dispute that, upon taking over, Northmont was faced with significant financial issues relating to the Resort, principally arising from the maintenance issues. In particular, the Resort was facing substantial deficits and increasing delinquencies in payment of assessments.

[49] Patrick Fitzsimonds was the chief executive officer of Northmont. Kirk Wankel, a chartered accountant, became the chief financial officer of Northmont in November 2010. Mr. Wankel would play a key role in the direction of the Resort and the financial decisions made in the years to come. He would eventually become the CEO of Northmont, in November 2012, in place of Mr. Fitzsimonds.

[50] In substance, the post-*CCAA* steps undertaken by Northmont towards identifying the issues included:

a) Fairmont never established or maintained a reserve or replacement fund to deal with long-term anticipated repairs;

b) Doug Frey, a person well-qualified to evaluate construction issues, was hired in June 2010 to prepare an initial report on these maintenance issues;

c) When Mr. Frey began his review, in the summer of 2010, Building 7000 foundation repairs were underway and the Building had been shuttered and was out of the time share regime;

d) Mr. Frey described the issues facing the Resort as ranging from “catastrophic to deferred”. He stated that the issues went beyond just maintenance issues. He was made aware of significant issues that

needed to be addressed, including compromised stucco, dry rot, failing decks, landings, patios and stairs, and plumbing leaks. His review was made even more challenging by reason of the fact that the Resort's maintenance and building records were incomplete or non-existent;

e) in Northmont's August 2010 disclosure statement, there was a discussion about the aging infrastructure and that the properties at the Resort needed to be refurbished, and that in the future, a greater portion of the annual maintenance fee would need to be budgeted to maintain the Resort. While no formal study had yet been done, it was estimated that $19 million would need to be spent on capital refurbishment costs over the next five years (excluding issues relating to Building 7000). In this document, Northmont advised that there was no capital reserve for these costs, and that an increase in the maintenance fee would be necessary in the future to pay for these costs;

f) Mr. Frey's preliminary review of the Resort was completed in the fall of 2010 or early 2011. He reported the problems to Mr. Fitzsimonds who then asked Mr. Frey to complete a more detailed review;

g) in December 2010, Mr. Van der Deen prepared his report and 2011 operating budget which was sent to the owners. The report advised that various projects had been completed in 2010, as previously advised in the last report. Also, by this December 2010 report, Mr. Van der Deen advised the owners of the insolvency proceedings of Fairmont and the transfer to Northmont. He also announced the change of the Resort's name to "Sunchaser Vacation Villas". Finally, Mr. Van der Deen announced that anticipated projects for 2011 were much the same as for 2010, including deck reconstruction, replacement of floor coverings and landscaping;

h) Mr. Frey's more comprehensive report was given to Mr. Fitzsimonds in the summer of 2011. That report identified various issues including those relating to foundations, roof and deck deterioration, envelope issues and

> water penetration in virtually every building causing mould and dry rot and stucco deterioration. Mr. Frey estimated that it would cost between $30-37 million to complete these repairs. Mr. Fitzsimonds was surprised to learn of the extent of the problems and concerned about the anticipated cost to fix the problems, including how the time share owners might react to paying such costs.

[51] In the fall of 2011, Mr. Fitzsimonds instructed Mr. Frey to "add some science" into the preliminary cost estimates and devise a remediation plan. Mr. Frey was to come up with a resort-wide remediation plan to deal with the problems, including those relating to foundations, the building envelope, the civil works, defective piping and water ingress issues. Mr. Frey decided that he needed to retain third-party professionals or consultants to assist him in identifying the problems and in formulating a plan to fix the problems.

[52] In December 2011, JEKE and the other owners were again advised of Northmont's efforts to address recurring deficits and deferred maintenance issues at the Resort. At this time, Northmont reported on the continued renovation work and advised the owners that it was working on a long-term plan by way of a complete site review for the required maintenance and refurbishment.

**7) Resort Renovation Planning**

[53] Northmont began retaining various professionals and consultants commencing in the fall of 2011, and was advised it would take some time to obtain the necessary reports. That process would continue well into 2012. In addition, Mr. Frey began to search for a general contractor to do the work and Vic Van Isle Construction ("VVI") was eventually retained in early 2012.

[54] The evidence at the trial on the remediation and renovation planning and costing was also before Loo J. I do not understand that JEKE takes issue with Loo J.'s description of the results of Mr. Frey and the consultants' work as described in the *Special Case* (BCSC):

[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.

[55] In addition to the significant maintenance issues, the Resort was also facing an operating deficit which, as at the end of 2012, was approximately $4.3 million. Of that amount, roughly $2.7 million was the cost to repair the foundation of Building 7000. These deficits had been previously financed principally by delaying payment of accounts payables, accruing deferred revenue from prepaid leases and by delaying payment of amounts owing to Northmont.

[56] The preliminary scope of the renovation plan and budget was presented to Northmont’s board of directors in November 2012.

[57] After input from the consultants and VVI, Mr. Frey ultimately arrived at a construction budget of approximately $40.8 million in March 2013. Loo J. described the budget in the *Special Case* (BCSC):

> [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 subtrades | $4,938,157 |
| Contractor contingency | $2,316,483 |
| Recreation building | $1,000,000 |
| PST | $1,860,260 |
| **TOTAL** | **$40,844,342** |

[58] Since this was only a budget, Mr. Frey anticipated that if any amounts were not spent, those funds were to be put into a reserve fund for later use by the Resort.

[59] Mr. Frey first became aware of the possibility of a realignment of the Resort through some general discussions with Mr. Wankel in September 2012. This was a very preliminary discussion between them. When Mr. Wankel raised the matter, Mr. Frey said it sounded like a good idea but asked Mr. Wankel if he "could prove it out."

[60] On December 10, 2012, a detailed letter was sent to the owners notifying them of the proposed renovation project and referring to the "New Sunchaser". This letter provided an estimate of a high-level budget in the range of $28 to $38 million, as well as the reasons why the project was necessary for the long-term health of the Resort. Northmont's letter described the renovation as an "absolute necessity, not an option". A glossy brochure was also attached outlining the "exciting changes … coming to your resort in 2013". I will refer to this as the "Renovation Plan".

[61] In December 2012, lessees and owners were also advised that for the next two years - 2013 and 2014 - they would receive a billing to, not only provide funds

for the planned renovation, but also to resolve the outstanding deficit. The owners were to have the option of paying for the renovation fee on an interest-free basis by a payment plan of $100 per month so as to lessen the financial burden.

[62] This communication, in December 2012, caught Mr. Belfry's attention, particularly as to what impact the proposed renovations would have on JEKE's financial responsibilities to the Resort. In early January 2013, Mr. Belfry began a series of communications with Northmont regarding the December 2012 report and budget regarding the "New Sunchaser".

[63] At this same time, in early January 2013, the records of Northmont reflect that Mr. Belfry was making efforts to sell JEKE's interests under the JEKE VIAs, but without any success. This was exactly the type of scenario that Northmont would later specifically identify as supporting a proposal to realign the Resort by allowing owners to terminate their VIAs without further financial obligation on certain terms.

[64] In January 2013, JEKE made the payment of the 2013 maintenance fees owing on its annual VIA.

[65] The communications between Mr. Belfry and Northmont would continue over the ensuing months which, from Mr. Belfry's point of view, did little to allay his concerns about the necessity of the proposal renovations and the financial costs of those renovations to JEKE.

[66] In February 2013, Northmont entered into a CCDC-3 form of construction contract with VVI to establish a fixed budget for the Renovation Plan. Northmont also commissioned a quantity surveyor ("QS") to review the Renovation Plan and the budget on an ongoing basis. In the usual fashion, it was intended that the QS would report on the payment of invoices for work completed and the cost to complete in order to ensure that costs were being properly managed.

[67] In March 2013, the renovation and repair work began. Three buildings in Riverside (Buildings 300, 400 and 800) have now been completed, along with

repairs to the pool and hot tub in the recreation centre. Work has also been done on the Riverview Building 8100 but limited to external structures.

[68] Mr. Frey indicated that Northmont has fallen behind schedule under the Renovation Plan. At some point prior to the trial, the work slowed down in light of the uncertainty arising from this litigation. Mr. Frey is, however, continuing with the Renovation Plan, as best he can, in order to keep the agreed-upon pricing under VVI's contract and maintain the trades' involvement.

[69] Relevant to the resort realignment plan discussed below, Mr. Frey states that the Renovation Plan is "scalable" in the sense that every building has its own individual budget; in the event that there are common costs as between the various structures (for example, roads, sewers and landscaping), the budgets are such that these common costs can be easily allocated to those structures.

[70] The January 2013 payment, in respect of JEKE's annual VIA for 2013, was the last payment JEKE would ever provide to Northmont.

[71] On April 3, 2013, Northmont billed JEKE and other owners for the fee arising from the Renovation Plan (which included an amount for the deficit recovery). The amount billed was $3,995.18 for the annual VIA, and $1,997.59 for the biennial VIA, for a total (before taxes) of $5,992.77 (the "Renovation Project Fee"). JEKE has refused to pay these amounts.

### 8) The Resort Realignment Plan

[72] The proposal to realign the Resort was developed by Mr. Wankel following his preliminary discussion with Mr. Frey in the fall of 2012. The impetus for the proposal, which I will call the "Resort Realignment Plan", was clearly the need to undertake the substantial work under the Renovation Plan.

[73] Fundamentally, the Resort Realignment Plan arose from Mr. Wankel's view that, in the absence of a restructuring of the Resort, any maintenance fee adequate to renovate the Resort, and place the Resort on a secure financial footing, would

cause a significant number of owners to default on their obligations. He considered that this would, in turn, obligate the remaining owners to cover the defaults, resulting in escalating defaults, and the eventual collapse of the Resort. I do not understand that JEKE disagrees with that assessment.

[74] By letter dated April 8, 2013, Northmont wrote to the Trustee setting out in detail the reasons for and purpose of the Resort Realignment Plan and requesting that the Trustee cooperate in:

> 1. 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
> 2. transfer to Northmont of portions of the Lands which have been thereby rendered free of Vacation Interval Agreements.

[75] This detailed letter outlines the Resort Realignment Plan which, in substance, consists of a number of steps being (1) assessment of the Renovation Project Fee; (2) a proposal to the owners by which they can elect to either pay the Renovation Project Fee or, pay a fee to Northmont in order to cancel their interests (the “Cancellation Fee”) and transfer their interest to Northmont; (3) amendment of the VIAs by agreement of those owners who wish to do so (mandatory in the case of those paying the Cancellation Fee); and (4) a reduction in the Resort by which non-renovated units would be surrendered to Northmont and then transferred in fee simple to Northmont, accompanied by the Trustee’s amendment of the register of interests to reflect this downsizing of the Resort.

[76] The fundamental assumption underlying the Resort Realignment Plan is that many owners would choose the cancellation option as a result of which the number of owners would be substantially reduced. As Mr. Wankel stated, if all or even most owners chose to stay, then the Resort would have been stabilized and there would not have been any need for the Resort Realignment Plan.

#### ***i) Step 1***

[77] I have already outlined the process by which the Renovation Plan was developed and the Renovation Project Fee was billed to owners in April 2013.

#### ***ii) Steps 2 and 3***

[78] These steps were accomplished by the forwarding of Northmont's letter of April 12, 2013, which is also referred to as the "Freedom to Choose, Reason to Stay" letter. This letter was sent to each owner, along with an invoice for each owner's applicable share of the Renovation Project Fee. The letter refers to the programme which was developed to allow owners to determine whether they wanted to pay the Renovation Project Fee and stay in the Resort, or pay the Cancellation Fee to terminate their VIA obligations.

[79] In the letter, Mr. Wankel described what he considered to be substantial benefits arising from the Resort Realignment Plan, being that:

1) owners would be provided with an option by which they could walk away. Considerations included: there was no market to re-sell these interests (as discovered by JEKE when Mr. Belfry attempted to sell); owners were being preyed upon by persons purporting to remove them from the time share upon payment of fees; and the demographics of the time share owners is such that increasingly, older owners who bought at another time in their lives no longer had the same desire to use their interests;
2) the Resort could be downsized to those who were clearly invested in the Resort and who wanted to stay, resulting in reduced delinquencies; and
3) arising from the Trustee's involvement in the process, there would be clear direction regarding the responsibilities under the VIAs.

[80] Northmont asserted that VIA owners who did not accept the offer to cancel, in exchange for payment of the Cancellation Fee, had an obligation to pay the Renovation Project Fee as well as ongoing maintenance fees. The Cancellation Fee

was estimated to be approximately 11% of what future costs payable under the VIA would be.

[81] Under Northmont's offer, VIA owners who elected to pay the Cancellation Fee were also required to enter into separate agreement by which they surrendered their VIA interest to Northmont in exchange for Northmont releasing them from all future liability under the VIA.

[82] The portion of the April 12, 2013 letter relating to the Resort Realignment Plan informed the owners that the Trustee had already been engaged in the process, particularly as regards Northmont's intention in relation to Step 4:

> 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.

[83] As it happened, Mr. Wankel's prediction about the take up of the cancellation option was correct. Mr. Wankel indicated that the majority of the VIA owners have now either contributed to the Renovation Project Fee (32%) or surrendered their interests under the cancellation option (43%), as proposed by Northmont. At present, some 25% of the owners have not responded to the proposal. Accordingly, Northmont now holds approximately 45% of the interests, being the VIA interests transferred to it by cancelling owners and interests previously held by it before the Renovation Project Fee was assessed.

[84] By April 2013, Mr. Belfry had garnered some support for his opposition to the Renovation Project Fee and the Resort Realignment Plan. On April 17, 2013, he forwarded a letter to Northmont. He took the position that there had been a breach by Northmont of various obligations under the VIAs and that there had been numerous misrepresentations to JEKE. Mr. Belfry asserted, therefore, that Northmont was not in a position to collect maintenance fees under the VIAs. He stated that JEKE was suspending all payments under the VIAs for the yearly assessments. He advanced a "without prejudice" offer to transfer JEKE's rights under the VIAs back to Northmont in consideration of a full release of any further obligations thereunder.

[85] Northmont rejected JEKE's "without prejudice" offer.

[86] Accordingly, JEKE has now been billed for the annual maintenance fees for 2013 for the biennial VIA and the regular maintenance fees for both VIAs for 2014, 2015 and 2016, in addition to the Renovation Project Fee. As of November 2014, the amount said, by Northmont, to be outstanding by JEKE, including interest and taxes, was $11,639.65.

#### 9) Trustee's Petition for Directions

[87] Following Northmont's April 8, 2013 letter to the Trustee regarding the Resort Realignment Plan, the Trustee filed a petition proceeding on April 16, 2013 in S.C.B.C. Action No. S132760 (the "Petition Proceeding"). The Trustee sought advice

and direction from the Court pursuant to s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464.

[88] Specifically, the Trustee is seeking this relief in respect of Northmont's desire to make certain unilateral amendments to the VIAs (by which certain portions of the Resort would be transferred to Northmont) and that the Trustee make corresponding changes to the register of the owners' interests in the Resort (ie. Step 4 of the Resort Realignment Plan).

[89] The Trustee and Northmont sought the Court's direction regarding the procedure for giving notice of the petition to owners. On April 18, 2013, Master Scarth granted an order providing for notice to be given by the Trustee to the owners. On May 30, 2013, that order was amended to refer to the anticipated hearing date of June 20, 2013.

[90] That hearing did not proceed on June 20, 2013. Rather, in July 2013, the Court ordered that a special case would be heard in order to determine two issues identified by the parties; namely, whether Northmont could charge the Renovation Project Fee and the Cancellation Fee. It is my understanding that Northmont had hoped that a determination of these interpretation issues in a special case would avoid, or at least truncate, a lengthy trial such as this.

[91] I have already referenced the outcome of the Special Case above in the Introduction.

[92] As matters stand, my order of May 19, 2015 is to the effect that the Petition Proceeding is to be held in abeyance pending the resolution of this action. Accordingly, no hearing has yet taken place to either confirm or deny the ability of Northmont or the Trustee to proceed in accordance with Step 4 of the Resort Realignment Plan by which the VIA owners' interests may be affected as proposed.

## III. ISSUES

[93] In large part, this dispute arises from widely-differing views as to the interpretation of the respective responsibilities of JEKE, on the one hand, and Fairmont/Northmont, on the other, under the JEKE VIAs.

[94] In my view, the interpretation exercise is greatly assisted by analyzing, in the first instance, the nature of the interests acquired by JEKE and the role of Fairmont, now Northmont, under the JEKE VIAs.

[95] The outline of the issues to be addressed is as follows:

1) what is the nature of the interests acquired by JEKE under the JEKE VIAs?;

2) what is the role of the Developer/Lessor/Manager (Fairmont, now Northmont) under the JEKE VIAs?;

3) is Northmont responsible for the remediation costs relating to Building 7000?;

4) is Northmont in breach of the JEKE VIAs, either in relation to the Renovation Project Fee, the Resort Realignment Plan or miscellaneous matters?; and

5) is repudiation of the JEKE VIAs available to JEKE if such breach(s) are found?

## IV. THE NATURE OF JEKE'S INTEREST

[96] The parties disagree, to some extent, on the nature of the interest acquired by JEKE.

[97] Mr. Belfry's evidence was to the effect that he considered that JEKE's interest was akin to that of a commercial tenancy with Fairmont being the lessor under such a lease. Mr. Belfry's position is, no doubt, informed by his previous occupation as a

commercial realtor. Even more to the point, this position appears to have arisen only in April 2013 when Mr. Belfry was refusing to pay the Renovation Project Fee on the basis of his argument that a commercial tenant is not responsible for “Capital Expenses” as part of “Common Area maintenance costs”.

[98] As an example, JEKE cites the analysis in *Royal Leather Goods Ltd. v. Grantham Holdings Ltd.*, 51 B.C.A.C. 222 at paras. 8, 10 which involved the interpretation of a commercial lease which expressly addressed the responsibility for costs which were “capital in nature”.

[99] In my view, there is absolutely no support for JEKE’s argument beyond the common fact that both types of relationship are governed by contract. However, unlike a time share, a commercial tenancy involves a one-on-one relationship between a landlord and a tenant that bears little resemblance to the contracts here which govern the collective nature of the interests held by the participants in a time share. The fundamental nature of a time share interest involves not only the creation of a contractual relationship between an owner and the developer, but also a relationship between all owners in the time share. This is evident in many ways.

[100] Firstly, the governing legislation defines a “time share plan”. When JEKE acquired its interest, Fairmont was required to comply with the *Real Estate Act*, R.S.B.C. 1996, c. 397. Section 1 provided:

> "time share interest" means the interest of a person in a time share plan;
>
> "time share ownership plan" means any plan by which a person participating in the plan acquires an ownership interest in real property and the right to use or occupy all or part of that property, including accommodations or facilities located on all or part of that property, for specific or determinable periods of time;
>
> "time share plan" means any time share ownership plan or time share use plan, whether in respect of land located in or outside of British Columbia, that provides for the use, occupation or possession of real property to circulate in any year among persons participating in the plan;
>
> "time share use plan" means any plan by which a person participating in the plan acquires a right to use or occupy real property, including accommodations or facilities located on that property, for specific or determinable periods of time but does not acquire an ownership interest in that property;

[101] In January 2005, the legislation concerning time share plans was transferred to the *Real Estate Development Marketing Act,* S.B.C. 2004, c. 41 ("*REDMA*"). Consistent with the earlier definition found in the *Real Estate Act*, *REDMA* sets out definitions in s. 1:

> "time share interest" means a person's interest in a time share plan;
>
> "time share plan" means a plan in respect of land in which persons participating in the plan
>
> > (a) each have a right of recurring use, occupation or possession of all or part of the land, including any accommodations or facilities located on it, on a periodic basis, and
> >
> > (b) may or may not acquire an ownership interest in the land that is the subject of the plan.

[102] Secondly, a time share plan is also different in many respects from a strata plan. Unlike a strata plan, a time share plan is governed by contract, rather than by statute, such as the *Strata Property Act*, S.B.C. 1998, c. 43.

[103] Here, the documentation makes clear that JEKE did not acquire a legal interest in the lands and buildings. The Prospectus expressly states that a purchaser will not receive any interest in the title to the real property subject to the time share plan. Recital B of the JEKE VIAs provides that title would be held by a trustee (or its nominee)

> …. for the benefit of present and future lessees to the extent of their interest and for the benefit of [Fairmont] to the extent of its residual interest in the Lands;

[104] In addition, each VIA 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. The relevant portions of the JEKE VIAs are as follows:

> D. The Lessee is desirous of purchasing a vacation leasehold interest in the Vacation Properties for the term and upon the terms and conditions hereinafter set forth.
>
> 1. DEMISE: The Lessor hereby demises and leases to the Lessee and the Lessee leases from the Lessor a specified Vacation Property 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 Vacation Property for a specified week as contemplated by that paragraph in consideration for a right to use and occupy for the duration of the Term either an unspecified Villa of the type specified in paragraph 1 or other equivalent Vacation Property 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 Vacation Property 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.

[105] A “Vacation Property” means the “Villas” which, in turn, is defined in the VIAs as the constructed residential dwellings in the resort development (defined as the “Project”). The word “Project” does not appear in the subsequent relevant portions of the VIAs. Rather, the phrase “Vacation Resort” is used, such as in paragraph 9 of the VIAs. It does appear that, at some point, this change was made and the correct reference to “Vacation Resort” was included in the draft form of VIA provided in the Prospectus received by the Belfrys. In any event, there is no dispute that “Vacation Resort”, as referred to throughout the VIAs, is intended to refer to the entire resort property which, of course, includes the Vacation Properties (or Villas).

[106] The CPA provides in section 12 that “all weeks float within their time classification for the duration of the lease agreement”. Accordingly, the JEKE VIAs are consistent with both the CPA and the Prospectus, the latter having advised prospective purchasers that:

> 2.02(1) The purchaser of a time share interest will become a lessee (“Lessee”) <u>pursuant to the terms of a vacation lease agreement</u>, the form of which is attached hereto as Schedule “H” (“Vacation Lease” or “Lease”). The interest being offered to prospective purchasers is that of a fixed week in a specific Villa and will be registered as such for the purposes of the Lessor’s records. However, once the Lease is registered with the Trustee, <u>each purchaser will then enjoy and exercise its rights under the Lease as a floating</u>

> week during a designated season in a designated type of Villa rather than a specific Villa. ...
>
> [Emphasis added]

[107] Accordingly, while JEKE may have notionally been assigned Vacation Properties #7019 and #7010 in Building 7000 under the JEKE VIAs, in truth, JEKE agreed that it had no “right” to use these units and that it only received an “exchange right” for a similar type of unit in the Resort at the agreed-upon season. The recording of a specific unit was, as the JEKE VIAs state, for administrative purposes only so as to allow the recording of the interests by the Trustee.

[108] As I will discuss below, this floating option would be an important limitation on the rights of lessees, such as JEKE, which allowed the Lessor/Manager greater flexibility in terms of managing the Resort for the time share owners generally.

[109] As previously stated, the Belfrys never used JEKE’s interest to stay at the Resort themselves. Rather, they used JEKE’s “floating” unit to stay at other resorts. Even in that event, the unit which was recorded as having been used by JEKE was not in Building 7000 but, rather, in Buildings 300, 500 1000, 3000 and 4000.

[110] Finally, there are also governance provisions in both a time share plan and a strata plan that emphasize that the collection of interests are to be managed for the benefit of the entire group. Here, both the VIAs and the CPA provides for the ability of the Lessor to unilaterally modify the leases for the benefit of the owners collectively. The CPA provides:

> 13. I understand that management reserves the right to modify these conditions for the benefit of the majority of the Vacation Lease Owners.

[111] The JEKE VIAs provide:

> 43. 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... .

[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.

## V. FAIRMONT AS DEVELOPER/LESSOR

[116] Fairmont was, of course, the original developer of the Resort. Fairmont was also the original manager of the Resort until it was later replaced by Northmont through the *CCAA* proceedings. The rights of both Fairmont and Northmont in both roles are relevant to interpreting the JEKE VIAs.

[117] The Prospectus provides that Fairmont will construct the Villas and other amenities provided at the Resort. When JEKE bought its interests, all of the

buildings, save for Building 8100 were in place, along with the amenities. This resulted in the creation of between 12,240 and 22,346 potential time share interests which Fairmont could attempt to sell.

[118] There is no dispute that Fairmont did sell a number of these interests over the course of the development of the Resort.

[119] The Prospectus also provided in section 2.01(1) that Fairmont reserved "the right to construct additional Villas to add to the Resort if the market for time share interests so dictates". Fairmont did construct Building 8100 in 2004, and as it did previously, took steps to sell interests in these units.

[120] The nature of selling time share interests is such that the Developer will typically hold some time share interests in the Resort at any given time.

[121] Here, the Developer would obviously retain a residual interest in the Resort after the term of any lease, which interest could be resold at the expiry of the lease. In addition, it was clearly contemplated as likely that the Developer would have interests in inventory at differing levels from time to time. In that event, the VIAs provide that the Developer is to be treated the same as other owners in terms of sharing in the expenses incurred in operating the Resort. The JEKE VIAs provide:

> 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, <u>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.</u>
>
> In the event that the Lessor should default in making payments as a lessee, then the Lessee or any other lessee holding a leasehold interest in the Vacation Resort shall be entitled to give notice to the Trustee, accompanied by proof of such default, and the Trustee shall thereupon be entitled to sublet the leasehold interests of the Lessor …
>
> [Emphasis added]

[122] The JEKE VIAs also gave other rights to Fairmont as the Lessor in two events: firstly, if JEKE defaulted in any payment; and, secondly, if JEKE failed to make a reservation with the prescribed time period.

[123] By the default provision, Fairmont could elect to terminate the lease. Paragraph 13 of the JEKE VIAs 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 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.
>
> [Emphasis added]

[124] Accordingly, in the event that Fairmont elected to terminate a lease, a lessee remained responsible for all payments to the date of termination. From that time forward, Fairmont was entitled to use the time share interest for its own purposes and it had the right to resell the interest. From the time of termination, Fairmont was responsible to contribute to costs per paragraph 14 of the VIAs.

[125] The JEKE VIAs also provided that if JEKE failed to reserve the interests in time, Fairmont could not terminate the VIAs, but could rent out the interest and keep all proceeds:

> 20. LESSOR'S RIGHTS WITH RESPECT TO VACATION PROPERTIES: The Lessee hereby acknowledges the right of the Lessor to use, occupy and rent any Vacation Property not reserved for a particular week period pursuant to a Vacation Lease, and to retain all monies and other consideration received as a result of the use, occupation and rental of any such Vacation Properties.

[126] Around the time of the *CCAA* filing, the Monitor reported on April 27, 2009 that Fairmont held approximately 725 weeks at the Resort.

## VI. FAIRMONT AS MANAGER

### 1) Appointment of Fairmont

[127] Paragraph 10 of the JEKE VIAs provide for the appointment of Fairmont as Manager:

> 10. MANAGEMENT BY THE LESSOR: The Lessee hereby appoints the Lessor as the manager (the "Manager") of the Vacation Resort 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 Vacation Resort 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 Vacation Resort;
>
> (b) in each calendar year (usually by January 15th).prepare a budget of the estimated Operating Costs for the 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 day of March in each calendar year, send to the Lessee:
>
> (i) a notice of assessment (the "Notice of Assessment") setting forth the 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, if any, 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 cash 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 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 obligations 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 Vacation Resort. 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.

[128] From at least 2005, Fairmont subcontracted out certain management functions relating to the Resort to CVM, a company related to certain shareholders of Fairmont. As stated above, Mr. Van der Deen was the general manager of CVM beginning in 2005.

[129] From in or about 2005 to 2007, FRPL Finance Ltd. raised over $41.5 million through the sale of various bonds which were held by various “Unitholders”. The funds were advanced to Fairmont and secured by Fairmont’s assets.

[130] In early 2009, Fairmont became insolvent and it defaulted on the loans owing to the Unitholders.

[131] On March 30, 2009, the Unitholders applied to obtain creditor protection for Fairmont and three other companies under the Fairmont Group under the *CCAA*. An initial order was granted on that date by Madam Justice Romaine of the Alberta Court of Queen’s Bench (the “Initial Order”). Ernst & Young Inc. was appointed as monitor (the “Monitor”), and Murray Moore was appointed interim chief restructuring officer (“CRO”) of Fairmont.

[132] The Initial Order is in fairly standard terms in terms of staying the exercise of rights or the commencement of proceedings during the restructuring proceedings. As such, Fairmont’s rights and responsibilities under the JEKE VIAs remained substantially intact even after the *CCAA* filing.

[133] In addition, the Initial Order prevented any steps being taken by counterparties to agreements with Fairmont (such as the JEKE VIAs) that might affect their validity and enforceability. Paragraph 16 of the Initial Order provided that:

> … no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by the Fairmont Group, except with the written consent of the Fairmont Group and the Monitor, or leave of this Court.

[134] It appears that after the *CCAA* filing, Fairmont continued to conduct its affairs in the ordinary course, including operating the Resort with oversight by the Monitor. In July 2009, the management agreement between Fairmont and CVM was repudiated such that management of the Resort reverted solely back to Fairmont. Mr. Van der Deen remained employed in his role as general manager of the Resort.

[135] By October 2009, Fairmont had created a new subsidiary, Resort Villa Management Inc. ("RVM"), by which certain management functions were sub-delegated to RVM. Mr. Van der Deen became an employee of RVM.

[136] All owners, including JEKE, were advised of the replacement of CVM with RVM as the party providing management services to the Resort.

[137] Paragraph 23 of the JEKE VIAs provides that leaseholders may terminate the services of Fairmont as Manager, provided that at least 51% of all leaseholders agree. There is no suggestion here that any steps were taken by the leaseholders to terminate the services of Fairmont as Manager at any time, although, of course, such steps could not have occurred during the *CCAA* proceedings without the agreement of Fairmont and the Monitor or by court order.

[138] Accordingly, the contractual relationship between Fairmont and the lessees under the VIAs remained intact throughout Fairmont's involvement until the transfer to Northmont in June 2010.

#### 2) Standard of Management

[139] Paragraph 10 of the JEKE VIAs provides that the Manager "shall manage and maintain the Vacation Resort in a prudent and workmanlike manner". On a rare point of consensus, JEKE and Northmont agree that this means that, where the Manager is required to exercise its judgment, it must do so reasonably.

[140] JEKE refers to the helpful recent discussion of "prudence" found in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission),* 2015 SCC 45:

> [34] … Because, as will be discussed, the meaning of "prudence" is the focus of much of the debate in this case, it is helpful to start by examining the ordinary meaning of the word as a baseline for the subsequent analysis. Pertinent dictionary definitions give a range of meanings for "prudent", including "having or exercising sound judgement in practical affairs" (The Oxford English Dictionary (2nd ed. 1989), vol. XII, at p. 729), "acting with or showing care and thought for the future" (Concise Oxford English Dictionary (12th ed. 2011), at p. 1156), or "marked by wisdom or judiciousness [or] shrewd in the management of practical affairs" (Merriam-Webster's Collegiate Dictionary (11th ed. 2003), at p. 1002). While these definitions may vary in their nuance, the ordinary sense of the word is such that a prudent cost is one which may be described as wise or sound.

[141] I would note that Loo J. discussed the managerial obligations of the Manager under the JEKE VIAs in the *Special Case* (BCSC) at paras. 76-82. She concluded that the Manager was obligated to act reasonably. In doing so, she relied on various authorities which have similarly been cited to me. These authorities arose in the context of the actions of strata councils acting with respect to maintenance and repair issues. Consistent with my acknowledgement of the similarities between the management of time share plans and strata plans, in terms of management of collective interests, I agree that the principles set out in these cases inform the standard applicable in these circumstances.

[142] The first decision is *Taychuk v. Strata Plan LMS 744*, 2002 BCSC 1638 where Justice Gray stated:

> [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), 20 B.C.L.R. (3d) 343 (B.C. S.C.) aff'd (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. Should it turn out that those they hire to carry out work fail to

> do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances: ...
>
> [Emphasis added.]

[143] Similarly, the Court in *LeClerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 held:

> [55] In *Weir v. Strata Plan NW 17*, 2010 BCSC 784 (B.C.S.C.), Josephson J. neatly summarized the relevant legal principles regarding the duty of a strata corporation to repair and maintain common property:
>
> > …
> >
> > [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*.
> >
> > …
> >
> > [31] It may even prove to be the case that the approach of the petitioner is the wiser and preferable course of action. Again, that does not render the approach of the respondent unreasonable.
> >
> > …
> >
> > [Emphasis added.]

[144] See also *The Owners, Strata Plan VIS 114 v. John Doe*, 2015 BCSC 13 at para. 68; *Dollan v. Strata Plan BCS 1589*, 2011 BCSC 570 at paras. 30-31.

[145] In conclusion, Fairmont was required to exercise its management functions in a reasonable manner under the JEKE VIAs. However, JEKE argues that the issues raised in this action concern, not the exercise of Northmont's managerial discretion but, rather, whether certain actions were even allowable on the part of Fairmont (and now Northmont) under the terms of the JEKE VIAs.

## VII. NORTHMONT BECOMES LESSOR / MANAGER

[146] There is no doubt that Northmont assumed the role of Lessor and Manager previously held by Fairmont under the JEKE VIAs. In my view, the effect of Northmont having done so is not controversial.

### 1) Factual Background

[147] In April 2010, the Unitholders held a meeting to discuss their realization options in relation to Fairmont's business and assets (including the Resort). The clear alternatives included a reorganization plan of the assets with a new ownership structure or an asset liquidation plan. At this time, it was more than evident that the Unitholders had the primary economic interest in Fairmont's assets given their secured position.

[148] As a result of that meeting, the Unitholders voted overwhelmingly in favour of a reorganization plan by which they would exercise their security against Fairmont's assets such that they would collectively take over the Resort and all Fairmont's interests in the Resort. The Unitholders 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 attempt to recover the amount owing under the Fairmont bonds.

[149] Essentially, this was to be accomplished by a transfer of Fairmont's assets to Northmont in consideration of a credit of a significant amount of the debt owing.

[150] In its Ninth Report dated April 26, 2010, the Monitor described this as the "Finance Reorganization Plan" in that the Unitholders would:

> … exercise [their] security on Fairmont's assets in such a way that Fairmont's operations and the assets secured by [the Unitholders] would ultimately be owned by the [Unitholders] under a new ownership structure and reorganized with a view to creating a viable and valuable business. …

[151] The ultimate agreement between the parties was complex, as I will discuss in more detail below. However, in summary, Fairmont agreed to transfer all of its interests in the Resort to the new ownership structure, which includes Northwynd

Limited Partnership ("'Northwynd LP"), and the later assignee of the assets, being Northmont Limited Partnership ("Northmont LP"), of which Northmont is the general partner. Northwynd LP also acquired all of the loans owing to the Unitholders by Fairmont and the security against Fairmont's assets held the Unitholders.

[152] Northwynd LP and Northmont LP are both 100% owned, directly or indirectly, by Northwynd Real Estate Investment Trust ("Northwynd REIT"), which is owned by the Unitholders. As such, pursuant to agreements approved within the *CCAA* proceedings, the approximately 800-850 Unitholders converted their secured debt into units of Northwynd REIT.

[153] When the proposed transaction was first presented to the Alberta Court of Queen's Bench in April 2009, the preservation of the time share plan and continuity of the Resort's operations were front and centre. In its Ninth report dated April 26, 2010, the Monitor referred to various benefits from the proposed transaction, one being that:

> 46. (d) timeshare usage will be essentially unchanged for the more than 15,000 time share owners who have purchased timeshare interests from the Fairmont Group;

[154] On April 27, 2010, Northwynd LP's offer (the "Offer"), was put before Romaine J. for approval. She ordered that Fairmont was authorized and directed to accept the Offer on substantially the terms set out in the Offer, and execute the later documentation or "definitive agreement" that was contemplated by the Offer.

[155] It appears that issues arose as to whether, and if so, how notice of any later application to approve the transfer to Northwynd LP would be given to time share owners given the clear intention to transfer Fairmont's interests in the VIAs to Northwynd LP.

[156] On June 4, 2010, prior to the June 22 application to approve the transaction with Northwynd LP, Romaine J. issued an order that set out the method of service on parties or counterparties with interests under leases or agreements (ie. VIAs). By that order:

> 1. Northwynd is hereby authorized and directed to serve notice of the application in the within matter to approve the Sale and vesting of title of the Secured Assets, as such terms are defined in the Order of this Honourable Court dated April 27, 2010 upon parties or counterparties with an interest under vacation leases, vacation experience leases … by sending a letter substantially in the form attached hereto as Schedule “A", to the last known mailing or electronic addresses of the Timeshare Purchasers as same are maintained in the records of Fairmont … no later than June 15, 2010.
>
> 2. Service as provided in this Order shall be deemed good and sufficient service in all respects upon all Timeshare Purchasers.
>
> [Emphasis added]

[157] Mr. Fitzsimonds, on behalf of Northwynd LP, subsequently executed an affidavit of service confirming that such notice had been provided. Romaine J. would later grant an order (described as the “Vesting Order” below), indicating that "[s]ervice of notice of the within application is deemed good and sufficient." Mr. Fitzsimonds stated that 17,631 time share owners had been served electronically or by ordinary mail. In particular, the notice was sent to Mr. Belfry’s email address. The court materials were also posted on the Monitor’s website.

[158] The terms of the Finance Reorganization Plan - or transfer of Fairmont’s interests to Northwynd LP/Northmont LP - and the manner by which it was to be implemented, was set forth in a later definitive agreement, being the foreclosure agreement dated June 15, 2010 (the "Foreclosure Agreement"), executed between Fairmont and Northwynd LP.

[159] The Foreclosure Agreement is a complex document and is a definitional *tour de force* with some 25 pages of definitions alone. The relevant provisions of the Foreclosure Agreement, in relation to the transfer of the VIAs, are as follows:

> “Foreclosed Assets" means, collectively, the Fairmont Foreclosed Assets ... (para. 1.1(jjjj));
>
> "Fairmont Foreclosed Assets" means, collectively ... the Fairmont Foreclosed Assets (Northmont)… (para. 1.1(pp));
>
> “Fairmont Foreclosed Assets (Northmont)" means:
>
> > (v) the Fairmont Timeshare Agreements … the Building 7000 Trust Fund;
> >
> > but does not include ...Fairmont Retained Liabilities; (para. 1.1(rr))

> "Fairmont Timeshare Agreements" means all of the Vacation Interval Agreements that apply to the Fairmont Lands or to the lands subject to the Fairmont Trust Agreement, including the Vacation Interval Agreements described in Schedule Schedule 1.1(ddd) and includes the receivables, if any relating thereto" (para. 1.1(cccc))
>
> "Vacation Interval Agreement" means, in relation to Fairmont …. a Vacation Experience Lease, Vacation Experience Lease and Co-ownership Agreement, Vacation Lease Conversion Contract or other agreement under which a purchaser thereof is granted an undivided leasehold interest and/or a fractional co-ownership interest or right to acquire a fractional co-ownership interest in an individual residential dwelling strata lot located on Lands that are subject to a Trust Agreement and includes a Vacation Interval Agreement that has been entered into but for which any statutory or contractual right of recession may not have expired. (para. 1.1(llllllll))

[160] It is undisputed that the intent of Fairmont and the Unitholders was to transfer to Northwynd LP all of Fairmont's interest in the VIAs as part of the assets transferred upon the foreclosure, and that the JEKE VIAs come within the definition of a "Vacation Interval Agreement".

[161] The Foreclosure Agreement also specifically addressed which Fairmont liabilities were being assumed, or more importantly, not being assumed. The following definition from the Foreclosure Agreement applies:

> "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 of 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). (para. 1.1(zzz))

[162] Further, pursuant to paragraph 2.1 of the Foreclosure Agreement, Northwynd LP was to acquire the "Foreclosed Assets" by transfer, assignment, conveyance and surrender "free and clear of all Encumbrances, other than Permitted Encumbrances". Encumbrances was defined as:

> "Encumbrances" means any mortgage, lien (including any construction lien or certificate of action filed with respect thereto), pledge, charge, security

> interest, restriction, claim, option to purchase, set-off, contractual obligation or liability, action, writ or other encumbrance of any nature whatever, other than Permitted Encumbrances. (para. 1.1(t))

[163] Northwynd did expressly assume liability for payment of suppliers who had supplied goods or services from the date of the *CCAA* filing to the "Vesting Date", in addition to paying for other *CCAA*-related liabilities (paragraph 2.3).

[164] That Northwynd LP was not agreeing to be bound by any other pre-*CCAA* liabilities of Fairmont is emphasized by paragraph 2.5 of the Foreclosure Agreement which provided:

> For greater certainty, [Northwynd] shall not assume any [Fairmont] Retained Liabilities of any nature or kind.

[165] On June 15, 2010, Northwynd LP entered into an agreement with Northmont LP by which Northmont LP would take title to the Foreclosed Assets immediately upon the transfer from Fairmont to Northwynd LP.

[166] The parties later sought court approval of all of these transactions. In support, the Monitor filed its Eleventh Report dated June 17, 2010.

[167] On June 22, 2010, Romaine J. granted a vesting order (the "Vesting Order"), allowing the vesting of and transfer of title to the "Foreclosed Assets" in accordance with the terms of the Foreclosure Agreement. The relevant portions of the Vesting Order are as follows:

1) Para. 3: approval of the Foreclosure Agreement;
2) Para. 4: approval of the transfer and vesting of the "Foreclosed Assets", as defined in the Foreclosure Agreement, to Northwynd LP in consideration of the satisfaction and discharge of approximately $43.8 million and the payment of other amounts as agreed to be assumed;
3) Para. 7: the transfer of interest to Northwynd LP occurred free and clear of any claims existing at the time of the transfer. Specifically, paragraph 7 provided:

   ...

   > (a) ... <u>title to all of the Foreclosed Assets shall vest absolutely in Northwynd;...</u>

> ... free and clear of and from any and all estates, interests, licenses, rights, options, security interests ... security notices, hypothecs, mortgages, pledges, agreements, statements of claim, certificates of lis pendens, disputes, debts, trusts or deemed trusts..., liens..., taxes and arrears of taxes, executions, levies and other rights, limitations, restrictions, interests and encumbrances, whatsoever, howsoever and whensoever created or arising, whether absolute or contingent, fixed or floating, whether or not they have attached or have been perfected, registered or filed and whether secured, unsecured or otherwise, whether liquidated, un-liquidated or contingent (collectively, the "Claims"), by or of all persons or entities of any kind whatsoever, including, without limitation, all individuals, firms, corporations... and regardless whether they have been served with notice of the application pursuant to which this Order is made, save and except for Permitted Encumbrances as such term is defined in the Foreclosure Agreement...

[Emphasis added.]

4) Para. 12: extinguishment of the title of Fairmont and those claiming under it:

   All of the interest, right, title, estate and equity of redemption of the Fairmont Group, and any persons claiming by, through or under any or all of the Fairmont Group in and to the Foreclosed Assets will upon the Vesting Date contemplated in the Foreclosure Agreement, be fully and finally extinguished.

5) Para. 14: confirmation that the VIAs are valid and enforceable by Northwynd upon transfer (see provision cited below).

[168] As stated above, as part of these transactions, the appointment of Philip K. Matkin Professional Corporation as Trustee was confirmed. Pursuant to s. 6 of the Trust Agreement, the Trustee maintains a register of vacation interval agreements and records in the register specific information relating to each VIA, including: the date of execution of each agreement; the type of villa (i.e. a lock-off villa, terrace villa, or other type of villa); the specified weeks or time periods in the specific villa; if applicable, the season, the date of commencement of the season and the number of weeks in such season leased by the owner; and, 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.

[169] Since the transfer, there is no evidence that any time share owner or lessee, including JEKE, has raised any objection to the transfer of the VIAs from Fairmont to Northmont. In addition, no such owner or lessee has taken any steps to appeal or set aside Romaine J.'s Vesting Order for lack of notice or any other reason.

### 2) Effect of the Transfer/Vesting Order on the VIAs

[170] JEKE submits, and I agree, that the JEKE VIAs are "executory contracts".

[171] In Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Toronto: Thomson Carswell, 2007) at 177-178, Dr. Sarra describes such contracts as follows:

> Executory contracts are generally contracts under which both parties still have obligations to perform, such that the failure to perform the contract is likely to cause a material breach that excuses the performance of the other party. Common examples of executory contracts include real estate leases, employment contracts, an uncompleted construction contract under which the customer agrees to pay the builder as the work progresses, or a contract for the continued supply of goods or services for which the supplier periodically bills the customer.

[172] Northmont agrees that the VIAs are continuing, and that the obligations of the parties did not come to an end as a result of the *CCAA*. This is a sensible position given that, clearly, JEKE remained liable under the JEKE VIAs even after the transfer; likewise, Northmont, having stepped into the shoes of Fairmont as Lessor and Manager, assumed the ongoing obligations to perform in both those capacities.

[173] In most cases, the issues that arise from the transfer of executory contracts relate to whether the counterparty to the contract is able to raise a "pre-transfer" or "upon transfer" issue as against the transferee. In *(Re) Veris Gold Corp*, 2015 BCSC 1204 at paras. 46-58, I discussed some of the issues that might arise upon such a transfer and also the statutory authority found in the *CCAA*, s. 11.3 to approve an assignment of a contract while also addressing such issues.

[174] In *Rescue!* at 178-179, Dr. Sarra states that a debtor corporation under *CCAA* protection will frequently be in material breach of executory contracts, giving rise to a right to terminate. Canadian courts have, in the past, granted relief to restrain the

ability of a counterpart from terminating or repudiating a contract in various circumstances (such as insolvency of the other party) that would deprive the insolvent person of the benefit arising from a transfer.

[175] Another typical circumstance is where the counterparty is given the right to restrict any assignment, perhaps also in the event of the insolvency of the other party.

[176] These very circumstances were expressly addressed in paragraph 14 of the Vesting Order, by which the Alberta court confirmed the validity and enforceability of the VIAs:

> On Vesting pursuant to paragraph 7 above, all of the interest of Fairmont … as the case may be, in each of the Foreclosed Contracts to which it is a party, including without limitation, each Timeshare Agreement ... as such terms are defined in the Foreclosure Agreement, shall vest absolutely in Northwynd and, upon transfer, in each Northwynd Affiliated LP to which such Foreclosed Contract is transferred pursuant to the applicable Asset Transfer Agreement, as defined in the Foreclosure Agreement ("Asset Transfer Agreement"), and shall be valid and enforceable by Northwynd and Northwynd Affiliated LP as against any party or counterparty to such Foreclosed Contract notwithstanding any contractual provisions set out therein:
>
> > (a) limiting or restricting the assignment or transfer thereof, or
> >
> > (b) triggering an event of default upon the assignment or transfer thereof or upon the insolvency or any Fairmont Group,
>
> and any such party or counterparty is stayed from enforcing any rights of termination or any other rights in relation to any breach of any Foreclosed Contract by reason of the assignment or transfer thereof.
>
> [Emphasis added]

[177] As it turns out, there are no rights of termination on the part of the lessees to be found in the VIAs, relating to insolvency or otherwise; nor do the lessees enjoy any right to restrict the right of the Lessor to assign the VIAs.

[178] This case is to be distinguished from the circumstances found in *Barafield Realty Ltd. v. Just Energy (BC) Limited Partnership*, 2015 BCCA 421, where the contracts in question specifically required the counterparty's consent to any assignment. Further, the Court of Appeal found that there was nothing in the later

court order that expressly or by implication waived that requirement (see paras. 25-39).

[179] I have addressed this issue perhaps in more detail than actually needed because of the manner in which this issue was raised in JEKE's pleadings and later abandoned.

[180] JEKE had previously advanced the argument that Fairmont was in breach of its obligations under the JEKE VIAs, and that Northmont was liable for losses caused by those breaches or subject to claims of repudiation as a result. These allegations were raised before me at a summary trial application brought by Northmont in March 2015, although that application was later abandoned: see *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.,* 2015 BCSC 1202.

[181] As one would expect, just prior to the start of the trial, JEKE cast a critical eye on its pleadings to confirm the allegations it wished to present at this trial. JEKE filed a further amended notice of civil claim (the "Further Amended NOCC") on December 14, 2015, some three weeks before the start of the trial. The pleading continued to include allegations that Fairmont was in breach of the VIAs arising from a lack of maintenance, or poor maintenance, and that Northmont was responsible for the repairs caused by such breaches (para. 26(e)).

[182] At this trial, JEKE proceeded to advance a spirited written and oral argument regarding the effect of the Vesting Order. JEKE's position was stated to be:

> … the accumulated failure and breaches commencing pre CCAA carrying through CCAA relating to the failure to undertake repairs, failure to manage, failure to construct, entitled [JEKE] to treat the JEKE [VIAs] as at an end.

Details of what these alleged "failure" and "breaches" were on the part of Fairmont were anything but clear.

[183] The difficulty is that there was a complete absence of any evidence to support that Fairmont had breached the VIAs in this fashion, beyond some general statements by RVM in late 2011 that there had been "deferred maintenance" at the

Resort. Needless to say, the fact that some maintenance had been deferred does not inevitably give rise to the conclusion that it arose from a breach of the VIAs or the negligence of the Manager, nor does it prove that, even if there was a breach, any damages arose as a result.

[184] At this trial, the only evidence concerning Fairmont's actions before the transfer of the VIAs arose from substantial documentation and the evidence of JEKE's own witness, Mr. Van der Deen, the CVM employee and general manager of the Resort. Mr. Van der Deen certainly was not asked to concede, nor did he concede, that Fairmont had acted unreasonably in relation to maintaining the Resort during his employment from 2005 to the time of the transfer to Northwynd LP. At some point prior to the trial, JEKE arranged for some construction experts to visit the Resort and review the substantial documentation concerning past and ongoing renovation work. No report, assuming one was prepared, was tendered by JEKE in support of such an argument.

[185] This same issue was raised by JEKE and other owners in the Special Case. Loo J. found that there was no evidence to support that the deferred maintenance had resulted in damage: see *Special Case* (BCSC) at paras. 97-101. Despite years of pre-trial procedures having been available to JEKE, given the successful appeal of the Special Case, JEKE has failed to muster *any evidence* in support of this argument.

[186] It is also somewhat ironic that JEKE would argue that Fairmont did not maintain the Resort properly, which if it had been done, would no doubt have earlier increased the fees payable by it had it been done during Fairmont's tenure. In addition, to some extent, the very repairs that JEKE originally argued should have been done by Fairmont are the same ones now proposed to be done by Northmont and are the subject of the Belfrys' complaints and refusal to pay.

[187] Eventually, after almost two days of argument by JEKE's counsel at this trial, JEKE eventually conceded that it now argues that only Northmont, not Fairmont, is in breach of the JEKE VIAs in respect of the deferred maintenance issues.

Northmont has never taken issue with the proposition that, upon transfer of the VIAs, it assumed the contractual managerial obligations that I have set out above. That included the obligation to maintain the Resort in a reasonable fashion and deal with the maintenance issues, including addressing required repairs arising from what was admittedly deferred maintenance on the part of Fairmont.

[188] Unfortunately, the advancement of vague allegations and the lack of any, let alone compelling, evidence in support, coupled at times with an abandonment of certain allegations only after the conclusion of JEKE's argument, was a recurring theme in this trial.

[189] In its written argument, JEKE suggested that issues arose relating to the duty of good faith contract performance as discussed in *Bhasin v. Hrynew*, 2014 SCC 71. When asked for an explanation as to the relevance of this submission, JEKE's counsel conceded that there is no allegation that Northmont had been dishonest in any way in the performance of its obligations under the JEKE VIAs.

[190] A further example is found in JEKE's argument to the effect that Mr. Wankel and Mr. Frey's evidence concerning the state of the Resort in June 2010 supports that the Fairmont Foreclosed Assets (as defined in the Foreclosure Agreement), "were clearly in a breach state". In my view, this is anything but evident, particularly given Mr. Van der Deen's evidence that he was well-aware of the maintenance issues affecting the Resort, and that he was making reasonable efforts to address them as well as he could, given the resources available to the Manager. JEKE's own witness stated that he was concerned about avoiding any precipitous increases in the fees to be charged to the owners and lessees, but still cognizant of the need to maintain the Resort to keep the owners "happy".

[191] My last point on this issue is that Northmont assumed management of the Resort in mid-2010, which the VIA owners either knew at that time or knew shortly thereafter. At no time prior to the Renovation Project Fee being raised and communicated to the owners in late 2012, did any issues arise in respect of Northmont's actions taken or not taken with respect to the Resort. As with Fairmont,

there is also no suggestion that any steps were taken by the owners to remove Northmont as Manager pursuant to paragraph 23 of the VIAs after Northmont took over in 2010.

## VIII. THE BUILDING 7000 EXPENSES

[192] JEKE argues that the portion of the Renovation Project Fee relating to the structural repairs of Building 7000 (approximately $4.3 million), should not be charged to the lessees. JEKE advances two arguments in this respect: firstly, that these are "capital costs" for which JEKE is not responsible under the terms of the JEKE VIAs; and, secondly, that Northmont accepted liability for these costs in the course of the *CCAA* proceedings: see Further Amended NOCC, paras. 25.g(v), 26b.

[193] I will address the "capital costs" issue later in these reasons. In this section of the reasons, I will address the second argument which requires a more detailed review of the *CCAA* proceedings.

[194] In July 2009, after the *CCAA* filing, Fairmont issued a disclosure statement relating to its "Reversionary Program" by which co-ownership interests were to be sold at the Resort. That document indicated that, in January 2009, Fairmont had been alerted to certain "subsidence issues" relating to Building 7000. The disclosure statement further indicated that Fairmont would not allow use of Building 7000 after October 2009 until necessary repairs had been done. In addition, Fairmont advised that, while it was not accepting legal responsibility for the issue, it had agreed to set aside $400 from each time share week sold to assist in paying for the repairs, which amounts were to be held in trust towards an estimated cost of $4.24 million. If nothing else, this indicated the views of Fairmont that, while it was not obligated to repair Building 7000 as Lessor, it agreed to voluntarily contribute to the costs of the remediation in a limited fashion.

[195] This sales programme began and the monies were deposited by Fairmont into what is described as the "Building 7000 Trust Account". By January 2010, the Monitor reported that there was approximately $769,000 in that account.

[196] A further disclosure statement was issued by Fairmont in August 2009 which stated that only the lower units on the ground floor in Building 7000 needed to be taken out of service. Assuming repair work began in October 2009, it was anticipated that repairs would be completed in May 2010. Fairmont stated:

> 2.3.1 … If the Developer is unable to raise sufficient funds for this repair and does not otherwise obtain funds to make the repair, it is possible that the maintenance fees payable pursuant to Section 3.10 will have to be increased in the future to provide sufficient funds to make those repairs.

[197] JEKE relies on certain evidence of Mr. Van der Deen in relation to what Fairmont's obligations were and what Northmont agreed to during the course of the *CCAA* proceedings. Shortly after the *CCAA* filing in early 2009, Mr. Van der Deen met with Mr. Moore, as CRO, and expressed concern about two matters: firstly, the receivable owed by Fairmont of approximately $500,000; and, secondly, what he considered to be Fairmont's obligations with respect to paying for the Building 7000 repairs. Mr. Van der Deen had in mind that Fairmont had paid for the Building 8000 repairs in the past.

[198] I fail to see how Mr. Van der Deen's evidence on this point, even if accepted, can be considered support for the proposition that Fairmont or Northmont agreed to assume liability for the Building 7000 repairs.

[199] There is no document signed by anyone at Fairmont that such an obligation was accepted. The July 2009 disclosure statement discussed above suggests exactly the opposite. No other evidence from a Fairmont representative was introduced at trial to this effect.

[200] Further, it is inconceivable that Mr. Moore, as the CRO of Fairmont during the *CCAA* proceedings, would accept responsibility for such a liability in the absence of a court order. There is no evidence that he did so. Mr. Van der Deen's "understanding" of what Fairmont had done in the past, and what Fairmont had agreed to in relation to Building 7000, is hardly reliable evidence of what actual agreements were in place. Fairmont might have agreed to pay for the Building 8000 repairs for any number of reasons, leaving aside that agreeing to pay for such

repairs does not, in any way, segue into a responsibility to pay for repairs to another building (ie. Building 7000) in the Resort.

[201] Aside from Mr. Van der Deen's vague understanding, JEKE contends that, in the course of the *CCAA* proceedings, Northmont agreed to pay for the Building 7000 repairs. JEKE relies on certain documents that were before Romaine J. leading up to the granting of the Vesting Order.

[202] There are documents in the April 2010 time frame when Northwynd LP presented its Offer and sought and received authorization from Romaine J. to proceed with such a transaction, which refer to such an obligation on the part of Northmont.

[203] In March 2010, the Information Circular, sent to the Unitholders in advance of the meeting to decide upon which course of action to embark, referred to a *pro forma* balance sheet indicating a "building repair liability" for Building 7000 of $4.3 million. The evidence before the Alberta court also included an affidavit of Gary Bentham, Northwynd LP's representative, sworn April 22, 2010, where he stated:

> 28. In addition, Northwynd LP will take responsibility for the repair of a property known as "Building 7000", located at Fairmont. That building requires foundation and structural repairs expected to cost more than $2.5 million in excess of funds currently held in a trust account on behalf of time share owners. Without those repairs timeshare owners in that building would be unable to use that property.

[204] In its Ninth report dated April 26, 2010, the Monitor referred to benefits from the proposed transaction, including that:

> 46(e) Northwynd LP will take responsibility (as contemplated in the Offer) for the repair of the Building 7000.

[205] Finally, JEKE refers to Northwynd counsel's written submissions to the Court at the hearing on April 27, 2010 which are to the same effect as Mr. Bentham and the Monitor's statements, namely, that Northwynd LP would take over "responsibility" for the repair of Building 7000.

[206] It is not exactly clear as to the documentary source for all of these statements as no document has been produced, including the Offer, that even refers to this liability and that Northmont agreed to pay for these repairs. The Offer referred only to Northwynd assuming specific delineated liabilities, none of which related to Building 7000. Further, the Offer was non-binding and subject to completion of a definitive agreement, namely, the later executed Foreclosure Agreement.

[207] As I have said, on April 27, 2010, Romaine J. ordered that Fairmont was authorized and directed to accept the Offer on substantially the terms set out in the Offer and execute the later documentation or “definitive agreement” that was contemplated by the Offer. In her reasons for judgment in respect of that application (*Fairmont Resort Properties Ltd. (Re)*, 2012 ABQB 39), Romaine J. did refer, at para. 25(d), to Northwynd taking responsibility for such repairs, again consistent with the earlier statements of Mr. Bentham and the Monitor in its Ninth Report.

[208] JEKE relies, in particular, on the Monitor’s Eleventh Report dated June 17, 2010, which was before Romaine J. on the application for the Vesting Order. The Monitor stated that the main terms of the Offer have been incorporated into the Foreclosure Agreement and had not been materially changed. The Monitor also stated:

> 12(f) Northwynd LP to take responsibility (as contemplated in the Offer) for the repair of the Building 7000;

By this time, the Monitor reported that the balance in the Building 7000 Trust Account was just in excess of $1.2 million.

[209] Without more, it is difficult to discern what the Monitor’s statement means. Again, there was nothing in the Offer to indicate that Northwynd had agreed to assume this liability, and nothing was changed in that respect in the negotiations leading up the execution of the Foreclosure Agreement. It is also not clear what is meant by taking “responsibility”, which could mean simply taking over the task of arranging for and managing the completion of the repairs using the monies in the Building 7000 Trust Account.

[210] The other evidence before Romaine J. was the affidavit of Mr. Bentham, sworn June 15, 2010, which attaches the Foreclosure Agreement as reflecting “the transaction contemplated in the Offer”. Mr. Bentham’s evidence did not include any statement that Northwynd had agreed to accept any liability in relation to Building 7000.

[211] Even so, it is uncontroverted that the Foreclosure Agreement, approved by the Vesting Order, makes no mention of Northwynd LP having assumed any liability of Fairmont in relation to Building 7000 (if such even existed at all).

[212] JEKE contends that the liability for the Building 7000 repairs was “internalized in the equity purchase price”, presumably as found in the Foreclosure Agreement. This odd phrase is, no doubt, seen as necessary given JEKE’s concession that the Foreclosure Agreement does not refer to any such liability. JEKE states that the Foreclosure Agreement contains a “gap or omission” regarding Northwynd LP’s acceptance of such responsibility.

[213] In fact, the Foreclosure Agreement provisions set out above make clear that Northwynd LP was expressly *not* assuming any liability of Fairmont, save as is expressly set out in the Foreclosure Agreement. Further, the circumstances leading to the execution of the Foreclosure Agreement are such that whatever might have been agreed to in April 2010, this Agreement was the “definitive” agreement that was intended to incorporate all terms upon which the transfers were to take place. This was a complex commercial transaction where careful drafting of the transfer terms by experienced solicitors was necessary given the nature of the assets.

[214] As one would expect, paragraph 5.3 of the Foreclosure Agreement provides for an “entire agreement” clause which confirms that:

> This Agreement, and any document delivered pursuant to this Agreement, constitutes the entire agreement between the Parties with respect to the matter herein and supersedes all prior agreements, understandings, negotiations and discussion relating to the subject matter hereof. …

[215] The Foreclosure Agreement does refer to a “Building 7000 Subsidy Agreement” being an agreement to be entered into between Northwynd LP and RVM “regarding funding in relation to the repair of … Building 7000”. No draft of such an agreement was attached. There is also a reference to the “Building 7000 Trust Fund” arising from the August 2009 arrangements between Fairmont and the Trustee concerning the administration of this fund. In addition, as noted above, the June 15, 2010 asset transfer agreement between Northwynd LP and Northmont LP, by which Northmont LP was to take title to the Foreclosed Assets, refers to the assumed liabilities which included a reference in Schedule “B” to the Building 7000 repair trust fund liability of $885,860.

[216] As contemplated by the Foreclosure Agreement, Northmont LP and RVM entered into a Limited Subsidy Agreement. The clear drafting found in the Foreclosure Agreement is also found in this document, particularly concerning Northwynd LP or Northmont LP’s degree of “responsibility” for the Building 7000 issues. By this agreement, Northmont agreed to continue to contribute $400 from each vacation interval interest sold into the Building 7000 Trust Account. The Limited Subsidy Agreement provides:

> H. Pursuant to the Foreclosure Agreement, NORTHMONT has acquired the Building 7000 Trust Account but has not assumed any liability for the Building 7000 Repair …
>
> …
>
> 4. If expenses for the Building 7000 Repair are at any point of time in excess of what is available to be paid from the Building 7000 Trust Account and such short fall cannot be covered from capital reserves of the Owners administered by RVM then RVM shall assess the Owners for the costs that are necessary to complete the Building 7000 Repair (the “Building 7000 Assessment”).
>
> ….
>
> 8. Nothing here shall be read or construed to impose or imply any liability on NORTHMONT for any cost of the Building 7000 Repair and its sole responsibility shall be to provide funds to the Building 7000 Trust Account from the future sales of Vacation Interval Interests and it is expressly understood that NORTHMONT does not accept any liability with respect to Building 7000 Repair.
>
> [Emphasis added]

[217] In addition, the August 2010 disclosure statement issued by Northmont expressly and correctly stated the effect of the Foreclosure Agreement and the Limited Subsidy Agreement. In the December 2011 communication to owners, Northmont advised that it had initiated a new programme by which it would place $500 per time share transaction into the Building 7000 Trust Account for the repairs. The audited financial statements indicate expenditures on Building 7000 were $2.35 million by the end of 2011.

[218] In short, there is nothing in the Foreclosure Agreement and the related Limited Subsidy Agreement to support that there is any agreement on Northwynd LP or Northmont LP's part to assume this liability. Indeed, the opposite is the case. These documents state that there is no such assumption of liability and that Northmont anticipated that the owners may have to be assessed for any such costs.

[219] To suggest, as JEKE does, that some other ethereal agreement on the part of Northmont exists and can co-exist with these detailed legal documents, defies commercial logic. In my view, no clarification of these agreements is necessary, as JEKE contends. A plain reading of the documentation, by which Northwynd and Northmont took over Fairmont's assets at the Resort, indicates that no such obligation was assumed, either through the course of the *CCAA* proceedings, or otherwise.

[220] Despite its contention that there is an agreement on the part of Northmont or Northwynd, and in the face of a denial of this claim, JEKE failed to cross-examine both Mr. Wankel and Mr. Frey on the point, despite both being officers of these companies.

[221] JEKE also suggests that there might be an ambiguity or perceived ambiguity with respect to the Vesting Order. The Vesting Order was a final and binding order.

[222] In *Yu v. Jordan*, 2012 BCCA 367, the Court addressed the proper approach in respect of the interpretation of its own orders. The Court stated:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

[223] The Court of Appeal in *Yu,* at para. 55, described the above matters - the pleadings, the language in the order, and the circumstances in which the order was granted - as "objective indicia" to be considered in interpreting the order.

[224] Consistent with the statements found in *Yu*, JEKE also refers to *Afton Food Group Ltd., Re,* 2006 CanLII 16365 (O.N.S.C.). There, Justice Spies adopted an approach to the interpretation of *CCAA* Orders where agreements are approved:

> [23] In applying these principles to the issues before me, I conclude that it is only if a provision of the CCAA Order is ambiguous or there is a gap or omission, that the Court should adopt a liberal interpretation and consider the purpose of the CCAA, attempt to balance the interests of the parties and consider what would be a commercially reasonable interpretation of the order. In the first instance, I should assume that the parties carefully drafted the terms of the CCAA Order and to the extent that the order is clear and unambiguous, I should interpret the order in accordance with its plain meaning and not engage in a "broad judicial interpretation". In doing so I am entitled to assume that the terms of the CCAA Order reflect the agreement negotiated between the parties, within the legal parameters that the court will impose, and that the agreement was codified in the order approved by the court.

[225] In my view, the language found in the Vesting Order, and the evidence before the Court on that application, was such that this Order clearly and unambiguously approved the Foreclosure Agreement and authorized Fairmont to take steps to complete the transactions contemplated by the Foreclosure Agreement. I have already stated my views on the clear import of the Foreclosure Agreement in terms of what liabilities Northwynd and Northmont agree to assume and which they stated they were not assuming. The Vesting Order itself has no language that would support such a liability on Northwynd or Northmont's part.

[226] I find that JEKE, through Mr. Belfry, had notice of, and an opportunity to participate in, the *CCAA* proceedings in 2010. Mr. Belfry denies having received notice of the application for the Vesting Order. Even if I accepted his evidence, which I do not, there is no explanation why JEKE did not apply before Romaine J. for “clarification” of her Vesting Order if JEKE thought that the Order did not reflect the true intent of the Alberta court.

[227] I have concluded that there is no basis upon which Northmont could be said to have accepted responsibility to pay for the repairs to Building 7000. Both parties made substantial submissions as to whether JEKE’s arguments on this point constituted a collateral attack on the Vesting Order. In light of my conclusions as to the effect of underlying agreements, which were expressly approved by that Order, I see no need to address these arguments.

## IX. CONTRACT INTERPRETATION / BREACH ISSUES

[228] JEKE alleges that Northmont is in breach of the VIAs in many respects. The major allegation is the same as that addressed in the *Special Case*, namely, that JEKE, as a lessee, is not obligated to pay the Renovation Project Fee under the terms of the VIAs.

[229] These issues inevitably require an interpretation of the VIAs in terms of what was intended by the parties, particularly as to which party is responsible for various costs of operating the Resort. I consider that it is appropriate to first decide the specific interpretation issues arising under the JEKE VIAs before the Renovation Project Fee issue. To a large degree, a determination of these issues will inform the remainder of JEKE’s allegations concerning the Renovation Project Fee.

[230] Before addressing the issues, I will summarize the applicable principles of contract interpretation, upon which both JEKE and Northmont agree. I need go no further than to quote Loo J.’s summary of the principles in the *Special Case* (BCSC):

> [61] … 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.

[231] The principles of contract interpretation has recently been the subject of discussion by Justice Rothstein in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed ... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As

> stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[232] In addition, the factual matrix surrounding the making of a contract may be considered but such evidence has its limitations. Again, the comments of the Court in *Sattva* provide guidance on this issue:

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

See also *Perrin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at paras. 25-26.

[233] Finally, evidence of post-contract conduct by the parties is of even more limited assistance. British Columbia courts have consistently held that such evidence may be resorted to only in the event of an ambiguity, i.e. if there are two reasonable interpretations that emerge from a reading of the contract: *Gilchrist v. Western Star*

*Trucks Inc.*, 2000 BCCA 70 at paras. 17-18; *Tangerine Financial Products Limited Partnership v. Tangerine FP Investments Ltd.*, 2012 BCCA 521 at para. 44; *Bednash v. 0791865 B.C. Ltd.*, 2014 BCSC 1987 at para. 29. The same principles arise from *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at paras. 23-27. In *Water Street*, the Court stated:

> [28] Thus, it does appear clear that, if extrinsic evidence of conduct post-dating the making of an agreement is adduced to resolve an ambiguity in the interpretation to be given to an agreement, its value may be limited and it must in any event be confined to the conduct of the parties or their employees where the parties are corporations.

[234] Here, both JEKE and Northmont contend that the words of the JEKE VIAs are clear and unambiguous and that, therefore, there is no need to consider any extraneous evidence. As such, they contend that there is no need to look beyond the four corners of the VIAs themselves in this exercise.

[235] Before I turn to the specific issues, another word about the abandonment of claims by JEKE. In its Further Amended NOCC (paras. 25.a. and .f), JEKE alleged that there were other specific breaches by Northmont: that Northmont had failed to provide audited financial statements by March of the following year; and, that Northmont had failed to assist the owners and lessees in the creation of a homeowners' association. Both issues were raised in the course of the trial and discussed by various witnesses. However, neither allegation was pursued in argument, and was only abandoned at the conclusion of JEKE's argument when counsel was asked by the Court to clarify whether it was pursuing these allegations.

[236] The remaining "subsidiary" issues arising from JEKE's Further Amended NOCC, which are discussed separately below, are:

i. the chargeback of delinquent accounts;

ii. the charging of capital costs;

iii. the calculation of the management fee;

iv. the calculation of the proportionate share; and

v. miscellaneous management issues.

**1) Chargeback of Delinquent Accounts**

[237] JEKE asserts that it is not obligated to cover the costs arising from the delinquency of other owners who fail to pay their assessments. JEKE also asserts that Northmont has charged management fees that it is not entitled to charge as a result of delinquency of other owners (see Further Amended NOCC, paras. 25.g.(i) and (ii)). JEKE argues that the VIAs do not allow such a charge, and that in imposing such a charge, it alters the calculation of the proportionate share under the VIAs.

[238] The relevant contractual wording on this issue (and other issues as discussed below) is found in paragraph 9 of the JEKE VIAs:

> 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 Vacation Resort and the Vacation Properties 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 (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);
>
> (g) painting, redecorating and refurbishing as required;
>
> (h) garbage disposal;
>
> (i) repairs to both the exterior and interior of the Vacation Properties;

> (j) service fees and costs of 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 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.]

[239] I agree with Northmont that a plain reading of paragraph 9 is to the effect that the owners and lessees are responsible to pay “all administration, maintenance and repair costs”, namely, the “Operating Costs”, relating to the Resort.

[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.

[241] Under paragraph 10(e) of the JEKE VIAs, the Manager is directed to charge the deficit on subsequent assessments. However, Mr. Wankel also testified that it is reasonable and prudent for the Manager to forecast delinquency and proactively budget for these defaults, rather than waiting to address them in future years, perhaps once the expenses are already incurred. Needless to say, such a reactive

approach could possibly create cash flow issues. In my view, nothing in the JEKE VIAs prevent such actions being taken by the Manager. As Northmont asserts, the self-correcting nature of the JEKE VIAs protects against any inaccuracy in the Manager's budget estimates, as with any other forecasted cost of the Resort. If the Manager over-estimates what the delinquencies will be, an operating surplus will result and can be addressed per paragraph 10(d) of the JEKE VIAs.

[242] On this issue, JEKE introduced into evidence the expert report of Michael Sileika, a chartered accountant, dated October 9, 2015. Mr. Sileika's opinion is found in Question 2 posed by JEKE. His mathematical analysis is not disputed, in that if there are defaulting owners, the remainder of the owners would be paying more in respect of the projected costs. While one might describe this as increasing the proportionate share, it is equally the case that the same result is achieved by increasing the amount of anticipated costs by the anticipated deficit. Despite JEKE's arguments, there is no evidence that the former process was used, in that different denominators were used for the calculation of the maintenance fees.

[243] Even more to the point, Mr. Sileika acknowledged the reality that a manager would have to budget for any anticipated delinquency or make up the deficiency in some manner in order to continue operations by which expenditures would be made.

[244] Mr. Van der Deen gave evidence that it was never his practice to include a bad debt expense in the budgets that were sent to owners during his tenure from 2005 to 2011. He suggested that the owners were never charged with such expenses. However, the financial statements of the Resort for 2006, 2007 and 2008 do show bad debt expenses being charged of $47,030, $2,953 and $5,361, respectively. The 2009 financial statements reflect a substantial increase in bad debt expense of $536,987, which Mr. Van der Deen's report to the owners indicates arose, at least in part, from the global economic recession which began in late 2008 to early 2009.

[245] These bad debt expenses continued for the years 2010-2012 after Northmont took over.

[246] In my view, JEKE's position is entirely at odds with the express statement in the JEKE VIAs that *all* "Operating Costs" would be paid by the owners (which parenthetically include Northmont in relation to the vacation interval interests held by it).

[247] The logical question that arises from JEKE' position is that, if such cost is incurred, and if the lessees, such as JEKE, are not responsible to cover these costs, then who is? Mr. Belfry agreed, in cross-examination, that there is nothing, either in the JEKE VIAs or the Prospectus, that says that anyone other than the owners are to pay any costs of operating the Resort. There is no provision to the effect that the Lessor or Manager is responsible for such costs.

[248] JEKE's response is a curious one that defies logic or common sense. It argues that if there is a defaulting owner, the Lessor/Manager has two options: collect the monies from that owner or take over the interest pursuant to paragraph 13 of the VIAs.

[249] As any collection lawyer knows, efforts to pursue payment from a debtor is anything but a sure thing. Any number of reasons, including bankruptcy, can dictate that even best efforts to collect monies may not bear fruit. Mr. Van der Deen's report of December 2010 to the owners refers to collection efforts being taken. There is no evidence to suggest that there are issues as to the adequacy of the Manager's efforts to collect amounts owing from time to time under either Fairmont or Northmont's watch.

[250] JEKE's argument also ignores the clear wording in paragraph 13 of the JEKE VIAs in that Northmont has the *option* of taking over the interest if an owner defaults. Northmont is not required to take over that interest. Even so, I do not read paragraph 13 as imposing an obligation on the Lessor to pay the amounts owing in default. By the terms of paragraph 13, the owner remains liable for such amounts.

[251] JEKE argues that the Lessor/Manager has the sole means of addressing this problem, given that the contractual relationship is between it and the owners. This is

true but, again, the nature of the relationships that I have discussed above reflect that such costs are borne collectively and the owner/lessee group as a whole rely on the Manager to act reasonably and prudently in collecting fees from defaulting lessees. The future cost of defaulting lessees may be mitigated by the Lessor taking the interest over, but absent Northmont taking such action within its own discretion, the problem created by the defaults remains in the hands of the Manager to be addressed as best it can.

[252] JEKE's argument would effectively designate the Lessor as a guarantor of any such owner in respect of the payment of amounts owing. Nothing in the JEKE VIAs would support such a conclusion.

[253] Finally, JEKE alleges that there was a double charging of management fees on the deficit amounts (see Further Amended NOCC, para. 25.g(ii)). However, Mr. Wankel testified that it is not possible to identify whether the deficit consists of costs upon which management fees have been charged. For instance, if the deficit arose by expenditures exceeding budgeted amounts, then no management fees would have been charged on the excess expenditures. Therefore, I agree with Northmont that there is insufficient evidence for this Court to conclude that Northmont has charged management fees on management fees. In any event, I make no finding that such would be contrary to the JEKE VIAs.

[254] In summary, in my view, delinquencies are properly estimated by the Manager as part of the budgeting process and are chargeable to JEKE under the terms of paragraph 9 of the JEKE VIAs. In that event, management fees are chargeable on such assessed Operating Costs per paragraph 10 of the JEKE VIAs. This did not have the effect of inappropriately increasing the proportionate share of costs allocated to all the owners.

**2) Charging of Capital Costs**

[255] JEKE contends that Northmont is not entitled to charge certain "capital costs" to the owners (see Further Amended NOCC, para. 26.f). JEKE also contends that

the Renovation Project Fee includes such "capital costs" in that it goes well beyond "regular maintenance" (see Further Amended NOCC, para. 27.a).

[256] I agree with the parties that this issue can be resolved based on a reading of the JEKE VIAs alone.

[257] As with the previous issue, I agree with Northmont that the plain wording of paragraph 9 of the JEKE VIAs is to the effect that the owners are to pay for *all* costs arising from the operation of the Resort, including refurbishing costs. Nothing detracts from this plain wording when paragraph 9 is considered within the context of the entire agreement. In particular:

1) lessees are responsible to pay all "Operating Costs" which is very broadly defined to include all administration, maintenance and repair costs;

2) lessees are also expressly stated to be responsible for "replacement costs";

3) the Operating Costs and replacement costs relate to the entire Resort (defined as the "Project" in Recital A but acknowledged as being consistent with the defined phrase "Vacation Resort" in paragraph 9), including the Villas (or Vacation Properties) and the common areas;

4) there is no reference, let alone a definition, of "capital costs" to be found in the JEKE VIAs;

5) the expansive nature of what the parties intended by these broad categories is evidenced by the "without limiting the generality of the foregoing" language used in paragraph 9. The later enumerated types of costs that could be imposed do not detract from this broad language;

6) the expansive wording is also emphasized by subparagraph 9(p) which refers to "all expenses incurred by the Lessor in the management of the Vacation Properties (i.e. see paragraph 10 of this Lease)". I reject JEKE's argument that this wording is simply referring back to the management functions of the Manager to be found in paragraph 10 of the JEKE VIAs, such as maintaining records. In fact, paragraph 10 provides generally that the Manager "shall maintain and manage the Vacation Resort";

7) in any event, the examples of costs set out in paragraph 9 are indicative of costs that may arguably be termed "capital costs". These include:

   (g) painting, redecorating and refurbishing as required;

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

(o) furniture and equipment replacement costs;

and

8) paragraph 9 also provides that a "yearly assessment shall be made of the furnishings and fixtures to permit replacement as required".

[258] Accordingly, I conclude that the plain reading of paragraph 9 is that all costs relating to the operation of the Resort, whether in the nature of capital costs or not, are to be borne by the owners. This applies even in the event of reconstruction of parts of the Resort as needed, whether from deferred maintenance issues or otherwise. There is no basis upon which the JEKE VIAs can be said to limit the responsibility to pay costs only for "regular maintenance" or "reasonable wear and tear", as JEKE argues.

[259] This same issue was raised by many owners (including JEKE, by its present counsel) in the *Special Case*. It was not described as a "capital cost" issue there but, rather, one going "beyond regular maintenance": see *Special Case* (BCSC) at para. 87. In any event, Loo J. was interpreting the VIAs based on the document itself, just as JEKE now suggests I should do, an approach that I endorse. Loo J.'s analysis is found the *Special Case* (BCSC) at paras. 86-89.

[260] As we know, many of the owners, including JEKE, successfully appealed Loo J.'s decision, taking the position that the decision unfairly assumed that the VIAs were enforceable, that all of the necessary facts were not before the Court, and that they had been deprived of a fair trial procedure: see *Special Case* (BCCA) at paras. 15, 18, 43 and 47. JEKE does not suggest that any evidence later garnered during the pre-trial process conducted after the Court of Appeal's decision (June 2014) to the date of this trial (one-and-a-half years), is relevant to the interpretation exercise on this issue given its position that a reading of the VIAs alone is sufficient.

[261] The issue of the enforceability of the JEKE VIAs is now squarely raised at this trial. However, the same interpretation of the JEKE VIAs, on this now described "capital cost" issue, arises as was addressed in the *Special Case*. In that regard, I would respectfully agree with the conclusions of Loo J. in the *Special Case* (BCSC) where she stated:

> [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. …

[262] Even accepting JEKE's argument that a distinction between these types of costs can be discerned from the VIAs, I agree with Northmont that there is insufficient evidence to distinguish which of the costs of the Resort are capital costs. JEKE did not provide any assistance to the Court in terms of what should be considered a "capital cost". I would note that *Black's Law Dictionary,* 6$^{th}$ ed defines capital costs as "[c]osts for improvements to property; such are depreciable over the useful life of the improvements."

[263] JEKE did not adduce any evidence in terms of what expenditures were made as "capital costs", nor did it provide any analysis of such expenditures, whether referred to as projected expenditures in the Renovation Project Fee or not.

[264] Further, JEKE did not introduce any expert evidence from its construction experts. As Northmont submits, this lack of evidence is a direct result of JEKE choosing not to submit a construction expert report analyzing the capital cost issue and, specifically, the expansive budgeting information in Northmont's disclosed documents, including the CCDC contract.

[265] At 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. For example, JEKE's counsel suggested, in argument, that replacement of a deck would be a "capital cost", versus replacement of the floor of a deck which would be a "wear and tear" cost. This distinction is lost on me. I fail to see how the "replacement" in either event would not be covered under the general phrase of "replacement costs", or the detailed reference to "repairs to the exterior" found in paragraph 9(i) of the JEKE VIAs.

[266] At 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.

[267] Mr. Frey’s evidence did refer to the numerous elements of the Renovation Plan, which he did acknowledge went beyond mere “maintenance”. These elements were necessary to address problems in the foundations, building envelopes, building drainage and removal of the Poly-B piping. Based on Mr. Frey’s evidence, I accept that the essence of the proposed work under the Renovation Plan is not a “reconstruction”, as argued by JEKE but, rather, a renovation or repair of the existing structures and facilities to address issues within those structures and facilities.

[268] Mr. Frey also stated that, while these structural repairs or renovations were taking place, the Manager was taking the opportunity to update various elements in the Villas themselves to 2013 standards. This included replacing outdated equipment, such as tubs, for which parts were no longer available, and VCRs, and also replacing various finishes within the units to standardize them. Paragraph 9 expressly contemplates that furnishings and fixtures may be replaced, whether they are still functional to a degree or not.

[269] Paragraph 8 of the JEKE VIAs provides that “[e]ach Villa is fully furnished and particulars of the furnishings have been described In the Prospectus”. Schedule “M” to the Prospectus is the list of furnishings for a two-bedroom villa. Mr. Belfry acknowledged that the list relates to his understanding of the furnishings of a two-bedroom villa at the Resort. He further acknowledged that the furnishings list goes

beyond furniture, and confirmed that he understood all of the following to be furnishings: wall-to-wall carpeting; floor tiling; accent walls; counters; bathroom sinks, tubs, faucets and toilets; electrical outlets; kitchen cabinetry; full bathroom and adjoining master bedroom; shelving; maintenance materials; and decorative tile. Schedule “M” expressly states that, with respect to furnishings, the intention is to have consistency as between the Villas:

> To the extent feasible all Villas will be decorated in similar colours, fabrics and furnishing styles.

[270] In *R. Marcus Little v. Metropolitan Toronto Condominium Corporation No 590*, 2006 CanLii 27995 (O.N.S.C.) at paras. 4 and 9, the Court held that replacing outdated elements is consistent with an obligation to maintain. Similarly, changing elements that were, at one time stylish to one more modern, was not inconsistent with this approach.

[271] Accordingly, to the extent that any updating is taking place, this is expressly allowed by the terms of the JEKE VIAs.

[272] On this point, Northmont refers to *Fudge v. Strata Plan NW2636*, 2012 BCPC 409, an authority also cited by Loo J. in the *Special Case* (BCSC) at para. 91. In *Fudge*, the Court found that the “repair” can also be interpreted as allowing an “improvement”:

> [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 <u>the word "repair" can incorporate the notion of "improve"</u>: 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 Inc. v. QAP Parking Enforcement Ltd.*, [1995] O.J. No. 517 (Ont. Div. Ct.).

[273] As with the delinquency issue, the logical question that arises is - if the owners are not required to pay for these types of costs, whether they are in the nature of capital or not, then who is?

[274] There are other aspects of the JEKE VIAs that provide some insight into the obligations of the Lessor in respect of these types of expenses. Paragraph 17 of the JEKE VIAs address the situation where there is damage to the Vacation Properties for which insurance is available. It provides:

> 17. DAMAGE TO THE VACATION PROPERTIES: If during the term of the 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; … The Lessor agrees to rebuild, repair or replace the Vacation Property provided insurance proceeds are available for such purpose.
>
> [Emphasis added]

[275] In other words, the Lessor is not agreeing to pay for any rebuilding, repair or replacement of the Vacation Properties where other funds (such as insurance), are not available to reimburse the Lessor.

[276] Paragraph 9 is the only provision in the JEKE VIAs that speaks to the liability of anyone to pay for the costs of the Resort. There is no provision in the JEKE VIAs (or any other document), that suggests that the Developer/Lessor/Manager is responsible to pay for any such costs (whether capital or not), save in relation to its proportionate share for interests that it holds. It is non-sensical to suggest that the parties did not intend to address this very important aspect in the VIAs by specifying the party who is to have this responsibility. It would have been easy enough to have specified such a liability on the part of the Developer or Lessor if that was the case. As it is, the Lessor does have responsibility to pay for a portion of such expenses by reason of its obligation to pay its proportionate share arising from the interests that it owns in the Resort.

[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.

[278] The parties refer to two authorities on this issue.

[279] In *Lydiatt v. Banff Rocky Mountain Resort*, 2008 ABPC 333, the Court was also addressing whether amounts were properly assessed against a time share owner. In that case, the relevant agreement contained wording similar to paragraph 9 of the JEKE VIAs, in that an owner was responsible to pay an Annual Use Fee for her share of “Operating Costs” (referable to management, maintenance, repair and operation of the Vacation Units), and “Replacement Reserves” (referable to painting, decorating, repairs to the exterior and interiors, refurnishing and replacement refurnishing): see paras. 7-10.

[280] In *Lydiatt*, the issue was responsibility to pay for certain “capital expenditures for renovations and redevelopment”, which included re-doing kitchens and bathrooms and updating mechanical and electrical systems. There was no mention of “capital costs” in the agreement. Judge McCarthy held that these capital costs could be properly included in a special assessment billed to owners: paras. 18-20. In the result, the owner succeeded in this litigation; however, it was only based on the fact that the special assessment was in excess of a 10% cap on annual assessment increases, circumstances not relevant here.

[281] JEKE relies on *Spence v. Caravans West Owners*, 2015 BCSC 1289 in support of its assertion that the owners are not responsible for costs of a capital nature. The agreement addressed in *Spence* was one related to a recreational vehicle resort, and the relevant clause was limited in nature, referencing “expenses incurred in the ongoing operation of the resort”. Based on the specific wording of the clause in *Spence*, Justice G.C. Weatherill held that a charge for an electrical services expansion was not encompassed in the types of expenses incurred in the day-to-day operation of the resort. He described the nature of the expansion not as a repair or restoration, but as a “substantial upgrade and improvement to the existing system” (para. 18). The Court further stated:

> [19] In my view, the phrase "ongoing operation of the resort" as used in the definition of Common Expenses does not capture capital improvements to the resort in the nature of this $3.5 million electrical services expansion. Moreover, the phrase "expenses from time to time" as used in Clause 11.4 does not include capital expenditures. In each case, the Co-Owners Agreement was plainly intended to capture expenses incurred to operate the resort as originally developed and built, not as may be changed, reconfigured, enhanced or improved in material ways in the future. The electrical system as originally installed was capable of functioning and providing the services as intended.

[282] I agree with Northmont that *Spence* is distinguishable from the case at hand because the provisions in the JEKE VIAs are completely different than the relevant clauses considered in that case. I consider paragraph 9 of the JEKE VIAs to be more expansive in providing for a broader type of expenditure in relation to the Resort, including costs for repair, refurbishment and replacement.

[283] I have not found any ambiguity in the JEKE VIAs in my interpretation of them as placing responsibility for all costs, including capital costs, on the owners. However, if such an ambiguity exists, the extrinsic evidence equally supports my interpretation.

[284] JEKE asserts that the Prospectus is inconsistent with the JEKE VIAs and that, in particular, paragraphs 2.06 and 2.10 support that paragraph 9 of the JEKE VIAs should be interpreted in a narrow fashion. As I have stated above, I do not agree that the Prospectus is part of the contractual relationship between the parties. It certainly denotes representations that were made by Fairmont to prospective lessees, such as JEKE, but the Prospectus is not incorporated into the VIAs in any fashion.

[285] In any event, I do not see the statements in the Prospectus as being inconsistent with the JEKE VIAs in respect of payment of costs. The Prospectus provides:

> 2.06(2) The cost of the time share interest is represented by the purchase price payable for the acquisition of a Vacation Lease and the yearly maintenance fee which includes the management fee. The yearly maintenance fee covers the cost of the following items:

(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 …;

(g) painting and redecorating as required;

(h) garage disposal;

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

(j) service fees and costs of 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 the Vacation Lease).

[286] This provision does not include the preamble found in paragraph 9 of the JEKE VIAs, but does list the specific "examples" found in that paragraph. However, the Prospectus, if relevant at all, must be read as a whole. Paragraph 2.02 cited above clearly refers to the draft VIA attached as Schedule "H", and that copy clearly references paragraph 9 in its entirety, including the general language found at the beginning of that paragraph.

[287] There is nothing in the Prospectus that imposes an obligation on any other person to pay such capital costs; nor, of course, is there anything in the Prospectus that empowers the Manager to charge and collect such costs of the Resort from any party other than the time share owners.

[288] Furthermore, paragraph 2.05(5) of the Prospectus states:

> (5) As compensation for its services, the Manager shall be entitled… plus all costs incurred by it relative to the operation of the Resort. All costs and expenses of administering the Resort during the currency of the Vacation

> Lease are borne by the holder of Vacation Leases, to the extent and manner set forth in the Vacation Lease.
>
> [Emphasis added]

[289] Accordingly, in my view, a reading of the entire Prospectus informs and confirms my earlier views on the interpretation of the costs provisions in the JEKE VIAs, in that *all* costs of the Resort are the responsibility of the owners.

[290] Both parties have also referred to other extrinsic evidence, being the conduct of the parties after execution of the JEKE VIAs.

[291] As Northmont submits, the types of costs charged to owners in the past have consistently included costs arguably of a capital nature. Mr. Frey testified that, to his knowledge, costs amounts invoiced to owners in the past have included exterior deck repairs; deck replacements; plumbing repairs and replacement; civil works such as road repairs, parking lot repairs and common area landscaping. This is more than evident, arising from the communications from the Manager to JEKE and other owners commencing in at least as early as 2004.

[292] In December 2004, the owners were advised that the Riverside exterior had been repainted and decks and railings on Building 300 had been replaced. JEKE was advised of a large refurbishment plan in November/December 2005 which included "extensive amount of upgrading and decorating of the older buildings and the Recreation Centre". The operating budget for 2005 projected refurbishing expenditures of $889,440. The audited financial statements indicated refurbishing expenditures for 2005 of $1.89 million.

[293] When Mr. Van der Deen became involved in 2005, the Resort was in the middle of a remediation of Building 800 with reconstruction of decks and footings, in addition to the replacement of furniture in the 100 units mentioned above. He would prepare the later yearly reports and budgets sent to owners. In summary, those documents disclosed:

a) In December 2005, JEKE was advised that the Resort was undertaking “the largest refurbishment plan in our history” relating to 100 units which included replacement of furniture. The operating budget for 2006 projected expenditures of $1.1 million for the Building 800 remediation project which had continued into 2006. Mr. Van der Deen’s idea was to finish Building 800 and then tackle Buildings 500 and 600 where similar serious issues had arisen. The audited financial statements indicated refurbishing expenditures for 2006 of $1.52 million;

b) In December 2006, JEKE was advised that the Resort’s accounting services had been moved to Calgary. The Resort had significantly higher staffing costs but the replacement reserve was not increased. By 2006, Mr. Van der Deen was aware of certain issues with Building 7000, particularly as regards cracking drywall. In addition, by this time, Mr. Van der Deen was aware of leaking issues arising from the use of Poly-B piping in many of the buildings. The operating budget for 2007 projected expenditures of $1.1 million. The audited financial statements indicated refurbishing expenditures for 2007 of $984,118;

c) In January 2008, JEKE was advised of difficulties in continuing problems in staffing the Resort and the costs of staffing. The enclosed operating budget for 2008 projected refurbishing expenditures of $1.2 million. The audited financial statements indicated refurbishing expenditures for 2008 of $1.5 million; and

d) In December 2008, JEKE was advised of ongoing improvements at the Resort, including a “complete exterior refurbishment” of Building 600 and reconstruction of decks on Building 700. It was reported that major renovations to the interior of the Riverside buildings would occur within the next few years once exterior improvements were made. The operating budget for 2009 projected refurbishing expenditures of $1.27 million.

[294] These same communications continued in late 2009 after Fairmont's *CCAA* filing:

a) in late 2009, the report or communication referred to "major construction projects" intended to be completed in 2010, including relating to replacing retaining walls, deck reconstruction, replacing floor coverings and undertaking pool repairs;

b) in late 2010, the report referred to the progress of these projects and indicated that further projects would be completed in 2012, including deck reconstruction, replacement of flooring, tennis court resurfacing and landscaping. It was also reported that work on Building 7000 had begun using funds in the Building 7000 Trust Account; and

c) in late 2011, the report indicated that the 2010 projects had included new decks and balconies on Building 500 and roof replacement of Buildings 500, 600 and 700. It was indicated that further projects would be completed in 2012, including more exterior building improvements, including more deck and balcony replacement. It was also reported that work on Building 7000 had begun using funds in the Building 7000 Trust Account.

[295] It is difficult to characterize these major projects as anything but "capital costs" or those going beyond "regular maintenance".

[296] Mr. Belfry testified that he reviewed all communications from the Manager from 2004 through 2011. He also paid all the invoices sent to JEKE with those communications without any objection whatsoever, while of the view that the description of costs in those communications were consistent with JEKE's obligation to pay for the cost of repair and refurbishment. Mr. Belfry only advanced his objection to such expenses after the Renovation Plan was proposed in late 2012.

[297] Mr. Frey testified that he did not think that any component of the Renovation Plan, in isolation, was different than what had been done before. Rather, Mr. Frey

testified that it could be characterized as more encompassing by dealing with all issues at the same time versus individual issues in a serial fashion. Mr. Frey referred to it as “more of the same”. With respect to the updating inside the units, Mr. Frey indicated, in particular, that in the hospitality industry, most furnishings are refreshed every 3-5 years.

[298] This evidence at this trial was not substantially different than that before Loo J. in the *Special Case*. I agree with the conclusions of Loo J. in the *Special Case* (BCSC) where she stated:

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

[299] The only evidence JEKE put forward, with respect to capital costs being paid by Fairmont, other than the Building 7000 issue, was the testimony of Mr. Van der Deen related to Building 8000. However, Mr. Van der Deen did not state, if he knew, why Fairmont chose to make the alleged payments or the circumstances of that payment for Building 8000. This evidence is, therefore, highly inconclusive in terms of interpreting the JEKE VIAs on the capital costs issue.

[300] Finally, JEKE argues that its interpretation of the JEKE VIAs is supported by the provisions of Fairmont’s August 2009 Disclosure Statement relating to the conversion program instituted at that time. Attached to that document was a draft vacation lease conversion contract (the “Conversion Lease”), which includes a new paragraph 11 regarding “Operating Costs and Reserve for Refurnishing” similar to paragraph 9 of the JEKE VIAs.

[301] Paragraph 11 of the Conversion Lease provides the same “without limitation” listing of “all administration, maintenance and repair costs”. However, the further provision in paragraph 11 provided:

> All maintenance and repairs to the Vacation Properties will be apportioned amongst the Owners in accordance with each Owner’s Proportionate Share [being specifically defined in paragraph 3]. A yearly assessment shall be made for capital reserves for replacements of the furnishings and fixtures to

> permit replacement as required and to pay the costs of capital improvements that may from time to time be required.
>
> [Emphasis added]

[302] In addition, paragraph 12 of the Conversion Lease expressly provided that the manager was required to, in the event of a cumulative operating deficit, either add the deficit to subsequent assessments or send a supplementary assessment to fund the deficiency.

[303] I agree with Northmont that this evidence is irrelevant to the interpretation of JEKE's obligations under the JEKE VIAs. JEKE is not a party to this contract and it arose in circumstances years beyond the execution of the JEKE VIAs. The preparation of this contract can hardly be described as conduct of Fairmont in the performance of the JEKE VIAs. The principles found in *Water Street* at paras. 27-28, cited above, clearly limit the use of this post-contractual conduct evidence.

[304] In conclusion, I find that properly interpreted, the JEKE VIAs impose an obligation on JEKE to pay *all* costs relating to the operation of the Resort, including what JEKE describes as "capital costs". As the JEKE VIAs did not impose any such obligation on Fairmont to pay for such "capital costs", similarly Northmont does not have that same obligation.

### 3) Calculation of the Management Fee

[305] JEKE alleges that Northmont is improperly calculating the management fee because it is charging the fee on gross maintenance costs instead of following the past practice of first deducting ancillary revenue. Ancillary revenues arise from such items as the operation of the corner store, movie rentals, recreation activities and lock-off fees.

[306] Paragraph 10 of the JEKE VIAs provides:

> ... 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 Vacation Resort. ...

There is no reference in paragraph 10 to ancillary revenue, nor is there any statement that the Manager's fee cannot be charged on costs relating to the generation of this ancillary revenue.

[307] Section 2.05(5) of the Prospectus similarly provides:

> As compensation for its services, the Manager shall be entitled to an annual fee equal to fifteen percent (15%) of the aggregate of the Replacement Reserves and the Operating Costs assessed in each calendar year with respect to the Resort, plus all costs incurred by it relative to the operation of the Resort. …

[308] JEKE's evidence on the issue was limited to Mr. Van der Deen's testimony that, when he was General Manager of the Resort, he charged the fee on costs net of ancillary revenue. However, Mr. Van der Deen acknowledged he was simply following past practice and relying on direction from CVM's directors. He acknowledged that he had not read and interpreted the JEKE VIAs on this issue, nor did he seek any legal advice on the proper interpretation.

[309] In my view, the plain reading of this portion of paragraph 10 of the JEKE VIAs is that a management fee is payable on gross, and not just net, revenues. As Mr. Wankel testified, this ancillary revenue arises from services provided by the Manager in the operation of the Resort. As Northmont argues, if the Manager is not compensated for these management services, it would be providing these services for free. This could not have been intended by the parties.

#### 4) Calculation of the Proportionate Share

[310] JEKE contends that Northmont charged, and continues to charge, maintenance fees in excess of the ratios provided for in the JEKE VIAs. In essence, JEKE alleges that Northmont has not paid its proportionate share of maintenance fees for the units held by it for the years 2011 to present (see Further Amended NOCC, paras. 24B, 25.b, 25.d. and .d(i)).

[311] "Proportionate share" is not a defined term of the JEKE VIAs; however, the concept is referenced in paragraph 9:

> … 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. …

[312] It is undisputed that Northmont, as the Lessor, is responsible for payment of the “portion” of the fees required to be paid for its units as if it were a lessee (paragraph 14 of the JEKE VIAs).

[313] The Prospectus also states:

> 2.06(2) … The annual budget is calculated by totalling all the maintenance costs and dividing by the number of week periods. Each Lessee is then responsible for his pro rata share as set forth in the budget multiplied by the number of weeks leased.

[314] The proportionate share is based, absent other circumstances, on charging each week on the basis of 1 (the numerator) divided by 12,581.70 (the denominator) of the costs of the Resort. This accounts for an adjustment in charges applicable as between the two bedroom and terrace units.

[315] JEKE asserts that Northmont has not apportioned the costs of the Resort equally in accordance with paragraph 9 of the JEKE VIAs, specifically, by taking a credit for offline Building 7000 inventory and other offline “shuttered buildings”.

[316] Both Mr. Wankel and Mr. Van der Deen testified that the Resort has one assigned maintenance week per unit which is why only fifty-one (51) time share intervals exist for each Villa. The Manager has no other contractual right to negatively affect a lessee’s right to use its interest, even if use of that unit is required for necessary maintenance.

[317] Mr. Van der Deen testified that the maintenance week per unit is insufficient to allow the Manager to perform all maintenance and refurbishment required at the Resort in any given year. He acknowledged that the Manager required additional inventory to perform required maintenance.

[318] Any lessee or owner is, of course, entitled to use its interests as it sees fit in accordance with the VIAs. For example, Northmont could have rented its interests

and generated revenue by doing so. In addition, I have already mentioned the other means under the JEKE VIAs by which Northmont, as Lessor, is entitled to use and gain revenue from certain units if a lessee defaults in payments and/or fails to make a reservation (see paragraphs 13 and 20).

[319] So, when faced with the need to access units for the purpose of performing maintenance, the only option available to the Manager is to acquire equivalent inventory from a third-party resort or acquire inventory from existing time share interest holders. This would all, of course, be at the cost of the collective owners as a cost of operating the Resort.

[320] From 2010 through to date, the bottom floor of Building 7000 has been unfit for occupation due to the repair issues affecting it. In addition, Mr. Van der Deen testified as to the significant maintenance, beyond housekeeping, that has occurred each year with the primary emphasis being on replacing the decks of Riverside buildings. Each deck replacement results in an entire building being offline for months at a time.

[321] In response to these maintenance projects, Northmont and RVM entered into a developer's use of inventory and payment agreement dated November 2, 2011 (the "Usage Agreement").

[322] The Usage Agreement outlines the three types of inventory available to Northmont, described as "Developer Inventory", the "Default Inventory", and the "Incidental Inventory". Pursuant to paragraph 6 of the Usage Agreement, Northmont agreed to provide the Manager with sufficient inventory to replace the offline Building 7000 inventory so as to allow for its repair. Mr. Wankel testified that, following the repair to the Building 7000 foundation, the ground floor of Building 7000 remained offline. Accordingly, the Manager continues to use Northmont inventory pursuant to the Usage Agreement to replace the offline Building 7000 ground floor inventory.

[323] Mr. Wankel testified that in return for providing access to the offline Building 7000 inventory, and pursuant to the Usage Agreement, the Manager provided

Northmont with a credit against its maintenance fees that would otherwise be payable on that inventory.

[324] On November 5, 2012, the Usage Agreement was amended (the “Amended Usage Agreement”). This agreement arose for the purpose of allowing the Manager to remove excess inventory held by Northmont from the Resort, which was anticipated to arise as a result of exercise of the cancellation option under the Resort Realignment Plan. By Northmont entering into the Amended Usage Agreement with the Manager, the Manager could “shutter” the excess inventory and, correspondingly, reduce operating costs relating to that inventory. The consideration to be provided to Northmont, by restricting the use of inventory otherwise available to it, was that Northmont would have no obligation to pay a portion of the maintenance fees for that inventory.

[325] Paragraph 8 of the Amended Usage Agreement describes how the credit was to calculated:

> …The Developer and Manager acknowledge that the inactivation of inventory will result in operational savings. As those savings are directly attributable to the inactive Developer Inventory, the Manager shall credit the Developer for those savings. For clarity, this credit leaves the other owners in the same economic position as had the Developer required the Manager to staff and operate the units as active inventory.
>
> For simplicity of management and administration, the Manager will provide an accounting to the Developer of its proportionate costs reflecting the inactive nature of the inventory and the Developer will pay those costs in accordance with its obligations rather than presenting a full invoice and credit. ...

[326] As a result, it is only the operational savings derived by the Manager by inactivating the inventory that is credited to the amount otherwise payable by Northmont. Mr. Wankel’s uncontradicted evidence was to the effect that these arrangements had no economic effect on the other owners in that it did not have the effect of increasing the financial burden borne by them in the operation the Resort.

[327] The 2014 audited financial statements, at Note 4, disclose both the gross amount and the corresponding credits, showing that the Amended Usage Agreement is in accordance with the concept of equal sharing under the

"proportionate share" calculation. The 2014 audited financial statements disclose that Northmont still continued to pay substantial carrying costs on the inactive inventory for those costs that could not be reduced.

[328] Mr. Sileika was asked to give his opinion on the issue as to whether Northmont had paid its proportionate share arising from the transactions reflected in the 2014 audited financial statements. This is set out in his answer to Questions 1 and 3 as found in his opinion.

[329] In substance, although Mr. Sileika suggested that his definition of proportionate share has not been applied to all owners in an equivalent manner, this was essentially based on his reference to the net amount paid by Northmont. His analysis, therefore, took the form of a mathematic analysis based on the figures in the financial statements alone. He was unable to say that the gross fee calculation was on anything other than a proportionate share basis.

[330] Accordingly, I agree with Northmont that the essential question that arises is the propriety of the Manager entering into the Usage Agreement and the Amended Usage Agreement.

[331] The JEKE VIAs require the Manager to act in a prudent and workmanlike manner for the benefit of the lessees and owners collectively. There are no provisions in the JEKE VIAs that would prevent the Manager from entering into such agreements with time share interest owners in the performance of its management duties.

[332] I agree that the Manager was required to ensure that Northmont "paid" for its share of the maintenance fees per paragraph 14 of the JEKE VIAs. Nevertheless, contrary to JEKE's assertion, payment can take a variety of forms.

[333] *Black's Law Dictionary*, 10th ed., states that the word "pay" can support several definitions:

> pay, *n.* 1. Compensation for services performed, salary, wages, stipend, or other remuneration given for work done.

> …
>
> 2. The act of paying or being paid. 3. Someone considered from the viewpoint of reliability and promptness in meeting financial obligations. 4. Metaphorically, retribution or punishment.
>
> pay, *vb.* 1. To give money for a good or service that one buys; <u>to make satisfaction</u> <pay by credit card>. 2. To transfer money that one owes to a person, company, et <pay the utility bill>. 3. To give (someone) money for the job that he or she does; to compensate a person for his or her occupation; <u>compensate</u> <she gets paid twice a month>. 4. To give (money) to someone because one has been ordered by a court to do so <pay the damages>. 5. To be profitable; to bring in a return <the venture paid 9%>.
>
> [Emphasis added].

[334] The authorities suggest that if a debt is satisfied, it is necessarily paid: *People's Loan & Deposit Co. v. Grant,* (1890) 18 S.C.R. 262 at 266. In addition, I do not consider that it is controversial to state that an amount may be “paid” by more than the transfer of money: see *Johnson v. Canada*, 2010 TCC 321 at para. 15, citing *Gibson v. R.*, [1996] 1 C.T.C. 2105.

[335] Accordingly, in my view, it was more than open to the Manager to accept an off-setting credit as being “payment” by Northmont of its obligation to pay maintenance fees.

[336] JEKE argues that the Usage Agreement and the Amended Usage Agreement are “self-serving” agreements. Certainly, it can be said that Northmont was essentially agreeing with itself. This assertion does not, however, answer the question as to whether the agreements were made in violation of the Manager’s obligation to reasonably manage the Resort. JEKE advances no direct challenge to the Agreements themselves. In addition, JEKE does not provide any analysis of the actual credits given as to whether all or just some of the credits are inappropriate, relying instead on a superficial review of the financial statements as to the amounts credited.

[337] Here, there is no evidence that these arrangements negatively affected the other owners by increasing the proportionate (or equal) share that they would

otherwise have paid. There also no evidence to support JEKE's argument that these agreements were not proper or in the best interests of the owners collectively.

[338] I consider that the entering into of these agreements represents a reasonable and prudent decision on the part of the Manager.

### 5) Miscellaneous Management Issues

[339] JEKE also advances a number of miscellaneous complaints about Northmont's actions after it took over from Fairmont in mid-2010.

#### *i) Deferred Maintenance*

[340] Another example of JEKE's vague and contradictory arguments arose from its closing argument and supplemental closing argument. JEKE alleges that Northmont breached its obligation to manage by its:

> … failure to deal with deferred maintenance, building failures and a recovery of delinquencies.

[341] I took this deferred maintenance argument to relate to maintenance issues arising in the time frame before the imposition of the Renovation Project Fee in April 2013 (see Further Amended NOCC, paras. 25.g(viii) and 26.e).

[342] JEKE argues that Northmont took over the Resort with full knowledge of a substantial amount of deferred maintenance. This is not contested by Northmont. Northmont agrees that, upon the transfer from Fairmont, it inherited the obligation to maintain the Resort, including dealing with the deferred maintenance issues.

[343] JEKE complains that Northmont did not properly address the maintenance problems following the take-over from Fairmont in mid-2010. I am unable to reconcile this statement with the uncontradicted evidence of Mr. Frey as to the substantial efforts that he was undertaking from mid-2010 to review the problems and understand the full extent of the issues so that he could reasonably formulate a solution for consideration by Northmont and the other time share owners.

[344] The quality of the argument breaks down even further.

[345] JEKE alleges that Northmont failed to timely address the maintenance issues which contributed (along with other alleged failures), to the Resort being brought to the “tipping point”. Details in support of this argument were lacking, save for JEKE’s reference to certain extensive building envelope assessments which Northmont received in August 2012. JEKE argues that Northmont failed to address “multiple instances of maintenance issues when required, such as moving sprinkler heads, sealing exposed OSB and patching compr[om]ised stucco”. Mr. Frey was not challenged on this point as to the timeliness of him addressing these problems. The answer is not hard to discern, however, as his evidence was to the effect that these problems were to be addressed by the Renovation Plan proposed in December 2012.

[346] JEKE did not argue that the extensive CCDC contract, later entered into by Northmont, failed to address these issues. No expert report was presented on these issues that would establish a lack of reasonable action on the part of Northmont or Mr. Frey. JEKE’s experts did visit the Resort and they reviewed, or had an opportunity to review, all renovation and construction documentation as they wished.

[347] In addition, just as in the *Special Case* (BCSC) at paras. 97-101, there is no evidence to suggest that any delay in addressing the maintenance issues resulted in damage being suffered.

[348] This meritless argument is followed by the odd statement that various amounts were budgeted for repair and maintenance in the years 2010-2012 but that lesser amounts were actually spent. JEKE states that Northmont “failed to invest in the Resort in a meaningful way”. It is beyond obvious that this mathematical comparison does nothing to illuminate this issue, or prove a breach of the JEKE VIAs, or prove damages as a result of any breach.

[349] Again, it is ironic that JEKE would argue in one breath that not enough money was spent on the Resort’s repairs from 2010-2012 to fix these problems, and in the next breath argue that, when presented with a bill for the Renovation Project Fee in

April 2013 to fix these very same problems, the amounts were not chargeable or were, in any event, excessive.

[350] There is simply no evidence to suggest that Northmont was in breach of its obligation to maintain the Resort in relation to the deferred maintenance.

### *ii) Failure to Collect Delinquent Accounts*

[351] JEKE argues that Northmont failed "to take aggressive action to collect these delinquent accounts" and that, in doing so, Northmont allowed the delinquency rate to increase. The delinquency rate did increase from 2.67% in 2010 to 10.6% in 2013. JEKE argues that the delinquencies were allowed to "spiral out of the control (no management)".

[352] The difficulty with this argument is that no facts are in evidence to support it. In fact, the documents, including those prepared by JEKE's own witness, Mr. Van der Deen, indicate otherwise. In his communication in December 2009, he reported that he had implemented a plan to deal with outstanding accounts, including hiring a professional collection agency. In his December 2010 communication, it was reported that the Manager had a "strong collections team". In RVM's December 2011 communication, it was reported that outstanding accounts would be sent for collection by the agency and this was done in 2012.

[353] There is no evidence linking the increase in the delinquencies in 2013 to any actions or inaction, on the part of Northmont, that could be said to be a breach of its managerial obligations.

[354] JEKE also appears to be complaining that legal actions were not commenced by Northmont until 2014. Yet, these actions clearly related to the Renovation Project Fee that had been assessed earlier in April 2013 and which was disputed by various owners. This is another example of the irony of JEKE's position, in that these actions were commenced against those owners in JEKE's camp who oppose the imposition of the Renovation Project Fee, and who now stand hand in hand with JEKE in advancing this action for a determination of that very issue.

### *iii) Head Office Overhead Charges*

[355] JEKE alleges Northmont "incurred excessive expenses for the Resort for its own benefit or gain, or the benefit and gain of its directors/shareholders, or closely-held corporations/entities" (see Further Amended NOCC, para. 25(c)).

[356] There is no doubt that changes in the administration of the Resort occurred when Mr. Wankel became involved. Mr. Van der Deen gave some very general evidence about these changes and he stated that he opposed Mr. Wankel's proposed changes. However, Mr. Van der Deen provided no testimony as to what those changes were or that they were incorrect in any way.

[357] Rather, Mr. Van der Deen repeatedly testified that he managed the Resort consistent with past practices and the advice and direction of CVM's directors. One example of these past practices related to the charging of employee costs. Mr. Van der Deen agreed that he only included the salaries of customer service and accounting head-office personnel in budgets, despite the fact that he was well-aware that other employee costs were also being incurred. Mr. Van der Deen prepared the budgets with reference to these other costs because it had always been done that way.

[358] Mr. Wankel confirmed that Mr. Van der Deen failed to allocate overhead costs associated with the head-office staff including the costs of benefits, rent, utilities, furniture and equipment. Mr. Wankel considered this to be an error. Mr. Wankel further confirmed that head-office charges to the Resort are strictly limited to the performance of duties related to the Resort, and do not include costs for Northmont or for any other non-Resort activities.

[359] RVM reported on the matter in the December 2011 communication and report in advising of past errors and omissions by management. The financial statements reflect an increasing amount charged for "off-site wages and benefits". In 2010, those costs were $478,378 and had increased to $979,854 for 2012.

[360] JEKE does not dispute that these overhead costs are allocable to the owners under the terms of the JEKE VIAs. Rather, JEKE's argument is the rather simplistic one that a five-fold increase in these charges is "not prudent". There is absolutely no evidentiary basis for the argument that Northmont is in breach of its management obligations under the JEKE VIAs in charging the amount of these costs.

#### *iv) Recovery of Deficits on Subsequent Assessments*

[361] JEKE asserted, at trial, that Northmont was not allowed to charge the deficit recovery as part of the Renovation Project Fee on the basis that deficits must be charged in the next year.

[362] In the December 2012 communication to the owners, RVM noted that the total deficit that had accrued over prior years needed to be addressed. Over these prior years, the deficit had arisen by reason of delinquencies and by expenditures relating to Building 7000. The Resort had no financing for its operations so these deficits were financed by delaying payment of accounts payables, accruing deferred revenue (prepaid leases) and by delaying payment of amounts owing to Northmont.

[363] RVM reported that once the 2012 financial calculations were known, it was intended that the final deficit number would be included in the Renovation Project Fee.

[364] JEKE's position seems to suggest that some other undefined person (as with the delinquency cost and capital costs), would be responsible to pay for these deficits, or that they would remain on the books of the Resort to be financed as best the Manager could arrange.

[365] Once again, JEKE's complaints are misguided. The express terms of the JEKE VIAs contemplate potential deficits and surpluses which most businesses will face, given the necessary uncertainty that arises from the budgeting (or estimating) process.

[366] Paragraph 10(e) provides that deficits are to be added to "subsequent assessment*s*", not the singular "subsequent assessment".

[367] As a chartered accountant, Mr. Wankel is well-aware of the budgeting process and the auditing of financial statements. Not surprisingly, he testified that it is impractical to assess deficits in the next years' assessment because the balances cannot be determined at the time of budget creation. They can only be determined following an analysis after year end. This was, of course, the reason why the December 2012 communication referred to a delay in dealing with the deficit, as above.

[368] Mr. Wankel also explained the further statement in the December 2012 communication that it was necessary to allocate the Renovation Project Fee (which was to include the deficit), equally between the 2013 and 2014 maintenance fee years in order to fairly treat the biennial odd and even time share interest holders (the every other year lessees). I agree with Northmont that the interpretation asserted by JEKE would result in the Manager having to charge deficits to these time share owners in a haphazard and unfair manner in relation to these interests.

[369] I conclude that a plain reading of paragraph 10(e) of the JEKE VIAs allows the Manager to assess deficits in, not only the following year in which the deficit was incurred, but in subsequent years.

### *v) The Northmont Sales Office*

[370] In December 2012, Northmont closed its sales office. The stated reason for doing this was that the market for time share interests had collapsed and the cost of maintaining the office could no longer be justified.

[371] JEKE claims that the closure of the sales office, allegedly done in conjunction with Northmont's plan to remove the Resort from the "time share model", is in breach of the JEKE VIAs (see Further Amended NOCC, para. 25.a.(ii)). JEKE asserts that the closure of the sales office is another way in which Northmont has fundamentally altered the bargain that JEKE was to receive under the JEKE VIAs.

[372] This is another example of an argument that has no merit. JEKE is unable to refer to any provision in the JEKE VIAs, or other contract document, that imposes an obligation on Northmont to continue time share sales once the minimum is achieved. There is no other evidence to suggest that Northmont otherwise agreed to keep the sales office open.

### *vi) Litigation Expenses*

[373] JEKE alleges that Northmont has improperly charged the owners for Northmont's litigation expenses relating to the *Special Case*, both in this Court and on appeal (see Further Amended NOCC, para. 25.g(iv)).

[374] JEKE relies on evidence given by Mr. Wankel at his examination for discovery. Mr. Wankel confirmed that the Resort's funds have been used to pay the legal expenses relating to Northmont's participation in the *Special Case*, together with a substantial number of collection actions commenced to effect recovery of maintenance fees from various owners or lessees.

[375] As I have discussed above, the *Special Case* arises out of the Petition Proceeding which specifically relates to the Trustee's application to the court for advice and directions in relation to the Resort Realignment Plan.

[376] Paragraph 9(p) of the JEKE VIAs provides that all expenses incurred by the Lessor in the management of the Vacation Properties are costs assessable to lessees.

[377] I agree that legal costs of Northmont relating to the *Special Case* do arise from the management of the Resort by Northmont. The questions posed in the *Special Case* related to the ability of Northmont to charge the Cancellation Fee and the Renovation Project Fee. Both of those questions were central to Northmont's management of the Resort.

[378] It is also worth noting that Loo J.'s decision that Northmont was entitled to charge the Cancellation Fee was set aside by the Court of Appeal but was not

subsequently raised or argued in this trial. Further, costs were awarded against Northmont by the Court of Appeal in respect of the appeal costs. Costs of the application before Loo J. were left to be dealt with by the judge hearing the merits of the claims. Presumably, the Court of Appeal intended that, upon the hearing of the Petition Proceeding, the presiding judge will have the ability to address those costs.

[379] In my view, it would be open to the judge, in that event, to address the matter of costs in the *Special Case* (BCSC) that may be payable to the Trustee (or lessees and owners), and also whether Northmont can claim for its own legal fees from the Resort's operating funds.

## X. RENOVATION PROJECT FEE / RESORT REALIGNMENT PLAN

[380] JEKE's allegations, in relation to the Renovation Project Fee and Resort Realignment Plan, as found in the Further Amended NOCC, are broad and far-ranging. The arguments advanced at the conclusion of the trial did not exactly track the allegations in the Further Amended NOCC. In any event, I have attempted to summarize the issues to be addressed as follows.

### 1) Renovation Project Fee Issues

[381] I have concluded that none of the issues raised by JEKE have any merit. I will address each argument briefly as follows.

#### *(i) Non-Payment of the Renovation Project Fee*

[382] JEKE alleges that Northmont is in breach of its obligation to pay its portion of the Renovation Project Fee (see Further Amended NOCC, para. 25.g(iii) and (vi)).

[383] Mr. Wankel testified that the Renovation Project Fee consists of different components, namely: (a) a renovation fee; (b) a management fee; (c) deficit recovery; and (d) taxes. Northmont has paid the portion of the Renovation Project Fee that relates to the outstanding deficit on each time share interest it owned at the time of initial invoicing, and on those time share interests it acquired as a result of owner cancellations, as evidenced by the 2013 and 2014 financial statements.

[384] Consistent with the intent to downsize the Resort, Mr. Wankel testified that the Resort Realignment Plan contemplates that the units previously owned by Northmont, and the units acquired by Northmont through the cancellation option, would not be renovated and would be removed from the Resort in a non-renovated state. Further, Mr. Wankel testified that the Manager has not invoiced the renovation portion of the Renovation Project Fee to Northmont because those units will not be renovated (aside from the units which are being used by the Manager and are the subject of the Usage and Amended Usage Agreements).

[385] In my view, it is within the discretion of the Manager to do so in an appropriate fashion. Further, I consider that this is a reasonable approach until it is determined whether Step 4 of the Resort Realignment Plan will come to pass. JEKE's counsel makes the somewhat vague assertion that if Northmont had paid its portion of the Renovation Project Fee, "we would not be here". There is no evidence to support such an assertion. In fact, to the extent that the renovations have been completed by the Resort using the Renovation Project Fee, this has allowed time share owners, including JEKE, to use these renovated units, just as contemplated by the VIAs.

[386] Needless to say, Northmont is not accessing the units that are the subject of the Usage and Amended Usage Agreements and it is not, therefore, enjoying these same benefits in the meantime. For these reasons, I do not agree with JEKE that this amounts to Northmont having "to have it both ways".

#### *(ii) Is the Renovation Project Fee a "Special Assessment"?*

[387] JEKE alleges that the Renovation Project Fee is a "special assessment" that is not allowed under the terms of the JEKE VIAs. Paragraph 12 of the JEKE VIAs does allow the Manager to impose a special assessment on an owner, although that arises where there is damage to Resort property as a result of the actions of the owners.

[388] This argument appears to arise because the Renovation Project Fee was not imposed as part of the regular year-end maintenance fee; rather, it was issued separately in April 2013. Mr. Wankel testified that the Renovation Project Fee was

not issued along with the regular 2013 maintenance fee, in order to allow for a finalization of the renovation budget, and to confirm the amount of the 2012 closing deficit, both of which were not available at the end of 2012. In addition, a delay to April 2013 resulted in a savings to the owners of HST on the renovation project component of the 2013 maintenance fees (a savings of approximately 4%).

[389] I agree that the Renovation Project Fee was not a special assessment as contemplated by Paragraph 12 of the JEKE VIAs. In addition, there is no provision in the JEKE VIAs that would prevent the Manager from sending out a maintenance fee assessment to the owners and lessees in this two-stage fashion. This later invoice, in April 2013, would not have come as any surprise to the owners given the December 2012 communication (which included the regular maintenance fee invoice). That letter expressly advised that the Renovation Project Fee would be billed later in April 2013 and:

> … billed in two equal amounts as part of the 2013 and 2014 maintenance fees …

[390] I agree with Northmont that the rationale for sending out the Renovation Project Fee invoice, as a maintenance fee, at a later time is entirely in keeping with its obligations to manage the Resort in a prudent and workmanlike manner. In light of the clear benefits to the owners and lessees in doing so, it is difficult to see why JEKE would complain about this matter.

### *(iii) Necessity / Scale of the Renovation Project Fee*

[391] In argument, JEKE's counsel asserted that the Renovation Project Fee was not "chargeable" to the owners. I disagree, and also would note that in the *Special Case* (BCSC) at para. 85, this Court noted that JEKE conceded as much.

[392] JEKE also alleges that the Renovation Project Fee is not necessary or timely and, in any event, is not "scalable" to the remaining buildings (see Further Amended NOCC, para. 27.g).

[393] JEKE relies on the evidence of CVM's general manager, Mr. Van der Deen and Diane Phypers.

[394] Mr. Van der Deen testified that, for many years, the Resort had pursued a "Band-Aid" approach to addressing recurring maintenance issues, some of which he described as "severe issues". In particular, the Manager had recognized the significant issues caused by the Poly-B piping which caused leaks. The temporary solution was to install water softeners in an effort to reduce the frequency and magnitude of water leaks, rather than resolving the problem by removing the inadequate piping. Mr. Van der Deen testified that the strategy was to "push back" these recurring problems into the future.

[395] Mr. Van der Deen's reports to the owners over the years, and his testimony at the trial, indeed, confirm that there were significant ongoing maintenance issues at the Resort. He was part of the management team that identified the need for $19 million in capital refurbishment costs in 2010, while having in mind that no reserves existed for such repairs. While Mr. Van der Deen was attempting, as the general manager, to address the maintenance issues as well as he could, he was clearly limited by financial restraints which did not allow for any full-scale renovations such as would later be proposed by Northmont. In part, his strategy was to spend as little as possible so as to "keep the owners happy", which I took to mean keeping the assessments as low as possible while fixing obvious problems that would affect the owners' enjoyment of the Resort.

[396] JEKE refers to evidence from Mr. Van der Deen concerning the level of bookings at the Resort, particularly in the summer when the Resort was busy. JEKE argues that Mr. Van der Deen's evidence supports that, at all times up to 2010, the interior of the buildings were "functional, operational and apparently served the purposes of the lessees". Aside from the fact that, even if accepted, this statement was likely out of date in 2012/2013, this evidence stands in stark contrast to the other evidence of Mr. Van der Deen concerning the significant maintenance issues which he was managing on a day-to-day basis. The fact that the Resort was busy in

the summer does not necessarily refute that these significant maintenance issues existed and required attention.

[397] In addition, Ms. Phypers stayed at the Resort in 2010 and 2013 and did not identify any “issues”. She stated that she had not seen any issues that would warrant the later proposed renovation. This anecdotal evidence concerning the state of the Resort at various times is hardly compelling. The fact that one owner, who is not a construction expert, enjoyed her stay at the Resort says nothing about the state of the Resort generally, particularly in relation to the Buildings or units she did not visit.

[398] Mr. Van der Deen’s employment to RVM ended in October 2011. Accordingly, he had no role in the development of the renovation budget that was then underway by Mr. Frey.

[399] Mr. Frey’s evidence, which I accept in its entirety, confirms that Northmont took a conscientious, thoughtful, and measured approach to identify the maintenance issues and possible solutions. Mr. Frey, himself, brought significant experience, knowledge and expertise to this challenging construction project. His approach involved sophisticated steps that one would expect in addressing the magnitude of the serious issues affecting the Resort. In particular, Northmont retained other professionals to provide their expertise in resolving this problem. This complex process took not weeks or months, but years to complete.

[400] The significance of the financial cost of the Renovation Plan was not lost on Mr. Frey or Mr. Wankel. Yet, I am satisfied that Mr. Frey made reasonable cost-conscious decisions concerning the scope of the work and that he negotiated the best possible prices to accomplish that work. This involved the decision that, rather than the *ad hoc* approach that had previously been employed by Fairmont, an all-encompassing approach was best. At least, in part, this allowed certain economies of scale in terms of the cost of work, and also ensured that the needed professionals and trades would be on site to complete the necessary work.

[401] I agree with Northmont’s submissions that the Renovation Plan was necessary to correct known, long-standing, recurring problems that had been “pushed back” by prior management, and which could no longer be reasonably deferred. As Loo J. concluded in the *Special Case* (BCSC) at paras. 90-95, I am satisfied that Northmont’s development of the Renovation Plan was an appropriate and reasonable execution of Northmont’s responsibility to manage the Resort in a prudent and workmanlike manner. I am also satisfied that Northmont evaluated the status of the Resort and developed the Renovation Plan and, subsequently, the Resort Realignment Plan, as quickly as possible and, in any event, within a reasonable timeframe in the circumstances.

[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.

[403] JEKE also complains that the Renovation Plan includes common area and civil work expenses that are not scalable. It is said that the Renovation Plan involves work that may benefit the buildings that Northmont is seeking to remove from the Resort and time share plan. However, both Mr. Wankel and Mr. Frey testified that common area and civil work costs relating to the units that will be removed from the time share plan will be apportioned to the owners of those units through cross-easements and covenants consistent with existing provisions on the condominiums that currently share common areas and civil works with the Resort. In other words, if there are benefits allocable to any of the buildings removed from the Resort at the end of the day, the owners will not bear those costs, Northmont will.

[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.

### *(iv) Advance Billing*

[405] JEKE argues that Northmont is not able to invoice for the Renovation Project Fee in advance, including charging the management fee on that amount (see Further Amended NOCC, para. 25.e, 25.g(vi) and 27.b). It asserts that Northmont has charged the Renovation Project Fee for work that is anticipated to be done at some future time, not done in the year in which it was charged to Northmont, or in the two budget/calendar years after it was invoiced.

[406] Paragraph 10 of the JEKE VIAs provides that the Manager shall:

> 10(b) in each calendar year (usually by January 15th) prepare a budget of the estimated Operating Costs <u>for the calendar year</u> (the "Estimated Operating Costs") <u>and</u> calculate the amount it deems necessary to <u>enable furnishing and fixture replacements to be made when required</u> (the "Replacement Reserves");
>
> [Emphasis added.]

[407] A plain reading of paragraph 10(b) confirms that furnishing and fixture replacements are "to be made when required," and are not restricted to a "calendar year".

[408] Further, the December 2012 communication to the owners provided that the Manager did not require payment in full on May 31, 2013. What was proposed was that owners could pay the Renovation Project Fee by way of a $100 per month interest-free payment plan that was anticipated to match payments to the renovation schedule.

[409] Accordingly, in essence, the billing of the Renovation Project Fee was on a yearly basis and was reasonably tied to the anticipated costs of the Renovation Plan. This proposal was, no doubt, intended to assist owners in meeting this

financial obligation while also ensuring that the Resort had sufficient funds to continue with the Renovation Plan as needed.

### *(v) Northmont's Use of Renovation Project Fees*

[410] JEKE asserts that Northmont has failed to apply the Renovation Project Fee to the work completed under the Renovation Plan, and has improperly used the Renovation Project Fee for purposes other than the Renovation Plan (see Further Amended NOCC, paras. 25.e and 27.h)

[411] Both Mr. Wankel and Mr. Frey testified as to the extent of the renovations completed to date. They testified that the 300, 400 and 800 Buildings had been completed, as well as the exterior work on the 8100 Building. Additionally, work was ongoing in the Recreation Centre in relation to the pool.

[412] Mr. Wankel testified that the annual maintenance fee communications, since April 2013, provide updates on the status of the renovations. JEKE obviously received these updates. Further, both Mr. Wankel and Mr. Frey testified that the 2016 communication dated November 27, 2015 advises owners that current construction delays are a result of the uncertainty created by this litigation and that Northmont anticipates resuming renovations by the fall of 2016.

[413] This unchallenged evidence clearly establishes that Northmont intended to implement the Renovation Plan, that the Renovation Plan is well underway and being paid for by the Manager, and that the current delays are a direct result of this litigation. JEKE has produced no evidence to the contrary.

### *(vi) Management Fees*

[414] JEKE argues that Northmont has charged excess management fees in relation to the Renovation Project Fee (see Further Amended NOCC, paras. 25.g(vii) and 27.e).

[415] I am not aware of any evidence on this point, and this matter does not appear to have either been pursued or abandoned in argument.

### 2) Resort Realignment Plan Issues

[416] JEKE's argument against the Resort Realignment Plan is essentially two-fold:

1) firstly, the Resort Realignment Plan is an attempt by Northmont to remove the Resort from the time share plan for its own benefit after imposing financial responsibility on the owners and lessees to pay for the renovation of the buildings (see Further Amended NOCC, paras. 25.a(i), (ii) and (iii) and 27.f). JEKE essentially describes the Resort Realignment Plan as some Machiavellian plot by Northmont to profit at the expense of the owners; and

2) secondly, the failures of both Fairmont, and then Northmont, in the past (which I have rejected as above), have all led the Resort to the "tipping point". When now faced with the Resort Realignment Plan, JEKE argues that it fundamentally alters that which was bargained for:

> The JEKE Lease does not provide for the Resort "realignment" contemplated by the Resort Realignment Plan. The implementation and steps taken by [Northmont] is effectively a windup of the "Resort" as defined in the JEKE Lese. The introduction of the cancellation program was a termination of the existing Resort structure. [Northmont's] April 12, 2013 communication advising [JEKE] that the Resort cannot continue and closure is inevitable absent the Resort Realignment Plan squarely recognizes this. The Resort Realignment Plan contemplated something fundamental[ly] different from what [JEKE] contracted for. "Resort" is a defined term in the JEKE Lease and the Resort Realignment Plan proposes to fundamentally alter what [JEKE] relied on as being the "Resort".

[417] I will firstly address the argument that the Resort Realignment Plan is a "sham" designed to steal the value of the owners' interests in the Resort.

[418] To support this contention, JEKE relies heavily on a November 5, 2012 PowerPoint presentation to the Northwynd REIT board of trustees. This PowerPoint presentation sets out the rationale for implementing the Resort Realignment Plan and states that the intent of the business plan is to maximize the Unitholders' recovery of the debt owed by Fairmont.

[419] To suggest that this is something inherently improper in the Unitholders' assessing this option for the purpose of profit is to ignore the primary objective of any business. It is apparent that the Unitholders were facing a grim financial result by reason of the insolvency of Fairmont. To suggest that this step - a consideration of their options toward recovering all or a portion of the amounts owed to them - is nefarious, is clearly misplaced.

[420] I have already discussed the substantial issues, both structural and financial, facing the Resort when Northmont took over. These issues were, of course, interrelated. The Unitholders had no choice but to address those issues if the Resort was to continue. It was clearly in the Unitholders' interests to find a solution to these difficulties and those efforts, principally of Mr. Wankel, gave rise to the Resort Realignment Plan.

[421] However, in my view, Northmont's business interests were, effectively, aligned with the interests of the owners; namely, to maintain the Resort in a state that would stabilize it financially so that the owners, including Northmont, could continue to enjoy the benefits that arose from its continuing operations. That Northmont's benefits were intended to be revenue from the Resort was hardly an unknown concept from the start of the Resort operations.

[422] As with many other allegations advanced in this litigation, the sham argument has no basis in the evidence before the Court. As Northmont argues, JEKE has not produced any evidence that would support the position that Northmont's legitimate consideration of its own business interests came at the expense of the contractual rights of JEKE.

[423] In addition, I reject that the imposition of the Renovation Project Fee was the first step in this so-called nefarious plot to steal the value in the Resort from the owners in accordance with the Resort Realignment Plan. Mr. Frey's evidence was that Northmont began efforts to address the maintenance issues in the summer of 2010 and he began the process of developing an overall budget for the Renovation Plan after that time.

[424] This process - ie. the Renovation Plan - was underway for in excess of a year prior to the first suggestion by Mr. Wankel in the fall of 2012 that there might be an opportunity to develop a realignment plan to address what was reasonably - and accurately - projected to be difficulties that would be faced by the Resort in the future. Mr. Wankel testified as to the general state of the industry, and specific issues at the Resort, including rising delinquency, the aging ownership base, and the further anticipated delinquency from the necessary renovation invoice.

[425] I accept the evidence of Mr. Wankel that the Resort Realignment Plan was developed in good faith with a view to benefit both Northmont and the owners, and is not a "sham". In that vein, the Resort Realignment Plan arose from the need to implement the Renovation Plan; the Renovation Plan was not crafted as the first step in a previously formulated Resort Realignment Plan. Again, there is no evidence to support JEKE's contention that Northmont crafted the Resort Realignment Plan with a view to driving out all the owners with a "grossed up" bill so that it could take over the Resort and realize on its value for its own benefit. To the contrary, I accept Mr. Wankel's evidence that if all (or perhaps most) of the owners had paid the Resort Renovation Fee as invoiced, and remained in the Resort, then there was no need to move to the Resort Realignment Plan. In that event, there is no windfall to Northmont as JEKE also alleged.

[426] The second issue arises from JEKE's argument that the Resort Realignment Plan alters that which it bargained for. JEKE argues that a shrinking of the Resort alters the very nature of the time share plan because it results in a reduction in the number of time share interests. JEKE also argues that the Resort Realignment Plan is unfair and prejudicial to it because it requires payment of the Renovation Project Fee when it is unclear what the ultimate Resort will look like upon completion of the Resort Realignment Plan.

[427] I have already discussed Steps 1, 2 and 3 in the Resort Realignment Plan set out in Northmont's April 8, 2013 letter to the Trustee, which steps have already been

accomplished. In this letter, Northmont describes Step 4 in the Resort Realignment Plan as follows:

> Step Four - Reduce the Size of the Resort
>
> The final step in the restructuring process (apart from actual refurbishment of the Resort) will be for Northmont to direct that the Trustee transfer to Northmont the portions of the Lands on which are located Villas that will not to be refurbished as part of the restructuring program. Upon completion of the transfer, those portions of the Lands, and the Vacation Interval Interests previously attributable thereto, will no longer form part of the Lands for purposes of the Trust Agreement and it will be the Intention of Northmont to apply for subdivision approval allowing those portions of the Lands (as they are presently constituted) to be separately titled in the name of Northmont or its nominee, to the extent that Is not already possible.

[428] This Step 4 is clearly subject to Northmont's request to the Trustee, which I outlined above in the Background Facts, and which request gave rise to the Petition Proceeding by which the Trustee is seeking this Court's advice and directions.

[429] Both Northmont and JEKE made submissions, at the conclusion of this trial, concerning the merits of their respective arguments that will be advanced at the time of the hearing of the Petition Proceeding.

[430] Northmont relies on paragraph 43 of the JEKE VIAs and paragraph 13 of the CPA (both cited above), as allowing it to unilaterally amend the VIAs.

[431] Northmont also relies on an Amended and Restated Trust Agreement dated June 10, 2009, between Fairmont and the Trustee which provides:

> 8. The Corporation may not transfer its beneficial interest in the Lands and the Trustee may not transfer its registered interest in the Lands except as contemplated by this section 8 or otherwise in compliance with an order of a Court having jurisdiction with respect to this Agreement. <u>Upon the expiration of all Vacation Interval Agreements for which a register is maintained by the Corporation, the Corporation shall transfer the Lands to [Northmont] or as [Northmont] may direct. With the written approval of [Northmont], approved by the Owners owning at least 66 2/3% of the Vacation Interval Interests, the Corporation or the Trustee may implement any amendment to the Vacation Interval Agreements including the sale, assignment, transfer or other disposition of the Lands.</u>
>
> [Emphasis Added]

[432] Northmont submits that the above Trust Agreement expressly provides for the ability of the Trustee and Northmont to effect a reduction in the size of the Resort in either of two options: if Northmont owns all the interests in a particular Villa, that Villa can be removed; or upon consent of 66 2/3% of the time share interest owners. Northmont further submits this is consistent with and in conjunction with the provisions of paragraph 43 of the JEKE VIAs. Northmont submits that Step 4 of the Resort Realignment Plan should be authorized because it meets the requirements set out in section 8 of the above Trust Agreement.

[433] Not surprisingly, JEKE has an entirely different view as to the ability of Northmont or the Trustee to effect the change to the Resort as contemplated by Step 4 of the Resort Realignment Plan.

[434] I do not fault Northmont for having taken steps toward effecting Step 4 of the Resort Realignment Plan. I agree that such steps are being taken in good faith and in accordance with the Manager's duty to manage the Resort in a prudent and workmanlike manner. However, in my view, these arguments are not properly before the Court at this time. In addition to JEKE, it is my understanding that a substantial number of other owners have responded to the Petition Proceeding. In that event, it is inappropriate to address the issue. Nothing in these reasons is to be taken as a determination of any of the issues raised in the Petition Proceeding.

[435] What results is my conclusion that JEKE's argument about the Resort Realignment Plan fundamentally altering the Resort to JEKE's detriment is premature. The Resort has not been shrunk as of yet, as the Trustee has taken no such action pending the outcome of the Petition Proceeding.

[436] No other fundamental change in the Resort has arisen. While many owners have accepted Northmont's offer and paid the Cancellation Fee, that has simply resulted in a change in the ownership of those units, not a reduction in the number of units. I accept that some of the Resort is now "shuttered", but that arises from the need to either renovate units, or maintain the *status quo* in respect of units that may never need to be renovated, as contemplated in the Resort Realignment Plan.

[437] In the meantime, JEKE's interests remain intact and the Belfrys remain able to use those interests as they see fit, subject to the terms of the JEKE VIAs. JEKE has, and continues to have, what was bargained for.

[438] The evidence is clear that the Resort continues to operate. Aside from the shuttered buildings, the remainder of the Resort is operational, and the buildings in the Resort, including the amenities, remain available to owners to use in accordance with their VIAs. If JEKE had paid its maintenance fees and the Resort Renovation Fee, JEKE would be able to use and occupy the Resort. Mr. Belfry agreed that he has never been denied use of his time share interest when his account had been current.

[439] In addition, JEKE has not been deprived of the right to use its interests for exchange purposes, as it had done in the past, nor is there any evidence that the trading value of JEKE's interest has been negatively affected in any way, or that JEKE was not able to make reservations in Interval International. Mr. Wankel testified that, to his knowledge, the trading value with Interval International has not been changed.

[440] In conclusion, the steps taken to date by Northmont, being steps 1, 2 and 3 under the Resort Realignment Plan, are an appropriate exercise of its managerial obligations. Those steps under the Resort Realignment Plan have not resulted in any fundamental alteration of JEKE's rights under the JEKE VIAs.

## XI. REPUDIATION RELIEF

[441] The primary relief sought by JEKE, throughout this litigation, has been the ability to walk away from its obligations under the JEKE VIAs. Despite the myriad breaches of the JEKE VIAs that have been alleged in this action, at no time has JEKE sought damages. As I have said numerous times in these lengthy reasons, JEKE has not sought to introduce any evidence towards proof of damages arising from any of these alleged breaches. For example, none of the allegations regarding overcharging of amounts were accompanied by any analysis of the amounts claimed.

[442] There is no disagreement between the parties as to the applicable law.

**1) The Breach Must Deprive the Bargain**

[443] A mere breach of contract does not terminate the contract. In *Morrison-Knudsen Co. Inc. v. British Columbia Hydro and Power Authority*, (1978) 85 D.L.R. (3d) 186 (B.C.C.A), the Court stated at para. 130:

> ... There are breaches compensable in damages only and breaches called fundamental breaches which can bring the contractual relationship to an end and free the parties from further performance... .

[444] Similarly, in *Sail Labrador Limited v. Challenge One (The)*, [1999] 1 S.C.R. 265, the Court cited various text authorities as recognizing that:

> [31] … as a general rule, parties to a contract must perform their obligations specifically as dictated by the contract. However, if the performance is deficient, for example in quality, quantity or timeliness, it is accepted that the defect in performance must attain a certain minimum degree of seriousness to entitle the non-offending party to rescind the contract. The failure in performance must substantially deprive the other party of what was bargained for. This concept is referred to as substantial non-performance or as a requirement that a breach go to the "root" of the contract. …
>
> [Emphasis Added]

[445] In *Williams v. Ron Will Management & Construction*, 2009 BCCA 543 at para. 14, the Court adopted the statement that the remedy can only be invoked where there are "circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided".

[446] JEKE also submits that an accumulation of breaches can result in a fundamental breach of a contract, citing *Kussmann v. AT&T Capital Canada Inc.,* 2002 BCCA 281 at paras. 16, 27; *De Monte Centre Management Inc. v. Spooner*, 2011 BCSC 1124 at paras. 64-71.

[447] Here, as I have concluded above, Northmont has not been shown to be in breach of the JEKE VIAs in any manner as alleged by JEKE. In any event, even if such breaches, individually or cumulatively, had been proven, I fail to see that these

amounted to any fundamental breach of the JEKE VIAs by which JEKE was deprived of the benefits of the bargain it struck.

[448] Pursuant to the JEKE VIAs, JEKE was granted the right to use its time share interests in the Resort on certain terms. As I discussed above, nothing has changed the right of JEKE to continue to use those interests; namely, by booking its "floating" interest. The Resort continues to operate and, subject to JEKE paying its obligations under the terms of the JEKE VIAs, it is still entitled to use the Resort (or exchange its interests in another resort).

### 2) The Innocent Party Must Elect to Terminate the Contract

[449] Even when a fundamental breach has occurred, this does not automatically result in the termination of the contract. The innocent party has the option to elect to treat the contract as terminated.

[450] In *Dosanjh v. Liang*, 2015 BCCA 18, the Court adopted the trial judge's summary of the rights of a party to accept a repudiation of a contract:

> [33] The trial judge summarized the general law with respect to a party's right to accept a repudiation of a contract at para. 50 of her judgment:
>
> > The consequences of a repudiation, whether by anticipatory breach or breach of a fundamental term, are well established. They are referred to in *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434, at para. 24, and *Homestar Industrial Properties Ltd. v. Philps* (1992), 72 B.C.L.R. (2d) 69 (C.A.), at para. 13, and may be summarized as follows:
> >
> > - A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract.
> > - If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately without waiting for the time that the contract should have been performed.
> > - If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own.

- If the innocent party wishes to accept the repudiation, he or she must make his or her election known.
- Once made, the election is irrevocable.

[451] In *Gulston v. Aldred*, 2011 BCCA 147, the Court reinforced the notion that the election must be made promptly:

> [50] Where there is a breach of a fundamental term, the innocent party has two options. As this Court stated in *Morrison-Knudsen Co. Inc. v. British Columbia Hydro and Power Authority*, (1978) 85 D.L.R (3d) 186 at para. 130:
>
>> … When faced with a fundamental breach the innocent party is put to an election. He may elect to affirm the contract and to hold the other party to the performance of his obligations and sue for damages as compensation for the breach. He may, on the other hand, elect to treat the breach as a fundamental breach and accept it as such. Thus he would terminate the contract and thereafter be relieved of any further duty to perform and he could sue at once for damages or *quantum meruit* for performance to that point. It is essential that such election, an election between inconsistent rights, be made promptly and communicated to the guilty party. Once made, the election is binding and cannot be changed.
>>
>> [Emphasis in Original]

[452] It has been stated that the timeliness of the communication requires that the election be made within a reasonable time: *Brown v. Belleville (City),* 2013 ONCA 148 at para. 45; *Dosanjh* at para. 37.

[453] As indicated in *Gulston*, the election to disaffirm a contract must be clearly and unequivocally made to the repudiating party. That communication can be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: *Brown* at paras. 45-48. The Court in *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425, stated:

> [38] An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a "wait-and-see" approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract. Either the contract is not repudiated and the rights and obligations under it still exist, or the contract is rescinded because of an accepted repudiation and then very different rights come into being in respect of a cause of action. In either case, parties must have prompt notice of their position. …

[454] JEKE contends that Mr. Belfry's April 17, 2013 letter constitutes JEKE's election and communication to Northmont that it accepted Northmont's repudiation of the JEKE VIAs. It is quite apparent that this letter does not contain any language saying as much. The letter does not even mention that JEKE takes the view that the JEKE VIAs have been terminated.

[455] As stated above, Mr. Belfry's letter to Northmont on April 17, 2013 contained language that JEKE was suspending all payments under the JEKE VIAs. JEKE also made a "without prejudice" offer to transfer JEKE's rights under the JEKE VIAs in consideration of a full release of any further obligations thereunder. That offer was not accepted by Northmont.

[456] In my view, there can be no doubt that the April 17, 2013 letter did not amount to an acceptance by JEKE of a repudiation of the JEKE VIAs by Northmont. This is confirmed by Mr. Belfry's own email of April 30, 2013 by which he stated:

> Please be assured I am acting on the advice of my lawyer and am trying to obtain the facts concerning financial obligations of the lessor under <u>our lease</u> in advance of preparing an appropriate submission for the June 20 hearing.
>
> [Emphasis added]

[457] This was undoubtedly relating to the June 20, 2013 hearing date which had been set in the Petition Proceeding. It is self-evident that JEKE would have had no status in relation to that hearing if he considered JEKE no longer bound by the terms of the JEKE VIAs. Indeed, JEKE did file a responsive pleading in the Petition Proceeding and participated in the *Special Case*, both in this Court and in the Court of Appeal.

[458] Mr. Wankel testified that he did not consider the April 17, 2013 communication to be a repudiation or termination. He testified that Northmont considered Mr. Belfry's April 17, 2013 letter exactly as it was worded; namely, a declaration of intent to suspend payments, together with a "without prejudice" offer. As I have said, Northmont did not accept this offer.

[459] Mr. Wankel further testified that Northmont rejected the offer and encouraged Mr. Belfry to seek legal advice.

[460] In its closing submissions, JEKE's counsel argued, in the alternative, that the filing of its notice of civil claim on October 8, 2014 was JEKE's election to terminate. Accepting, for the sake of argument, that this was a clear communication of JEKE's acceptance of the repudiation, I would hardly characterize this as being done within a reasonable period of time. The issue arose from JEKE's perspective in April 2013, which amounts to a delay of over one-and-a-half years until this event. This may have arisen from JEKE's "wait-and-see" approach depending on the outcome of the appeal in the *Special Case*, with reasons issued in June 2014; however, this does not accord with the prompt notice requirement cited above in *A & G Investment* at para. 38.

[461] In conclusion, I reject JEKE's claim for repudiation of the JEKE VIAs on the basis that JEKE had not shown that there has been a breach or breaches of the JEKE VIAs that have fundamentally deprived JEKE of the benefits under the JEKE VIAs. This is sufficient to dispose of JEKE's claim; however, in the alternative, I also find that if there were breaches entitling JEKE to accept them as repudiation by Northmont and, if the filing of the notice of civil claim was the communication of JEKE's election to accept, this was not forwarded to Northmont within a reasonable time.

## XII. CONCLUSIONS

[462] JEKE's claims are dismissed.

[463] Neither party made substantial submissions on the issue of costs at the conclusion of the trial. Needless to say, given its success on all issues raised in this action, costs are awarded in favour of Northmont against JEKE. My preliminary view is that Northmont is entitled to its party-and-party costs of the action on Scale B.

[464] However, I recognize that other cost considerations may arise from these reasons (or other matters of which I am not aware), which may result in either party

seeking a different costs award. Accordingly, if either or both parties wish to seek a different costs award, they may schedule a further hearing to address that matter provided that, on notice to the other, that party contacts Supreme Court Scheduling to do so within 30 days of the release of these reasons.

“Fitzpatrick J.”

**Schedule "A"**

…

D. The Lessee is desirous of purchasing a vacation leasehold interest in the Vacation Properties for the term and upon the terms and conditions hereinafter set forth.

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 Vacation Property 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 Vacation Property for a specified week as contemplated by that paragraph in consideration for a right to use and occupy for the duration of the Term either an unspecified Villa of the type specified in paragraph 1 or other equivalent Vacation Property 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 Vacation Property 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 or the first week in the Season of the calendar year designated by the Lessee on the first page of this Lease. …

…

7. USE AND OCCUPANCY: Vacation Properties are leased to the Lessee for use by the Lessee and the Lessee's immediate family, guests and tenants as private residential dwellings only…

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 Vacation Resort and the Vacation Properties 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 (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);

(g) painting, redecorating and refurbishing as required;

(h) garbage disposal;

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

(j) service fees and costs of 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 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 1of this Lease. …

A yearly assessment shall be made of the furnishings and fixtures to permit replacement as required.

10. MANAGEMENT BY THE LESSOR: The Lessee hereby appoints the Lessor as the manager (the "Manager") of the Vacation Resort 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 Vacation Resort 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 Vacation Resort;

(b) in each calendar year (usually by January 15th).prepare a budget of the estimated Operating Costs for the 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 day of March in each calendar year, send to the Lessee:

(i) a notice of assessment (the "Notice of Assessment") setting forth the 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, if any, 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 cash 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 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 obligations 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 Vacation Resort. 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.

…

12. SPECIAL ASSESSMENTS: In the event that during a week period a Vacation Property Is damaged by reason of the negligence or malicious acts of the Lessee or a subtenant, guest or invitee of the Lessee then the Lessor shall notify the Lessee by way of a notice of special assessment (the "Notice of Special Assessment") of the cost of repairing such damage and the Lessee shall, within thirty (30) days from the date of the Notice of Special Assessment pay the amount thereof. The Lessee will be responsible for all damage to any Vacation Property and the building in which the Vacation Property is located and for all theft of, or breakage or other damage to, the furnishings which occurs while the Vacation Property is occupied by the Lessee or is caused by the Lessee, his guests or invitees, reasonable wear and tear excepted. Chipped, cracked, burned, torn or otherwise damaged furnishings shall be counted as breakage. For payments received after thirty (30) days a late charge of 10% of the amount past due or two percent (2%) per month (being 26.824% per year) of the amount past due (whichever is greater) will be assessed.

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.

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.

In the event that the Lessor should default in making payments as a lessee, then the Lessee or any other lessee holding a leasehold interest in the Vacation Resort shall be entitled to give notice to the Trustee, accompanied by proof of such default, and the Trustee shall thereupon be entitled to sublet the leasehold interests of the Lessor …

…

17. DAMAGE TO THE VACATION PROPERTIES: 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; … The Lessor agrees to rebuild, repair or replace the Vacation Property provided insurance proceeds are available for such purpose.

…

20. LESSOR'S RIGHTS WITH RESPECT TO VACATION PROPERTIES: The Lessee hereby acknowledges the right of the Lessor to use, occupy and rent any Vacation Property not reserved for a particular week period pursuant to a Vacation Lease, and to retain all monies and other consideration received as a result of the use, occupation and rental of any such Vacation Properties.

21. LESSEE'S ASSOCIATION: The Lessee covenants and agrees to help create, organize, establish and thereafter maintain membership in an association of lessees of the Vacation Properties, 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. The Lessor agrees to

cooperate with the lessees in the formation of such an association and agrees to recognize the association …

23. REMOVAL OF MANAGER: The Lessee in conjunction with other holders of leasehold interest in the Vacation Resort totaling not less than fifty-one per cent (51%) of all leaseholders of Vacation Properties 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. …

…

43. 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. …