
# Court of Queen's Bench of Alberta

**Citation: Northmont Resort Properties Ltd v Reid, 2018 ABQB 1002**

**Date:**
**Docket:** 1703 22524
**Registry:** Edmonton

Between:

**Northmont Resort Properties Ltd**

Respondent/Cross
Appellant (Plaintiff)

- and -

**James Reid and Diane Reid**

Appellant/Cross
Respondents (Defendants)

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**Reasons for Decision**
**of the**
**Honourable Mr. Justice J.J. Gill**

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## Introduction

[1] A group of the Defendants appeal a decision by Young PCJ (***Northmont Resort Properties Ltd v Reid***, 2017 ABPC 249 (***Reid decision***) striking their Dispute Notes (the Provincial Court's version of a Statement of Defence) and counterclaims on the basis that they had already been finally decided in other litigation and therefore were *res judicata* and an abuse of process. She further granted the Plaintiff, Northmont Resort Properties Ltd, judgment against the Defendants in the amounts claimed in the Civil Claims. Northmont also cross appeals, alleging that Young PCJ erred by setting pre-judgment interest at the rate set in the *Interest Act*,

RSA 1985, c I-15 (***Northmont Resort Properties Ltd v Reid***, 2018 ABPC 49, the ***Interest Decision***).

[2] Briefly, the Plaintiff Respondents, Northmont Resort Properties, assumed the role of lessor and resort manager of a resort in British Columbia pursuant to creditor protections orders and agreements under the *Companies' Creditors Protection Act,* RSC 1985, c C-36 (CCAA) (relevant sections are attached in Appendix A) following the insolvency of the original resort developer, Fairmont Resort Properties Ltd. The lessees were timeshare owners who had entered into vacation interval agreements (VIAs) with Fairmont, and Northmont acquired these VIAs in the Fairmont CCAA proceedings. Northmont subsequently sent invoices for renovation project fees (RPFs) to the resort's timeshare owners to address significant financial and maintenance issues. Many of the timeshare owners refused to pay the RPFs, leading to significant litigation in Alberta and BC.

[3] At issue in the litigation was whether the timeshare owners were liable for the RPFs. In BC, Northmont sued over 700 timeshare owners in both the BC Provincial Court and BC Supreme Court; while in Alberta, Northmont sued nearly 2000 timeshare owners in Alberta Provincial Court. There were also actions in this Court. In a BC action, referred to as the JEKE action, JEKE Holdings Ltd, one of the timeshare owners, sued Northmont, raising the same issues as in the actions in which Northmont was the plaintiff.

[4] This lengthy and complex history is set out in the following British Columbia decisions:

> ***Philip K. Matkin Professional Corp v Northmont Resort Properties Ltd***, 2013 BCSC 2071 (the ***Loo Decision***);
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> ***JEKE Enterprises Ltd v Philip K Matkin Professional Corp***, 2014 BCCA 227 (the ***Loo Appeal Decision***);
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> ***JEKE Enterprises Ltd v Northmont Resort Properties Ltd***, 2016 BCSC 401 (the ***JEKE Decision***);
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> ***JEKE Enterprises Ltd v Northmont Resort Properties Ltd***, 2016 BCSC 1578 (the ***JEKE Costs Decision)***;
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> ***JEKE Enterprises Ltd v Northmont Resort Properties Ltd***, 2017 BCCA 38 (the ***JEKE Appeal Decision***);
>
> ***Northmont Resort Properties Ltd v Golberg***, 2017 BCSC 1680 (the ***Golberg Decision***).
>
> ***Northmont Resort Properties Ltd. v Golberg***, 2018 BCSC 151 (the ***Golberg Interest Decision***)

## Facts

### Background

[5] From 1990 to 2009, Fairmont constructed, marketed, and developed the Resort, then known as "Fairmont Vacation Villas" which it leased (and then later sold) as vacation intervals, or timeshares, in the Resort. There were approximately 18,950 timeshare vacation intervals registered in the name of owners who each executed standard forms of vacation interval agreements (VIAs). Each VIA sets out particulars of the owner's interest, including:

(a) the type of vacation property including reference to a specific unit;
(b) whether the agreement is annual or biennial; and
(c) the "season" of the time share interest.

[6] Clause 9 of the VIAs is the most relevant provision. It provided:

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;

(I) 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.

[7] Fairmount became insolvent in 2009 and sought CCAA creditor protection in Alberta. In June 2010, Fairmont and its creditors entered into a foreclosure agreement, leading to Northmont becoming the successor to Fairmont's rights and obligations under the VIAs. In late 2012, Northmont decided that significant renovations and repairs were necessary, and given the Resort's significant financial and maintenance issues, in April 2013, it assessed RPFs from the timeshare owners to cover the financial deficits and undertake the renovations. Alternatively, Northmont indicated that owners could surrender their timeshare interests and terminate their obligations under the VIA upon payment of a cancellation fee. Most of the VIA owners either contributed the RPF or surrendered their interests. Some did neither.

**Early Litigation history**

[8] In 2013, Philip K. Matkin Professional Corp, as the beneficial title holder for the timeshare owners and Northmont, brought a special case seeking advice and direction related to 1) whether Northmont was entitled to charge or levy the cancellation fee; and 2) whether Northmont was entitled to levy the RFP under the VIAs. Justice Loo held that the answer to both questions was yes (the ***Loo Decision***). On appeal, the ***Loo Appeal Decision***, the BC Court of Appeal held that the questions were not appropriate for a special case because the underlying facts were in dispute and the questions before the Court were based on hypothetical circumstances.

[9] Starting in August 2014, Northmont began filing claims against the defaulting timeshare owners; eventually there were about 3000 claims in BC Supreme Court, BC Provincial Court, Alberta Court of Queen's Bench and Alberta Provincial Court.

[10] In October 2014, JEKE Enterprises Ltd, one of the timeshare owners that had chosen to neither pay the RFP or terminate their VIA and pay the cancellation fee, sued Northmont in British Columbia, alleging that Northmont had breached the VIAs by insisting on the payment of the RPFs or the cancellation fee. JEKE had entered into two VIAs, purchasing two 40 year leasehold interests in the Resort. Along with the VIAs, JEKE also entered into a consumer protection agreement (CPA) and acknowledged receipt of a prospectus as required by disclosure legislation. This litigation eventually lead to the ***JEKE Decision*** and the ***JEKE Appeal Decision***.

**The Superconference and the Defendants' position on the relationships among the actions**

[11] In January 2015, representatives from the four courts in which actions had been commenced, Associate Chief Justice Rooke for the Court of Queen's Bench of Alberta, Judge Young for the Provincial Court of Alberta, Madam Justice Loo for the Supreme Court of British Columbia, Judge Webb for the Provincial Court of British Columbia, and counsel for all parties, met to discuss a way forward for all the actions (the Superconference). At that Superconference, Counsel for JEKE advised that the JEKE action was a "mirror by design" of the common defence and counterclaim by the other defendants: ***Golberg Decision,*** at para 49; ***Reid Decision*** at para 18. Counsel noted: "...the JEKE action raises all of the same issues as about – well, almost 800 other B.C. Supreme Court proceedings . . ." (***Reid Decision*** at para 19).

[12] Young PCJ in the ***Reid Decision*** also quoted the following statements by counsel for the Defendants from the Superconference transcript (paras 19-20):

> I am the Alberta agent for Mr. Geldert, and myself and Mr. Geldert and Mr. Alexander have worked together, and so effectively the dispute notes and counterclaims that we have filed mirror what has been filed by Mr. Alexander's office in – in British Columbia.

Mr. Alexander added that:

> [T]he important point on that in response to what Mr. Virtue said earlier with respect to this misrepresentation claim and what people might have been told when they buy, those do not form a part of the defence or counterclaim in terms of individualized different facts for each of our clients. But I agree with Mr. Virtue that to the extent that there are others out there who defend on the basis of what they were told when they buy, none of us really has control over that, but that defence, that counterclaim, that representation claim, does not form a part of the Geldert group's response to the debt claim.

[13] In the ***Golberg Decision*** at para 49, Branch J added the following from the transcript:

> MADAM JUSTICE LOO: So to summarize, your counterclaims do not allege misrepresentation?
>
> MR. ALEXANDER: Not -- not based on individual disclosure statements, individual statements. I failed to state they only raise a common issue about what the documents say Northmont/Fairmont was going to (INDISCERNIBLE) what their roles (INDISCERNIBLE) arising out of the documents.
>
> MADAM JUSTICE LOO: I understand. So it is not -- no oral misrepresentations?
>
> MR. ALEXANDER: Right.

[14] Following the Superconference, all involved awaited the results of the JEKE action (***Reid Decision*** at para 24). Young PCJ went on to note that the Defendants sought a stay of the Alberta Provincial Court actions until a judgment was issued in the JEKE action, which she granted and she further adjourned their application to consolidate all the Northmont actions and transfer them to Queen's Bench (at para 25). She then went on to quote from the Defendants' Notice of Application (at para 26):

> 22. As of the filing of this application, Northmont has filed at least 578 actions in the B.C. Supreme Court, 188 actions in the B.C. Provincial Court, and at least 1,141 actions in the Province Court of Alberta. **These claims raise identical issues and differ only on the quantum of the claim which is based on the type of timeshare interest purchased.**
>
> 23. In the actions for which the Defendants' counsel acts for the other defendants in Alberta, and in a considerable number of the actions commenced in British Columbia, counterclaims have been filed to the Northmont Actions and those **counterclaims raise identical issues to the claim in this action concerning Northmont's breach of contract and a claim for set-off against any amounts due. Northmont has the same claim against the Defendants as has been advanced in the Northmont Actions.**

24. **The result is that this action and all the Northmont Actions raise the same set of issues.**

(Emphasis added)

**The JEKE action**

[15] Young PCJ quoted the "Further Amended Notice of Civil Claim" filed by JEKE (at para 27), which read:

28. As of the date of this Notice of Claim, Northmont has filed 299 claims in the Provincial of British Columbia and the Supreme Court of British Columbia (the "Northmont Actions"). As of the date of this amendment, those claims now number in excess of 3,000 claims in the Alberta and B.C. courts. **These claims all raise issues in regard to the RPF, set-off of amounts against any maintenance fee, and identification of ports [sic] of any fee that are the responsibility of Northmont that are the same but for the quantum of the claims in the Northmont Actions**, which may differ based on the type and time interval of the timeshare interest purchased. Nonetheless, **the issues in dispute are the same in this action and the other similar claims and will involve the same, evidence, including expert opinion evidence.**

(Emphasis added)

[16] Fitzpatrick J described JEKE's claim at para 6-9 of the ***JEKE Decision:***

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.

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.

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".

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.**

(Emphasis added)

[17] Fitzpatrick J dismissed JEKE's action in January 2017, concluding that JEKE did not acquire any interest in the Resort's real property, but instead acquired a timeshare interest. She further held that Northmont retained a residual interest in the Resort after the expiry of any lease. As manager, she concluded, Northmont must maintain the Resort and deal with maintenance issues, including conducting required repairs. She then went on to interpret the VIAs, concluding that the plain meaning of the words meant that the costs for delinquent accounts, capital expenses, and Northmont's legal fees all fall within the meaning of "Operating Costs" in clause 9. Further, she held that since the VIAs do not refer to "capital costs," and it would defy logic that the parties failed to turn their minds to who would pay for significant maintenance issues, such costs were intended to be covered by clause 9 and were included in "operating costs." She further concluded that even if there had been ambiguity in the VIAs and she could consider extrinsic evidence, that extrinsic evidence supported her interpretation.

[18] The BC Court of Appeal upheld her decision, concluding that Fitzpatrick J's decision was correct.

### The *Golberg Decision*

[19] The ***Golberg Decision*** was issued in September 2017, and was similar to the ***Reid Decision***, in that Northmont, as plaintiff, sought to strike the defendants' pleadings on the basis that they were an abuse of process or *res judicata*. In particular, the Defendants sought to add new defences of misrepresentation and ***Tilden*** defences, positions that were inconsistent with the position the Defendants had taken earlier. Branch J held that this constituted an abuse of process and struck the new defences. He further held that the contractual interpretation defences were *res judicata* as having been finally determined in the ***JEKE Decision*** and ***JEKE Appeal***

## Who are the Appellants?

[20] In the ***Reid Decision,*** Young PCJ noted that this action was one of nearly 2000 brought by Northmont against timeshare owners who were represented by Strathcona Law Group (SLG Defendants); SLG was retained by Geldert Law Corporation of British Columbia (Geldert Group). Many of these defendants have withdrawn their appeal. The Defendants in the ***Reid Decision*** were all members of the Geldert Group. The following Defendants are now self-represented and continue to seek appeal: Roxanne McBride, Arthur Dennis, Roseanne H. Laughlin, Michael McMillan, Lori Ann McMillan, Kim Tran, Garry R. Hennan, and F. Gaylene Hennan.

[21] The Court received notice that the following appellants have withdrawn from the appeal:

Milagros Macabasco
Tammy Myla Cervantes
Margaret A. Pisesky*
Janette M. Dodds*
Julia and Jesper Trangeled
Arthur and Helen Engels*
Tammy and Alvin Kurash*
Gary Budnyk and Truth Renaissance:*
Derek and Diane Pyne*

Roger and Maria Rivard*
Edwina and Kenneth Oliver*
David and Heather Vickar*

[22] The asterisked appellants remain as cross-respondents.

## The Appeal

### Standard of Review

[23] The standard of review is that set out in ***Housen v Nikolaisen***, [2002] 2 SCR 235 and was summarized in ***Marquee Energy Ltd. (Re)***, 2016 ABCA 360 at para 12:

> (a) conclusions on issues of law are reviewed for correctness: ***Housen*** para. 8,
>
> (b) findings of fact, including inferences drawn from the facts are reviewed for palpable and overriding error: ***Housen*** paras. 10, 23; ***H.L. v Canada (Attorney General),*** 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and
>
> (c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: ***Housen*** paras. 33, 36.
>
> The standard of review for findings of fact and of inferences drawn from the facts is the same, even when the judge heard no oral evidence: ***Housen*** at paras. 19, 24-25; ***Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.***, 2015 ABCA 406 at para. 9, 609 AR 313.

[24] The analysis in ***Housen*** applies to appeals of Provincial Court decisions to this Court: ***Tucker v Edmonton (City)***, 2011 ABQB 55 at para 9; ***Palmer v Van Keulen***, 2005 ABQB 239 at para 11.

[25] I conclude that the issue on appeal was a question of mixed fact and law: Were the Defendants' actions in defending this action, given the litigation history of these parties, an abuse of process and was the defence raised regarding the interpretation of the VIAs *res judicata?* Both questions require the application of a legal test to the facts. Therefore, Young PCJ's decision may only be set aside if there is palpable and overriding error.

### Submissions

[26] The Laughlins, the McMillans, Kim Tran, and Roxanne McBride filed their submissions together. They argue that they do not have a valid agreement because they were in default for not paying their RPFs, thus triggering the default provision of their original agreement. That clause reads in part: "If a default in any payment ...has not been remedied... Northmont **may** terminate the rights of the Buyer..." (emphasis added).

[27] They also cite the *Consumer Protection Act, RSA* 2000, c C-26.3, and argue that there were renewals, extensions, and amendments to the agreements without their consent. They

further argue that there were misrepresentations when they bought the contracts, and that this invalidates the agreements.

[28] Garry R Hennan is also self-represented. He argues that the VIA he and his wife, Gaylene entered into with Fairmount was a term lease with only a right of occupancy, and that they assumed no responsibility for capital cost expenditures. He further argues that because the VIA was for a term, it could not represent "true ownership," and that without true ownership, they are not liable for any capital costs or contribution to a Capital Reserve. Mr. Hennan further argues that Northmont cannot make unilateral changes to the VIAs because they did not agree to the changes imposed and there was no consideration provided.

[29] A submission was also received from Roxanne McBride, consisting of documents that were not before Young PCJ. Mr. Hennan, the Laughlins, the McMillans, and Kim Tran also included additional documents in their submissions. This was contrary to my Order of July 4, 2018, which read:

> ...no written submissions filed herein shall refer to any new evidence that was not before the Provincial Court, unless that new evidence is contained in an affidavit filed with leave of this Court obtained before the date that the written submission is to be filed.

[30] These documents were not in an affidavit, and therefore have no evidentiary value. Further, no leave was sought or granted to admit new evidence. Finally, the documents are not relevant to the issues on appeal. I give them no weight or consideration.

**Analysis**

[31] An appeal is not an opportunity to re-argue the same issues that were addressed by the first decision-maker; an appeal is supposed to address alleged errors made by the first decision-maker. In this case, Young PCJ decided this case on the basis that the Defendants' attempts to raise new defences was an abuse of process because they had assured the Courts at the Superconference and in their submissions to the Courts that the ***JEKE Decision*** was intended to mirror the issues in all the other cases and was intended to be a test case. Further, she concluded that the ***JEKE Decision*** finally determined the interpretation questions: Northmont was entitled to charge the timeshare owners the RPFs or the cancellation fee under clause 9 of the VIAs. Based on these conclusions, she struck the Defendants' Dispute Notes and granted summary judgment.

[32] On Appeal, none of these Defendants addressed this analysis; instead they attempted to re-argue their case on its merits, arguments already made and decided in the ***JEKE Decision*** and the ***JEKE Appeal***. I understand these Defendants are now self-represented and may have not understood the role of appellate review. I will address, briefly, their arguments, but the essence of the appeal lies in deciding whether Young PCJ erred in concluding that the new defences were an abuse of process and whether the interpretation of the VIAs had been finally decided in the ***JEKE Decision*** and upheld on appeal in the ***JEKE Appeal***.

**Were the VIAs terminated by the lessees default?**

[33] First, the question of whether the default terminated the VIA was directly addressed in para 82 of the ***JEKE Appeal:***

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

[34] In other words, the Defendants cannot escape the obligations under the VIA by defaulting, unless the lessor chooses to terminate the lease. It is clear that termination of the VIA for default is discretionary by Northmont, and it may choose not to terminate. It did not do so; it offered to terminate the VIAs if a cancellation fee was paid. There is no basis for this argument.

**Consumer Protection Act/Fair Trading Act**

[35] Northmont did not unilaterally change the terms of the VIAs; the RPFs and the cancellation fee were charged to the timeshare owners under the terms of clause 9 of the VIA. The ***JEKE Decision*** and the ***JEKE Appeal*** held that the clear and unambiguous language of the VIAs meant that the timeshare owners were liable for capital costs. As noted by Northmont in their submissions, the *Fair Trading Act* defence is essentially a statutory version of the *Tilden* defence, a defence of misrepresentation. Young PCJ held that the misrepresentation defences were an abuse of process, and therefore struck those defences. The Defendants have not addressed whether she erred in reaching that conclusion; instead they continue to argue simply that there were misrepresentations made to them.

**True ownership**

[36] There is nothing in the VIAs that suggest that the costs under clause 9 depended upon real property ownership.

**Abuse of process/ issue estoppel**

[37] I agree with Fitspatrick J and the BC Court of Appeal that the Defendants' attempts to raise new defences in the face of their counsels' statements at the Superconference and in court submissions that the JEKE case was to be a test case and all the issues were the same, constitutes an abuse of process.

[38] In ***Behn v Moulton Contracting Ltd***, 2013 SCC 26, the Supreme Court of Canada discussed the principles underlying abuse of process (at para 39-41):

> In ***Toronto (City) v. C.U.P.E., Local 79,*** 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35;...
>
> The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements...
>
> As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In ***Canam Enterprises*** and in

> ***C.U.P.E.,*** the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met.

[39] As noted previously, there is a lengthy history to this dispute, beginning with the special case heard before Justice Loo. It is clear that all the affected timeshare owners were aware of the proceedings (para 20 of ***Golberg Decision***), and that the intention was that all the rights, obligations and liabilities of the 14,500 timeshare owners were to be determined in a single case. It is also evident from the Superconference and the ***JEKE Decision*** that the JEKE action was intended to be that test case (***Golberg Decision*** at para 33-34; ***Reid Decision*** at para 68; ***JEKE Costs Decision*** at para 78).

[40] Finally, Mr. Hennan's submissions are a repetition of the arguments raised by the Defendants in the ***JEKE Decision*** on the interpretation of the VIAs. This is *res judicata.* That is, the question of how the VIAs should be interpreted, including whether the VIAs included an obligation to pay a portion of the capital costs incurred in renovating the Resort, has already been decided.

[41] I therefore dismiss the appeals.

**The Cross-Appeal**

[42] Northmont cross-appeals the ***Interest Decision***, in which Young PCJ held that the VIAs that pre-dated 2004 were subject to the *Interest Act*, RSC 1985, c I-15 (relevant sections of the *Interest Act* are set out in Appendix A), and that therefore the interest rate for those agreements were to be calculated at the statutory interest rate of 5% per year. There are two groups of Cross-Respondents, one group represented by Mosaico Law (Arthur and Helen Engels, Tammy and Alvin Kurash, Gary Budnyk, Truth Renaissance, and Derek and Diane Pyne) (the Mosaico Respondents), and the second by McLennan Ross (Janette Dodds, Margaret Pisesky, Roger and Maria Rivard, Edwina and Kenneth Oliver, and David and Heather Vickar) (the McLennan Respondents).

[43] The VIAs were acquired by Northmont through the operation of a Foreclosure Agreement and authorized by Romaine J in a Vesting Order under the CCAA. Much of Northmont's argument rests on the interpretation of the Vesting Order, which provides, in part, that the assets are transferred:

> ... free and clear of and from any and all estates, interests, licenses, rights, options, security interests (whether contractual, statutory or otherwise including security interests evidenced by registration pursuant to the *Personal Property Security Act* of the Province of Alberta or Province of British Columbia, or any other personal property registry system), security notices, hypothecs, mortgages, pledges, agreements, statements of claim, certificates of lis pendens, disputes, debts, trusts, deemed trusts (whether contractual, statutory or otherwise), liens whether contractual, statutory, or otherwise (including, without limitation, any statutory or builders' liens), taxes, 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, unliquidated or contingent (collectively "the Claims"), by or of all persons or entities of any kind

> whatsoever, including, without limitation, all individuals, firms, corporations, partnerships, joint ventures, trusts, unincorporated organizations, governmental and administrative bodies, agencies, authorities or tribunals and all other natural persons or corporations, whether acting in their capacity as principals or a [*sic*] agents, trustees, executors, administrators or other legal representatives and Her Majesty in right of Canada and Her Majesty in Right of the Province of Alberta and Her Majesty in right of the Province of British Columbia and agents of the Crown and regardless of 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 (the "Permitted Encumbrances") or any security that may be granted by Northwynd or a Northwynd Affiliated LP (the "Northwynd Created Security") in the Forclosed Assets or any of them.

**Standard of Review**

[44] The parties disagree on the standard of review applicable here. Mosaico Defendants argue that the standard of review on the interpretation of the *Interest Act* and the Vesting Order is correctness, while the standard of review of how the Vesting Order applies to the VIAs, requires deference. The McLennan Ross Defendants assert that the issue is the application of a legal standard to a set of facts, and that therefore the standard of review is palpable and overriding error. Northmont asserts that the standard of review is a question of interpreting the *Interest Act* and the Vesting Order, or alternatively asserts that the trial court has committed an extricable error in principle with respect to the characterization of a legal standard to a set of facts. Both of these attract a standard of correctness.

[45] I conclude that the issue on appeal is a pure question of law. However, I construe the question differently than Northmont. In my view, the issue is not how the *Interest Act* applies to the VIAs, but whether the CCAA authorizes a Court to exclude the operation of the *Interest Act* to the VIAs. As a question of law, therefore, the correctness standard applies. Even if the question is whether the Vesting Order should be interpreted as Northmont suggests, as ordering the assignment of the VIAs free and clear of the obligations under the *Interest Act*, the legal question remains whether the CCAA authorizes such an order – an extricable question of law.

**Judge's Young's Decision**

[46] Judge Young noted that the VIAs that predated 2004 require timeshare owners to pay interest on monies owed at a monthly rate and do not set out an equivalent annual interest rate (***Reid Decision*** at para 2). Section 4 of the *Interest Act* provides that no interest exceeding 5% per year can be charged when an agreement only sets out an interest rate per day, week, month, or period less than one year, and does not provide "an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent." Northmont argued that the Vesting Order under the CCAA proceedings ensured provided it received all the Fairmont assets "free and clear of any security, charge or other restriction." Judge Young concluded:

> (a) the Vesting Order did not include any interpretation of the interest provisions in the VIAs;

(b) the Defendants' reliance on the *Interest Act* is not an abuse of process, because although the issue was not raised in their Dispute Note, it was argued in the application for judgment;
(c) Northmont did not argue that the interest provisions in the VIAs comply with the *Interest Act;* and
(d) Northmont did not argue that the *Interest Act* is an obscure statute the Court should ignore.

[47] Judge Young held that the pre-2004 VIAs violated the Interest Act and rejected Northmont's argument that raising the Interest Act was an abuse of process. Neither of these findings are contested by Northmont on appeal.

**Submissions**

**Northmont's Submissions**

[48] Northmont argues that Young PCJ erred in three ways:

(a) Incorrectly interpreting the CCAA and the Vesting Order;
(b) Characterizing the Vesting Order contrary to its clear and unambiguous meaning; and
(c) Granting judgment in favour of the Defendants in the absence of an application by them.

[49] Northmont focuses on Young PCJ's statement that "the Vesting Order did not include any interpretation as to the provisions in the VIAs," saying that the Vesting Order was not required to interpret the provisions of the VIAs. Further, it argues that s. 36(6) of the CCAA gives the Court the power to grant a vesting order "free and clear of any security, charge, or **other restriction"** (emphasis added) and s. 11 grants the Court to the power to make any order it considers appropriate, including orders vesting assets free and clear of other parties' interests. It asserts that the Vesting Order here was clear and unambiguous, and that the Court is entitled to enforce and give effect to such an Order, without engaging in *ex-post facto* analysis that would effectively be a collateral attack on the court-supervised insolvency process. (Sections 11 and 36 of the CCAA are set out in Appendix A to these Reasons).

[50] Northmont asserts that if the counterparties to contracts assigned to purchasers under CCAA could lie in the weeds and assert rights years later, this would result in increased due diligence, costs, time, and therefore reduced acquisition values to the purchaser, the debtor and the CCAA creditors. Further, it argues that Fitzpatrick J in the ***JEKE Decision*** analyzed the Vesting Order (paras 147-179) and that ***Interest Decision*** ignored these findings. It insists that the VIAs were assigned to Northmont free and clear, and that this was essential to the survival and restructuring of the Resort. In particular, Northmont argues that the assignment of contracts under the CCAA should result in fair treatment to all stakeholders (citing ***Re Varis Gold Corp***, 2015 BCSC 1204 (at para 55)), and must balance assisting the reorganization process with fair treatment for counterparties (***Veris*** at para 58).

[51] Northmont goes on to assert that the counterparties here (the timeshare owners) were fairly treated by receiving notice of the assignment of the contracts, giving them an opportunity to consider their rights and object to the terms of the assignment in the Vesting Order. Here, Northmont notes, none of the timeshare owners objected to the terms of the Vesting Order, nor

did they appeal it. Northmont concludes that it would be absurd to suggest that a Vesting Order should speculate about issues that might arise in the absence of an application by a counterparty at the time the Vesting Order is granted.

[52] Northmont goes on to argue that Young PCJ limited her analysis to the application of the *Interest Act* to the pre-2004 VIAs and did not consider the pleadings, language of the Vesting Order, or the circumstances in which the Vesting Order was granted. Northmont suggests that the Defendants are engaging in an attack on the Vesting Order by raising a statutory defence, something that was not raised by the Defendants in the ***JEKE Decision.*** Quoting Branch J in the ***Golberg Decision*** (at para 66), Northmont argues "... a purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked."

[53] Finally, Northmont argues that Young PCJ rendered judgment in favour of the Cross-Respondents when there was no application for such judgment. Instead, Northmont suggests, its application for summary judgment should have been dismissed and that issue should have proceeded to trial.

**McLennan Ross Respondents**

[54] The McLennan Ross Respondents argue that Northmont is attempting to circumvent the provisions of the *Interest Act* by arguing that the assignment of the VIAs during the CCAA proceedings could place it in a better position *vis a vis* third party contractual counter-parties. While the McLennan Ross Respondents agree that the Vesting Order permitted Northmont to acquire the VIAs free and clear of **creditor** claims, there is nothing in the CCAA or the Vesting Order that grants it the right or expectation that it could charge an interest rate in contravention of the *Interest Act*.

[55] The McLennan Ross Respondents characterize the issues on appeal a little differently than Northmont, describing them as:

(a) Did the Trial Judge err in determining that the pre-2004 VIAs violated the *Interest Act?*
(b) Did the Trial Judge err in interpreting the Vesting Order and the CCAA?
(c) Did the Trial Judge err by rendering judgment in favour of the cross-respondents in the absence of an application by them for judgment?

[56] The McLennan Ross Respondents argue that while the CCAA protects against material breaches of agreements because of the insolvent nature of the debtor, it is not intended to protect against risks because of the application of statutory rights. The risks of the application of s. 4 of the *Interest Act* are entirely different from risks from insolvency. The CCAA is not intended to eliminate all contractual or legislative rights arising from the transfer of assets under the CCAA. The CCAA is aimed at protecting against jeopardizing the restructuring of an insolvent company. The Respondents had statutory rights under the *Interest Act* and extinguishing those rights would place Northmont in a better contractual position than the debtor corporation. In particular, the McLennan Ross Respondents quote Wachowich J in ***Horizon Village Corp., Canada (Re)*** (1991), 82 Alta LR (2d) 152, at para 10:

> The court will be reluctant to imply plan terms which will alter contractual relations. Certain terms will be implied, however, if the purposes of the C.C.A.A.

> and any plan made under the C.C.A.A. will be defeated without such implied terms.

[57] Further, the McLennan Ross Respondents argue that if the CCAA intended that its provisions would override other legislative provisions, it would have been simple to state precisely that, citing ***NsC Diesel Power Inc (Re)*** (1990), 258 APR 295; 79 CBR (ns) 1 at para 14.

[58] The McLennan Ross Respondents further distinguish s. 36(6) of the CCAA, relied on by Northmont, from s. 11.3 of the CCAA. Section 11.3 deals specifically with the assignment of agreements, while s. 36(6) deals with the sale or disposition of assets generally. In particular, the McLennan Ross Respondents note that under s. 36(6) the CCAA permits the Court to convey assets "free and clear of any security, charge or other restriction," but the same language does not exist in s. 11.3. In fact, s. 11.3 specifically requires the Court to consider whether the assignee would be able to perform the obligations under the agreement. In ***Nexient Learning Inc (Re)*** (2009), 62 CBR (5th) 248 Wilton-Siegel J noted (at para 59):

> The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

[59] The McLennan Ross Respondents argue that the factors in s. 11.3(3) define the parameters that the court must consider when deciding to assign an agreement, and these parameters focus on whether the assignee is able to fulfill its obligations under the agreement. Counterparties are thus entitled to notice to address whether the assignee is appropriate, not to respond to justifications for extinguishing contractual or statutory rights.

[60] The McLennan Ross Respondents argue that that there is nothing in the Vesting Order, express or implied, that provided that Northmont acquired the pre-2004 VIAs free of the statutory requirements of the *Interest Act*. The Vesting Order provided that the assets were assigned free and clear of any creditor claims that otherwise attached to those assets.

[61] Finally, the McLennan Ross Respondents reject Northmont's alternative argument that Young PCJ erred by granting judgment in favour of the cross-respondents when they had made so such application. The McLennan Ross Respondents note that they are the Defendants in the Action, and it was Northmont who sought summary judgment, including seeking interest in that judgment of 26.824%. Northmont successfully obtained judgment, but was unsuccessful in its claim to the interest rate under the agreements. The pre-2004 VIAs did not conform to the requirements of the *Interest Act*, and therefore Northmont was unsuccessful in its claim for the interest rate set out in the VIAs. That does not amount to giving judgment to the McLennan Ross Respondents; it merely demonstrates that Northmont did not prove its entitlement to that rate of interest.

**Mosaico Law**

[62] The Mosaico Respondents assert that s. 36(6) of the CCAA provides for the sale of a debtor's assets "free and clear" of any security, charge or other restriction, as lost as the creditor whose interest is being extinguished by such a transfer receives an interest in other assets or the proceeds. Thus, they conclude the section applies only to creditors, citing ***Barafield Realty Ltd. v***

***Just Energy (BC) Limited Partnership***, 2015 BCCA 421. In ***Barafield***, the Vesting Order contained a provision very similar to the Vesting Order here, and the Court of Appeal held that the assigned contract was transferred free and clear of any creditors' interests, but not counterparties. Therefore, the Mosaico Respondents argue, Young PCJ correctly concluded that the Vesting Order did not include any interpretation of the interest provisions in the VIAs and that the Vesting Order did not reference the Respondents rights under the *Interest Act*.

[63] Further, the Mosaico Respondents note that paras 14 and 15 of the Vesting Order dealt specifically with limiting the contractual rights of timeshare owners under the VIAs, limiting their rights to terminate upon assignment, insolvency and some other specific breaches of the VIAs. The Vesting Order did not, however, expressly deal with the rights under the *Interest Act*. The Mosaico Respondents argue that clear and express wording, like that in paragraphs 14 and 15 of the Vesting Order, would be necessary to extinguish their rights under the *Interest Act*.

[64] Northmont argues that the words "other restriction" in "free and clear of any security, charge or other restriction" includes defences under the *Interest Act* and presumably then under other legislation or the common law. This, the Mosaico Respondents argue, is inconsistent with the rest of s. 36(6) which states that the other assets of the company be subject to a security, charge or other restriction "in favour of the creditor whose security, charge or other restriction is to be affected by the order."

[65] Finally, the Mosaico Respondents argue that the statutory defence under the *Interest Act* did not need to be pleaded, that counsel raised the issue in written submissions, and that Young PCJ could have applied the *Interest Act* provisions even without such submissions. In any event, a court may grant a remedy "...whether or not it is claimed or sought in an action" under r 1.3(2).

**Analysis**

**Interpreting the CCAA and the *Interest Act***

[66] Interpreting statutory provisions requires that the words of the Act be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (***Ewert v Canada***, 2018 SCC 30 at para 29, citing ***Rizzo & Rizzo Shoes Ltd (Re),*** [1998] 1 SCR 27, at para. 21).

[67] The purpose of s. 4 of the *Interest Act* is to protect consumers who are purchasing on credit or borrowing money: ***VK Mason Construction Ltd v Bank of Nova Scotia***, [1985] 1 SCR 271 at p 287, where Wilson J noted:

> Section 4 is consumer protection law in the sense that, with respect to loans other than real estate mortgages, consumers are entitled to know the annual rate of interest they are paying.

[68] The purpose of the CCAA, has been described in ***Sun Indalex Finance, LLC v United Steelworkers***, [2013] 1 SCR 271 as follows (per Cromwell J at para 205):

> First, it is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in ***Century Services***, at para. 15:

> ... the purpose of the CCAA ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

[69] First, in my view, s. 36(6) of the CCAA can only be interpreted as applying to sales or disposition free and clear of **creditors' interests**. The clause refers to "security, charge or other restriction." Generally, one reads a list with specific items followed by a general expression, as limiting the general expression to the class of the specific items: ***Conseil scolaire francophone de la Colombie-Britannique v. British Columbia***, 2013 SCC 42 (at para 23); ***Consolidated Fastfrate Inc v Western Canada Council of Teamsters***, 2009 SCC 53 (at para 42). Thus, the list item "other restriction" should be interpreted as referring to restrictions in the nature of security interests or charges, and not as broadly expanded to include free and clear of any obligation imposed by statute for a purpose unrelated to the CCAA.

[70] Moreover, this interpretation is supported by the clear language of the second part of the provision:

> ... if it [the Court] does [authorize a sale or disposition], it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction **in favour of the creditor whose security, charge or other restriction is to be affected by the order**.
>
> (Emphasis added)

[71] Second, as noted by the McLennan Ross Respondents, Northmont's argument would effectively place Northmont in a better contractual position with the cross-respondents than they had been in with Fairmont. It is true that the CCAA may place successor entities in a better position than the insolvent corporation in terms of relationships with **creditors**, but there is nothing in the CCAA that suggests or requires that there be a similar change in the relationship between contracting parties. The purpose of the CCAA informs the interpretation of the legislation, and despite Northmont's assertion that the prospect of having to conform to the consumer protection provisions in the *Interest Act* was essential to the survival and restructuring of the Resort, there is nothing in the CCAA that suggests that courts can override statutory rights unrelated to the insolvency.

[72] Third, unlike s. 36 which deals with the assignment of assets generally, s.11.3 of the CCAA specifically deals with the assignment of agreements. Its language is much more limited. It requires the Court to consider a number of factors to determine whether the assignment of an agreement would be appropriate. That list of factors is not exhaustive, and includes such things as whether the monitor considers the assignment appropriate and whether the assignee can fulfill the obligations under the agreement.

[73] Further, s. 11.3 and the jurisprudence regarding counterparties' involvement with the assignment of agreements is directed towards the appropriateness of the assignee and its ability to meet the obligations under the agreement, not towards justifying extinguishing contractual or statutory rights. As noted in ***Nexient,*** any jurisdiction to interfere with contractual rights must be exercised sparingly and in a manner that meets the purpose and spirit of the CCAA (at para 59). That purpose is to further the "continuity of the business of the debtor to the extent feasible" (***Nexient*** at para 61). In ***Nexient,*** the issue was whether the assignee was required to acquire all of a debtor's contracts with a third party, where there was an interconnection among the

contracts, either express or implied. The Court held that it would be inappropriate if the result would be unfair to the counterparty.

[74] I conclude that the CCAA does not, either expressly or impliedly, authorize a Court to assign an agreement free of statutory limitations that are of general application and whose application is unrelated to the CCAA purpose of either continuing the debtor's business or transferring it to some other person who can carry it on.

[75] Based on this conclusion, it is unnecessary to examine whether the Vesting Order purported to assign the VIAs free and clear of the requirements of the *Interest Act*. However, in the interests of completeness, I will do so.

**Interpreting the Vesting Order**

[76] The Vesting Order lists in great detail the interests that are excluded from the assignment of the assets, stating that the assets are transferred free and clear of:

(a) estates,
(b) interests,
(c) licenses,
(d) rights,
(e) options,
(f) security interests (whether contractual, statutory or otherwise including security interests evidenced by registration pursuant to the Personal Property Security Act of the Province of Alberta or Province of British Columbia, or any other personal property registry system),
(g) security notices,
(h) hypothecs,
(i) mortgages,
(j) pledges,
(k) agreements,
(l) statements of claim,
(m) certificates of lis pendens,
(n) disputes,
(o) debts,
(p) trusts,
(q) deemed trusts (whether contractual, statutory or otherwise),
(r) liens whether contractual, statutory, or otherwise (including, without limitation, any statutory or builders' liens),
(s) taxes, and
(t) other rights, limitations, restrictions, interests and encumbrances...

[77] The first five items in the list - estates, interests, licenses, rights, and options – are proprietary interests in the assets. The next five - security interests, security notices, hypothecs, mortgages, and pledges are all interests held by creditors to secure a debt. The next four - agreements, statements of claim, certificates of *lis pendens*, disputes – are causes of action or potential causes of action. Debts are a subset of creditors' interests. Trusts, deemed trusts, liens and taxes are interests imposed on the asset arising from either common law or statute. The final basket clause must be interpreted within the context of the lengthy specific list.

[78] Section 4 of the *Interest Act* does not impose an interest or claim or cause of action upon an asset. It describes how an agreement charging interest must describe that interest in the agreement – it must set out the annual interest rate. It then prescribes the consequence of failing to do so – the only interest that can be charged is 5% annually. This does not fall within the language of the Vesting Order.

[79] While the Vesting Order does specify that the assignment is free of certain statutory interests, those statutory interests are security interests, deemed trusts, and liens. The substitution of a statutory interest rate for breach of the VIAs does not come within this description.

[80] I conclude that Young PCJ did not err when she concluded that the Vesting Order did not restrict the consequences of the *Interest Act*.

**Judgment in the Absence of an Application**

[81] The Cross-Respondents are correct on this issue. Northmont applied for summary judgment, seeking interest under the terms of the VIAs. The VIAs were in breach of the *Interest Act*. The Cross-Respondents raised the Act in opposition to Northmont's application for interest at the contract rate. The Cross-Respondents did not obtain judgment; Northmont did. It just did not obtain the judgment amount it argued it was entitled to under the VIAs. Young PCJ applied the existing statutory provisions and agreed with the Cross-Respondents' submissions as to the application of the *Interest Act*.

[82] As noted by the Cross-Respondents, the application of the *Interest Act* was raised in written submissions before Young PCJ, and Young PCJ could have applied the Interest Act provisions even without such submissions. Further, under r 1.3(2), a court may grant a remedy "...whether or not it is claimed or sought in an action."

**Post-judgment interest**

[83] The Mosaico Respondents argued that Young PCJ had granted post-judgment interest. Post-judgment interest does not accrue until after the Judgment Rolls are filed.

**Conclusion**

[84] The appeal and cross-appeal are both dismissed. If necessary, the parties may speak to costs within 90 days of this decision.

Heard on the 10th day of October, 2018.
**Dated** at the City of Edmonton, Alberta this 12th day of December, 2018.

**J.J. Gill**
**J.C.Q.B.A.**

**Appearances:**

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## Appendix A

### Companies' Creditors Arrangement Act, RSC 1985, c C-36

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

...

**Factors to be considered**

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

**Restriction**

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

### Assets may be disposed of free and clear

36 (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

### Interest Act, RSC, 1985, c. I-15

4 Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express

statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

**Judgment Interest Act, RSA 2000, c J-1**

6(1) In this section, "judgment debt" means a sum of money or any costs, charges or expenses made payable by or under a judgment in a civil proceeding.

(2) Notwithstanding that the entry of judgment may have been suspended by a proceeding in an action, including an appeal, a judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied, at the rate or rates prescribed under section 4(3) for each year during which any part of the judgment debt remains unpaid.