This is the 4th affidavit
of D. Matthews
in this case and was made on
July 2, 2025

NO. S-243389
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE RECEIVERSHIP OF
ECOASIS DEVELOPMENTS LLP AND OTHERS

BETWEEN:

SANOVEST HOLDINGS LTD.

PETITIONER

AND:

ECOASIS DEVELOPMENTS LLP, ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD., ECOASIS RESORT AND GOLF LLP, 0884185 B.C. LTD., 0884188 B.C. LTD., 0884190 B.C. LTD., 0884194 B.C. LTD., BM 81/82 LANDS LTD., BM 83 LANDS LTD., BM 84 LANDS LTD., BM CAPELLA LANDS LTD., BM HIGHLANDS GOLF COURSE LTD., BM HIGHLANDS LANDS LTD., BM MOUNTAIN GOLF COURSE LTD. and BEAR MOUNTAIN ADVENTURES LTD.

RESPONDENTS

AFFIDAVIT

I, Daniel Matthews, businessman, care of 2900 – 733 Seymour Street, Vancouver, BC V6B 0S6 AFFIRM THAT:

1. I am the president and a director of 599315 B.C. Ltd. ("**599**"), which is an equal partner to the petitioner, Sanovest Holdings Ltd. ("**Sanovest**"), in the respondents, Ecoasis Developments LLP ("**Developments Partnership**") and Ecoasis Resort and Golf LLP

(the "**Resort Partnership**" or "**Resorts**" and, together with Developments Partnership, the "**Partnerships**"). I am also a director, the President and Chief Executive Officer of the respondent, Ecoasis Bear Mountain Developments Ltd. ("**EBMD**"), which is the managing partner of the Partnerships, and a director of the other respondent companies. In the foregoing capacities, I have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be based upon information and belief, and where so stated I verily believe the same to be true.

2. I make this affidavit in response to the application to amend the receivership order brought by Sanovest. In this affidavit, I make references to my earlier affidavits filed in this proceeding. Unless otherwise defined, capitalized terms herein are as defined in the application response.

3. I have reviewed the Receiver's Reports, the affidavit #3 of Tian Kusumoto filed June 16, 2025 ("**Kusumoto #3**"), and Tian Kusumoto's confidential affidavit made June 23, 2025 (the "**Confidential Affidavit**"). In this affidavit, I respond to the Confidential Affidavit and parts of Kusumoto #3 that concern the amendment of the receivership order only. Unless I state otherwise, where I have not specifically responded to any statements or paragraphs in those affidavits, that is not meant to be admission or agreement with those statements or paragraphs. I will respond to parts of Kusumoto #3 that concern the Sanovest Loan in a separate affidavit, to the extent that may be necessary.

RESORTS BUSINESS AND OPERATIONS

4. I have served as the President and CEO of EBMD since 2013. My acting as President and CEO of EBMD formed part of the understanding between Tom Kusumoto and I as we pursued the acquisition opportunity and was then later implemented by formal agreement.

5. Serving in this role on the ground has helped me develop a deep understanding and appreciation of the Bear Mountain community and its evolution and growth over the past decade. I provided details of my work as President and CEO in my affidavit #1 at paragraphs 14 to 20. Since the commencement of these receivership proceedings by Sanovest, I have continued to operate and manage the Resort Partnership's business.

6. I described the Resort Partnership's assets and operations in my affidavit #1 at paragraphs 8 to 12.

7. In response to paragraph 43(d) of Kusumoto #3, Tian Kusumoto's characterization of the Pro Shop, the golf club storage and food outlets as recreational amenities is inaccurate. They are simply operational outlets to facilitate the recreational amenities of golf, tennis and the BMAC recreational facility.

8. In response to paragraph 44 of Kusumoto #3, Tian Kusumoto's assertion that Resorts' business has experienced significant financial challenges "at all times" is incorrect. Resorts' management and staff have addressed the operational and financial issues identified by the Receiver. Any persisting challenges are due to Sanovest/Tian Kusumoto's:

   a) continued refusal to advance funds to Resorts; in combination with its

   b) more recent but ongoing objection to Resorts receiving financing from any other source (a topic I will return to below).

9. In response to paragraph 45 of Kusumoto #3, the Resort Partnership did not lose access to the Hotel. As detailed in my affidavit #1 at paragraph 22, the Resort Partnership's decision not to renegotiate or renew the Hotel lease was informed by a long history of issues, including ongoing and past deficiencies and serious findings of liability against the Hotel in the Hotel Arbitration. I discussed the issues with the Hotel lease and the decision to not renew the lease in my affidavit #1 at paragraphs 21 to 37. I also set out the details of the plan for transitioning into the new premises at the BMAC in my affidavit #1 at paragraphs 38 and 42.

10. The transition plan has been established for over 18 months, and phase 1 of the plan was completed upon vacating the Hotel. Tian Kusumoto has refused to fund any of the costs associated with the transition from the Hotel to the BMAC. As noted by the Receiver in its First Report at paragraph 8.92, I personally paid for the most significant cost of phase 1 of the plan of approximately $35,000 for golf cart charging stations.

11. One of the Receiver's recommendations is that the Resort Partnership further advance the transition plan, which would entail renovations and other updates at a total cost of approximately $360,000. That is approximately one-year's rent under the Hotel lease that Resorts saved by moving from the Hotel to BMAC. Tian Kusumoto has refused to authorize the Resort Partnership to fund those costs using internal funds and has refused to allow the Receiver to fund an advance to carry out the second stage of the transition plan.

12. In response to paragraph 47 of Kusumoto #3, over the past nine months, the Resort Partnership's management and staff have worked diligently and tirelessly to provide the Receiver with operational and financial information as requested and to implement the Receiver's recommendations, as evidenced by the detailed progress updates from Resorts to the Receiver appended to the Receiver's Reports. Indeed, I note that it appears Kusumoto #3 relies exclusively on the Receiver's Fourth Report and pays no heed to the Supplement to the Fourth Report. The latter confirms all of the Receiver's requests have been fulfilled save a couple that continue to be the subject of ongoing work.

13. To address the financial challenges identified by the Receiver, Mr. Kevin Isomura, partner at DMCL, was engaged by the Resort Partnership to oversee all financial and tax matters relating to the Resort Partnership, including responding to the Receiver's requests in respect of the Resort Partnership's finances. Several of Mr. Isomura's memos to me are also appended to the Receiver's Reports. See specifically, the Receiver's Third Report, section 5.0 and Appendix A, the Fourth Report, section 6 and Appendix C, and the Supplement to the Fourth Report, section 2.2 and Appendix A.

14. With respect to the controller position, it was initially filled on February 3, 2025 with permanent employment conditional on the candidate successfully completing the three-month probationary period with a focus on demonstrating abilities to carry out duties of the role and suitability for the position. The candidate did not meet expectations during the probationary period hence the employment was terminated on April 28, 2025. The job posting for this position has been reposted. In the interim, DMCL will continue in

coordination with Resorts management and staff to complete all necessary accounting tasks, including keeping statutory filings current.

15. The food and beverage manager position was reposted and applicants are being interviewed. In the interim, duties of this role have been delegated to internal resources. BMAC has also hired additional cooking staff to meet peak season requirements.

16. In further response to paragraph 47 and in response to paragraph 48 of Kusumoto #3, with respect to the final financial statements for 2020 to 2024, as set out in DMCL's memos to me and Resort Partnership's responses to the Receiver, DMCL, with the assistance of Resorts management and staff, is continuously working on and making significant progress in the preparation and completion of the financial statements and other financial deliverables. The volume of the work to satisfy the Receiver's requests has been significant, which has been exacerbated by simultaneously having to manage the ongoing Hotel Arbitration. I note that the Receiver acknowledged the inherent difficulty involved in juggling these competing demands at paragraph 8.6 of its First Report. As CFO, Tian Kusumoto did not take any steps to support the Resort Partnership despite knowing of the shortage of staff at that time and that Resorts' management would otherwise be engaged in the Hotel Arbitration hearing from late September through October 2024.

17. Furthermore, completion of the historical financial statements is dependent on the resolution of issues that are the subject of ongoing litigation between the parties. They are not an unsolved deliverable due to inaction or delay by the Resort Partnership. As set out in my affidavit #1 at paragraph 55, with respect to financial statements from and after 2018, Tian Kusumoto well knows that these have remained incomplete or unfiled due to several factors, including the breach of the operations agreement by the Hotel to provide accounting services to the Resort Partnership (as determined by the arbitrator and which led to a finding of liability and damage award against the Hotel in the Hotel Arbitration). Tian Kusumoto is also aware that the 2019 and 2020 financial statements are now completed but have not been filed due to disagreement regarding the characterization of certain matters that are the subject of underlying litigation between the partners. I am

prepared to sign the 2019 and 2020 financial statement prepared in a manner that reflects the decisions made by the directors in those years (i.e., Tom Kusumoto and myself). However, Tian Kusumoto refuses to accept this. And while the information required for the 2021 to 2023 financial statements has been compiled, these too cannot be finalized given the disagreement as to past transactions. The information underlying the draft financial statements is, and has always been, available to Tian Kusumoto.

18. As well, the Receiver acknowledged in its First Report at paragraph 8.56(h) that financial statements for 2019 to 2021 have been prepared (not requested by the Receiver) to varying levels but certain information is incomplete and/or there are certain litigation matters that require conclusion prior to financial statements being finalized. Mr. Isomura also confirmed in a memo dated December 6, 2024 (attached as Appendix C to the Receiver's Third Report) that draft financial statements have previously been compiled for the fiscal years ending December 31, 2020 and 2021, but are awaiting approval by the partners pending the resolution of certain litigation matters that require conclusion prior to financial statements being finalized.

19. With respect to the integrated FY26 cash flow that the Receiver noted as still outstanding, it is in the process of being prepared by DMCL. Mr. Isomura has advised that he is prioritizing tasks that the Receiver has requested.

20. While not required, Resorts has been providing additional, unrequested financial information to the Receiver, including a Resorts' proforma budget through to 2037.

21. In response to paragraph 49 of Kusumoto #3, the FY 2025 integrated cashflow forecast was prepared by DMCL in coordination with Resorts management after months of intensive work that required analysis and reconciliation of substantial financial information. The forecast anticipated the Receiver making an advance to the Resort Partnership as contemplated by the terms of the consent receivership order agreed to by the parties. I did not expect that after fulfilling the extensive financial deliverables requested by the Receiver to support an advance, or after securing a viable alternative lender to fund an advance, that Sanovest would ultimately oppose all attempts by the Receiver to advance a loan to the Resort Partnership. The alternative lender that I

obtained a term sheet from is open to negotiation and remains willing to honour the terms of the proposed interim financing or as those terms may otherwise be agreed.

22. I do not believe there is any dispute that the Partnerships' assets have sufficient value to retire the secured and unsecured debts in full. I understand the Receiver's consultant, Placemark, has provided a base value for an en block sale that significantly exceeds the value of all secured and unsecured debts. I have commissioned a current appraisal from a certified appraiser that values the assets at a materially higher value. Further, the stalking horse bid from 599 presented to the Receiver, if accepted and approved, would also result in repayment of all secured and unsecured debt in full. As such, Tian Kusumoto's complaint that funding would be used to pay unsecured debt seems disingenuous, particularly in combination with a stated willingness to fund those costs but only if I am removed (i.e., it is evident that Tian Kusumoto does not have a principled concern about unsecured creditors receiving a "preference" – which, of course, is a necessary aspect of continuing Resorts' operations and maintaining its going concern value).

23. In response to paragraph 50 of Kusumoto #3, Mr. Isomura has advised that the Resort Partnership is not insolvent. He has further advised that Resorts' assets significantly exceed its liabilities (by orders of magnitude – I am intentionally being opaque to as to not inadvertently impair any future sales process). He also confirmed that DMCL is managing all financial and reporting obligations of Resorts, all statutory filings are current, and payment arrangements have been established for certain statutory obligations and payments being initiated. Resorts' finances are stable, with the exception of outstanding accounts payable, which are being reduced with excess cash flow. It is true that we are experiencing liquidity challenges for the reasons discussed above and below, however, we have successfully managed those challenges for a number of years now (since Tian Kusumoto took his father's place as the controlling mind of Sanovest). We are managing our liabilities as they come due and, furthermore, Resorts' value greatly exceeds its liabilities. I also note that the Resort Partnership is currently in the height of its operating season, a period historically characterized by strong revenue generation and positive cash flow. Resorts recently concluded its best month in May 2025 since 2019 for the largest revenue category of green fees and power carts.

24. In response to paragraph 51 of Kusumoto #3, in accordance with the Receiver's recommendation, the Resort Partnership, in coordination with DMCL, has brought all statutory filings up to date. Tian Kusumoto has long been aware of the outstanding statutory obligations of the Resort Partnership. Resorts' management has attempted to procure funding to satisfy these obligations through an advance as permitted under the terms of the receivership order; however, Tian Kusumoto/Sanovest have refused to advance funds to Resorts, objected to any advance of funds by the Receiver to Resorts and objected to Resorts securing interim financing from any other source. DMCL, in coordination with Resorts' management, has arranged payment plans on certain statutory obligations and Resort Partnership has complied with its payment obligations in that regard. Outstanding statutory obligations will, of course, also be paid through the eventual sales process.

25. In response to paragraph 52 of Kusumoto #3, Tian Kusumoto's claim that Resorts' business cannot be sustained in in the absence of immediate and significant funding is not true. Although not ideal, and we would prefer to have the ability to secure funding like any other business, Resorts has managed the liquidity challenges for a number of years (including through the most recent slow season). In fact, we are currently in the midst of the busy season with increased revenues.

26. Staffing needs have been addressed to fully meet operational and budgetary parameters. Notably, the golf head pro and agronomy superintendent positions were recently filled with extremely qualified personnel from within the organization and with collectively 45 years of experience in the golf industry. The pro shop, members facilities, and food and beverage services have been operated from the BMAC without interruption since the transition from the Hotel on July 1, 2024. Lease arrangements with the BMAC are now in place at $3,500 per month, which will save Resorts over $300,000 in rent per year compared to the lease with the Hotel. The transition to the BMAC constitutes an upgrade for our non-member golf and tennis guests given the enhanced visibility and premises of BMAC, which are in the heart of the Bear Mountain community and closer to guest parking and services. As set out below, Sanovest and Tian Kusumoto have continued to oppose any advance to fund the second phase of the transition plan and have also refused

to permit third party financing, despite the Receiver's recommendation that the transition plan be advanced. In any event, the continued operation of the Resorts business from the BMAC facilities is not at risk, as suggested by Tian Kusumoto or at all, as the facility is owned by a related entity of which Tian Kusumoto and I are directors.

27. In response to paragraph 53 of Kusumoto #3, Tian Kusumoto's statement that the equipment remains unpurchased due to financial constraints related to outstanding lease payments is incorrect. Given the uncertainty of future ownership, the leasing company was not prepared to enter into a leasing agreement for the purchase of new equipment. The agronomy department is equipped with another utility vehicle and sprayer on site that can ensure quality of courses and landscaping is maintained while the second sprayer is repaired. I note that Tian Kusumoto has characterized the equipment as crucial and essential while simultaneously refusing to advance funds or to allow me to secure funding from another source.

28. In response to paragraphs 54 of Kusumoto #3, as set out in more detail below, this is contrary to the receivership order that was granted by consent and statements made by counsel during the hearing in September 2024.

29. In response to paragraph 55 of Kusumoto #3, and specifically in response to Tian Kusumoto's allegation of lack of transparency in Resorts' finances, Tian Kusumoto has complete access to all financial information of Resorts' business. He is the second signatory on all Resorts' bank accounts. All banking transactions including withdrawals, wire transfers, pre-authorized payments, and cheques require dual authorization and signatures from both Tian Kusumoto and me. All transactions are inputted in the general ledger, and Tian Kusumoto maintains real time access to the general ledger from his digital device. He regularly interacts with DMCL on all accounting matters. As requested by Tian Kusumoto, Resorts' accounting staff also provides, in advance, detailed backup to him for all payment transactions, including the Resorts' credit card. Other allegations made by Tian Kusumoto in this paragraph are addressed elsewhere herein.

30. In response to paragraph 56 of Kusumoto #3, as explained by Rob Larocque, general manager for the Resort Partnership, in his affidavit #1 filed in the Oppression Action, it is

common within the industry and for Resorts to offer rate discounts throughout the year in order to bolster revenues when required. As with the practice of offering discounts to members that pre-pay their annual dues, this is also consistent with previous years and is a critical budgeting strategy to provide cashflow to the Resorts business during the slower months. Given the uncertainty generated by these receivership proceedings, pre-pay revenue in January 2025 (even with the additional pre-pay option for 2026) was much less than in 2024. While this impacted Resorts' cashflow in early 2025, the overall dues revenue for 2025 will be higher given fewer members opted for the discount.

31. In response to paragraphs 57 and 58 of Kusumoto #3, Tian Kusumoto's assertion that the Resorts business has deteriorated under my management is false. Despite the challenges created by the Developments Partnership's receivership, which have led to loss of membership sales and revenue, the largest area of the golf business, which contributes to over 60% of the revenue, has continued to increase. As shown in the chart below, the green fee and cart revenue year over year for the period from January 1 to May 31 has steadily increased with a large bump in revenues in May.

	YEAR to DATE			April			May		
	2025	2024	2023	2025	2024	2023	2025	2024	2023
Total Rounds-Member/Paid	**13,076**	**13,792**	**12,997**	**4,223**	**4,027**	**3,569**	**5,073**	**4,649**	**4,641**
REVENUE-Golf									
Mountain Green Fee & Cart Revenue	407,879	396,837	312,120	121,744	93,259	92,397	216,621	183,829	150,804
Valley Green Fee & Cart Revenue	468,242	465,081	404,283	165,559	152,610	132,029	243,599	204,961	189,025
Total Round Revenue	**876,121**	**861,918**	**716,403**	**287,303**	**245,869**	**224,426**	**460,220**	**388,790**	**339,829**

32. As well, destination travel revenue year to date for the period from January 1 to May 31 was up over 53%. Resorts also made progress in significantly reducing the payables despite confusion and disruption caused by the Developments Partnership's receivership.

33. While the Resorts business does have liquidity challenges, there are significant receivables that could be utilized to repay an advance from the Receiver or another source. Mr. Isomura, together with Resorts management, addressed on several occasions various ways to repay an advance. See Appendix A of the supplement to the Fourth Report (Ecoasis Resort Progress Update), section 2 and Appendix A of the Fourth Report (DMCL memo dated Feb 19), section "C" As well, I have proposed alternative financing

by an interim lender with a term sheet that the lender will still honour. If the market was canvassed, other interim lenders would similarly be willing to advance funds to Resorts.

34. In response to paragraphs 59 and 60 and Kusumoto #3, I agree that Resorts will properly form part of the sales process, but a receivership is not necessary in order for it to be included (at the very least, not at this time). I note that I am a prospective purchaser of the assets and have submitted a stalking horse bid to that end. If I am the ultimate purchaser, a receivership of Resorts will have impaired its operations, harmed its reputation, strained its relationships with customers and suppliers, etc. – along with an additional layer of significant costs in the form of professional fees – for no corresponding benefit whatsoever. To the extent it becomes necessary for the Receiver to be appointed over Resorts for the purposes of a sale, I humbly suggest that could occur at a later point in time (for example, when the sale to the purchaser is approved). I also have no objection to giving assurances or the Court making orders as may be necessary to give prospective purchasers whatever comfort they may need in that regard.

35. In response to paragraph 58 and 61 of Kusumoto #3, Tian Kusumoto's statement that putting Resorts in receivership will help rebuild relationships with stakeholders is counterfactual and grossly unfounded. Firstly, there is no need to "rebuild" those relationships, which are strong. Secondly, and conversely, the appointment of a receiver and associated stays of hundreds of vendor/supplier accounts would be extremely damaging to Resorts' reputation, credibility and future relationship with the suppliers. Many vendors and suppliers have, in good faith and based on an established and trusted relationship that has been developed over the last 12 years with Resorts' staff and management, created payment plans on outstanding accounts and/or otherwise agreed to hold off on requiring payment until the conclusion of the sales process. A considerably less intrusive measure would be to direct the Receiver to exercise its court-ordered authority to fund an advance to the Resort Partnership.

SANOVEST'S OBJECTION TO THE RESORT ADVANCE

36. Leading up to the receivership order of September 18, 2024, the Partnerships had significant outstanding payables due to the following:

a) the Partnerships' lender, Sanovest, refusing to advance any funds while also objecting to the Partnership's securing funds from another source; and

b) Sanovest/Tian Kusumoto simultaneously obstructing the Development Partnership's other means of generating revenue, i.e., through sales of real estate in accordance with the business plan that was agreed to in 2013 when Bear Mountain was acquired.

37. The natural consequence of the foregoing was that Resorts, as the only revenue generating entity, had to support the Developments Partnership, and managing both Partnerships' finances became more challenging. This was extensively detailed in the original receivership applications and affidavits and formed one of the reasons that Sanovest argued in support of a full receivership over Resorts.

38. After a few days of hearing of competing applications brought by myself/599 and Sanovest, the parties agreed to the consent receivership order made September 18, 2024. The key items 599 negotiated in exchange for agreeing to a receivership over all of the Partnerships' lands were as follows:

a) Exclusion of the oppression litigation, consisting of four separate actions between the parties and the Hotel Arbitration from receivership (paragraphs 2(a) and 13 of the receivership order);

b) Exclusion of Resorts' business and operations from the receivership (paragraph 2(b) of the receivership order); and

c) Authority of the Receiver to advance monies to Resorts to fund its business and operations and a court-ordered charge to secure repayment of those advances (paragraph 32 of the receivership order).

39. It was no secret at that time that Resorts desired financing from the Receiver, or an alternative source, to resolve or alleviate its liquidity challenges. The topic was discussed by counsel throughout the hearings and specifically as they were formulating the consent order. The following exchange between Sanovest's counsel and the court is illustrative:

> CNSL K. Jackson: ... So the receiver may negotiate an advance of funds with Resorts. So I assume that's a negotiation, really, between the receivers and Mr. Matthews -- receiver and Mr. Matthews.
>
> ...
>
> THE COURT: Because your point is the receiver may decide the business is quite viable but needs financial assistance, and in its view, it should –
>
> CNSL K. JACKSON: Well, that's right. So, you know, within the $2.5 million, some part of that may need to be advanced to Resorts, and if so – you know, the way it will happen, to my mind, is resorts is going to have to come -- I'm using Resorts. Mr. Matthews will have to come to the receiver and say, look, we need some money to go through some purpose, and the receiver will decide, A, am I satisfied this is -- is it a prudent loan; right? And that's the question. If it is, it has good security for it if it can get repaid. That's part of the question too. Is it satisfied with the security? But this is all within the discretion of the receiver as, you know, frankly, the person managing the estate, which our client is content to put that in the hands of the receiver.
>
> THE COURT: all right. And if Mr. Matthews wanted to go out and try to arrange his own financing, at least for the Resorts, he could. There's nothing that stops him.
>
> CNSL K. JACKSON: For Resorts.

40. Attached as **Exhibit "A"** is a copy of the excerpt from the transcript of the hearing on September 17, 2024 during which this exchange occurred. The court ultimately approved the inclusion of paragraph 32 of receivership order.

41. In the Receiver's First Report at paragraph 9.3, the Receiver wrote: "Funding is required in the near term for the Resorts Business with a recent funding request of approximately $1.26 million submitted to the Receiver (the Resorts Loan), and the unfunded Transition Plan of approximately $367,000. As part of the Resorts Plan, EBMD should provide its plan to fund its liquidity needs. If a path to fund the Resorts Business from the Receiver's borrowings is set after consultation with Sanovest, the Receiver would need to ensure that appropriate monitoring and reporting protocols are established to ensure the stability of the Resorts Business."

42. Shortly after the issuance of this Report, Sanovest began to put up roadblocks to any advance to Resorts, as evidenced in the emails and letters between counsel of November 22 and 27 and December 18, 2024. Attached as **Exhibit "B** is a copy of a November 22,

2024 letter from Sanovest's counsel to my counsel. Attached as **Exhibit "C"** is a copy of a November 27, 2024 letter from my counsel to Sanovest's counsel. Attached as **Exhibit "D"** is a copy of a December 18, 2024 email from Sanovest's counsel in response to the November 27, 2024 letter.

43. I was not particularly worried at the outset given that the receivership order empowered the Receiver to advance funds to Resorts. We focused on satisfying the Receiver's requests and implementing its recommendations.

44. By January 2025, Tian Kusumoto, as CFO and director, continued to block payment of costs by the Resort Partnership for the Hotel Arbitration and the Receiver had yet to respond to our funding request. In mid-March 2025, I reached out to the Receiver to request an update on the advance. Attached as **Exhibit "E"** is an email exchange between counsel on March 25 and 27, 2024.

45. Shortly thereafter, on April 14, 2025, the Receiver delivered the Fourth Report recommending receivership over Resorts. This came as a complete shock given the positive conversations and significant advancement on the recommendations of the Receiver. On my reading of the Report, the Receiver does not seem to say that it could run the business better in the current circumstances. At section 9.3 of the Fourth Report, the Receiver writes that "Absent significant additional capital to advance the Transition Plan and other potential improvements to the operations, the Receiver does not view that management of the Resorts Business by the Receiver would significantly improve operations." and if Resorts were added to the receivership, "the Receiver's goal would be to maintain stable operations". I respectfully suggest that current management can do so without the harm and very significant costs associated with a receivership.

46. On my reading, the key reason identified by the Receiver for the inclusion of Resorts in the receivership was the lack of funding to satisfy outstanding payables and to fund the Hotel Litigation. Of course, the reason for the lack of funding was Sanovest's refusal to fund in combination with its opposition to 599 or any other party advancing funds to Resorts. In that regard, I refer to sections 7.7(c), 8.2 and 9.2 of the Fourth Report.

47. On May 9, 2025, I met with the Receiver to the discuss the changed circumstance of the Resort Partnership since the issuance of the Fourth Report. The damages award in the Hotel Arbitration had been rendered on April 15, 2025, with Hotel ordered to pay the Resort Partnership $2.058 million by April 29, 2025, which sum would be enough to satisfy Resorts' outstanding payables and statutory obligations of GST/PST.

48. Also, since, to my knowledge, the Receiver had not canvassed the market for an alternative lender to Sanovest, I reached out to a third-party lender that the Receiver had worked with in the past. In relatively short order I obtained a term sheet on terms I felt were largely consistent with Sanovest's terms. I provided this term sheet to the Receiver on May 22, 2025. I emphasized our concern in connection with Sanovest remaining the interim lender, particularly since its funding was stated to be conditioned on the Receiver not lending any money to Resorts (outside of a receivership).

49. On June 5, 2025, the Receiver issued the Supplement to the Fourth Report. In the Supplement the Receiver noted its meeting with the third-party lender. The Receiver further noted the requirement for an interest reserve and higher overall cost relative to the Sanovest facility (as a result of the cost of a required appraisal and a $50,000 upfront fee).

50. I note that the cost of an appraisal and the relatively modest upfront fee contemplated in the third-party lender's term sheet pale in comparison to the costs that would be associated with the appointment of the Receiver over Resorts. In any event, after receiving the Supplement to the Fourth Report, I called a representative of the third-party lender whom I worked with on the term sheet to ask whether there was any flexibility on terms. They affirmed they were open to negotiation, but they had not received any further communication from the Receiver.

51. I greatly respect the Receiver and appreciate this must be a relatively difficult appointment to navigate. I will add that we have enjoyed what I consider to be an excellent working relationship with the Receiver. However, based on the foregoing and the commentary in the Receiver's Fourth Report and its Supplement, it is difficult to reach a conclusion other than that Sanovest has been given an effective veto with respect

to any potential financing for Resorts. Suffice to say, I am disappointed Sanovest failed to leave the funding decision between the Receiver and myself, or to the sole discretion of the Receiver, as I understood to have formed part of the *quid pro quo* when we agreed to the consent receivership order.

HOTEL ARBITRATION

Current Status

52. On April 15, 2025, the arbitrator issued a second partial award with respect to damages (the "**Damages Award**"). After setting off money found owing, the arbitrator ordered the Hotel to pay the Resort Partnership $2,058,017.63 by April 29, 2025 and post-award interest at prime plus 1%, compounded and adjusted semi-annually. Hotel has not paid the award.

53. On May 13, 2025, Hotel filed an application seeking a stay of execution and leave to appeal the Damages Award in BCCA File No. CA50676 and filed a petition in BCSC File No. S-253638 seeking to set aside the Damages Award on the basis of bias.

54. In response to paragraph 63 of Kusumoto #3, on May 30, 2025, the Hotel's application for a stay and leave to appeal was heard, and on June 4, 2025, the Court of Appeal dismissed the application in its entirety.

55. In further response to paragraph 63 of Kusumoto #3, on June 23, 2025, the Resort Partnership filed a petition in BCSC File No. S-254741 seeking to enforce the Hotel Damages Award (the "**Award Enforcement Petition**"). Attached as **Exhibit "F"** is a copy of the Award Enforcement Petition. Attached as **Exhibit "G"** is a copy of the affidavit #1 of Jennifer Dunn filed in support of that petition. The arbitral awards are attached as Exhibits A and I of Ms. Dunn's affidavit.

56. The Award Enforcement Petition summarizes the history of the court proceedings brought by the Hotel in connection with the Hotel Arbitration. Resorts now seeks enforcement of the Hotel Damages Award notwithstanding the Hotel's third attempt at attacking the arbitrator's award based on allegations of bias.

57. In response to paragraph 64 of Kusumoto #3, Tian Kusumoto's understanding of Resorts' counsel's position with respect to outstanding legal fees is dated (more than six months ago). I note that Tian Kusumoto did nothing to assist the situation at the time – and, indeed, specifically wanted the court-ordered stay to apply to the Hotel Arbitration. I have now personally funded considerably more than the amount identified in the Receiver's Reports. It was through our determined efforts, notwithstanding Tian Kusumoto's obstreperousness, that an excellent result was ultimately achieved for Resorts.

58. Resorts' counsel in the Hotel Arbitration has continued to act. As noted, we were successful in opposing the Hotel's application for leave to appeal the Damages Award. Further, Resorts has now filed its submissions for an award of costs of the Hotel Arbitration.

59. With respect to the email exhibited to Tian Kusumoto's Confidential Affidavit, I did not intend to purport to bind Resorts, without Tian Kusumoto's knowledge and approval, to that arrangement in my discussions with counsel (and that is not my understanding of what happened). That having been said, I have struggled to understand Tian Kusumoto's ostensible concern. Firstly, as noted, I have personally funded a significant portion of Resorts' legal fees in connection with the Hotel Arbitration. Secondly, the need for some form of arrangement resulted entirely from his and Sanovest's refusal to advance any funds to Resorts and objection to our securing any other source of funds – which positions have harmed Resorts' operations generally and its ability to fund the successful Hotel Arbitration specifically. Thirdly, Resorts is not in receivership and this form of reasonable arrangement, it seems to me, falls squarely within my authority as President and CEO and would not require approval of the board. Lastly, with respect to the "collateral [I was] purporting to negotiate with", doing so is an inherent aspect of operating Resorts on a day-to-day business – and, again, there is no prospect that Sanovest will not be repaid, in full.

Tian Kusumoto's Refusal to Allow Funding for the Hotel Arbitration

60. I have long suspected that Tian Kusumoto was working with Messrs. Clarke and Malak. As an example, attached as **Exhibit "H"** is a copy of a July 16, 2021 email chain in which Tian Kusumoto and Mr. Clarke discussed matters concerning Partnerships business without my involvement. One of the allegations against Tian Kusumoto in the oppression claim is that he has been working with the hotel operators since 2021 (and possibly earlier) to negatively impact the outcome of the Hotel Arbitration and/or arbitral award granted to Resorts.

61. When the Hotel Arbitration began to move forward in 2023 to the damages portion, Tian Kusumoto made additional efforts to obstruct the proceedings by refusing to allow Resorts to pay the outstanding legal bills of its counsel and at the same time refusing to allow Resorts to fund legal fees and expenses for the damages portion of the Hotel Arbitration. He also represented to Resorts' counsel that counsel may never get paid.

62. As noted above, Hotel sought leave to appeal the Hotel Damages Award and petitioned to have the award set aside for bias. It was simply necessary for Resorts to respond in those court proceedings. Further, Resorts was required to make costs submissions to the arbitrator by an ordered deadline. Resorts' counsel had requested retainers for the leave application and for preparing costs submissions. I asked Tian Kusumoto to authorize Resorts to pay the retainers. He again refused to authorize payment unless I agreed not to oppose the appointment of the Receiver over Resorts.

63. Over the last 18 months, to ensure the Hotel Arbitration continued without disruption, that an award on damages would be rendered by the arbitrator, and that Resorts would not lose this asset, I personally advanced considerable sums (more than was reported by the Receiver) on behalf of Resorts to pay the arbitrator, Resorts' counsel, and expert fees.

64. The exclusion of the Hotel Arbitration from the receivership order was a negotiated term and of paramount importance to me and 599 in consenting to the receivership order. This was due to my legitimate concern that Tian Kusumoto was working with the hotel operator to disrupt and derail the arbitration proceeding. Furthermore, and in any event, I

note section 7.7(c) of the Receiver's Fourth Report and query the result if the receivership is expanded over Resorts.

65. In response to paragraph 62 of Kusumoto #3, Tian Kusumoto's claim that the Hotel Arbitration continues to place strain on Resorts' limited time and resources is false. Resorts, of course, has not been able to pay its legal fees due to having been starved for cash by Sanovest. Rather, I personally advanced a substantial amount of funds to ensure that the Hotel Arbitration could be prosecuted to its successful conclusion. I have also not been paid for my work as CEO since January 2023. Ms. Stannard—who played a crucial role in supporting Resorts and its counsel in the Hotel Arbitration over the past five years, among other work she has undertaken for Developments Partnership and Resorts—has also not been compensated for her efforts.

IMPACT OF RECEIVERSHIP OVER THE RESORT PARTNERSHIP

Receivership Costs

66. Resorts management has asked for a budget from the Receiver of the costs of the expansion of the receivership over the Resorts business. To date, we have not received one. However, I expect the costs to be quite significant.

67. As set out in Resorts' May 2025 progress update (Appendix A of the supplement to the Fourth Report), the Developments Partnership's business has only three employees and was not carrying on any active development business or land sales at the time the Receiver was appointed. The professional and legal counsel fees of the Receiver, as reported in Appendix A of the Fourth Report, were estimated to be approximately $964,000 for the period from September 18, 2024 to June 27, 2025.

68. Resorts' operations are complex and time intensive. There needs to be oversight and management of agronomy/horticulture, golf operations, tennis operations, golf and tennis membership, GMEA membership, destination event/stay and play business, resort marketing and membership sales, and F&B business. Managing the community of over 3,000 residents also demands substantial time and resources. The business employs

approximately 130 people, with many seasonal hires requiring significant oversight as we head into the busy season.

69. The costs of a receivership would be further increased given the necessary engagement and communication with community members, current golf and tennis members, and vendors/suppliers. I do not consider incurring these costs, particularly over an undefined timeline, and coupled with interest accruing at approximately $14,700 per day according to Sanovest, to be in the best interests of the Resort Partnership or its stakeholders at this stage, particularly given our ongoing operations and the availability of third-party funding.

Impact on Revenue

70. The Resort Partnership's business is currently in its busy season (from May to September), which generates over 75% of green fee/power cart/sales revenue for the year and that is critical to its continued sustainability The appointment of the Receiver would necessarily disrupt operations and pull resources away from the business during this critical period. In my experience, insolvency proceedings are not viewed favourably by the public, and so I expect the appointment would negatively impact our destination/stay and play tour business (accounts for $450,000 in revenue in the coming months) as well as our bookings for the 2026 season.

Human Capital Impact

71. The Resorts' team has performed admirably throughout this unsettled period. There is no doubt that expanding the receivership to include Resorts would significantly impact morale and risk more deleterious consequences.

Increased Delay and Mounting Debt

72. The ongoing accrual of interest under the Sanovest Loan (estimated by Sanovest at over $14,700 per day) and other financial obligations continue to accrue. The sale process has yet to be finalized, notwithstanding the parties' initial expectation it would be approved last year. The Receiver taking possession of and overseeing the Resorts' business would

require additional resources and, I fear, potentially further delay the ultimate resolution of this matter and thus result in further unnecessary erosion of our equity position.

Erosion of Confidence and Operations Impairment

73. A receivership would severely damage trust with critical suppliers, potentially disrupting the supply chain and impairing the broader operational systems that support Resorts. Consequently, this would lead to increased costs, reduced quality, and a loss of essential partnerships with vendors, suppliers, and industry networks. Some of these partnerships are unique and longstanding, the loss of which would severely hamper the future owner of Bear Mountain.

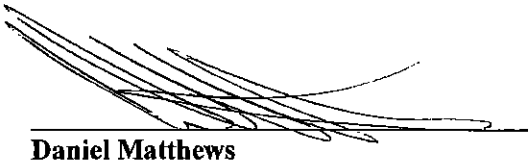
Impact on Going Concern Value and the Community

74. Drawing from prior receivership experience at Bear Mountain in 2008 to 2010, I expect there to be considerable negative repercussions for the local community of Langford and the broader region resulting from a receivership of the Resorts business, including negative media attention and long-term societal and financial implications. The appointment of the Receiver over Resorts would also unnecessarily indicate to the market that this is a "distressed sale" and should be valued accordingly.

75. Particularly in light of the acknowledgement by Placemark and the Receiver of the importance of Resorts to the overall value of the Bear Mountain project, it would seem contrary to the objective of obtaining the best value for the stakeholders to appoint a Receiver over Resorts as opposed to simply ensure it receives a reasonable level of funding (with whatever controls are considered appropriate). I certainly do not see a countervailing benefit that justifies the certain costs, operational harm and negative impact on Resorts' going concern value that an appointment would have.

76. I acknowledge the solemnity of making this affidavit and acknowledge the consequences of making an untrue statement.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 2nd day of July 2025.



Daniel Matthews

A ~~Commissioner~~ for taking Affidavits for British Columbia

The deponent was not physically present before me, but was in my electronic presence utilizing video technology. The process described by the Law Society of British Columbia for remote commissioning of affidavits or solemn declarations was utilized.

LILY Y. ZHANG
Barrister & Solicitor
P.O. Box 1
2900-733 SEYMOUR STREET
VANCOUVER, B.C. V6B 0S6
(604) 691-7571

This is Exhibit "A" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for taking Affidavits within British Columbia

No. S234048
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE MR. JUSTICE WALKER)

Vancouver, BC
September 17, 2024

BETWEEN:

599315 B.C. Ltd. and Daniel Matthews

Petitioners

AND:

Ecoasis Bear Mountain Developments Ltd., Ecoasis Developments LLP, and Ecoasis Resort and Golf LLP, Tian Kusumoto, and Sanovest Holdings Ltd.

Respondents

*****

No. S243389
Vancouver Registry

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE RECEIVERSHIP OF ECOASIS DEVELOPMENTS LLP AND OTHERS

BETWEEN:

Sanovest Holdings Ltd.

Petitioners

AND:

Ecoasis Developments LLP, Ecoasis Bear Mountain Developments Ltd., Ecoasis Resort and Golf LLP, 0884185 B.C. Ltd., 0884188 B.C. Ltd., 0884190 B.C. Ltd., 0884194 B.C. Ltd., BM 81/82 Lands Ltd., BM 83 Lands Ltd., BM 84 Lands Ltd., BM Capella Lands Ltd., BM Highlands Golf Course Ltd., BM Highlands Lands Ltd., BM Mountain Golf Course Ltd. and Bear Mountain Adventures Ltd.

Respondents

PROCEEDINGS IN CHAMBERS

COPY

APPEARANCES

Counsel for Sanovest Holdings:	A.I. Nathanson, KC K. Jackson L. Hiebert
Counsel for 599315 B.C. Ltd.:	G. Brandt W.L. Roberts C. Ohama-Darcus
Counsel for Alvarez & Marsal:	P. Rubin

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SEPTEMBER 17, 2024

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EXHIBITS

Exhibit	Description	Page
	No exhibits marked.	

RULINGS, REASONS, ORDERS

Description	Page

CNSL K. JACKSON: Sorry, receiver's charge.
THE COURT: Right.
CNSL K. JACKSON: I told you this last time. There's a small mortgage for HSBC. We've been very clear to carve that out. They are on notice, and we don't intend to prime them anyways.
THE COURT: Right.
CNSL K. JACKSON: Same thing for the receiver's borrowings charge at paragraph 27.

Paragraph 31 -- oh, yeah, right. So we had proposed $2 million as the receiver's -- 2.5 as the receiver's borrowings limit.

THE COURT: I saw that. Right.
CNSL K. JACKSON: In their draft, 599 has come back with 5 million, which --
THE COURT: Interesting.
CNSL W. ROBERTS: Sorry, that wasn't a substantive point. If it's 2 and a half, it's 2 and a half.
CNSL K. JACKSON: Okay.
THE COURT: That makes sense.
CNSL K. JACKSON: No, I was curious. Okay. Okay. We'll leave it at 2 and a half, then.
THE COURT: Yeah.
CNSL K. JACKSON: Paragraph 31.
THE COURT: Right.
CNSL K. JACKSON: Now, this was that part we had some discussion about, because the resort's business and management is not going to be in the receivership.
THE COURT: Right.
CNSL K. JACKSON: As I said, it would be unusual for the receiver to loan funds from an estate to a non-receivership entity. But I can get my head around it by consent and with a court order that protects everyone.

And so this is the unusual part here about this. So:

> The receiver is authorized and empowered, but not required, to advance funds to EBMD and Resorts, and the receiver is hereby granted a charge over all the assets and undertakings of EBMD and Resorts as security for repayment of any such advances with interest and charges.

So the receiver may negotiate an advance of funds

with Resorts. So I assume that's a negotiation, really, between the receivers and Mr. Matthews -- receiver and Mr. Matthews.

THE COURT: And if there is a loan, it has priority.

CNSL K. JACKSON: Pardon me, Justice?

THE COURT: If there is a loan, then it ranks in priority.

CNSL K. JACKSON: It ranks in priority to all the other interests of anyone else over the -- over the assets of Resorts and EBMD.

THE COURT: Because your point is the receiver may decide the business is quite viable but needs financial assistance, and in its view, it should --

CNSL K. JACKSON: Well, that's right. So, you know, within the $2.5 million, some part of that may need to be advanced to Resorts, and if so -- you know, the way it will happen, to my mind, is resorts is going to have to come -- I'm using Resorts. Mr. Matthews will have to come to the receiver and say, look, we need some money to go through some purpose, and the receiver will decide, A, am I satisfied this is -- is it a prudent loan; right? And that's the question. If it is, it has good security for it if it can get repaid. That's part of the question too. Is it satisfied with the security? But this is all within the discretion of the receiver as, you know, frankly, the person managing the estate, which our client is content to put that in the hands of the receiver.

THE COURT: All right. And if Mr. Matthews wanted to go out and try to arrange his own financing, at least for the Resorts, he could. There's nothing that stops him.

CNSL K. JACKSON: For Resorts.

THE COURT: Or for the business. For the business.

CNSL K. JACKSON: Well, I don't see -- I mean, it's a good question. Whatever authority he has to borrow money for Resorts now would continue.

THE COURT: Right.

CNSL K. JACKSON: They just couldn't charge the lands.

THE COURT: Right.

CNSL K. JACKSON: Right. So whatever that authority is, it wouldn't be affected.

THE COURT: Because he's not -- in other words, he's not confined to only borrowing money from the

receiver.
CNSL K. JACKSON: I think that's right. Yeah. Correct. I think that's right.
THE COURT: Okay.
CNSL K. JACKSON: I mean, the intention is, presently, hands off the resort's business.
THE COURT: Right. Okay.
CNSL K. JACKSON: So Justice, you know, I'm trying to think. I don't think anything else requires discussion. As I say, I think we addressed the issues that had come up, the agreement that was put to the court.

As I say, I looked at my friend's draft in the amount of time that I did have. It was a substantial redraft, which was mostly stylistic, and the issues that were substantive, we boiled down, discussed, and I put them to you, and I think we've got agreement, largely, other than the issue of costs.

In the interests of time, Justice, I think it may behoove us to hear from Mr. Roberts --
THE COURT: I agree.
CNSL K. JACKSON: -- about the terms of the order, and then --
THE COURT: We can deal with costs later.
CNSL K. JACKSON: -- get the costs at the end, or maybe we have to adjourn that, but I do want -- I want an order today, most importantly, that we've all agreed on. That's the most important thing.
THE COURT: Yes.
CNSL K. JACKSON: Thank you, Justice.
CNSL W. ROBERTS: Thank you, Justice.
THE COURT: Mr. Roberts.

SUBMISSIONS RE DRAFT ORDER BY CNSL W. ROBERTS:

CNSL W. ROBERTS: So I'll say for the record that I agree with Mr. Jackson on a number of things, and some of which I don't.

But on the big structural issues, we're *ad idem*.
THE COURT: Okay.
CNSL W. ROBERTS: Where we differ is style and form. We say this matters. Style and form of this order, how it says what it's supposed to say and when it says what it's supposed to say matter. This is going to be read -- I don't -- the people

This is Exhibit "**B**" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for taking Affidavits within British Columbia

FASKEN

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November 22, 2024
File No.: 329480.00001/14082

Daniel Byma
Direct +1 604 631 4777
dbyma@fasken.com

By Email

Lawson Lundell LLP
Barristers and Solicitors
Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver, BC V6C 3L2

Attention: Craig A.B. Ferris, K.C. and Gordon Brandt

Dear Sirs:

Re: Sanovest Holdings Ltd. v. Ecoasis Bear Mountain Developments Ltd. et al, SCBC Vancouver Registry Action No. S243389

We write in respect of the First Report of the Receiver (the **"First Report"**) and rely on the definitions therein unless stated otherwise.

At paragraph 8.72, the Receiver notes that Resorts Management requested that the Receiver fund certain "Critical" amounts in Resorts' accounts payable summary found at paragraph 8.68.

Sanovest is concerned that EBMD made this request without apparent consideration to the proper authorizations required to enter into a loan agreement on behalf of either Developments or Resorts. Article 8.1 of EBMD's Articles of Incorporation requires the directors to authorize any borrowing. This requires directors' resolutions and a quorum of both EBMD's directors (see Article 18.10). We also refer you to EBMD's directors' resolution, dated August 1, 2022, which specifically authorizes borrowing only with the consent of both Dan Matthews and Tian Kusumoto (the **"Borrowing Resolution"**).

We are instructed that Sanovest and Tian have not been consulted by Mr. Matthews with respect to the loan request and no authorizations to borrow funds on behalf of Resorts have been sought or obtained. In our view, this is emblematic of the concerns raised by the Receiver in the First Report with respect to inadequate corporate governance and financial oversight.

FASKEN

While Sanovest is not opposed to EBMD obtaining funding from the Receiver for certain of Resorts' operational requirements, Sanovest expects to participate in any discussions and negotiations as it relates to the scope and terms of such loans and for proper procedure to be followed with respect to authorization for any such borrowing, including pursuant to Articles 8.1 and 18.10 and the Borrowing Resolution.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

DocuSigned by:
Daniel Byma
4002D61771FA421...
Daniel Byma
Personal Law Corporation

DB/

cc: Peter Rubin, counsel for Todd Martin and Anthony Tillman, Alvarez & Marsal

This is Exhibit "**C**" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for taking Affidavits within British Columbia

LAWSON LUNDELL LLP

Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver, BC
Canada V6C 3L2
T: 604.685.3456

November 27, 2024

Gordon Brandt
D: 604.631.9167
F: 604.669.1620
gbrandt@lawsonlundell.com

VIA EMAIL

Fasken Martineau DuMoulin LLP
2900 – 550 Burrard Street
Vancouver, B.C. V6C 0A3

Attention: Daniel Byma

Dear Counsel:

Sanovest Holdings Ltd. v. Ecoasis Bear Mountain Developments Ltd. et al, SCBC Vancouver Registry Action No. S243389

We write in response to your letter dated November 22, 2024, criticizing steps taken by Mr. Matthews to seek funding for Ecoasis Resort and Golf LLP (the "**Resort Partnership**").

Your letter references Article 18.10 of EBMD's Articles – which states a quorum requirement generally for the transaction of directors' business – and the directors' August 1, 2022 "Borrowing Resolution", which authorizes any of two of the President and Secretary/Chief Financial Officer to borrow money on behalf of EBMD, as managing partner of the Resort Partnership.

In the present circumstances, Matthews requested and the parties consented to an order providing as follows:

> The Receiver is authorized and empowered, but not required, to advance funds to EBMD and Resorts, and the Receiver is hereby granted a charge over all of the assets, undertakings and properties of EBMD and Resorts (the "Resorts Funding Charge") as security for the repayment of any such advances, together with any interest and charges thereon. The Resorts Funding Charge shall rank in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the mortgage registered against certain of the Ecoasis 329480.00001/306265763.12 -11 - Entities' real property in favour of HSBC Trust Company (Canada) under Charge No. CA3393750. For greater clarity, such advances shall be within the borrowing limits set by paragraph 28.

It is a necessary corollary of the parties' consent to the order granting lending authority to the Receiver that EBMD also consented to such borrowing. Indeed, this is precisely what Mr.

Jackson explained to the Court in the course of the presenting the receivership order as a consent order. With respect to the above-noted paragraph, Mr. Jackson made the following submissions:

> CNSL K. Jackson: ... So the receiver may negotiate an advance of funds with Resorts. So I assume that's a negotiation, really, between the receivers and Mr. Matthews -- receiver and Mr. Matthews.
> ...
>
> THE COURT: Because your point is the receiver may decide the business is quite viable but needs financial assistance, and in its view, it should --
>
> CNSL K. JACKSON: Well, that's right. So, you know, within the $2.5 million, some part of that may need to be advanced to Resorts, and if so – you know, the way it will happen, to my mind, is resorts is going to have to come -- I'm using Resorts. Mr. Matthews will have to come to the receiver and say, look, we need some money to go through some purpose, and the receiver will decide, A, am I satisfied this is -- is it a prudent loan; right? And that's the question. If it is, it has good security for it if it can get repaid. That's part of the question too. Is it satisfied with the security? But this is all within the discretion of the receiver as, you know, frankly, the person managing the estate, which our client is content to put that in the hands of the receiver.

Since that time, Matthews has been proceeding to seek funding for the Resort Partnership through the Receiver, authorized by the consent order and on the strength of the parties' common understanding as explained by Mr. Jackson in Court. There was no objection from Sanovest at any time prior to your November 22, 2024 letter, despite the Receiver's First Report having been circulated one month earlier on October 25, 2024.

Furthermore, we understand that Mr. Kusumoto has consulted extensively with the Receiver on all matters related to the Receivership, and has had more than adequate opportunity to inquire or provide input into the extent of funding that should be provided to the Resort Partnership as loan funds through the Receiver. We are not aware of any concerns or objections that Mr. Kusumoto has expressed through that process.

Your letter asserts that the steps Mr. Matthews has taken to seek funding for the Resort Partnership are "emblematic" of management issues for which Mr. Matthews is responsible. As the above demonstrates, that is not the case. Rather, it is Sanovest's conduct in raising this late-stage objection to the Receiver funding the Resort Partnership that is emblematic of the obstructionist approach that Sanovest has taken to the parties' business, jeopardizing the value of the underlying assets.

It is through Mr. Matthews' efforts that the Resort Partnership has avoided receivership and the destruction of value that would be associated with such a step. In this regard, the Receiver's First Report foreshadows as follows at Exhibit "G":

> Should the Resort business fall under receivership the revenues laid out for 2025 will be drastically reduced in the following area:

- The projected membership sales in both golf and tennis will be dramatically reduced and possibly nonexistent.
- Monthly dues will be reduced because of lost new sales.
- Uncertainty could lead to current active memberships invoking their one-time opportunity to place a membership on a Leave of Absence (see Rules & Regs) reducing the monthly dues realized for the year.
- Green Fee/Power carts could see a reduction in both the local Islander golf rounds as well as the lucrative destination golf rounds as news of receiver being in place disseminates through the golf community across the country.
- Reduced rounds will also affect ancillary revenues within food and beverage and pro shop sales. Fewer rounds played equate to less spending in these areas.

Mr. Matthews continues to work as the Resort Partnership's President and CEO to avoid just such an outcome. Nonetheless, Sanovest and Mr. Kusumoto have continued to disallow his management fees for this work. By contrast, Mr. Kusumoto has not taken any steps, in his role as CFO, to support the ongoing management of the Resort Partnership, despite the shortage of staff in the current funding environment.

In the circumstances, it is not open to Sanovest to raise belated objections to the steps Mr. Matthews is taking, in difficult circumstances, to preserve the value of the enterprise for both 599315 B.C. Ltd. and Sanovest, particularly where this matter has already been addressed via a consent order and counsel's representations, with Sanovest agreeing to place the extent of borrowing in the Receiver's hands, in discussion with Matthews.

We understand that the Receiver is continuing to consider the Resort Partnership's funding request (which is for the $1.25M in critical expenditures noted in the attached summary and supporting documents, which are also included as appendices in the First Report), which are to be updated and supported by further documentation to be provided in the coming weeks. Should Mr. Kusumoto wish to discuss the funding request at this stage, we are instructed that Mr. Matthews is prepared to meet with him at his convenience.

Yours very truly,

LAWSON LUNDELL LLP

Gordon Brandt

Encl.

cc. Mr. Peter Rubin of Blakes Cassels, and Graydon LLP, Counsel to the Receiver

This is Exhibit "**D**" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for taking Affidavits within British Columbia

Lily Y. Zhang

From: Daniel Byma <dbyma@fasken.com>
Sent: December 18, 2024 10:07 AM
To: Gordon Brandt (3167) - 14Flr <gbrandt@lawsonlundell.com>
Subject: FW: [EXT] RE: Sanovest Holdings Ltd. v. Ecoasis Bear Mountain Developments Ltd. et al, SCBC Vancouver Registry Action No. S243389

[THIS MESSAGE ORIGINATED FROM OUTSIDE OUR FIRM]

Gordon,

I just wanted to reach out and advise that we do not agree with your position in this letter and will be responding with a more complete answer over the coming days.

Best,

Dan

Daniel Byma*
Partner
T +1 604 631 4777 | **dbyma@fasken.com**
Fasken Martineau DuMoulin LLP

*Law Corporation

From: Riza Celiz <rceliz@lawsonlundell.com>
Sent: November-27-24 11:28 AM
To: Daniel Byma <dbyma@fasken.com>; Andrew I. Nathanson <anathanson@fasken.com>
Cc: 'Rubin, Peter' <peter.rubin@blakes.com>; cferris <cferris@lawsonlundell.com>; Gordon Brandt (3167) - 14Flr <gbrandt@lawsonlundell.com>; Caitlin Ohama-Darcus <cohamadarcus@lawsonlundell.com>; Kimm Otto <kotto@lawsonlundell.com>
Subject: [EXT] RE: Sanovest Holdings Ltd. v. Ecoasis Bear Mountain Developments Ltd. et al, SCBC Vancouver Registry Action No. S243389

{CAUTION: This email originated from outside of Fasken. Exercise care before clicking links or opening attachments.}

Good morning,

Further to my email below, please find attached a corrected version of the letter from Mr. Brandt with enclosures.

The letter is being corrected to copy Mr. Rubin to the correspondence.

Warm regards,

RIZA CELIZ | Legal Assistant
D 604.631.3647 | F 604.669.1620 | E rceliz@lawsonlundell.com
LAWSON LUNDELL LLP 1600 - 925 West Georgia Street, Vancouver, BC V6C 3L2
Vancouver | Calgary | Yellowknife | Kelowna

From: Riza Celiz (3647) - 14Flr
Sent: Wednesday, November 27, 2024 10:32 AM
To: 'Daniel Byma' <dbyma@fasken.com>
Cc: Gordon Brandt (3167) - 14Flr <gbrandt@lawsonlundell.com>; Caitlin Ohama-Darcus (3263) - 14Flr <cohamadarcus@lawsonlundell.com>; Kimm Otto (3364) - 14Flr <kotto@lawsonlundell.com>
Subject: Sanovest Holdings Ltd. v. Ecoasis Bear Mountain Developments Ltd. et al, SCBC Vancouver Registry Action No. S243389

Good morning,

Please see attached letter and enclosures of today's date, sent on behalf of Mr. Gordon Brandt.

Warm regards,

RIZA CELIZ | Legal Assistant
D 604.631.3647 | F 604.669.1620 | E rceliz@lawsonlundell.com
LAWSON LUNDELL LLP 1600 - 925 West Georgia Street, Vancouver, BC V6C 3L2
Vancouver | Calgary | Yellowknife | Kelowna

2024
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This is Exhibit "**E**" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for taking Affidavits within British Columbia

Lily Y. Zhang

From: Rubin, Peter <peter.rubin@blakes.com>
Sent: March 27, 2025 4:15 PM
To: Gordon Brandt (3167) - 14Flr <gbrandt@lawsonlundell.com>
Cc: William Roberts (3163) - 14Flr <wroberts@lawsonlundell.com>; Bychawski, Peter <peter.bychawski@blakes.com>
Subject: RE: Ecoasis Resort and Golf LLP ("Resort Partnership") - Funding Request

[THIS MESSAGE ORIGINATED FROM OUTSIDE OUR FIRM]

Gordon,

Thank you for your email below. We have had an opportunity to speak with the Receiver. It would appear that Mr. Matthews has misunderstood the position of the Receiver on this matter. The Receiver did encourage Mr. Matthews to speak to his counsel which we presume is what prompted your email.

Sanovest has advised the Receiver that it: (i) is not prepared to advance funds to the Receiver if those funds will be loaned to Resorts while Resorts is under Mr. Matthews' control; and (ii) expects to oppose any funding advance by the Receiver to Resorts in the current circumstances. The Receiver would prefer to avoid a dispute with a 50% shareholder and the largest secured creditor as such disputes are disruptive and can be expensive. That being said, the fact that Sanovest is opposed is not, in our view, determinative of whether the Receiver can borrow funds and whether the Receiver can advance funds to Resorts under the Receivership Order. Paragraph 32 of the Receivership Order permits the Receiver to exercise its discretion in this regard.

In our view, the issues include whether the Receiver is: (i) able to source borrowings on appropriate terms and in accordance with the Receivership Order; and (ii) of the view that lending money to Resorts is appropriate in the circumstances (and in what amount and on what terms). I understand that on Tuesday Mr. Matthews provided income statement forecasts to the Receiver for review and consideration. The Receiver will review that additional information. With respect to the first point, can you please advise whether Mr. Matthews or 599 is prepared to loan funds to the Receiver and if so on what terms and conditions.

Peter

Peter Rubin*
Partner
peter.rubin@blakes.com
T. +1-604-631-3315
* denotes law corporation

Blake, Cassels & Graydon LLP
3500 - 1133 Melville Street, Vancouver, BC V6E 4E5 (Map)
blakes.com LinkedIn

Blakes Means Business

From: Gordon Brandt <gbrandt@lawsonlundell.com>
Sent: Tuesday, March 25, 2025 5:33 PM
To: Rubin, Peter <peter.rubin@blakes.com>
Cc: William Roberts <wroberts@lawsonlundell.com>
Subject: Ecoasis Resort and Golf LLP ("Resort Partnership") - Funding Request

Peter,

I write with respect to the Resort Partnership's requests for funding from the Receiver (a "**Resorts Loan**"), which requests were first made in October 2024. More recently, the Resorts Loan requests are addressed in my January 2, 2025 email enclosing Mr. Matthews' letter titled "Receiver Funding of Hotel Arbitration Legal Costs", and in the Resort Partnership's February 19, 2025 Progress Report on Resort Business, addressing the broader $1.35M Resorts Loan request and providing options for repayment.

I am advised by Mr. Matthews that in discussions with the Receiver, he has been told that the Receiver considers that it is not authorized to advance any Resorts Loan to the Resort Partnership as the Receiver recently brought an intended Resorts Loan to Sanovest (through its counsel) but Sanovest opposed any such funding. Mr. Matthews has been advised that the Receiver requires Sanovest authorization in order to proceed.

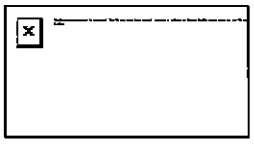
If that is indeed the Receiver's position, we note that this is inconsistent with both the Receivership Order and the representations that Mr. Jackson made in Court as to the Receiver's right to, in its judgment, approve Resorts Loan funding. I refer in this regard to our letter dated November 27, 2024 and its enclosures, which I attach for ease of reference. I also note that there is nothing in the Receivership Order that requires the Receiver to source receivership funding through Sanovest.

In light of the above, I would appreciate if you could please clarify the Receiver's views on this matter.

Regards,

Gordon

GORDON BRANDT | Partner
D 604.631.9167 | **F** 604.669.1620 | **E** gbrandt@lawsonlundell.com
LAWSON LUNDELL LLP 1600 - 925 West Georgia Street, Vancouver, BC V6C 3L2
Vancouver | Calgary | Yellowknife | Kelowna



Disclaimer

This is Exhibit "**F**" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for Taking Affidavits within ~~British Columbia~~

No. S-2547 4 1
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ECOASIS RESORT AND GOLF LLP

PETITIONER

AND:

BEAR MOUNTAIN RESORT & SPA LTD.,
BM MANAGEMENT HOLDINGS LTD. and
BM RESORT ASSETS LTD.

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

Bear Mountain Resort & Spa Ltd.
1200 – 925 West Georgia Street
Vancouver BC V6C 3L2

BM Management Holdings Ltd.
1200 – 925 West Georgia Street
Vancouver BC V6C 3L2

BM Resort Assets Ltd.
1000 – 595 Burrard Street
Vancouver BC V76 1S8

The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1

The petitioner estimates that the hearing of the petition will take two hours.

☐ This matter is an application for judicial review.

☒ This matter is not an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below by the Petitioner named in the style of proceedings above.

If you intend to respond to this proceeding, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response to petition has been set by order of the court, within that time.

The ADDRESS FOR SERVICE of the petitioner is:	c/o DLA Piper (Canada) LLP Barristers & Solicitors Suite 2700 1133 Melville Street Vancouver, BC V6E 4E5 Attn: Roger D. Lee and Struan T. Robertson
Fax number address for service:	n/a
E-mail address for service:	By email to both Roger.Lee@ca.dlapiper.com and Struan.Robertson@ca.dlapiper.com

The name and office address of petitioner's lawyer is:

Roger D. Lee and Struan T. Robertson
DLA Piper (Canada) LLP
Barristers & Solicitors
Suite 2700 1133 Melville Street
Vancouver, BC V6E 4E5

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. The arbitration award of Murray L. Smith K.C. dated 15 April 2025 be recognized and enforced;

2. Judgment be entered in favour of Ecoasis Resort and Golf LLP against Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd. and BM Resort Assets Ltd., jointly and severally, as follows:

   (a) Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd. and BM Resort Assets Ltd. must pay Ecoasis Resort and Golf LLP $2,058,017.63 by 29 April 2025; and

   (b) Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd. and BM Resort Assets Ltd. must pay Ecoasis Resort and Golf LLP post-award interest at the Bank of Montreal's prime rate plus 1%, compounded and adjusted semi-annually, from 29 April 2025.

3. Leave is granted to Ecoasis Resort and Golf LLP to enforce the arbitration award against Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd. and BM Resort Assets Ltd. in the same manner as an order of this court.

Part 2: FACTUAL BASIS

A. Overview

1. This is a petition brought by Ecoasis Resort and Golf LLP ("**Ecoasis**") to recognize and enforce the arbitral award issued by Murray L. Smith K.C. (the "**Arbitrator**") dated 15 April 2025 (the "**Damages Award**") pursuant to s. 61 of *Arbitration Act*, SBC 2020, c 2 (the "***Act***").

2. The arbitration was split into two phases, one for determining liability and one for determining the quantum of damages. In total, there were 22 days of arbitration hearing time (seven for the liability phase and 15 for the damages phase), extensive written and oral submissions were submitted, thousands of pages of documents and witness statements were tendered, and many procedural applications.

3. Ecoasis was successful at both the liability and damages phase of the hearing. The Court of Appeal dismissed the Respondents' leave applications of both phases of the hearing.

4. Ecoasis now seeks to enforce its award of $2,058,017.63, plus interest, against the Respondents.

B. Parties

5. The petitioner Ecoasis is a limited liability partnership that has its registered and records office at 2700 – 1133 Melville Street in Vancouver, British Columbia.

6. The respondents Bear Mountain Resort & Spa Ltd. ("**Bear Mountain**") and BM Management Holdings Ltd. ("**BM Management**") are British Columbia companies with registered and records offices at 1200 – 925 West Georgia Street in Vancouver, British Columbia. The respondent BM Resort Assets Ltd. ("**BM Resort**") is also a British Columbia company, with a registered and records office at 1000 – 595 Burrard Street in Vancouver, British Columbia. (Together, Bear Mountain, BM Management and BM Resort, the "**Respondents**".)

7. Prior to 11 July 2019, Ecoasis owned the Westin Bear Mountain Resort & Spa near Victoria, British Columbia, which included the Westin Hotel (the "**Hotel**") and two world class 18-hole golf courses (the "**Golf Courses**").

8. On 11 July 2019:

   (a) BM Management and Bear Mountain purchased the Hotel from Ecoasis;

   (b) Ecoasis entered into a commercial lease with BM Resort and BM Management (the "**Lease**") to lease back portions of the Hotel for its operation of a Pro Shop, a members lounge and a real estate office; and

   (c) Bear Mountain and BM Management entered into an operations agreement (the "**Operations Agreement**") with Ecoasis for the integrated operation of the Hotel and golf businesses.

9. Shortly after July 2019, issues arose with respect to both the Operations Agreement and the Lease.

C. The Liability Award

10. The parties sought third-party binding resolution through arbitration before the Arbitrator. 15 issues related to the Lease and Operations Agreement were set for determination as documented in signed terms of reference dated 16 September 2020 (the "**Terms of Reference**").[1]

11. The parties agreed that the arbitration would be conducted pursuant to the laws of British Columbia and specifically the *Arbitration Act*, SBC 2020, c 2 (the "***Act***").

---

[1] Those 15 issues were as follows: Equipment Lease Payments; Food and Beverage; Liquor Licence; December 2019 Meeting; Hotel Rates and Discounts; Driving Range Access; Limited Common Property and Additional Areas of Use; Access to the North Langford Recreation Centre; Additional Outstanding Invoices and Issues Related to Invoices Generally; Accounting Services; Termination of the NLRC Lease; Disruption of Ecoasis Business Operations; Termination of the Commercial Lease; Termination of the Operations Agreement; and Breach of the Non-Solicitation Agreement.

12. A hearing on liability for the 15 issues outlined in the Terms of Reference was held in January of 2021. On 26 February 2021, the Arbitrator issued a partial final award determining liability (the "**Liability Award**"). Ecoasis was substantially successful on all of the issues pursuant to the Liability Award with damages to be assessed.

13. One of the principle issues that weaved its way through the arbitration was the Respondents' breach of a non-competition and non-solicitation agreement (under the applicable asset purchase agreement). The Liability Award found that:

(a) Mr. Clarke (the then Ecoasis CFO) was involved in finding a purchaser for the hotel and in negotiating the details of the asset purchase agreement, the Operations Agreement and the Commercial Lease;

(b) Mr. Clarke was the key person in the sale of the hotel and in the ongoing operation of the hotel and golf and tennis businesses;

(c) Mr. Clarke (while still CFO for Ecoasis) entered into personal negotiations with Mr. Malak (the Principle of the Respondents) as early as May 2019 – over a month before the transaction closed;

(d) In those negotiations it was agreed that Mr. Clarke would ultimately be employed by the Respondents;

(e) The Respondents entered into a consulting agreement with Mr. Clarke immediately after he left employment with Ecoasis;

(f) No disclosure of the arrangement between Mr. Clarke and the Respondents was made to Ecoasis;

(g) After the Sale, Mr. Malak retained the services of Mr. Clarke's wife in purchasing strata units and she was paid approximately $27,000;

(h) If there was an adverse inference to be drawn, it was in respect of the failure of Mr. Clarke to refute the words and conduct attributed to him in the witness statements tendered by Ecoasis;

(i) the Respondents breached the non-competition and non-solicitation agreement by working with Mr. Clarke without Ecoasis' knowledge after July 11, 2019 and by entering into a consulting agreement with him in 2020;

(j) it is impossible to gauge the extent to which this duplicity contributed to the breakdown in the relations between the parties;

(k) as disagreements were ongoing between the Respondents and Ecoasis, Mr. Clarke was secretly working for the Respondents and making agreements on behalf of Ecoasis for increases in compensation for such things as accounting services, and ultimately the termination of accounting services, without the authorization of Ecoasis;

(l) both Mr. Malak and Mr. Clarke were sophisticated businessmen who were aware of the serious breach of trust inherent in their business dealings;

(m) the duty of loyalty owed to Ecoasis by an employee in the position of Mr. Clarke is one of the most significant obligations recognized in law; and

(n) the Respondents were liable for damages to be assessed or cost consequence caused by breach of the non-competition and non-solicitation agreement.

D. Dismissal of the Respondents' First Appeal and Withdrawal of Bias Petition

14. On 31 March 2021, the Respondents filed a petition in the Supreme Court of British Columbia (Vancouver Registry File No. S-213239) which sought to have the Liability Award set aside (the "**First Bias Application**"). The Respondents alleged in this petition that there were justifiable doubts as to whether the Arbitrator had been impartial, and that the award should be set aside because "there was a real danger of bias on the part of the arbitrator in conducting the arbitration".

15. Ecoasis filed a response to the Respondents' bias petition on 11 June 2021. The earliest date that could be obtained to hear the First Bias Application was 20 January 2022.

16. Instead of having the bias petition heard, the Respondents elected to wait to discontinue the First Bias Application proceeding on 19 January 2022, the day before it was to be heard..

17. The Respondents also filed an application for leave to seek leave to appeal the Liability Award, but that application was dismissed by the Court of Appeal on 28 June 2021.

Ecoasis Resort and Golf LLP v. Bear Mountain Resort & Spa Ltd., 2021 BCCA 285

E. Damages Hearing

18. Hearings regarding quantification of damages following the Liability Award occurred in September, October and November of 2024. These hearings were preceded by extensive written submissions filed between August 2023 and June 2024.

19. On the eve of the damages hearing, the arbitrator requested a further retainer, and indicated he would not continue without the retainer. The Respondents took the position that the Arbitrator had withdrawn and simply refused to participate further in the Arbitration. The grounds for the withdrawal were spurious and an attempt to delay the damages hearing.

20. When it became apparent the arbitration was going to proceed even without the Respondents' participation, the Respondents then brought an application in Supreme Court without notice to Ecoasis. When this was unsuccessful, the Respondents brought the application in Supreme Court, now on notice to Ecoasis, seeking a ruling that the Arbitrator had withdrawn. On August 22, 2024 Madam Justice Lamb dismissed the Respondents' application. Justice Lamb found that (1) the application should have first been made to the arbitrator and (2) that in any event, the arbitrator had not withdrawn.

21. Right before the hearing regarding quantification of damages started, by letters dated 15 August and 13 September 2024, the Respondents wrote to the Arbitrator

to raise a challenge of bias pursuant to s. 17(1)(b) of the *Act*. The Respondents' focus in this challenge was the Arbitrator's 2 August 2024 ruling with respect to Procedural Ruling #9 which stated that the arbitration would proceed without the Respondents participation.

22. The Arbitrator dismissed the Respondents' bias challenge on 23 September 2024. The Respondents did not apply to the Supreme Court of British Columbia for it to decide on the challenge pursuant to s. 18(4) of the *Act*.

23. On 15 April 2025, after three weeks of hearing the evidence, the Arbitrator issued a second partial final award with respect to damages (the "**Damages Award**"). The Arbitrator ordered that:

(a) Ecoasis pay the Respondents $29,453 for food and beverage services – which was the amount Ecoasis said was the correct amount for the preceding five years rather the erroneous and inflated charges calculated by the Respondents;

(b) The Respondents pay Ecoasis $193,720.80[2] for Ecoasis' lost profits arising from the Respondents' refusal to provide food and beverage services to Ecoasis in breach of the Operations Agreement;

(c) The Respondents pay Ecoasis $680,000 for Ecoasis' loss associated with the Respondents' failure to provide Marriott privileges to Ecoasis employees;

(d) Ecoasis pay the Respondents $162,183.00 for food and beverage charges incurred by Ecoasis members and the amount of $33,091.42 for hotel room charges which was the amount Ecoasis said was the correct amount years prior rather than the erroneous and inflated charges calculated by the Respondents;

---

[2] Arising from a total estimated loss in profits of $276,744 subject to a 30% discount to account for uncertainty in the calculation of a loss of opportunity.

(e) The Respondents pay Ecoasis $377,255.58 for payment of "additional outstanding invoices" related to rental costs for the members lounge (collected by the Respondents), "stay and play packages", food and beverage charges and Pro Shop purchases by hotel guests;

(f) The Respondents pay Ecoasis a total of $157,097.28 in damages for accounting services costs, loss of the Homeowner Card program and GST penalties and interest caused by the Respondents' failure to provide accounting services as required under the Operations Agreement;

(g) The Respondents pay Ecoasis $602,959.75 for business interruption to the golf operations caused by the Respondents' cumulative breaches; and

(h) The Respondents pay Ecoasis $271,711.65 for business interruption to the tennis operations caused by the Respondents' cumulative breaches.

24. After setting off the moneys found owing, the Arbitrator ordered that the Respondents must pay Ecoasis $2,058,017.63 by 29 April 2025. The Arbitrator further ordered that post-award interest was owing at the Bank of Montreal prime rate plus 1%, compounded and adjusted semi-annually, from 29 April 2025.

25. On 13 May 2025, the Respondents filed:

(a) an application seeking a stay of execution and leave to appeal the Damages Award with the British Columbia Court of Appeal (File No. CA50676) (the "**Second Appeal**"); and

(b) a petition in the Supreme Court of British Columbia (Vancouver Registry File No. VLC-S-S-253638) which seeks an order setting aside the Damages Award on the basis of bias (the "**Third Bias Application**").

26. In the Second Appeal, the Respondents alleged that the Arbitrator erred by:

(a) Awarding joint and several damages against the Respondents for breach of the Operations Agreements;

(b) Awarding damages for lost liquor sales, despite finding that the Respondents were not liable for damages resulting from the failure to transfer the liquor licence;

(c) Making new findings of liability in a bifurcated proceeding that was limited to issues with respect to quantum of damages;

(d) Applying the wrong legal standard for mitigation;

(e) Applying the wrong legal principles to calculate contingency reductions;

(f) Misapprehending the evidence regarding the parties to the Commercial Lease and Operations Agreement;

(g) Misapprehending the evidence of Ecoasis' expert Ralph Miller regarding calculation of damages; and

(h) Misapprehending the content and impact of receiver's reports.

27. The Respondents' application for a stay of execution and leave was heard in the Court of Appeal chambers on 30 May 2025.

28. The Court of Appeal dismissed the Respondents' application in its entirety on 4 June 2025.

29. The Third Bias Application alleges — for a third time now — that there are justifiable doubts regarding the Arbitrator's impartiality and that the Damages Award should be set aside because there was a real danger of bias on the part of the Arbitrator in conducting the arbitration. The Respondents base their allegations of bias on the following:

(a) The Arbitrator's treatment of the Respondents' witness, specifically referring to an instance when the Arbitrator warned that witness (prior to cross-examination on 13 January 2021) as follows: "you're still under the compulsion of the affirmation to tell the truth, nothing but the truth, and that

will weigh not only on your conscience but also could lead to serious consequences" – this is one of the exact same grounds that were relied upon in the First Bias Application, which the Respondents unilaterally abandoned one day before the hearing date.

(b) The Arbitrator's conduct with respect to Procedural Ruling #9 and the 2 August 2024 case management conference when the Respondents refused to participate in the arbitration.

(c) That the Arbitrator drew an adverse inference against the Respondents after concluding that they were in possession of signed guest receipts and chose to suppress that evidence.

(d) The Arbitrator's alleged misapprehension of the evidence of Ralph Miller regarding calculation of damages.

(e) The Arbitrator's alleged application of the wrong legal standard with respect to mitigation.

(f) The Arbitrator's alleged new findings of liability in a bifurcated proceeding that was limited to issues with respect to quantum of damages.

(g) The Arbitrator's alleged failure to apply the correct legal principles to calculate contingency reductions.

(h) The Arbitrator's alleged misapprehension of the content and impact of receiver's reports.

(i) The Damages Awards' payment terms, specifically that: (a) the Damages Award required payment within 14 days, whereas the Liability Award required that Ecoasis pay the Respondents $54,091.26 without providing a specific timeline; and (b) the Damages Award held the Respondents jointly and severally liable.

(j) The Arbitrator's alleged "failure to consider the significance" of Ecoasis' business plan.

30. The Third Bias Application has no merit. Not only are the allegations of bias without merit, but almost all of the cited rationales: (a) have been raised before; or (b) have already been reviewed by the Court of Appeal and dismissed.

31. The Respondents have estimated that the hearing for their Third Bias Application will take two days. That hearing has not been scheduled yet, and could not be heard for months. The Respondents also might withdraw the Third Bias Application on the eve of a hearing, which is what they did previously on with the First Bias Application.

Part 3: LEGAL BASIS

32. Section 61 of the *Act* specifies that the Supreme Court must recognize and enforce a Canadian arbitral award unless one of six express exceptions — enumerated as subsections (a) to (f) of s. 61(3) — applies.

33. One of the possible exceptions to recognition and enforcement is if "there is a pending application to set aside or appeal the award": s. 61(4)(e).

34. In summary, the applicable sections of the Act provide:

(a) The Court has no discretion to decline and recognize and enforce an arbitral award unless one of the factors set out in s. 61(4) is present;

(b) If one of more of the s. 61(4) factors is present, the Court may decide to recognize and enforce the arbitral award but is not required to do so; and

(c) If the s. 61(4)(d) or (e) factors apply, the Court may make the award for recognition and enforcement of an arbitral award, but stay the order.

Seylynn (North Shore) Properties Phase II Limited Partnership v. Seylynn (North Shore) Phase II GP Ltd., 2025 BCSC 530 at para. 16

35. Section 61(5) of the *Act* specifies further that, if there is a pending application to set aside or appeal the award (such that this subsection applies) then the Supreme Court may nonetheless "order that recognition and enforcement of the arbitral award is stayed for a time and on conditions, including conditions as to the deposit of security".

36. A Supreme Court decision to recognize and enforce an arbitral award has the same effect as a court judgment granting the remedy described in the award: s. 61(6) of the *Act*.

37. As Madam Justice Dickson (as she then was) stated in *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834 at para. 64: "Public policy requires the court to give substantial deference to decisions made in commercial arbitration. The need for deference arises out of the two principal objectives of arbitration: early finality and a determination made outside the court system."

38. The necessary deference afforded by the courts reflects the fact that arbitration is a consensual process. Courts should be reluctant to interfere in the parties' agreement to resolve their dispute outside of the judicial process.

> *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, 2015 BCSC 2014 at para. 38; see also *La Compagnie D'assurance-Vie Manufactures v. B.C. Gas Inc.*, 1998 CanLII 3813 (BC SC) at para. 7

39. The Respondents' Third Bias Application relies on alleged indicia of bias from the arbitration proceedings prior to the Arbitrator's issuance of the Damages Award.These complaints are improper and cannot ground an application to set aside the Damages Award: ss. 18 and 58(4) of the *Act*.

40. No informed person, viewing the matter realistically and practically, could conclude that the presence of an apprehension of bias existed. The Respondents' suggestion that it does is an attempt to circumvent enforcement of the Damages Award. These kinds of tactics should be discouraged by this Court.

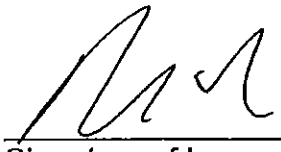
41. The Respondents' allegation strikes at the core of the Arbitrator's reputation, and layers on top allegations that cannot be retracted, but is left on the public record with complete disregard to its implication.

42. The Court of Appeal refused the Respondents' application seeking leave to appeal the Damages Award on the basis that the Arbitrator committed various legal errors. The Respondents rely on many of these same alleged errors to suggest that there is a real danger that the Arbitrator was biased against the Respondents. The Court of Appeal's dismissal of the Respondents' leave application indicates that there was little or no merit to the Respondents' complaint that the Arbitrator committed legal errors; for the same reason, this Court should find that there is little to no merit to the Respondents' allegations of a real danger of bias based on the same alleged errors.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Jennifer Dunn made 23 June 2025.

June 23, 2025
Date



Signature of lawyer for petitioner
for DLA Piper (Canada) LLP (Roger D. Lee and Struan T. Robertson)

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this petition

☐ with the following variations and additional terms:

_____

_____

_____

_____

Date: _____ _____

Signature of ☐ Judge ☐ Associate Judge

This is Exhibit "**G**" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for taking Affidavits within ~~British~~ Columbia

This is the 1st affidavit
of Jennifer Dunn in this case
and was made on 23 June 2025

No. S-254741
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ECOASIS RESORT AND GOLF LLP

PETITIONER

AND:

BEAR MOUNTAIN RESORT & SPA LTD.,
BM MANAGEMENT HOLDINGS LTD. and
BM RESORT ASSETS LTD.

RESPONDENTS

AFFIDAVIT

I, Jennifer Dunn, Legal Assistant, of 2700 – 1133 Melville Street, Vancouver, BC V6E 4E5, British Columbia, SWEAR THAT:

1. I am a legal assistant at DLA Piper (Canada) LLP, solicitors for the Petitioner, Ecoasis Resort and Golf LLP, in this action. I have personal knowledge of the facts and matters hereinafter deposed to in this affidavit, except where they are stated to be based upon information and belief; In those cases, I have identified the source of the information. I believe everything in this affidavit to be true.

2. Attached to this affidavit and marked as **Exhibit A** is a true copy of the partial final award of Murray L. Smith, K.C. dated 26 February 2021.

3. Attached to this affidavit and marked as **Exhibit B** is a true copy of the petition filed on 31 March 2021 in Supreme Court of British Columbia file No. S213239 (the "**First Bias Petition Proceeding**").

4. Attached to this affidavit and marked as **Exhibit C** is a true copy of a notice of hearing filed on 25 November 2021 in the First Bias Petition Proceeding.

5. Attached to this affidavit and marked as **Exhibit D** is a true copy of a notice of discontinuance filed on 19 January 2022 in the First Bias Petition Proceeding.

6. Attached to this affidavit and marked as **Exhibit E** is a true copy of Procedural Order #9 dated 8 February 2024 from Murray L. Smith, K.C.

7. Attached to this affidavit and marked as **Exhibit F** are true copies of transcripts from court hearings in Supreme Court of British Columbia chambers on August 7 and 8 2024 for the Respondents' *ex parte* application seeking a stay of the arbitration proceedings.

8. Attached to this affidavit and marked as **Exhibit G** is a true copy of a letter dated 17 September 2024 that DLA Piper (Canada) LLP sent to Boughton Law Corporation and Smith Barristers.

9. Attached to this affidavit and marked as **Exhibit H** is a true copy of the Ruling on Challenge for Bias dated 23 September 2024 from Murray L. Smith, K.C.

10. Attached to this affidavit and marked as **Exhibit I** is a true copy of the second partial final award of Murray L. Smith, K.C. dated 15 April 2025 (the "**Damages Award**").

11. On 13 May 2025, the Respondents filed a notice of appeal and application seeking leave to appeal and a stay of execution with respect to the Damages Award in Court of Appeal file No. CA50676.

12. The Respondents' application for leave to appeal and a stay of execution of the Damages Award was heard on 30 May 2025. Attached to this affidavit and marked

as **Exhibit J** is a true copy of Justice Winteringham's reasons for judgment dismissing the Respondents' application to the Court of Appeal.

13. Attached to this affidavit and marked as **Exhibit K** is a true copy of the petition filed on 13 May 2025 in Supreme Court of British Columbia Action No. VLC-S-S-253638 (the "**Second Bias Petition Proceeding**").

14. The Second Bias Petition Proceeding seeks to have the Damages Award set aside. Ecoasis Resort and Golf LLP has not filed a response to this petition yet, and no hearing dates have been scheduled for it yet.

15. No stay of enforcement of the Damages Award has been issued. The Damages Award has not been set aside, nor has it been remitted to the arbitrator.

SWORN BEFORE ME at Vancouver, British Columbia, on 23 June 2025.

A Commissioner for taking Affidavits for British Columbia.

Jennifer Dunn

Niles Bond
Barrister & Solicitor
DLA Piper (Canada) LLP
1133 Melville Street, Suite 2700
Vancouver, BC V6E 4E5
604.687.9444

This is **Exhibit "A"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.

A Commissioner for taking Affidavits for British Columbia

IN THE MATTER OF AN ARBITRATION PURSUANT TO:

Asset Purchase Agreement, Commercial Lease, Hotel, Golf Course and Tennis Operations Agreement and Non-Competition and Non-Solicitation Agreement dated July 11, 2019, between Ecoasis Resort and Golf LLP, 1210110 B.C. Ltd, BM Resort Assets Ltd. and 2600 Viking Way Limited,

BETWEEN:

ECOASIS RESORT AND GOLF LLP

AND:

BEAR MOUNTAIN RESORT & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD.

PARTIAL FINAL AWARD
February 26, 2021

ARBITRATOR:
Murray L. Smith, Q.C.

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Partial Final Award

Introduction

1. Prior to July 11, 2019, Ecoasis Resort and Golf LLP ("Ecoasis") owned The Westin Bear Mountain Golf Resort & Spa near Victoria, British Columbia – consisting largely of a hotel and two 18-hole Jack Nicklaus-designed golf courses. By a purchase agreement effective July 11, 2019, 1210110 B.C. Ltd. and 2600 Viking Way Limited purchased the hotel from Ecoasis and entered into an Operations Agreement and Commercial Lease for the integrated operation of the hotel and golf businesses. The purchasers changed names such that they are now known as Bear Mountain Resort & Spa Ltd, BM Management Holdings Ltd. and BM Resort Assets Ltd. (collectively "Hotel").

2. Hotel purchased the Westin Hotel referred to by the parties as the Clubhouse Building. The Clubhouse Building included a number of residential and commercial strata lots. Hotel also purchased two commercial strata lots in a building known as the Fairways Building as well as two strata lots in the Finlayson Building. Hotel also purchased the Ecoasis interest in a lease with the City of Langford for a recreational facility that included a gym and a pool.

3. The remaining Ecoasis assets included the Mountain Golf Course, Valley Golf Course and a practice facility and driving range. Ecoasis leased back space in the hotel for the operation of the Pro Shop, a members lounge and a real estate sales office.

4. The parties entered into an Operations Agreement for the cooperative management of the hotel and golf businesses. Under that Agreement, Hotel was to provide, *inter alia*, food and beverage service and accounting services for Ecoasis.

5. Issues arose between the parties regarding requirements to be included in the accounting services and the cost of the food and beverage service. The relationship between the parties deteriorated to the point where 15 separate heads of disagreement arose with respect to obligations owed under the Operations Agreement, the Commercial Lease and a Non-Competition and Non-Solicitation Agreement.

6. The parties ultimately agreed to seek third-party binding resolution through arbitration.

Submission to Arbitration / Applicable Law / Appointment of Arbitrator

7. Ecoasis was represented by Roger Lee and Struan Robertson of DLA Piper (Canada) LLP in Vancouver, British Columbia. Hotel was represented by Martin Sennott and Susan Do of Boughton Law Corporation in Vancouver, British Columbia.

8. By email dated June 8, 2020, counsel for Hotel advised Murray Smith that various matters were in dispute and that both sides had agreed to his selection as sole arbitrator. By return email, the appointment was accepted.

9. Various exchanges between the parties and the arbitrator took place over the Summer of 2020 regarding the organization of the proceedings. Neither party wished to be identified as Claimant or Respondent because each were raising certain of the issues. While the various contracts that were signed included dispute resolution provisions, the arbitration proceeding that was established was pursuant to a Submission Agreement rather than a triggering of an arbitration clause in one of the agreements.

10. There was no Notice of Arbitration filed by either party. The parties agreed to a list of 15 issues on September 14, 2020. On September 16, 2020, the parties agreed formal Terms of Reference that attached as Schedule "A" the 15 issues and questions that would establish the scope of authority of the arbitrator on the reference. Listed below are the issues:

-Equipment Lease Payments
-Food and Beverage
-Liquor Licence
-December 2019 Meeting
-Hotel Rates and Discounts
-Driving Range Access
-Limited Common Property and Additional Areas of Use
-Access to the North Langford Recreation Centre
-Additional Outstanding Invoices and Issues Related to Invoices Generally
-Accounting Services
-Termination of the NLRC Lease
-Disruption of Ecoasis Business Operations
-Termination of the Commercial Lease
-Termination of the Operations Agreement
-Breach of the Non-Solicitation Agreement

11. The parties agreed that substantive matters in issue would be governed by the laws of British Columbia. The parties also agreed that the applicable procedural law would be the *Arbitration Act*, S.B.C. 2020, c. 2 and that the rules of procedure of the Vancouver International Arbitration Centre would be generally followed. These latter agreements were confirmed on the first day of evidentiary hearings on January 5, 2021.

12. Counsel agreed to timelines for steps in the proceedings. These timelines were confirmed at a procedural meeting convened on November 13, 2020. Procedural Order #1 was issued to set dates for requests for documents, delivery of expert reports, witness statements and written briefs in advance of evidentiary hearings scheduled for two weeks commencing January 5, 2021.

13. Following the delivery of Redfern Schedules setting out requests for production of documents, Procedural Order #2 was issued on December 2, 2020. Hotel was required to produce certain categories of documents under that Order.

14. Evidentiary hearings were held between January 5 and January 13, 2021 on the Zoom platform, administered by Charest Legal Solutions Inc. Written arguments were delivered on December 31, 2020 and updated on January 21, 2021. Oral arguments were made on January 22, 2021. Evidentiary proceedings and oral arguments were recorded, and transcripts were provided by Charest.

15. At the outset of the evidentiary hearings, certain issues were raised regarding the admissibility of portions of witness statements and expert reports. Violations of the parol evidence rule were argued in respect of witness statements and expert reports were challenged for bias and violation of the rule against experts interpreting contractual documents. The portions of witness statements and expert reports that were objected to were not struck out but were left to be considered in the final award on the basis of rules of law relating to construction of contracts and expert evidence.

16. Challenges to expert reports based on bias and a lack of independence arising out of the fact that certain experts were retained as advocates for the parties in other proceedings were taken into consideration and were dealt with as a matter going to the weight of the evidence.

17. Requests for production of experts' files relating to the matters in issue were allowed and those files were produced in due course to the satisfaction of counsel.

Factual Background

18. Under the Commercial Lease, Ecoasis leased back areas in the hotel for the Pro Shop, the members lounge and a real estate sales office. Under the Operations Agreement each party agreed to provide benefits and services related to the ongoing hotel and golf operations. In addition, the parties entered into a Non-Competition and Non-Solicitation Agreement, the relevant part of which prohibited the solicitation of employees of the other party.

19. The parties acknowledged in the Operations Agreement that the ongoing operation of the business of one was an essential element of the business of the other, and that any interruption in the operation of their respective businesses would be a detriment to the other.

20. Section 3.3 of the Operations Agreement provided that:

> Each Party recognizes that the standard of operation and service are described in general terms and each Party is authorized to exercise reasonable discretion in modifying such services and privileges, or implementing operation rules and policies based on operational experience, if in the reasonable opinion of the applicable Party the same will ensure the delivery and availability thereof in a manner consistent with the Standards and will not result in any material loss of services, privileges, or rights to the other Party.

21. The term Standards was defined to mean:

> (A) With respect to the Golf and Tennis Business, the standard of operation of the Golf and Tennis Business existing as of the date hereof; and
> (B) With respect to the Hotel Business, the standard of operation existing as of the date hereof.

22. Under Section 4 of the Operations Agreement, it was agreed that Hotel would provide food and beverage service and accounting services to Ecoasis.

Accounting Services

23. Section 4.1 of the Operations Agreement established that Hotel would provide "accounting services for the Golf and Tennis Business, including processing of daily revenue, bi-weekly payroll, accounts payable and event billing."

24. Section 4.1(b) provided that Hotel would use commercially reasonable efforts to provide Shared Services including the accounting services "without interruption, and that an equal service level with respect to the Shared Services is provided to the GT Operator [Ecoasis] as is provided to the Hotel Operator."

25. Section 4.1(f) of the Operations Agreement provided:

> The Hotel Operator shall provide a reasonably detailed invoice of the Shared Services within five (5) days of the end of each month and the GT Operator shall pay such monthly invoice within ten (10) business days. Upon the Gt Operator's request, the Hotel Operator shall make available to the GT Operator any supporting materials and calculations used to create the invoice.

Food and Beverage Services

26. Section 4.2 of the Operations Agreement provided:

(a) The Hotel Operator agrees to provide food and beverage services to the GT Operator for use in the course of the Golf Course Business, including, but not limited to sales to golf course and tennis members and guests at the takeout window, members lounge and comfort station. The GT Operator shall pay the Hotel Operator's cost as set out on the Hotel Operator's financial statements for the preceding month for food cost, non-alcoholic beverage cost and liquor costs plus twenty percent (20%). The GT Operator may charge any price for such food and beverages, provided that same shall not be lower than those established by the Hotel Operator and charged to hotel guests and members of the general public. The GT Operator shall be entitled to all revenue it receives in its food and beverage sales.

(b) The Hotel Operator agrees to make all food and beverage prepared or provided on the Hotel available to Golf and Tennis Members at a twenty percent (20%) discount from the prices made available to its hotel guests and the general public.

(c) The Hotel Operator shall continue to offer executive members of the GT Operator and all employees and staff of Ecoasis Developments LLP a staff discount of 20% on all food and beverages.

27. Under Section 5 of the Operations Agreement, registered hotel guests were entitled to pay "guest of member rates" for rounds of golf included in stay-and-play packages, employees of Ecoasis were entitled to current corporate hotel room rates and employees of Hotel were entitled to staff discounts in the Pro Shop and golf privileges on the Valley and Mountain courses. In addition, employees of Ecoasis were entitled to "maintain privileges through the hotel franchise agreement with Marriott to book hotel rooms at discounted rates through the Marriott Website."

Breakdown in Relationship

28. The CFO for Ecoasis was David Clarke. He was involved in finding a purchaser for the hotel and in negotiating the details of the purchase agreement, operations agreement and lease-back agreement. Mr. Clarke entered into personal negotiations with the principal of the purchaser, Raoul Malak, as early as May of 2019. In those negotiations it was agreed that Mr. Clarke would ultimately be employed by Hotel, potentially as CEO. No disclosure was made to Ecoasis of this arrangement, nor of the fact that after the sale Mr. Malak retained the services of Mr. Clarke's wife in purchasing strata units. Over the next year, Mr. Clarke's wife was paid approximately $27,000.

29. In October 2019, Hotel sent an email to David Clarke with invoices for a very large amount owing from Ecoasis to Hotel for the reconciliation of cash and deposits relating to the July sale. The amount owing was $1,447,508.90. These invoices were not brought to the attention of Ecoasis until December 3, 2019. Mr. Clarke left for a one-month honeymoon overseas in early November 2019.

30. On December 3, 2019, Mr. Clarke brought the Reconciliation issue to the attention of Dan Matthews, the principal of Ecoasis. On that same day, Hotel invoiced Ecoasis for July 2019 food and beverage charges. Mr. Matthews was concerned that there was no back-up for the Reconciliation or for the invoice for food charges.

31. On December 18, 2019, Ecoasis requested back-up for the food invoices to which Mr. Malak replied that back-up would be provided in February 2020. Mr. Malak further advised that Hotel would be cutting off food service to Ecoasis the following day. Mr. Matthews sought a meeting to discuss matters including the Reconciliation, to which Mr. Malak responded that the amount of the Reconciliation must be paid immediately. On December 20, 2019, Hotel discontinued Marriott privileges to Ecoasis staff. On December 23, 2019, Mr. Matthews repeated his request for a meeting and advised that Ecoasis was providing a cheque that day for the full amount of the Reconciliation.

32. On December 30, 2019, Mr. Malak on behalf of Hotel, and Mr. Matthews and Tom Kusumoto on behalf of Ecoasis, met to discuss matters. Amongst other things, it was agreed in that meeting that Ecoasis would get out of the food and beverage business. It had already been agreed that Hotel would terminate accounting services to Ecoasis effective January 31, 2020.

33. On January 3, 2020, food service was restored notwithstanding the fact that invoices for food and beverage service had not been paid and that Ecoasis was demanding back-up to prove that Hotel was charging for the cost of food plus 20% as provided under Section 4.2 of the Operations Agreement. On January 31, 2020, food and beverage services were again terminated with a demand by Mr. Malak that previous invoices be paid without the back-up requested by Ecoasis.

34. At the same time that disagreements were developing in respect of accounting services and food and beverage services, a dispute arose regarding liquor licences. At the time of the sale of the hotel it was necessary for Ecoasis to transfer the liquor licence associated with the hotel restaurant and bar. There was a disagreement between the parties regarding whether or not portions of that liquor licence that related to the Valley Golf Course and the members lounge were intended to be transferred to Hotel or were instead to be transferred back to Ecoasis. Under liquor licensing regulations Hotel was not entitled to use the liquor licence for the members lounge or the golf course because the Hotel did not control those premises. The position of Hotel was that the licence related to the members lounge and the golf course were intended to be registered in the name of Hotel, and the position of Ecoasis was that those portions of the licence were intended to be transferred back to Ecoasis.

35. In late January 2020 issues were also outstanding regarding invoices from Hotel relating to usage of the North Langford Recreation Centre. On February 11, 2020 Hotel provided limited back-up for July 2019 food costs but did not provide the requested prior month's financial statement setting out the line item for food cost that Ecoasis

maintained was necessary under the Operations Agreement. In February 2020 Ecoasis learned that Hotel was not providing the employee discount promised under the Operations Agreement for hotel stays.

36. Invoices for food costs remained unpaid, ostensibly because the required accounting back-up was not provided. In March 2020 Ecoasis sent Hotel an invoice for approximately $500,000 for hotel guest use of the driving range. Use of the driving range had not been provided for under the Operations Agreement. In March 2020 Hotel learned that Ecoasis was using areas for staging golf carts that were not covered under the Commercial Lease and issued a demand that Ecoasis vacate those areas. On April 8, 2020 Hotel entered the areas said to be beyond the terms of the lease, cut locks and threatened to tow golf carts. On April 14, 2020, counsel for Hotel wrote to advise that the Operations Agreement and Commercial Lease were terminated and that Ecoasis must vacate the premises. A court proceeding was launched to enjoin Hotel from evicting Ecoasis. The parties then agreed to resolve all of their disputes in one arbitration.

Issues to be Determined

37. As set out in paragraph 10 above, the parties identified the issues to be determined by jointly submitting 15 issues along with the questions that were said to arise from those issues. The list was titled "Arbitration Questions" and was attached as Schedule "A" to formal Terms of Reference dated September 16, 2020.

Evidence at Hearings

Ecoasis Witnesses

38. It was agreed that witness statements and expert reports would stand as evidence in chief. Ecoasis delivered two expert reports from Dennis Coates dated December 15, 2020 and December 22, 2020, the latter in response to the corresponding expert report of Mr. Hick on behalf of Hotel. Mr. Coates offered opinions on the law and practice of liquor licensing under the authority of the Liquor and Cannabis Regulation Branch of British Columbia. He said that there was no way in which Hotel could serve alcoholic beverages in the members lounge or on the Valley golf course because Hotel did not control those premises or the businesses operated thereon.

39. Ecoasis also delivered two expert reports from Dana Adams dated December 15, 2020 and December 22, 2020, the latter in response to the report of Mr. Polson, the corresponding expert for Hotel. Ms. Adams offered an opinion as to the requirements to be expected of a similar corporate accounting department, listing 17 expected functions. Both Mr. Coates and Ms. Adams attended for cross-examination.

40. Ecoasis delivered statements for 15 witnesses, 10 of whom were Golf and Tennis Club

members. Of those 10, only two testified: Fred Edwards and Lloyd Richards. Counsel agreed that the statements of witnesses that were not called for cross-examination would stand as their evidence in chief. The witnesses for Ecoasis that were called to testify were Dan Matthews (the CEO of Ecoasis), Daina Rozitis (the Controller for Ecoasis), Melissa Hodson (the Executive Assistant to Mr. Matthews) and Rob Larocque (the Director of Golf).

41. Tom Kusumoto attended for questioning off-the-record before a court reporter pursuant to a subpoena. The transcript of those questions and answers was tendered as evidence in the proceedings. Mr. Kusumoto was a part-owner, shareholder and director of Ecoasis.

Hotel Witnesses

42. Hotel tendered the reports of two experts, one in accounting and the other in liquor licensing. Christopher Polson provided a report dated October 14, 2020 in which he opined that the accounting services provided for under the Operations Agreement would cost far more than the compensation specified under the Agreement. He also commented that the accounting functions required under the Agreement were confined to the four listed items of daily revenue, bi-weekly payroll, accounts payable and event billing. His opinion regarding the interpretation of the Agreement was not given any weight.

43. Hotel tendered the expert reports of Bert Hick regarding the law and practice of liquor licensing. His report, dated December 16, 2020, confirmed the requirements for a licence-holder to maintain control over the premises and business which are the subject of the licence. In a supplementary report dated December 23, 2020, Mr. Hick responded to the expert report of the Ecoasis expert, Mr. Coates, to suggest that Hotel could obtain a licence over the members lounge and the Valley golf course through a sublease arrangement. Hotel also tendered the expert report of Pino Bacinello regarding the valuation of liquor licences. He provided an opinion that a Liquor Primary Licence is valued in the range of four to five times EBITDA.

44. Hotel delivered witness statements from two witnesses, Raoul Malak (the sole director of Bear Mountain Resort & Spa Ltd. and operator of the hotel business) and David Clarke (the previous CFO of Ecoasis now working as a consultant for Hotel). Brian Harrington, the hotel manager, attended for questioning off-the-record before a court reporter pursuant to a subpoena. The transcript of those questions and answers was tendered as evidence in the proceedings.

45. Mr. Malak provided two lengthy witness statements dated December 16, 2020 and December 23, 2020 outlining the history of dealings with Ecoasis. Mr. Clarke provided a witness statement dated December 16, 2020 that was confined to an explanation of his personal reasons for leaving the employment of Ecoasis. Mr. Malak was examined

at length at the evidentiary hearings. Mr. Clarke was not called for cross-examination.

Issue #1 – Equipment Lease Payments

46. This issue relates to amounts owing from Hotel to Ecoasis for lease payments for items including photocopiers and dish washers. Ecoasis was required to assign these leases under the Asset Purchase Agreement.

Position of Ecoasis

47. Ecoasis confirmed receipt of payment for the equipment leases, has now executed assignment of photocopier leases and is preparing assignment agreements regarding dishwashers. Ecoasis does not expect any difficulty in the final steps to resolve this issue.

Position of Hotel

48. Hotel states that all outstanding amounts have been paid and that execution of assignment documents is in process but seeks an order that Ecoasis immediately complete any outstanding lease assignments.

Analysis

49. The parties appear to have amicably resolved this issue. If there is any issue that remains outstanding the parties are at liberty to apply.

Issue #2 – Food and Beverage

50. Under Section 4.2 of the Operations Agreement, Hotel agreed to provide food and beverage service to Ecoasis at locations including but not limited to the takeout window, members lounge and comfort station. Hotel also agreed to provide a 20% discount on food and beverages to Golf and Tennis Members. Ecoasis was not permitted to undercut the hotel menu prices in the members lounge.

51. The primary issue for consideration under this head is whether or not Hotel was obliged to charge for the cost of food alone or the cost of food plus labour associated with the obtaining, storage and preparation of food. Other issues are (1) whether or not Hotel is liable for breach of Sections 4.2(b) of the Operations Agreement for failure to provide a 20% discount to Ecoasis members for food and beverages, (2) whether or not Ecoasis was undercutting hotel menu prices in the members lounge and (3) whether or not Ecoasis was required under Section 4.2 to obtain alcohol beverage services exclusively from Hotel.

Position of Ecoasis

52. Mr. Lee, on behalf of Ecoasis, says this issue is to be resolved on the basis of principles of contractual interpretation as set out in *Creston Molly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 and *Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2019 BCCA 278. In essence these cases establish that the objective intention of the parties is to be determined on the basis of the words used, having regard to the factual matrix underlying the negotiation of the contract but not the subjective intentions of the parties. The interpretation of the contract must accord with sound commercial principles. It is only if the contract language is ambiguous that extrinsic evidence may be considered.

53. Mr. Lee relies upon the plain and ordinary meaning of "food cost" and the express reference to the Hotel Operator's financial statements in Section 4.2 of the Operations Agreement. The term "food cost" was not qualified to include references to labour costs and it is clear from Hotel's financial statements that "food cost" is a separate line item.

54. Mr. Lee submits that the position of Hotel that "food cost" includes labour was not shared by Mr. Clarke, Mr. Harrington, Mr. Larocque or Mr. Matthews. Mr. Lee further argues that Hotel's position that Section 4.2 entitled Hotel to a 20% profit on food services is not supported on the evidence. The position of Ecoasis is that Mr. Malak was unhappy with the agreement for food and beverage services and wanted to revise those provisions of the Operations Agreement.

55. Ecoasis says that invoices for food and beverage were not paid because they were incorrect and provided no back-up to establish that food costs were confined to the cost of food in that line item in the previous month's financial statements plus 20%. Despite requests for the back-up, Ecoasis says Mr. Malak refused despite having that information in December 2019. Ecoasis says that the decision by Mr. Malak to cut off food services in December 2019 was not reasonable and was in violation of contractual obligations.

56. In response to the allegation by Hotel that Ecoasis was undercutting hotel menu prices, Ecoasis says that to the extent there was any such conduct it was inadvertent and, in any event, not brought to its attention in a timely way. Ecoasis also disputes the Hotel position that Ecoasis was required to exclusively purchase food and beverage from Hotel. Ecoasis says no such provision was contained in the Operations Agreement.

57. Ecoasis submits that Hotel improperly submitted invoices for alcohol purchased by Ecoasis for sale in its own outlets. Hotel invoiced Ecoasis on February 29, 2020 for 20% on liquor obtained by Ecoasis from the liquor store. Contrary to the Hotel position that Section 4.2 of the Operations Agreement required Ecoasis to exclusively purchase alcohol from Hotel, Ecoasis says there is no such provision. Ecoasis argues that it would

be illegal to purchase liquor from Hotel for sale on premises not controlled by Hotel.

58. Ecoasis also argues that Hotel was in violation of Section 4.2(b) of the Operations Agreement in suspending the 20% discount to Golf and Tennis Members on food and beverages. The Golf and Tennis Members who testified at the hearings, Mr. Richards and Mr. Edwards, confirmed that discounts were not being provided.

59. In response to the Hotel submission that an adverse inference ought to be drawn because Ecoasis did not take the opportunity to cross-examine Mr. Clarke in relation to matters in issue, Ecoasis says there is no requirement in law to conduct a cross-examination.

60. Ecoasis seeks relief including an order that Hotel revise and reissue invoices for the cost of food alone plus 20%. Ecoasis seeks a finding that Hotel breached Section 4.2 of the Operations Agreement by suspending food and beverage services and the 20% discount to Golf and Tennis Members with damages to be assessed.

Position of Hotel

61. Hotel argues that the Operations Agreement provided for food and beverage services to the "Golf and Tennis Business," defined under the Operations Agreement to include the two golf courses, driving range and tennis centre. Mr. Sennott argues that Section 4.2(a) of the Operations Agreement states that "the Hotel Operator agrees to provide food and beverage services to the GT Operator for use in the Golf Course Business including but not limited to sales to golf course and tennis members and guests at the takeout window, members lounge and comfort station."

62. Hotel says the initial invoices for food and beverage services were not issued to Ecoasis until December 2019 because accounting staff were occupied with completing work that should have been completed by Ecoasis as part of the Asset Purchase Agreement. By February 11, 2020, Hotel had issued invoices totaling $58,939.64 that have yet to be paid. Food and beverage services were suspended on or about January 31, 2020 because invoices remained unpaid. Ecoasis was advised to cease selling alcohol in the members lounge because Ecoasis was required to obtain its liquor from Hotel pursuant to the Operations Agreement. Hotel submits that it was entitled to receive a 20% profit on the cost of food and beverage, otherwise there would be little benefit to Hotel in providing food and beverage service. Hotel also says Ecoasis must pay the 20% premium for liquor obtained by Ecoasis from sources other than Hotel.

63. Hotel further argues that Ecoasis was provided with the back-up calculations that broke down the cost including the food item, stewarding labour, cook labour and 20% of the total. The cost of tableware and overhead was not included. Hotel says Section 4.2 of the Operations Agreement does not specify that food to be delivered must be prepared or cooked.

64. Hotel submits that a spreadsheet detailing the cost of food and beverage was provided to Ecoasis on or about February 11, 2020. On April 17, 2020, counsel for Ecoasis sent a letter to Hotel suggesting that the proper amount for food and beverage services was $26,279.84 lower than the Hotel calculation. Hotel says it requested back-up for the Ecoasis calculations but has yet to receive that information.

65. Hotel argues that it is unreasonable of Ecoasis to have failed to pay any amount for food and beverage services when Ecoasis itself acknowledged owing at least $32,659.80. If Ecoasis disputed the amount owing, it was incumbent upon it to pay the amount owing and then follow the dispute resolution procedures in the Operations Agreement.

66. Hotel also argues that Ecoasis was undercutting hotel menu prices in the members lounge. The difference in pricing was said to have been brought to the attention of Ecoasis in a meeting on or about December 4, 2019, but the contravention continued. Golf members were thus incentivized to order in the members lounge rather than other food and beverage outlets in the hotel.

67. In respect of the allegation that the 20% discount to Golf and Tennis Members was suspended, Hotel argues that at no time did it intentionally remove or refuse to honour the discount. Hotel argues that if there was a problem, the fault was that of Ecoasis when the point-of-sale system was changed from that used by Hotel. Golf and Tennis Members could no longer charge their member accounts while using hotel food and beverage outlets. Golf and Tennis Members do not carry proof of membership, making it difficult to honour the discount.

68. Hotel relies upon *Sattva* and related cases to argue that Section 4.2 of the Operations Agreement clearly contemplated the provision of food and beverage services but was ambiguous regarding the determination of the cost of food. The only commercially reasonable interpretation, considering the factual matrix and objective evidence, is that Hotel would provide a complete and profitable service rather than a piecemeal offering with marginal returns. Hotel says the ambiguity ought to be resolved in favour of a finding that Hotel was to receive a 20% profit on the costs of food and beverage services, otherwise there would be little benefit to provide such services. The ambiguity is said to extend to the meaning of "food" and whether it must be cooked. It would not be commercially reasonable to stipulate food costs as relating to ingredient costs only. Hotel says the ambiguity must be resolved in a manner that promotes a sensible commercial result. This would include costs of fully cooked, prepared and packaged food.

69. In response to the position of Ecoasis that there were give-and-take elements to the hotel purchase transaction that may have compensated for lower prices for food and beverage services, Hotel argues there is no evidence. Hotel submits that a reasonable

interpretation of the Operations Agreement is that Hotel is entitled to a 20% profit on food and beverage services.

70. Hotel seeks to have an adverse inference drawn from the failure of Ecoasis to cross-examine Mr. Clarke. Hotel relies *upon Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 for principles governing the drawing of an adverse inference where a party fails to call a witness who would have knowledge of facts that would assist that party. The failure to call such evidence is an implied admission that the evidence of the absent witness would not support the party's case. Hotel says Mr. Clarke was only willing to provide a witness statement addressing his reasons for leaving the employment of Ecoasis. He remained available for cross-examination by Ecoasis generally. The failure of Ecoasis to do so is said to warrant an adverse inference, particularly on the issue of whether or not there was "give-and-take" as argued by Ecoasis.

71. Hotel seeks relief including a declaration that Ecoasis was in breach of the Operations Agreement by failing to pay the outstanding food and beverage invoices, and that the discontinuance of food and beverage services by Hotel was justified. Hotel seeks an order that Ecoasis pay outstanding invoices in the amount of $62,252.14, plus $14,894.92 for 20% of liquor costs obtained from sources other than Hotel. Hotel also seeks a declaration that Ecoasis breached the Operations Agreement by charging less for food and beverage in the members lounge than charged elsewhere in the hotel and seeks a declaration that, as a result of the various breaches by Ecoasis, hotel properly terminated the Operations Agreement. Hotel also seeks a declaration that the 20% discount to Golf and Tennis Members under Section 4.2 of the Operations Agreement was not suspended by Hotel.

Analysis

72. The interpretation of a commercial contract requires the decision-maker to give effect to the parties' intentions as derived from the words used, in the context of the contract as a whole, and within the factual matrix (also called surrounding circumstances). The relevance of the factual matrix was described in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, by Rothstein J. at paras. 57-58:

> [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 (*Glasweglan Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 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.

73. The task at hand is to decide what a reasonable person with knowledge of the surrounding circumstances would have understood the parties to mean by the words used at the time the Operations Agreement was signed. The words used must be given their usual and ordinary meaning. Surrounding circumstances at the time of the making of the contract may be considered for the purpose of gaining insight into the mutual intention of the parties. The facts known to both parties must be considered to ascertain objectively their mutual intention. The combination of the parol evidence rule and the entire agreement clause in Section 13.6 of the Operations Agreement render inadmissible any understandings outside the written agreement for the purpose of qualifying the words used.

74. Section 4.2(a) of the Operations Agreement provided:

> The GT Operator shall pay the Hotel Operator's cost as set out on the Hotel Operator's financial statements for the preceding month for food cost, non-alcoholic beverage cost, and liquor costs plus twenty percent (20%).

75. Having regard to the principles governing the interpretation of contracts as set out in *Sattva* and related cases cited by counsel there is no foundation for a finding of ambiguity in the provision of Section 4.2 of the Operations Agreement for calculating the cost of food. It is clear from the plain meaning of the words used and the factual matrix that food costs were to be determined on the basis of the costs set out in Hotel's financial statements for the preceding month. Section 3 of the Operations Agreement set out clearly that the standard of operations prior to the sale of the hotel were to be continued. Food cost in the hotel's financial statements was a line item separate from labour and other costs. There is no basis for construing the provisions of Section 4.2 to read the cost of food as set out in the financial statements for the preceding month plus any other costs for labour associated with the purchase and preparation of food that Hotel in its sole discretion may choose to include.

76. Ecoasis was not required under Section 4.2 of the Operations Agreement to obtain alcohol beverage services exclusively from Hotel. There is no language in that Section that would give effect to such an intention. It was not open to Hotel to charge a 20% mark-up on liquor that Ecoasis purchased from other sources. On the issue of whether

or not Hotel suspended the 20% discount for Golf and Tennis Members, the evidence presented, including the evidence of Mr. Richards and Mr. Edwards, establishes that Hotel did suspend the discount contrary to the requirements of Section 4.2(b) of the Operations Agreement.

77. Hotel failed to provide proper back-up for the invoices for food and beverage services. It was not unreasonable in the circumstances for Ecoasis to refuse to pay the outstanding invoices. It was incumbent upon Hotel to provide the necessary back-up if prompt payment was expected.

78. There was no legal obligation for Ecoasis to cross-examine Mr. Clarke. If there is an adverse inference to be drawn, it is in respect of the failure of Mr. Clarke to refute the words and conduct attributed to him in the witness statements tendered by Ecoasis. The words and actions attributed to him were not contradicted. At the time of the arbitration Mr. Clarke was working for Hotel. In the limited statement that he did give he demonstrated an animus toward Ecoasis. There is no principle of law that obliges a party to cross-examine a witness tendered by the other party.

79. Hotel is liable for failure to comply with the obligations under Section 4.2 of the Operations Agreement to provide food and beverage service to Ecoasis and to provide a 20% discount for food and beverage in hotel outlets to Golf and Tennis Members. Hotel is ordered to reissue invoices for food costs based on the food cost in the previous month's financial statements plus 20%. Ecoasis is not obliged to pay the Hotel invoice for alcohol purchased by Ecoasis from sources other than Hotel.

80. The claim that Ecoasis was undercutting hotel menu prices in the members lounge is not supported on the evidence. Even if there were menu price increases that were not caught by Ecoasis, it is not clear that any undercharge would have resulted in an incentive to Ecoasis members to dine elsewhere than the members lounge given that golf members were entitled to a 20% discount in other hotel food and beverage outlets.

81. Hotel is liable for damages to be assessed for breach of Sections 4.2(a) and 4.2(b) of the Operations Agreement.

Issue #3 – Liquor Licence

82. As an aspect of the Asset Purchase Agreement, it was necessary for Ecoasis to transfer over the liquor licence for the hotel restaurant and bar facilities. This was Liquor Primary Licence #302754 ("Licence 54"). Licence 54 also covered the members lounge and the Valley Golf Course. The Mountain Golf Course was covered by a different licence, Liquor Primary Licence #301488 ("Licence #88"). The requirement under liquor licensing regulations was that the licence holder must have a valid interest by way of ownership or a lease of the premises covered by the licence. As a result, Licence #54, owned by Hotel, would not allow Hotel to supply alcoholic beverages to the members

lounge or the Valley Golf Course. As Ecoasis did not retain a licence applicable to those premises, neither could Ecoasis serve liquor in those places.

83. The issue that arises is whether or not the parties intended, under the Asset Purchase Agreement, that the portions of the licence covering the members lounge and Valley Golf Course would be transferred back to Ecoasis. In addition, there was a collateral issue as to whether or not it was intended that Ecoasis would be entitled to serve liquor in the members lounge and on the Valley Golf Course, or rather, that Ecoasis was required to obtain alcohol beverage service for those locations exclusively from Hotel. This latter question was resolved under Issue #2 above in the finding that Ecoasis was not required under Section 4.2 of the Operations Agreement to obtain alcohol beverage services exclusively from Hotel.

Position of Ecoasis

84. Ecoasis submits that the portion of Licence #54 covering the Valley Golf Course was transferred to Hotel by mistake. Ecoasis was actually able to recover the portion of Licence #54 that covered the Valley golf course. With the blessing of the LCRB those privileges were transferred to Licence #88 that covered the Mountain Golf Course. Ecoasis submits that it is nevertheless necessary to rule on the mistake issue in respect of that portion of Licence #54 in order to answer the Hotel argument that Ecoasis breached the Operations Agreement by interfering with ownership of the portion of Licence #54 relating to the Valley Golf Course.

85. Ecoasis relies upon *Yu v. Xu*, 2020 BCSC 1291 for the proposition that the law recognizes three types of mistake, common, mutual and unilateral. A common mistake is one by both parties, a mutual mistake arises upon a misunderstanding between the parties, and a unilateral mistake arises when only one party makes a mistake and the other party is aware of that mistake. Ecoasis also relies upon *Canada (AG) v. Fairmont Hotels Inc.*, 2016 SCC 56 for the principles governing the remedy of rectification to correct mistakes in contracts.

86. Ecoasis argues that the parties made a common or mutual mistake and did not intend to include the Valley Golf Course licence in the transfer. Ecoasis relies upon the evidence of Mr. Matthews that Ecoasis never intended to transfer the Valley Golf Course licence, and that there were no discussions regarding the Valley Golf Course licence before the sale. Ecoasis also relies upon the testimony of Mr. Malak, who said that he was surprised to learn in December 2019 that the hotel owned a liquor licence that controlled the two golf carts that served the Valley Golf Course.

87. Ecoasis argues that the absence of any intention to transfer the Valley Golf Course licence is supported by the evidence showing that Hotel never questioned the fact that it was not getting revenue from the sale of liquor on the Valley Golf Course, and that there was no evidence that Hotel took steps to provide that service subsequent to the

sale.

88. Ecoasis submits that the transfer of the liquor licence governing the Valley Golf Course did not accord with the true agreement of the parties. Golf seeks a remedy of rectification of the Asset Purchase Agreement.

89. In respect of the transfer of the portion of Licence #54 covering the members lounge, Ecoasis seeks to have a term implied in the Asset Purchase Agreement that Hotel would transfer that portion of the licence back to Ecoasis. Ecoasis relies upon *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89 for the principles of law related to when a term may be implied in a contract. These principles include a requirement that the implied term is necessary to make the contract effective and reflect the true intentions of the parties.

90. In support of its position, Ecoasis submits that the requested term ought to be implied in order to give business efficacy to the Asset Purchase Agreement because Ecoasis leased the members lounge as part of the contractual arrangement at the time of the sale of the hotel and because liquor licensing regulations are clear that Hotel was not entitled to sell alcohol in the members lounge. Ecoasis also relies upon a number of other arguments including the fact that there is no provision in the Operations Agreement to require exclusive purchase of liquor from Hotel. Negotiations included points of agreement for Ecoasis to purchase its own liquor and there was an exclusion under Schedule "G" to the Asset Purchase Agreement of liquor inventory in the members lounge. Ecoasis also relies upon conversations between Mr. Harrington and Mr. Malak in the Summer of 2019 regarding the transfer back to Ecoasis of those portions of Licence #54 relating to the members lounge.

91. Ecoasis submits that it is necessary for the portion of Licence #54 covering the members lounge to be transferred back to Ecoasis to give business efficacy to the Asset Purchase Agreement, the Commercial Lease, and the Operations Agreement. In the alternative, Ecoasis submits that the remedy of an implied term is available to fill gaps in parts of the agreements to which the parties did not turn their minds.

92. Ecoasis relies upon the expert opinion of Dennis Coates establishing that only the party that owns or leases the premises covered by a liquor licence may hold the licence. Ecoasis disputes the opinion of Bert Hick to the effect that Hotel could achieve such control through a sublease.

93. Ecoasis seeks relief including a finding that the parties did not intend to transfer the Valley Golf Course portion of Licence #54, and that there was either a common or mutual mistake warranting an order of rectification to remove the Valley Golf Course portion from the Asset Purchase Agreement.

94. Ecoasis also seeks a finding that it was an implied term of the Asset Purchase

Agreement that Hotel was to transfer the members lounge portion of Licence #54 back to Ecoasis after the sale, with an order that Hotel transfer that portion of Licence #54 back to Ecoasis.

95. Further relief requested includes a finding that Ecoasis is allowed to obtain liquor from third parties for resale in its operations, a finding that Hotel is not allowed to advertise liquor resales or consumption in Ecoasis owned or leased premises and a finding that Hotel is liable for damages for failing to transfer the portions of Licence #54 relating to the Valley Golf Course and members lounge back to Ecoasis – with damages to be assessed.

Position of Hotel

96. Hotel submits that the parties always intended to transfer the whole of Licence #54 to Hotel under the Asset Purchase Agreement. Hotel relies upon the absence of any evidence that there was any discussion prior to the sale relating to the transfer back to Ecoasis of the portions of Licence #54 covering the members lounge or the Valley Golf Course.

97. Hotel submits that the parties agreed that Hotel would provide alcoholic beverage services for the Valley Golf Course pursuant to Section 4.2 of the Operations Agreement and says that the unilateral actions of Ecoasis to cause the Liquor and Cannabis Regulation Branch ("LCRB") to remove the Valley Golf Course portion of Licence #54 rendered it impossible for Hotel to provide that service. Hotel says that the removal of the golf course portion and the members lounge portion of Licence #54 from the hotel's licence would render Section 4.2 of the Operations Agreement redundant and that there would be no need to pay 20% of all liquor sales to Ecoasis, as required under Section 4.2 of the Operations Agreement, if all liquor sales were not being provided by Hotel.

98. Hotel submits that Ecoasis was offside in speaking unilaterally with the LCRB, and that if there was a dispute regarding the licences it was incumbent upon Ecoasis to follow the dispute resolution procedures under the contract before contacting the LCRB.

99. Hotel relies upon the expert opinion of Bert Hick that Hotel would have been able to obtain regulatory approval for sale of alcohol in the members lounge and the Valley Golf Course through a sublease arrangement that provided Hotel with the necessary ownership or control over the licenced premises.

100. Hotel also refers to other issues that arose subsequent to the sale, including a suspension of those portions of Licence #54 covering the members lounge because of structural changes and Hotel's concern that Ecoasis was improperly storing liquor that was not obtained under Hotel's liquor licence.

101. Hotel submits that there was a clear agreement for the transfer of the entirety of Licence #54 to Hotel under the Asset Purchase Agreement, and that Ecoasis subverted the clear intention of the parties and jeopardized Hotel's liquor licence. Hotel seeks relief including declarations that the parties intended the transfer of the entirety of Licence #54 and that there was no agreement for Hotel to transfer any portion of Licence #54 back to Ecoasis. Hotel also seeks an order that damages are payable for the loss of the ability to serve alcohol on the Valley Golf Course – with damages to be assessed in accordance with the expert report of Mr. Bacinello that a Liquor Primary Licence is to be valued on the basis of four to five times EBITDA. Hotel also seeks an order that damages are payable by Ecoasis for the loss of food and beverage sales generally, including alcohol.

Analysis

102. There were many moving parts to the sale of the hotel in July 2019 and in the contracts including the Asset Purchase Agreement, the Commercial Lease, and the Operations Agreement. It is not clear on the evidence that the parties ever turned their mind to the fact that portions of Licence #54 covered the members lounge and the Valley Golf Course. It is clear that it was necessary to transfer Licence #54 to Hotel so that Hotel could continue offering restaurant and bar services. It is also clear that by simple operation of law, those portions of Licence #54 that related to the Valley Golf Course and the members lounge would expire, be extinguished, or would be otherwise inoperable upon Licence #54 being transferred into the name of Hotel. The reason that those portions of Licence #54 could not be saved was agreed by both experts, Mr. Coates and Mr. Hick, on grounds that it is essential for the owner of a licence to have ownership or control over the premises covered by the licence.

103. While it is correct to say that the parties may not have intended to transfer that portion of Licence #54 that related to the Valley Golf Course, it was not the sort of common mistake or mutual mistake that would allow for the remedy of rectification. The probable mistake that occurred was that the parties simply did not realize that the Valley Golf Course was covered by Licence #54. The evidence of Mr. Matthews is to the effect that he did not appreciate that Licence #54 covered the Valley Golf Course, thinking that it was covered by Licence #88 the same as the Mountain Golf Course. Mr. Malak never turned his mind to the fact that Licence #54 covered the Valley Golf Course.

104. This is not the kind of mistake that was addressed by the Supreme Court of Canada in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 SCR 678, where the parties agreed to the transfer of property measured in yards but the signed contract mistakenly referred to the property measured in feet. In the case at hand, the parties never shared any intention or even turned their minds to the fact that the portion of Licence #54 covering the Valley Golf Course was meant to be reserved to Ecoasis or otherwise transferred back to Ecoasis. It would be impossible to rewrite the

Asset Purchase Agreement, under the equitable jurisdiction to order rectification, to read that Ecoasis was only transferring that portion of Licence #54 that related to the Hotel restaurant and bar facilities.

105. The reason that it would be impossible to so rewrite the Asset Purchase Agreement is that it was not within the power of the parties to make such an agreement. Only the LCRB could approve a separation or other division of Licence #54. The only logical solution to the parties' mistake in not realizing that Licence #54 covered the Valley Golf Course was for Ecoasis to make an application subsequent to the sale of the hotel for a new licence covering the Valley Golf Course. Any agreement of the parties for the transfer back to Ecoasis of that portion of the licence would be of doubtful efficacy insofar as it would require the approval of a third party not party to the contract. While it might be said that the Asset Purchase Agreement could be rewritten to set out a provision that the parties would cooperate in submissions to the LCRB to allow Ecoasis to regain liquor licensing privileges over the Valley Golf Course, the very same result would obtain simply by Ecoasis making the same submission to the LCRB once Licence #54 was transferred to the name of Hotel and the right of Hotel to serve liquor on the Valley Golf Course fell away. There was no provision of the Asset Purchase Agreement, express or implied, that would preclude Ecoasis from applying to the LCRB for the right to serve alcohol on the Valley Golf Course just as it was doing on the Mountain Golf Course under Licence #88.

106. Similarly, it is not feasible to imply a term in the Asset Purchase Agreement for the transfer back to Ecoasis of that portion of Licence #54 relating to the members lounge. Not only is there no evidentiary base to support a finding that the parties objectively intended that to occur, there is no basis upon which Ecoasis can meet the requirement at law to establish that such a term was essential to make the Asset Purchase Agreement work. It could not be said that a reasonable bystander, if asked, would say that the parties obviously intended at the time of the sale of the hotel that Hotel would transfer the members lounge portion of Licence #54 back to Ecoasis. The reason is that it was outside the power of the parties to effect a transfer back. The reasonable bystander is more likely to say, if questioned, that they obviously could not have intended such a term. It cannot be said that the implied term that Hotel would transfer the members lounge portion of Licence #54 back to Ecoasis was necessary to give business efficacy to the Asset Purchase Agreement. As with the Valley Golf Course portion of Licence #54, it will be necessary for Ecoasis to apply to the LCRB for a new licence over the members lounge, patio and take out window. There is no provision of the Asset Purchase Agreement, express or implied, that would preclude Ecoasis from making this application to the LCRB.

107. The opinion of Mr. Hick that Hotel could offer alcohol service to the members lounge and the Valley Golf Course by the device of a sublease arrangement is not supported on the evidence. This opinion is speculative and unsupported by any evidence. It is to be doubted that the LCRB would approve of such artifice. It would clearly be a sham to

suggest that Hotel controlled the premises of the Valley Golf Course and the members lounge. The complexity of such a sublease arrangement, including liability and insurance issues, are far too great to allow for any conclusion that any such arrangement would be possible. The testimony of Mr. Hick that he received assurance from an official with the LCRB that such a scheme might work is far too vague and unreliable to be given any weight.

108. The relief requested by Ecoasis, seeking rectification of the Asset Purchase Agreement or implication of a term to either remove the Valley Golf Course portion of Licence #54 or transfer the members lounge portion of Licence #54 back to Ecoasis is denied. It follows that Hotel is not liable for damages for failing to transfer those portions of Licence #54 related to the Valley Golf Course and the members lounge back to Ecoasis.

109. Likewise, the relief sought by Hotel, seeking declarations that the parties intended that Hotel own liquor licences over the Valley Golf Course and the members lounge is denied. There is no basis upon which to order that Ecoasis pay damages. Ecoasis is allowed to obtain liquor from third parties for resale in its operations, Hotel is not allowed to advertise liquor resales or consumption in Ecoasis owned or leased premises.

Issue #4 – December 2019 Meeting

110. Over the Fall of 2019 a number of issues arose relating to such things as food and beverage services, accounting services and liquor licensing. In an attempt to resolve some of these issues, the parties agreed to meet in December. On December 31, 2019, Mr. Malak met with the two principles of Ecoasis, Dan Matthews and Tom Kusumoto. In the course of that meeting, it was agreed that Ecoasis would no longer be in the food and beverage business and would concentrate its efforts on the golf and tennis business. The parties agreed that Hotel would pay Ecoasis an amount equal to 20% of liquor sales and 20% of rental income generated from the members lounge. In addition, it was agreed that the Marriott discount would be reinstated and that the management teams of Hotel and Ecoasis would meet in January 2020 to finalize the details of the verbal agreement that Ecoasis would no longer be in the food and beverage business.

111. The issue that arises from the December meeting is whether or not a binding agreement was reached under which Hotel would henceforth provide all food and beverage services to Ecoasis, including the supply of alcohol.

Position of Ecoasis

112. Ecoasis cites case authorities setting out the principles of law regarding contract formation that require an intention to contract, an agreement on all essential terms and certainty. The cases also note the requirement that the analysis be objective and exclude subjective intentions of the parties. There is also a reference in the caselaw to

the relevance of subsequent conduct to determine whether or not the parties made a binding contract.

113. Ecoasis submits that the December 31, 2019 negotiations did not result in a binding agreement because key terms were missing including what Ecoasis was to provide in exchange for the 20% of rental income generated by the members lounge and what benefit would accrue to Ecoasis for Hotel assuming all food and beverage services. Ecoasis notes that there were differences in the evidence of Mr. Malak, Mr. Matthews and Mr. Kusumoto regarding what items were agreed in respect of a kickback for alcohol sales and whether or not such agreement was confined to certain nights such as the Wednesday night "Mens' Night."

114. Ecoasis also relies upon subsequent conduct to argue that no written amendments to the Operations Agreement were ever proposed or signed and that the parties did not meet further to finalize matters that had been put over to January 2020 for further discussion.

115. Ecoasis seeks a finding that no binding agreement was reached between the parties.

Position of Hotel

116. Hotel submits that a binding oral agreement was made at the December 2019 meeting in which Ecoasis clearly agreed to get out of the food and beverage business and Hotel would be the exclusive provider of those services. The essential terms for compensation were agreed on the basis that Hotel would pay Ecoasis a 20% kickback on liquor sales and 20% of rental income generated from the members lounge.

117. Hotel concedes that there were further matters to be finalized, but that these were limited to minor issues including operational hours for the members lounge and the procedure for functions and events held in the members lounge.

118. Hotel relies upon the evidence of Mr. Kusumoto confirming the agreement that Ecoasis would not be involved in the food and beverage business in the future, and that it was expected that the agreement made at the December 2019 meeting would be implemented. As stated by Mr. Malak, it was not progressed further because the representative of Ecoasis failed to attend the subsequent meeting in January 2020 to implement the agreement made.

119. Hotel seeks relief including a declaration that the December 2019 agreement is valid and was breached by Ecoasis and that Hotel was thus entitled to terminate the Operations Agreement.

Analysis

120. Under general principles of contract law, an agreement to agree is not enforceable. However, where the main elements of an agreement are established, with the necessary proof of intention, essential terms and certainty, minor matters can be left for further agreement. In the case at hand, Hotel concedes that there were remaining details to be finalized but says that these details were in respect of minor matters relating to hours of operation and protocols for functions in the members lounge.

121. There was agreement on points of principle at the December 31 meeting, including the agreement that Hotel would henceforth be the exclusive provider of food and beverage services to Ecoasis. However, there were essential terms that were not agreed with certainty such that a final agreement remained inchoate. It is not clear on the evidence of Mr. Malak, Mr. Matthews and Mr. Kusumoto what the agreement was for payment by Ecoasis for food services and which provisions of Section 4.2 of the Operations Agreement would continue. The agreement for Hotel to pay Ecoasis an amount equal to 20% of the rental income generated from the members lounge was too vague and uncertain to establish a binding contract.

122. The negotiations on December 31, 2019 established an agreement to agree. This view is reinforced by the failure of the parties to reduce the agreed terms to a written amendment to the Operations Agreement. It is not open to make a finding that an enforceable oral contract was made in the December meeting. The required certainty of essential terms was absent and any modification of the Operations Agreement would require an agreement in writing under the entire agreement clause in Section 13.6.

Issue #5 – Hotel Rates and Discounts

123. Section 5 of the Operations Agreement provided for Hotel to give various discounts and benefits to Ecoasis employees and certain organizations as set out in Schedule "B" and Schedule "C". The relevant provisions of the Operations Agreement are:

> 5.2 Hotel Rates.
> Employees of the GT Operator and Ecoasis Developments LLP shall be entitled to the current corporate hotel room rates set out in Schedule "C" (which rates are inclusive of the resort fee); the rates provided on Schedule "C" are subject to annual review.
>
> 5.3 National Sports Agreements.
> The Hotel Operator agrees to make hotel rooms available at the times and at the rates as set out in the National Sports Agreements, subject to availability within the hotel.

5.4 Event Pricing.
The Parties agree to act reasonable and in good faith to negotiate, on an event by event basis, terms where the Hotel Operator will grant the GT Operator a licence to use one or more event spaces in the Hotel Property at a discounted rate subject to availability and a discounted hotel rate will be offered by the Hotel Operator to event participants, provided that a minimum number of hotel rooms are booked by event participants subject to availability.

5.5 Reciprocal Employee Benefits.
The Parties agree that all employees of the Hotel Operator shall be entitled to staff discounts on retail products in the GT Operator's Pro Shop and tennis/golf privileges on the "Mountain Course" or the "Valley Course" that the GT Operator offers to its own staff (which, among other things, is subject to availability, frequency of play restrictions and the GT Operator's code of conduct) as per the Employee Handbook provided by the vendor (Ecoasis Resort and Golf LLP). The parties further agree that all employees of the GT Operator shall be entitled to current staff food and beverage discounts and to maintain privileges through the hotel franchise agreement with Marriott to book hotel rooms at discounted rates through the Marriott Website, subject to availability and subject to the current terms and conditions of this employee benefit.

124. Ecoasis maintains that Hotel has failed to honour the obligation to offer benefits as required under Section 5. Hotel says all obligations were honoured and that increases in room rates were permitted under the Operations Agreement that allowed for annual review.

Position of Ecoasis

125. Ecoasis submits that the Marriott privileges promised to Ecoasis employees under Section 5.5 of the Operations Agreement were unilaterally terminated by Hotel in December 2019. Ecoasis submits that Hotel removed access to Marriott privileges on or about December 18, 2019, during the Christmas season when those privileges would have been of most benefit. The Marriott privileges were denied at the same time that Mr. Malak advised that food and beverage services would be terminated.

126. Ecoasis says the Marriott privileges were restored when it was agreed that Hotel would be paid $3,000 per month for HR Services. However, in June 2020 Hotel again withdrew access to the Marriott privileges

127. Mr. Matthews states that he was informed by Marriott Canada's president that there was no initiative by Marriott that would result in access to those privileges being cancelled for Ecoasis employees. Ecoasis argues that Hotel has provided no proof that Marriott requirements precluded access for Ecoasis employees.

128. Ecoasis also argues that hotel discounts for Ecoasis employees were unlawfully increased by Hotel. The agreed rates were set out at Schedule "C" to the Operations Agreement. Section 5.2 provided that the scheduled rates were subject to annual review. Ecoasis also argues that it was understood in negotiations that the discount would also be available for other contractors working for Ecoasis, so long as Ecoasis made the reservation. Likewise, Ecoasis argues that the rate would be made available to various charity groups that worked with Ecoasis. The argument of Ecoasis is that it would not make commercial sense that the discount would be available only for employees who, for the most part, were local and would not need a hotel room.

129. Ecoasis notes that on December 17, 2019, Hotel unilaterally increased the corporate room rates. In January 2020, Mr. Larocque was charged $175 for a room rather than the agreed rate of $125 per night set out in Schedule "C." When hotel discounts became an issue in the arbitration, Hotel credited Ecoasis for this overcharge in July 2020. In February 2020, Ecoasis tried to book a room for the Ecoasis accountant and was charged $175. On June 3, 2020, Hotel advised that it was increasing the corporate rates.

130. Ecoasis also submits that the obligation under Section 5.3 of the Operations Agreement for Hotel to make rooms available at rates set out in the National Sports Agreements was breached. These rates, as set out in Schedule "B" to the Operations Agreement, were said by Mr. Matthews to not have been honoured in respect of Cycling Canada.

131. Ecoasis also alleges a breach of Section 5.4 of the Operations Agreement under which the parties were to act reasonably and in good faith to negotiate event pricing. Mr. Matthews listed a number of instances in which the obligation under Section 5.4 was violated by Hotel – including the Golf for Kids Charity Classic, the Greater Victoria Sports Hall of Fame, the Yes Victoria Golf Tournament, Sport Assist, Johnston Wholesale, Ronald McDonald House Golf Tournament and the Sport Assist Charity Golf Tournament. Mr. Matthews outlined the different circumstances under which these events were frustrated by the actions of Hotel. Some of these circumstances were confirmed in the statement of Mr. Larocque.

132. Ecoasis seeks findings that Hotel violated Sections 5.2, 5.3, 5.4 and 5.5. of the Operations Agreement with damages to be assessed.

Position of Hotel

133. Hotel submits that Ecoasis employees were entitled to the discounted corporate rate as set out in Schedule "C" to the Operations Agreement subject to annual review. Following an annual review of those rates, Ecoasis was given notice of the Revised Discounted Hotel Rates. Hotel had previously permitted the discounted rates for employees of Ecoasis and third-party contractors, but currently the discount is not available to third-party contractors who are not covered by Section 5.2 of the Operations Agreement.

134. In respect of Marriott privileges, Hotel says that the privileges were provided as originally agreed but were no longer available under applicable Marriott guidelines. Accordingly, Ecoasis was notified in June 2020 that only Hotel employees qualified for Marriott privileges and it was impossible to comply with the obligation under Section 5.5 of the Operations Agreement. Hotel says the Marriott privileges could not be provided to Ecoasis employees without putting the Marriott franchise agreement at risk.

135. In respect of event pricing, Hotel submits that it has been ready and willing to negotiate with Ecoasis for event space, but Ecoasis has been unwilling. Hotel agrees that it was obliged under Section 5.3 of the Operations Agreement to make rooms available as set out in Schedule "B" to the Operations Agreement, the National Sports Agreements, and submits that those obligations have been honoured.

136. Hotel seeks a declaration that there was no violation of Sections 5.2, 5.3 and 5.4 of the Operations Agreement as well as a declaration that the Marriott privileges are not available to employees of Ecoasis.

Analysis

137. Under Section 5.2 of the Operations Agreement, Hotel was obliged to offer a discounted corporate rate to Ecoasis employees as scheduled to the Operations Agreement subject to annual review. It is not clear on the evidence that Hotel was in violation of the obligation under Section 5.2. Where there was an example of an overcharge, a refund was provided. Other evidence of failure to honour the obligation to provide room discounts was too vague to allow a finding of breach.

138. Hotel was obliged to provide Ecoasis employees with the benefits of Marriott privileges pursuant to Section 5.5 of the Operations Agreement. Hotel submits that it cannot honour that requirement without jeopardizing the Marriott franchise agreement. Mr. Matthews offers hearsay evidence that there is no reason to doubt the ability of Hotel to offer Marriott privileges to Ecoasis employees. Mr. Malak says his reading of the Marriott guidelines disqualifies Ecoasis employees from eligibility.

139. The contractual obligation to provide Marriott privileges to Ecoasis employees is clearly set out in the Operations Agreement. It is incumbent upon Hotel to establish on a balance of probabilities that it cannot comply with that agreement. The evidence tendered by Hotel falls far short of establishing that the Marriot franchise was in jeopardy or that Marriott privileges could not be offered to Ecoasis employees. Hotel was in violation of the obligation under Section 5.5 of the Operations Agreement and is liable for damages to be assessed.

140. The evidence tendered by Ecoasis of a violation of the obligation to honour National Sports Agreements was not supported by sufficient evidence to allow a finding that there was such a breach. There is accordingly no finding that Hotel breached Section 5.3 of the Operations Agreement.

141. The evidence tendered by Ecoasis of a violation of Section 5.4 of the Operations Agreement in respect of unreasonable event pricing was not supported by sufficient evidence to allow for a finding that there was such a breach. The description by Mr. Matthews of problems with various organizations, even though supported to some extent by Mr. Larocque, did not meet the required threshold of proof that Hotel violated Section 5.4.

Issue #6 – Driving Range Access

142. There is no contractual provision for use of the driving range by hotel guests. Prior to the sale of the hotel, guests were permitted to use the driving range as an amenity that went with their registration. Ecoasis never kept track of which hotel guests were using the driving range.

143. When the cooperative relationship between Hotel and Ecoasis broke down, Ecoasis billed Hotel approximately $500,000 for driving range access over the period July 11, 2019 to December 31, 2019 with a further invoice for usage between January 1, 2020 and March 14, 2020. The driving range was closed in March 2020 as a result of the pandemic.

144. Ecoasis seeks reasonable compensation for driving range use, while Hotel denies that any meaningful compensation is appropriate in the circumstances of very limited use.

Position of Ecoasis

145. Ecoasis submits that prior to the sale of the hotel, Ecoasis negotiated with Marriott to justify the $25 resort fee charged on hotel room registrations. It was necessary to prove value for the resort fee, which value was justified on the basis that guests would be given access to the driving range. Ecoasis notes that Hotel continued to advertise access to the driving range as a benefit associated with the resort fee through at least the Summer of 2020. Ecoasis submits that there was an understanding with Hotel that

in exchange for access to the driving range, Ecoasis would receive a fee of $25 per room registration.

146. On this basis, Ecoasis invoiced Hotel on March 12, 2020 the sum of $415,850.00, later adjusted to $440,265.00 in October 2020 to remove a set-off for recreation centre invoices that were included in the earlier invoice. The Ecoasis invoices were based on Flash Reports for the actual number of rooms booked. On October 14, 2020, Ecoasis invoiced Hotel $99,828.75 for the period January 2020 to March 15, 2020 based on estimated room nights. On March 14, 2020, Hotel advised Ecoasis that driving range privileges had been suspended for Hotel guests, but Hotel continued to promote driving range access as part of the resort fee through the Summer of 2020.

147. The Ecoasis position is that there was an implied agreement that Hotel would pay for guest access to the driving range and practice facilities. In the alternative, Ecoasis submits that fees for driving range access should be determined on the basis of *quantum merult*. Ecoasis submits that Hotel would be unjustly enriched by receiving the $25 resort fee that was charged to guests for access to the driving range facilities.

148. Ecoasis relies upon *Rafal v. Legaspi*, 2007 BCSC 1944 for the principles underlying *quantum meruit*. Where goods or services are provided under a contract, reasonable remuneration may be claimed if goods or services are furnished at the request or acquiescence of the other party in circumstances that render it unjust for the other party to retain the benefit conferred. In addition, Ecoasis relies upon *Noh v. Plaza 88 Developments Ltd.*, 2010 BCSC 1491 (BCCA) for the rule that unjust enrichment is established where one party is enriched with a corresponding deprivation to the other party without a juristic reason for the deprivation.

149. Ecoasis further relies upon *Aerovac Systems Ltd. v. Darwon Construction (Western) Ltd.*, 2010 BCSC 654 for the principle that there is a broad discretion to consider many indicia in the calculation of a *quantum meruit* claim including estimates, reasonable expenses, negotiations and expert opinions.

150. Finally, Ecoasis cites *Infinity Steel Inc. v. B&C Steel Erectors Inc.*, 2011 BCCA 215 for the principle that compensation ought to be awarded where there is a contract between the parties, but they have not agreed upon a price for goods or services to be provided under the contract.

151. Ecoasis relies upon various admissions made by Mr. Malak, including concessions on cross-examination that hotel guests were allowed to use the driving range in the period July 11, 2019 to March 14, 2020, that a $25 resort fee was charged for each room stay in that period and that access to the driving range was advertised as a component of the resort fee.

152. Ecoasis seeks an order that Hotel pay the invoices submitted for driving range access

on the basis of *quantum meruit*.

Position of Hotel

153. Hotel states that it is prepared to pay for actual guest usage of the driving range. However, Hotel states that there is no back-up information to confirm actual usage despite repeated requests. Hotel submits that the Resort Fee includes various amenities including such things as parking and Wi-Fi access as well as access to the business centre, gym, pool and driving range. Driving range privileges for hotel guests were removed as of March 14, 2020.

154. Hotel estimates that there were nine hotel guests who used the driving range in the period July 1, 2019 to December 31, 2019 who did not otherwise have access to the range through green fees or by virtue of being a Golf and Tennis Member. On the basis of this estimate, Hotel submits that the value of actual usage of the driving range in 2019, based on $25 per visit, would be in the amount of $225. Hotel notes that Ecoasis internally allocated 5.5% of the resort fee to driving range access when Ecoasis was operating the hotel.

155. Hotel seeks a declaration that there is no agreement relating to driving range access and that Hotel should only be responsible under a *quantum meruit* calculation for the sum of $225. In the alternative, Hotel seeks an order that Ecoasis is only entitled to payment in an amount equal to 5.5% of the $25 resort fee collected by Hotel.

Analysis

156. The parties did not address separate payment for use of the driving range under the Asset Purchase Agreement or the Operations Agreement. The deprivation to Ecoasis for such use was not of sufficient moment for Ecoasis to keep track of which hotel guests used the driving range or practice facilities.

157. The causal connection between the resort fee and any entitlement to compensation for driving range use is too remote to constitute a foundation for calculation of either unjust enrichment to Hotel or deprivation to Ecoasis. The resort fee was a matter between Hotel, Marriott and hotel guests – there is no basis for Ecoasis to make any claim on the resort fee, or to claim that the resort fee is in some way a measure of compensation for such guests as may have used the driving range without having been a Golf and Tennis Member or having paid a green fee.

158. There is nothing in the evidence tendered by Ecoasis that would allow for any meaningful calculation of the number of hotel guests that may have used the driving range. The estimates tendered by Hotel are equally not meaningful, and the claim that the correct number is nine guests approaches a *de minimis* level.

159. Access to the driving range was an aspect of the purchase of the hotel and the ongoing intermingled operations of the hotel and golf businesses. Use of the driving range was part and parcel of the cooperative arrangement between the parties. There was no need to particularize every detail of the continuing cooperative arrangement for the operation of the hotel and golf businesses. Business was to continue as usual. The parties never intended for there to be separate compensation for driving range use. The contractual arrangement between Hotel and Ecoasis provided a juristic reason for Hotel to have the benefit of access to the driving range for its guests so as to preclude any claim for *quantum meruit*.

160. There is no foundation for the claim by Ecoasis that it was an implied term of the Operations Agreement that Hotel would pay for driving range usage. It was not necessary, in order for the Operations Agreement to work, that Hotel pay for guest access to the driving range. There is no basis upon which a claim for an implied term of for *quantum meruit* can stand. This claim by Ecoasis is dismissed. Ecoasis is no more entitled to half a million dollars for payment for driving range use than Hotel is entitled to the approximately $175,000 that is claimed for use of the members lounge patio and the golf cart staging area to be discussed under the next Issue #7.

Issue #7 – Limited Common Property and Additional Areas of Use

161. After months of deteriorating relations between Hotel and Ecoasis, a new Issue emerged regarding Ecoasis use of Limited Common Property and additional areas not covered by the defined areas under the Commercial Lease for which Ecoasis was making lease payments. In addition, it emerged that Hotel was using some of the space that had been leased back to Ecoasis.

162. The main areas in contention regarding use of Limited Common Property is the staging area for golf carts outside the pro shop and the patio for the members lounge. The Additional Use areas said to be used by both Ecoasis and Hotel were for the most part minor storage areas. The issues that arise are whether or not Ecoasis should be ordered to cease use of the disputed areas and make compensatory payment for use of those areas back to July 2019. Likewise, there is an issue as to whether or not Hotel is liable for use of areas leased by Ecoasis and for interruption of Ecoasis' business by Hotel restricting access to the staging area and the members lounge patio as a result of renovation work on the hotel.

Position of Ecoasis

163. Ecoasis says use of the disputed areas was permitted as either an express or implied term of the Operations Agreement and Lease, or was allowed as a matter of promissory estoppel.

164. Under the Commercial Lease, Ecoasis leased premises that were part of Strata Lot 1 for

the members lounge, pro shop, real estate sales centre and cart storage. The areas that were not covered by the lease included the staging area for golf carts outside the pro shop and the members lounge patio. The Additional Space in dispute included level two of the parking lot of the Fairways Building that was used to park golf carts and store maintenance materials, cart storage areas in the hotel and areas used for storage of bottled water and liquor.

165. Ecoasis submits that it was only in March 2020, when Hotel was trying to apply pressure on Ecoasis in respect of other matters, that Hotel raised the issue of disputed use of Limited Common Property and Additional Areas. Ecoasis notes that Hotel also used areas of Ecoasis space, including storage of miscellaneous equipment in the Elevate Building and the mens' locker room that was leased and paid for by Ecoasis for its members. Hotel allows its male spa guests to have complete access to the Ecoasis mens' locker room and all of the supplies provided by Ecoasis.

166. The Additional Space is no longer used by Ecoasis, but portions of the Limited Common Property are still used in the operation of the golf and tennis business and are said by Ecoasis to be a "critical cog of the golf operations."

167. The Limited Common Property that remains in dispute is the staging area for golf carts, and the patio – both of which are said to be essential to Ecoasis operations. Ecoasis submits that its business would be severely impacted without the ability to park as many as 144 golf carts in staging for golf tournaments and for golfers to congregate outside the pro shop before departing in their carts. Ecoasis notes that it does not have exclusive use of the staging area, which is also used by Hotel, as it is the only entrance and exit to the Level 2 Underground Area. Hotel also uses the staging area for banquet carts and transit by guests for numerous purposes. Ecoasis submits that the staging area is common property beneficially used by both parties.

168. Ecoasis argues that there are many signs designated for various purposes specific to the staging area and the patio that have been in place for many years. Ecoasis submits that the members lounge patio offers the only external direct access to the members lounge.

169. Ecoasis first submits that use of the Limited Common Property is contemplated under the Operations Agreement in those provisions establishing that Ecoasis operations would be permitted to continue after the hotel sale in a manner consistent with pre-sale business operations, including Sections 1.1(f) and (r) and Section 3. Section 1.1(f) defines the Golf and Tennis Business to mean the combined private and public golf course business conducted from the Valley Course and the Mountain Course, the driving range and premises covered by the Commercial Lease.

170. Section 1.1(r) defines "Standards" to mean the standard of operation of the golf business existing as of July 11, 2019.

171. Section 3 of the Operations Agreement recognizes that the golf business is an essential element of the hotel business, that any interruption in the golf business will be a detriment to Hotel, and that each party recognizes a reasonable discretion in the other to modify privileges in a manner consistent with the Standards.

172. Ecoasis argues that the doctrine of promissory estoppel prevents a landlord from relying on a tenants' past unauthorized use of property as a basis to allege a default, citing *1328773 Ontario Inc. v. 2047152 Ontario Ltd.*, 2013 ONSC 4953.

173. Ecoasis also argues legal principles applicable in the law on the right to quiet enjoyment of property. Ecoasis cites *Siddoo v. OJJ Enterprises Ltd.*, 2020 BCSC 297 for the requirements to establish a breach of the covenant of quiet enjoyment. A landlord may not act in such a way as to render the premises substantially less fit for the purposes for which they were leased. Reference is made in *Siddoo* to decisions discussing the common law implied right to "quiet enjoyment."

174. Ecoasis refers to a number of decisions relating to calculation of damages for breach of quiet enjoyment that establish that, while difficult, a court must do the best it can even if it is a matter of guesswork.

175. Ecoasis seeks relief including an order that it is entitled to continued use of the staging area and members lounge patio at no additional cost and seeks damages for Hotel's breach of the right to quiet enjoyment further to Section 34.1 of the Commercial Lease. Ecoasis also seeks a finding that Hotel was not entitled to use portions of premises leased by Ecoasis.

Position of Hotel

176. Hotel submits that upon review of the areas covered by the Commercial Lease, it became apparent that Ecoasis was using additional areas including the members lounge patio, the liquor storage room on level two of the hotel and numerous parking stalls on level P2 of the Fairways Building. Hotel submits that Ecoasis had no permission to use those additional areas without paying rent. If the areas were critical to the golf business, Hotel says they should have been included in the Commercial Lease. The golf staging area comprised approximately 8,000 square feet of Limited Common Property for Strata Lot 1. Hotel submits that Ecoasis is trespassing and seeks rent for use of those areas.

177. Hotel submitted an invoice in the amount of $91,651.93 for use of the cart staging area from July 1, 2019 to April 30, 2020, $47,534.73 for rent payable for the period May 1, 2020 to September 30, 2020 and $28,582.97 for the period October 1, 2020 to December 31, 2020. Rent claimed is calculated on the basis of $13.50 per square foot, which is an average of rent paid under the Commercial Lease. Hotel was not aware that

It was storing equipment on premises leased to Ecoasis and immediately removed that equipment once discovered.

178. Hotel disputes the claim by Ecoasis for breach of a right to quiet enjoyment of the Leased Premises. In particular, Hotel submits that there were renovations underway that did not render the leased premises wholly or partially unfit and have not adversely impeded access.

179. Hotel submits that the Commercial Lease clearly identified the areas that were leased by Ecoasis. Hotel seeks relief including a declaration that Ecoasis is not entitled to use the unauthorized use areas and that the unauthorized use is a breach of the Commercial Lease, entitling Hotel to terminate the Commercial Lease. Hotel also seeks an order that damages be paid by Ecoasis and that Ecoasis immediately vacate those areas. Hotel also seeks an order that no damages are payable by Hotel for its unauthorized use of areas leased to Ecoasis. Finally, Hotel seeks a declaration that it has not breached the Ecoasis right to quiet enjoyment.

Analysis

180. The matters that remain in contention relate to use of Limited Common Property associated with Strata Lot 1. The other areas in dispute are no longer being used. In respect of the claims for unauthorized use of the Additional Areas by both Hotel and Ecoasis for such things as storage that have now been rectified there is no basis for an award of damages. It is inherent in a complex agreement that there will be some confusion. The respective claims of Hotel and Ecoasis are of a *de minimis* nature.

181. The substantial issue that remains relates to past, present and future use of the cart staging area outside the pro shop and the patio for the members lounge.

182. Any issue of impaired access to premises leased by Ecoasis relating to renovations is not of such moment as to warrant a finding of liability on the part of Hotel. With any agreement for cooperation between businesses such as Ecoasis and Hotel, there will be give and take for which there is an implied licence under the leasing and cooperation agreements.

183. It is an implied term of such leasing and cooperation agreements that the lessee will have access to Limited Common Property in order to meaningfully use premises covered by the lease and to conduct the businesses contemplated under the agreements. A lessee must be able to use sidewalks, roads, paths, elevators and structures such as balconies and patios in order to gain access to leased premises and to operate a business from the leased premises.

184. It is not clear on the evidence, and Hotel has not tendered evidence specifically to establish, that it is feasible for Hotel to rent out Limited Common Property associated

with Strata Lot 1 that is available for use generally by hotel guests, golf members and the general public.

185. More pertinent to the resolution of the Limited Common Property issue is the objective intention of the parties under the combined operation of the Commercial Lease and Operations Agreement in respect of the use of premises not dedicated to the exclusive use of either party. The Operations Agreement contains a number of implied and express terms that contemplate the use of Limited Common Property in the operation of the golf business that pre-existed the sale of the hotel.

186. It is an implied term of any agreement in the nature of a lease of premises that there will be use of common property. In this case there are additionally express terms of the Operations Agreement that contemplate use by Ecoasis of the staging area and the members lounge patio without additional payment. Section 1.1(f) acknowledges the operation of the golf and tennis business from hotel premises, and Section 1.1(r) acknowledges the golf and tennis business pre-existing the sale of the hotel as establishing a standard to be recognized by the parties. The parties objectively intended that it would be business as usual after the sale of the hotel to the extent possible in the same manner as before the sale. There was an implied term of good faith in both agreements that would preclude either party from post-contractual conduct that would deny the other party the benefit of the bargain. Use of the patio and cart staging areas are examples of such benefits. There was pre-existing common use of such areas as the driving range and the mens' locker room that were important for the business of Hotel and use of the patio and common area outside the pro shop that were important for the business of Ecoasis.

187. Other provisions of the Operations Agreement that bear on the Limited Common Property issue include Section 2.2 that provides that nothing in the Operations Agreement shall be deemed to restrict the freedom of either party to conduct its business and Sections 3.1 and 3.2 that recognize that the golf business and hotel business are essential to each other. In addition, Section 3.3 provides that both parties recognize a discretion in the other to modify such services and privileges based on operational experience that, in the reasonable opinion of the other party, will ensure the availability of such services and privileges "in a manner consistent with the Standards". The defined term "Standards" relates to the operations of the golf business existing at the date of sale of the hotel.

188. It is common ground that the staging area and the members lounge patio were part and parcel of the golf business at the date of the sale of the hotel. Continued use of the staging area and the members lounge patio by Ecoasis is thus contemplated in both implied and express terms of the Operations Agreement and the Commercial Lease.

189. It is not necessary to address issues of promissory estoppel or quiet enjoyment of property in order to resolve the Limited Common Property issue. The request by

Ecoasis for an order entitling Ecoasis to continued use of the staging area and the members lounge patio is granted. The order requested for a finding that Hotel was not entitled to use premises leased by Ecoasis is dismissed. There is an implicit obligation on both parties to act in good faith in the respective operation of the hotel and golf businesses, with cooperative use of areas that may be owned or leased by the other party that are necessary to give efficacy to the Operations Agreement and the Commercial Lease. Just as Ecoasis may have a right to continued use of the members lounge patio, Hotel is entitled to use of the driving range and the mens' locker room facilities for its guests.

190. The Hotel claim that Ecoasis is liable for trespass on the Limited Common Property areas in issue is dismissed as is the request that damages be paid by Ecoasis. Given these findings there was no basis for Hotel to terminate the Commercial Lease.

Issue #8 – Golf and Tennis Member and Social Member Access to the North Langford Recreation Centre

191. Part of the combined hotel and golf operations at the time of sale of the hotel included use of the North Langford Recreation Centre ("NLRC") that included gym and pool facilities. The NLRC was owned by the City of Langford and leased to Ecoasis. As part of the sale of the hotel in July 2019, Ecoasis was obliged to assign the NLRC lease to Hotel.

192. There were different types of membership that allowed access to the NLRC. Golf and Tennis Members were allowed access as part of their membership fees. There were also Social Members who, for the most part, were homeowners in the Bear Mountain Resort who were allowed access to the NLRC as part of the fees paid for their homeowner card. In addition, hotel guests and members of the public were allowed to use the NLRC. These were classified as Regular Members.

193. The NLRC was closed on March 15, 2020 because of the pandemic. Up until then the centre was used by the members described above but without specific agreement between Hotel and Ecoasis as to how the use would be accounted for. There was no provision in the Operations Agreement for NLRC usage.

194. The payments attributable to the NLRC were, for the most part, credited to Ecoasis because Ecoasis collected the fees for Golf and Tennis Members, collected payment for the homeowner card issued to Social Members and, for accounting reasons, received fees attributable for NLRC usage by hotel guests and the general public. These latter fees were deposited to the Ecoasis bank account. While there was no written agreement for how Hotel would be reimbursed for payments for NLRC usage, it was understood that Hotel would invoice Ecoasis for the various categories of usage.

195. Over the period December 2019 to the Spring of 2020, Hotel issued a number of invoices to Ecoasis including $54,091.26 for Golf and Tennis Members, $43,893.73 for

Social Members, $2,581.98 for additional Social Members and $134,136.49 for Regular Members. Ecoasis disputed these invoices for reasons including the number of members, the rate charged and the failure of Hotel to provide the necessary accounting back-up to explain monies said to have been deposited to the accounts of Ecoasis.

Position of Ecoasis

196. Ecoasis concedes that there is no agreement with respect to NLRC access fees. Ecoasis argues that an appropriate fee would be $25 per member per month based on actual use. The main objection by Ecoasis to the invoices submitted by Hotel for NLRC access is that Hotel has not provided an accounting for social membership fees alleged to have been deposited to the Ecoasis bank account.

197. Upon receiving invoices in December 2019 for 334 Golf and Tennis Members at a cost of $40 per month, Ecoasis objected that there were not that many members actually using the NLRC. Mr. Clarke claimed that the correct total was 116 Golf and Tennis Members using the facility. He suggested an appropriate rate of $25 per month. Sometime in January 2020, Mr. Clarke, on behalf of Ecoasis, is said to have agreed with Mr. Malak that the appropriate rate would be $55 per month per member.

198. On January 30, 2020, Michelle Patton sent Mr. Clarke (cc. to Mr. Matthews) a revised invoice for Golf and Tennis Members stipulating 122 members at a rate of $55 per month. When combined with the invoice for February 2020 dated April 20, 2020, the amount that Hotel invoiced Ecoasis for Golf and Tennis Member access to the NLRC was $54,091.26. Mr. Matthews conceded at the hearing that the invoices for the number of Golf and Tennis Members and the rate charged were acceptable.

199. Ecoasis notes that the Operations Agreement was silent on the cost for Social Members use of the NLRC but the Asset Purchase Agreement provided that Social Memberships remained part of the golf and tennis business. In February 2020, Ecoasis raised the issue of whether or not Hotel was keeping revenue related to Social Memberships for its own, in essence taking those members as their own. After arguments back and forth Ecoasis says Mr. Malak relented on March 13, 2020 by conceding that Social Memberships should continue to form part of the golf business. Mr. Malak advised that Social Member dues were deposited to the bank account of Ecoasis. In response to the Hotel claim for reimbursement for Social Member use of the NLRC in the amount of $43,893.73 Ecoasis submits that it has not received an accounting of revenues collected for Social Members that would allow Ecoasis to verify the amount claimed.

200. Ecoasis seeks relief in in the form of an order that Hotel produce the required backup information to verify the amounts that Hotel claims were credited to the Ecoasis bank account.

Position of Hotel

201. Hotel took over operation of the NLRC on July 11, 2019. Golf and Tennis Members were allowed access as part of their membership fees. Ecoasis was collecting those fees and it was agreed that Hotel would bill Ecoasis for Golf and Tennis Member use.

202. In December 2019, Hotel billed Ecoasis but the number of members and the rate charged were disputed. Following an agreement in January 2020, Hotel revised the invoices to charge 122 members a fee of $55 per month for the period July 2019 to the end of February 2020 in the amount of $54,091.26. In cross-examination Mr. Matthews conceded that the number of members charged, and the rate charged, were accepted.

203. Hotel submits that after the disagreement in March 2020 regarding withholding membership fees paid by Social Members, Mr. Malak wrote on March 13, 2020 to advise that Hotel was not holding any funds relating to Social Members and that all such funds were being deposited to the bank account of Ecoasis. Hotel invoiced Ecoasis for 99 Social Members at the rate of $55 per month for the period July 11, 2019 to March 14, 2020. The first invoice was in the amount of $43,893.73 and the second invoice was in the amount of $2,581.98. Hotel submits that neither of these invoices was paid. In the same letter of March 13, 2020, Ecoasis was advised that all funds collected with respect to Regular Members were deposited to the Ecoasis bank account. On May 6, 2020 Hotel sent Ecoasis the Regular Members invoice in the amount of $134,136.49 attaching accounting back-up that included a printout of the IBS point-of-sale reports showing funds collected along with spreadsheets showing transactions in the Ecoasis bank account.

204. Hotel seeks relief including declarations that Ecoasis pay invoices for Golf and Tennis Members in the amount of 54,091.26, Social Members in the amount of $43,893.73 and $2,5891.98 and Regular Members in the amount of $134,136.49.

Analysis

205. Ecoasis disputes the amounts owing insofar as Ecoasis has not been able to verify the amounts that were credited to the Ecoasis bank account. Mr. Matthews did concede that the invoices relating to Golf and Tennis Members was accepted. The amount invoiced for Golf and Tennis Members is thus sufficiently verified to warrant an order that Ecoasis pay Hotel the amount of $54,091.26.

206. The amounts invoiced by Hotel for Social Members have not been conceded absent the accounting back-up necessary to verify the amounts claimed by Hotel. This back-up may have formed part and parcel of the reconciliation latterly delivered by Hotel in January 2021, but it is not clear on the evidence that there has been sufficient verification. Accordingly, the order for Ecoasis to pay Hotel for access to the NLRC by Social Members is reserved pending further agreement of the parties or further

submissions regarding verification of amounts owing.

207. Hotel says Ecoasis was invoiced for Regular Member usage of the NLRC in the amount of $134,136.49 with sufficient back-up including IBS point-of-sale reports and spreadsheets of banking transactions. Hotel says that this accounting back-up is sufficient to allow Ecoasis to verify the amount owing. Ecoasis has not conceded the adequacy of the accounting back-up. The many pages of accounting documents that were provided by Hotel in support of the invoices are not sufficiently clear to allow for a conclusion that the amount claimed for Regular Member usage is correct. It is beyond the competence of an arbitration tribunal to digest and interpret the many pages of accounting documents that were tendered by Hotel. As with the order in respect of Social Member fees, the order in respect of payment of the Invoice for Regular Members is reserved pending further agreement of the parties or further submissions confirming verification of amounts owing.

Issue #9 – Additional Outstanding Invoices and Issues Related to Invoices Generally

208. There are a number of issues relating to amounts owed for goods and services. These issues include accounting services provided by Hotel in issuing T4 slips and for the Horticulture and Parkway Maintenance operations, building utilities invoices, cash reconciliations, hotel stays and room charges, food and beverage invoices, and goods and services provided to hotel guests by Ecoasis.

209. The controversy over these issues turns largely on the scope of accounting services to be provided by Hotel under the Operations Agreement and the amount of back-up that each party was obliged to provide with the invoices tendered. Ecoasis submits that the amounts owed are not clear without further back-up. Hotel says Ecoasis has all the information that is necessary to verify the invoices. At the same time, Hotel says it is not obliged to pay the Ecoasis invoices until further back-up is provided.

Position of Ecoasis

210. Ecoasis begins by submitting that issues relating to the outstanding invoices dovetail with Issue #10 in the arbitration – Accounting Services. Amounts are owed between the parties, but the correct amount owed is uncertain because of Hotel's failure to provide adequate accounting information both to substantiate invoices and to meet obligations to provide accounting services.

211. In respect of Horticulture, Ecoasis says that Hotel failed to pay for services provided for which invoices tendered in the amount of $7,114.09 on January 31, 2020 and $2,569.60 on March 31, 2020 remain unpaid.

212. Hotel in turn billed Ecoasis for accounting services relating to Horticulture and Parkway Maintenance. Ecoasis submits that these services were part of the Golf and Tennis

Business and should have been included in the accounting services provided by Hotel under Section 4.1 of the Operations Agreement.

213. Hotel also issued an invoice for $1,575.00 for preparation of T4 slips that Ecoasis says were both part of the normal payroll processing covered by Section 4.1 and were redundant as T4 preparation is actually done by the Ecoasis payroll provider, Ceridian.

214. In respect of the invoices for hotel stays, Ecoasis says that further information is required as detailed in Exhibits A-G of the second witness statement of Melissa Hodson. There were ongoing credits and debits relating to such things as Stay and Play Packages, access to the recreation centre, golf events and banquet services, food and beverage charges and golf and tennis services provided to hotel guests. However, Ecoasis says it was impossible to determine the correct amounts owing without proper accounting back-up. Ecoasis calculates that it is owed $975,164.14 for various outstanding invoices that remain unpaid by Hotel.

215. Ecoasis submits that the amounts claimed by Hotel are a moving target and notes that the reconciliation in Hotel Document #271, produced in January 2021, shows numerous examples of excessive payments made by Ecoasis to Hotel in the $1.4 million reconciliation payment made in December 2019. Under the new reconciliation Ecoasis notes significant amounts owing by Hotel to Ecoasis from July 2019 including cash reconciliation, accounts receivable and payroll transactions.

216. Ecoasis submits that the evidence tendered by Hotel relating to accounting matters was inadequate. Mr. Malak admitted that he was not involved in the accounting operations. Mr. Clarke restricted his evidence to his employment relationship with Ecoasis. The critical witness, Michelle Patton, provided no evidence at all – even though she was the Controller for Hotel.

217. Ecoasis seeks relief including findings that nothing is owed to Hotel for accounting services relating to Horticulture and T4 preparation, and that Hotel be ordered to pay such amounts as may be owing to Ecoasis after accounting reports haves been finalized and back-up information has been provided. In addition, Ecoasis seeks an order that Hotel pay the invoices for Horticulture services.

Position of Hotel

218. Hotel submits that the preparation of T4 slips fell outside the accounting services required of Hotel under the Operations Agreement. Likewise, Hotel submits that accounting services relating to Horticulture and Parkway Maintenance were outside the scope of accounting services required under the Operations Agreement.

219. Hotel submits that the Asset Purchase Agreement in Sections 1(b)(vii) and (viii) excluded Horticulture and Parkway Maintenance from the Golf and Tennis Business,

defined in Section 1(b)(vi) and were thus excluded from the scope of Section 4.1.

220. Hotel submits that Ecoasis is in arrears in the amount of $161,900.42 for food and beverage services plus $57,400.79 for hotel room invoices sent on April 23, 2020. Hotel notes the statement of Melissa Hodson showing a large number of hotel stays that were approved by Ecoasis but nevertheless remain unpaid.

221. In respect of amounts owing to Ecoasis, Hotel submits that it will provide payment upon being properly presented with an invoice and back-up information. Hotel says the total of unpaid Ecoasis invoices is $685,954.59.

222. Hotel notes that Ecoasis failed to pay the reconciliation amounts billed in October 2019 until late December 2019.

223. Hotel seeks relief including a declaration that the invoice for preparation of T4 slips is valid, as are the invoices for accounting services in respect of Horticulture and Parkway Maintenance. Hotel also seeks a declaration that invoices for food and beverage services and hotel room stays were validly issued.

Analysis

224. Most of the issues that arise under this heading fall to be determined in accordance with the ruling under Issue #10 – Accounting Services. As noted below in that section, the scope of Accounting Services is much broader than claimed by Hotel. While Horticulture and Parkway Maintenance may have been defined under the Asset Purchase Agreement to be separate from the Golf and Tennis Business, the accounting services in respect of those operations were part and parcel of the accounting services prior to the sale of the hotel and would have continued to be part of the accounting services Hotel was obliged to provide under the Operations Agreement. The claim by Hotel for separate payment for those services is dismissed.

225. The amount charged to Hotel for Horticulture services was properly invoiced by Ecoasis. Hotel is ordered to pay those invoices in the amounts of $7,114.09 and $2,569.60.

226. The amounts owed between Hotel and Ecoasis for such items as food and beverage services and hotel stays will depend upon the provision of proper back-up as detailed in this award under Issue #10 – Accounting Services.

227. The failure of Hotel to provide a witness statement from the Controller, Michelle Patton, is a significant evidentiary gap that militates against the Hotel position that Ecoasis is to be faulted for failure to pay outstanding invoices. The matter of fixing the amounts owed for outstanding invoices must be reserved to a future date to allow Ecoasis an opportunity to review accounting records, especially the 2021 reconciliation

set out at Hotel Document #271.

Issue #10 – Accounting Services

228. As part of the hotel sale it was agreed in the Operations Agreement that Hotel would assume responsibility for providing accounting services for the golf operations. In the Fall of 2019 disputes arose as to the scope of accounting services Hotel was required to provide and the amount of compensation. Ecoasis was dissatisfied with the failure of Hotel to provide reports such as income statements and an up-to-date general ledger as well as back-up generally for invoices issued by Hotel.

229. Background facts to Hotel assuming responsibility for accounting included the fact that the entire accounting staff of Ecoasis was hired by Hotel at the time of the purchase. David Clarke was responsible for oversight of accounting staff prior to the sale and continued to be the contact person for Ecoasis after the sale in dealing with accounting staff.

230. As disagreements arose between Hotel and Ecoasis regarding accounting services, it appeared to Ecoasis that Mr. Clarke was acting in a manner contrary to the best interests of Ecoasis – including alleged unauthorized agreements between Mr. Clarke and Hotel to pay Hotel for pre-sale accounting services, to pay increased compensation for accounting services and ultimately to terminate the obligation to provide accounting services entirely.

231. Expert witnesses were called to establish the scope and cost of accounting services to be expected in a similar accounting department. Dana Adams gave an opinion regarding the range of accounting services to be expected in an internal accounting department for an organization like Ecoasis – including 17 enumerated items related to the recording and reporting of financial activities. Christopher Polson provided an opinion on behalf of Hotel that the accounting services provided by Hotel, and alleged by Ecoasis to be expected of Hotel, had a market value far in excess of the compensation amount set out in the Operations Agreement. Mr. Polson's opinions on the interpretation of the Operations Agreement and the scope of accounting services intended by the parties were inadmissible.

232. The issue that arises under this head turns on the interpretation of Section 4.1 of the Operations Agreement. That provision required that Hotel provide accounting services to Ecoasis including processing of daily revenue, bi-weekly payroll, accounts payable and event billing. There are also issues relating to the level of services that were actually provided by Hotel, and in particular the level of financial reporting that was provided.

Position of Ecoasis

233. Ecoasis notes that prior to the sale of the hotel, accounting services for both the hotel and golf businesses were done by the same accounting team. The Ecoasis accounting team reported to David Clarke. The accounting services that were provided were extensive. Ecoasis retained no accounting staff beyond Mr. Clarke after the sale. Michelle Patton, the Controller, became an employee of Hotel. The Operations Agreement provided that the accounting services provided would be at an equal level with accounting services provided to Hotel (Section 4.1(b)). The compensation for accounting services was scheduled to the Operations Agreement with a provision for review in 90 days, and thereafter on an annual basis.

234. Ecoasis says it was not aware of any problem with the delivery of accounting services until December 2019. At that time, it was discovered that there were issues known to Mr. Clarke that had not been communicated to Ecoasis. One issue related to Ms. Patton and the accounting staff being tied up with due diligence for Hotel auditors associated with the sale – for which Mr. Clarke, without authority, agreed that Ecoasis would pay Hotel $8,000 for June 2019 accounting work. In October 2019, Mr. Clarke agreed to increase the monthly fee for accounting services from $8,000 to $10,000 without prior authority. In December 2019, again without prior authority from Ecoasis, Mr. Clarke agreed that the accounting services being provided would be terminated as of January 31, 2020.

235. Ecoasis notes that Hotel tendered a witness statement from Mr. Clarke that detailed the personal breakdown in relations between Mr. Clarke and Ecoasis but did not dispute any of the allegations or characterizations of his conduct that were included in the witness statements of Mr. Matthews and other Ecoasis witnesses. Ecoasis seeks a ruling that evidence of the words and conduct attributed to Mr. Clarke was uncontradicted. Ecoasis also argues that Hotel failed to call Michelle Patton as a witness. In addition, evidence of deficiencies in the accounting services provided by her on behalf of Hotel was not contradicted. Ecoasis seeks to have an adverse inference drawn from the failure of Hotel to provide a witness statement from Ms. Patton. Ecoasis argues that Mr. Malak had little independent knowledge of accounting matters.

236. After January 31, 2020, Ecoasis hired Kevin Isomura to assist with 2019 tax returns and accounting issues. Mr. Isomura inquired of Ms. Patton in the Spring of 2020 regarding trial balances and financial statements but was told by Ms. Patton that the information was not available and that no further financial information would be provided by Hotel.

237. Ecoasis hired Daina Rozitis as the new Controller in March 2020. Ms. Rozitis discovered that the accounting services provided by Hotel up to January 31, 2020 were wholly lacking. There was no back-up for any of the accounts in trial balances, recording of transactions was incomplete, January payrolls had not been entered, bank receipts were not entered, no bank reconciliations had been provided, monies were withdrawn from Ecoasis accounts improperly and access to 2019 accounting information was denied.

238. A very unusual situation arose in the Spring of 2020 when Ms. Rozitis attempted to access accounting records and data that Hotel said were provided to Ecoasis. Mr. Clarke told her the accounting information was on the S: and O: drives of the Ecoasis server but those drives could not be located. The Ecoasis IT provider discovered that those drives had been deleted from the Ecoasis server in mid-March 2020. The only Ecoasis staff person with access to those drives was Mr. Clarke. The information stored in those drives was later provided to Ecoasis on a thumb drive.

239. Upon review of the accounting data that was ultimately provided Ms. Rozitis was able to confirm with Ms. Patton that Hotel continued to make adjusting entries in the Ecoasis books up to August 2020. However, Ms. Patton advised that she was not authorized to provide those adjustments to Ecoasis. Ms. Rozitis also discovered that bank reconciliations for Ecoasis for 2019 showed October 31, 2019 as the last entry. The last month-end completed by Hotel for Ecoasis was July 31, 2019.

240. On August 4, 2020 Mr. Lee, on behalf of Ecoasis, wrote to Mr. Sennott, acting for Hotel, to explain the difficulties that Ecoasis was having in getting year end accounting information for 2019. Mr. Lee made a demand for 23 categories of accounting information needed by Ecoasis:

    1. the current year trial balance and general ledger ("GL") downloaded to Excel as at December 31, 2019 and January 31, 2020;

    2. the bank reconciliations for each general ledger bank account at December 31, 2019 and January 31, 2020, as well as the bank statements for each account;

    3. the prepaid expense schedule at December 31, 2019 and January 31, 2020;

    4. the accounts receivable listing reconciled to GL as at December 31, 2019 and January 31, 2020;

    5. inventory count and listing of inventory reconciled to GL at December 31, 2019;

6. analyses of year over year decrease in security deposit account (note that when an "analysis" is asked for, we are simply seeking the detail - e.g. the breakdown of information which shows the basis for the decrease in this case);

7. fixed asset schedule reconciled to GL as at December 31, 2019 and January 31, 2020;

8. list of fixed asset additions and dispositions during the 2019 year;

9. intercompany and loan schedules reconciled to GL as at December 31, 2019 and January 31, 2020;

10. accounts payable listing and accrued liabilities reconciled to GL as at December 31, 2019 and January 31, 2020;

11. list of all payables relating to wages including CRA, MSP, EHT, group benefits, WCB and accrued vacation and gratuities payable at December 31, 2019;

12. list of all deferred revenue, gift certificates, golf dues, credit and rain cheques payable reconciled to general ledger at December 31, 2019;

13. GST collectible and payable reconciled to GST returns December 31, 2019 and January 31, 2020;

14. copies and reconciliations of all monthly GST, WCB and payroll remittance and other government returns filed during 2019;

15. year-end list and reconciliation of capital leases payable, and deposits received to GL December 31, 2019 and January 31, 2020;

16. analysis and list of all commitments, including rent and lease schedules as at December 31, 2019 and January 31, 2020;

17. list of shared services and charges and transactions between the hotel and Ecoasis Resort & Golf LLP as at December 31, 2019, and January 31, 2020;

18. analysis of all insurance expensed for 2019;

19. analysis of consulting fees for 2019;

20. list of all golf and tennis members by category as at January 31, 2020;

21. analysis of repairs and maintenance accounts up to January 31, 2020;

22. analysis of all related party expenses including charges by hotel up to January 31, 2020; and

23. the monthly financial statement for Ecoasis for each month from July 1, 2019 through January 31, 2020.

241. Ecoasis submits that Hotel's failure to provide accounting services as required under the Operations Agreement has caused many problems including an inability to file 2019 tax returns and significant accounting fees to complete the work that Hotel should have done. Confusion relating to financial information for Golf and Tennis Members is said to have caused a disruption in business operations. The homeowner card program for Social Members had to be dismantled.

242. Ecoasis submits that Accounting Services under Section 4.1 of the Operations Agreement "including processing of daily revenue, bi-weekly payroll, accounts payable and event billing" are not confined to those enumerated items. Ecoasis cites the case of *Claus v. Claus*, 2008 BCSC 1523 for the principle that specific items preceded by the word "including" do not circumscribe the interpretation of matters to the items included. Instead, the items listed should be taken as providing examples only.

243. Ecoasis seeks relief including a finding that Hotel was required under Section 4.1 of the Operations Agreement to provide the same accounting services as were provided prior to the sale of the hotel, and that Hotel has failed to meet that obligation. Ecoasis also seeks an order that full accounting services be provided by Hotel for the period July 11, 2019 to January 31, 2020 including all back-up information. Ecoasis seeks damages for breach of Section 4.1 of the Operations Agreement – with damages to be assessed.

Position of Hotel

244. Hotel submits that accounting services required under Section 4.1 of the Operations Agreement should be confined to the four enumerated items following the word "including". Hotel says the broad range of accounting services argued by Ecoasis could not have been intended because the compensation scheduled to the Operations Agreement was far too low. Hotel submits that the difficulty encountered by Ecoasis after accounting services were terminated on January 31, 2020 was a reflection of the lack of Ecoasis preparation to take over accounting services. Hotel says Ecoasis chose to part ways with David Clarke in March 2020 with the result that there was no transition of knowledge to Ms. Rozitis who was hired two weeks later. Hotel says the antiquated SunSystems accounting program used by Ecoasis was inadequate.

245. Hotel says that at all times the accounting work for Ecoasis was treated with equal priority to the work done for Hotel. Hotel submits that Ecoasis was offered additional accounting services in March 2020 and says Ecoasis admitted that the additional services were beyond the scope of the original obligation of Hotel. Hotel also submits that Ecoasis had all of the accounting data that was necessary but had no idea as to how to access the information on the Ecoasis server. Hotel notes that a USB drive containing all of the accounting data was provided to Ecoasis on August 11, 2020.

246. Hotel relies upon the expert opinion of Christopher Polson to the effect that Hotel was providing accounting services with a value in the range of $11,000 to $13,500 per month. This was well beyond the compensation in the amount of $8,000 per month provided for under the contract. The broader services alleged by Ecoasis under the Operations Agreement would have cost much more. Hotel says the Ecoasis expert, Ms. Adams, confirmed the values used by Mr. Polson and confirmed that there is a range of services provided by accounting staff in different companies. Hotel says there is an ambiguity in Section 4.1 of the Operations Agreement that should be resolved on the basis of commercial reasonability. The parties could not have intended the broad scope of accounting services argued by Ecoasis given the limited amount of compensation provided in the Operations Agreement.

247. Hotel argues that an adverse inference should be drawn because Ecoasis failed to cross-examine Mr. Clarke on his witness statement citing *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 for principles governing the drawing of an adverse inference. Hotel does not respond to the Ecoasis argument that an adverse inference ought to be drawn from the failure to call Ms. Patton.

248. Hotel seeks relief including a declaration that the accounting services required under the Operations Agreement were confined to the four enumerated items, and that Hotel completed all services required. Hotel also seeks a declaration that no further information is owed to Ecoasis with respect to accounting services.

Analysis

249. Case authority establishes that the enumeration of items after the word "including" does not serve to limit the matters to the enumerated items. In *Claus v. Claus* it was held that:

> "...where a general term is followed by specific terms, and those specific terms are preceded by the word "including", the meaning to be attributed to that general word is not circumscribed by these specific items. They should be taken as providing examples, but not setting strict limitations."

250. There is no ambiguity in the language of Section 4.1 of the Operations Agreement in the term "accounting services". The words used, the whole of the Agreement and the factual background establish a requirement to provide accounting services in the same manner and to the same level as existed prior to the sale of the hotel. The accounting services that were to be delivered under the Operations Agreement are those enumerated in the 17 bullet points listed in the expert report of Dana Adams. There was no limitation on the accounting services that would be provided under the Operations Agreement. Hotel was obliged to provide a full suite of accounting services consistent with the services that had been provided prior to the sale of the hotel and consistent with the accounting services that the accounting team provided to Hotel after the sale. The services to be provided were those to be expected in a similar accounting department including the preparation of income statements, balance sheets, up-to-date general ledger entries and the recording and reporting of financial data necessary for tax purposes.

251. On the evidence, the accounting services provided by Hotel were inadequate particularly in respect of reporting obligations to Ecoasis. Hotel breached its obligations under Section 4.1 of the Operations Agreement. The extensive failures of Hotel triggered a cascade of conflict between the parties, notably in respect of back-up for invoices issued by Hotel.

252. The argument by Hotel that the compensation provided under the Operations Agreement ought to be determinative in establishing the scope of Section 4.1 is not accepted. Commercial reasonability is but one factor to be considered when interpreting a contractual provision. The level of compensation does not serve to create an ambiguity in the language of Section 4.1 especially when there was a provision for review of that compensation.

253. The statements and conduct attributed to Mr. Clarke by Mr. Matthews and other Ecoasis witnesses are accepted as true and correct. It was open to Hotel to tender a full statement from Mr. Clarke. It was incumbent upon Hotel to tender evidence to contradict the allegations made by Mr. Matthews regarding Mr. Clarke acting without authority to agree matters that favoured the position of Hotel. The impropriety of the relationship between Hotel and Mr. Clarke will be dealt with further under Issue #15, the allegation of breach of the Non-Solicitation Agreement by Hotel.

254. Evidence that Ms. Patton refused to provide accounting information on request by Ecoasis and as instructed by Hotel is similarly accepted as true and correct as it was uncontradicted. It was open to Hotel to provide a witness statement from Ms. Patton to refute those allegations. It was incumbent upon Hotel to provide a witness statement from Ms. Patton. Evidence of deficiencies in accounting services as detailed in Ecoasis witness statements was likewise uncontradicted.

255. The relief sought by Ecoasis is granted in a finding that Hotel breached its obligation

under Section 4.1 of the Operations Agreement to provide accounting services. Hotel must provide Ecoasis with complete financial information as broadly defined in the letter from Mr. Lee dated August 4, 2020 noted above. Hotel must provide up-to-date statements of accounts receivable and accounts payable with complete back-up data. Hotel is liable for damages caused by breach of Section 4.1 of the Operations Agreement with damages to be assessed.

Issue #11 – Termination of the NLRC Lease

256. Prior to the sale of the hotel Ecoasis was renting the North Langford Recreation Centre from the City of Langford. The pool and the gym were available for use by Golf and Tennis Members, Bear Mountain community members, hotel guests, and the general public. Fees from the various categories of users were said to have been either collected by Ecoasis or deposited to the Ecoasis bank account by Hotel.

257. As part of the sale, it was agreed that the lease on the NLRC would be transferred to Hotel. It is common ground that the lease was long expired at the time of the sale. The month-to-month tenancy was assumed by Hotel. Ecoasis did not prepare an assignment of the expired lease.

258. The NLRC was closed in March 2020 because of the pandemic. Thereafter, the City of Langford terminated the month-to-month tenancy and put the NLRC up for sale. The City of Langford ultimately sold the NLRC to an entity owned by Mr. Matthews and Mr. Kusumoto. Hotel seeks damages for breach of the Asset Purchase Agreement in the failure of Ecoasis to execute an assignment of the expired lease.

Position of Ecoasis

259. Ecoasis notes that the original lease for the NLRC had an 11-month term from February 1, 2015 to December 31, 2015. On expiry of the term in 2015 Ecoasis continued to rent on a month-to-month basis. To the extent that the month-to-month tenancy could be assigned to Hotel, Ecoasis says this was effected by Hotel assuming the rental and, with the approval of the City of Langford, paying the monthly rent.

260. Ecoasis submits that attempts were made to assist Hotel in obtaining a new longer-term lease. On November 12, 2019, Patrick Julian of Koffman Kalef, on behalf of Ecoasis, wrote to Ralston Alexander of Cook Roberts, who was acting for Hotel. Mr. Julian asked Mr. Ralston for input regarding a request to be made of the City of Langford for a new lease for the NLRC. Mr. Julian attached a draft Lease Agreement commencing November 1, 2019 and a draft "Assignment and Assumption Agreement". Mr. Ralston did not get back to Mr. Julian. Mr. Matthews stated that it was assumed that Hotel did not wish to pursue the assignment. Mr. Matthews assumed Hotel was content with continuing to operate the NLRC on a month-to-month basis.

261. Ecoasis submits that it is relevant that Mr. Clarke had been negotiating terms of employment with Mr. Malak prior to the sale of the hotel. One of the job description items was to provide consulting services to purchase the NLRC. Further, Mr. Matthews stated that Mr. Malak was in direct discussions with the City of Langford to purchase the NLRC in December 2019. It was always understood that the City of Langford intended to eventually sell the NLRC.

262. Ecoasis submits that Hotel requested a formal assignment with respect to the NLRC Lease on May 19, 2020, but that this request seemed to be academic in that Hotel advised Ecoasis on the very same day that the City of Langford had terminated the rental and Hotel had been asked to vacate.

263. Ecoasis submits that the subsequent purchase of the NLRC is irrelevant to any issue in the arbitration and that the NLRC Lease was, for all practical purposes, assigned to Hotel when Hotel assumed the rental in 2019. Assignment of the expired lease would not have given Hotel any greater entitlement to the NLRC beyond a month-to-month tenancy and that the City of Langford was entitled to terminate the month-to-month lease. Ecoasis says no assignment would have changed that fact.

264. Ecoasis seeks an order that Hotel's claim with respect to a purported failure to assign the expired NLRC Lease be dismissed.

Position of Hotel

265. Hotel acknowledges that the lease for the NLRC had expired and that the rental had become a month-to-month tenancy. Hotel argues that Ecoasis was obliged under Section 1(c) of the Asset Purchase Agreement to assign the expired Lease. That provision required that Ecoasis obtain the consent of third parties for the assignment of contracts. Hotel accepts that the City of Langford was aware of the change of ownership and accepted rent payments by Hotel up to March 2020.

266. Hotel says it approached the City of Langford with an offer to purchase the NLRC in October 2019. The offer was not accepted, and in February 2020 the City of Langford released a request for expressions of interest for the sale of the NLRC. Hotel submitted a proposal that was not accepted. The City of Langford asked Hotel to vacate by May 20, 2020. Mr. Malak stated that he was advised by a city official on May 21, 2020 that the City had not been aware of an agreed assignment of the expired Ecoasis lease. On or about August 26, 2020, Hotel became aware of a sale of the NLRC to a company controlled by Mr. Matthews and Mr. Kusumoto.

267. Hotel submits that Ecoasis breached the Asset Purchase Agreement under which Ecoasis was obliged to execute such documents as may be required to give full effect to the Agreement and to use reasonable best efforts to implement the Agreement. Hotel submits that Ecoasis made no *bona fide* attempts to assign the NLRC Lease, and

actively took steps to disrupt the lease and obtain the NLRC for itself. Hotel seeks relief including a declaration that Ecoasis failed to assign the Lease and interfered with the Lease after July 11, 2019. Hotel seeks an order that Ecoasis is liable for damages to be assessed.

Analysis

268. Section 1(a)(iii)(1) of the Asset Purchase Agreement provided that Hotel would purchase "that certain lease agreement dated for reference the 9th day of April, 2015, between the City of Langford, as landlord, and the Vendor, as tenant, in respect of the pool and fitness facility located adjacent to the Hotel operated by the Vendor pursuant to such lease under the name 'North Langford Recreational Facility.'" It is common ground that the lease was long expired at the date of the sale of the hotel. The month-to-month tenancy that continued was assumed by Hotel with the consent of the City of Langford. The month-to-month tenancy, to the extent that it was capable of being assigned, was for all practical purposes assigned to Hotel when Hotel took over the rental of the NLRC. The lease identified in the Asset Purchase Agreement, dated April 9, 2015, had expired and could not be assigned.

269. In correspondence regarding an application for an extension of the Lease, Hotel expressed no interest in either the negotiation of an extended lease or the associated assignment of the extended Lease. Mr. Ralston Alexander, the lawyer for Hotel, did not respond in a timely way to the Ecoasis overture in that respect. It was apparent from subsequent dealings in May 2020, however, that Hotel did seek to have Ecoasis assign the expired lease to assist Hotel in its efforts to purchase the NLRC. There is no evidence that any purported assignment of the expired lease would have improved the bargaining position of Hotel.

270. To the extent that the month-to-month tenancy for the NLRC was capable of assignment, it was for all intents and purposes assigned. There was no breach by Ecoasis of any obligation under the Asset Purchase Agreement to implement the transfer of the month-to-month tenancy. The City of Langford accepted Hotel as the new tenant. The NLRC was closed in March 2020 because of the pandemic and the City of Langford proceeded thereafter with a plan to sell. The request for a declaration that Ecoasis was in breach of the Asset Purchase Agreement for failure to assign the expired Lease is dismissed.

Issue #12 – Disruption of Ecoasis Business Operations

271. Under this head, Ecoasis alleges numerous breaches of the Operations Agreement, breach of a right of quiet enjoyment, breach of the Non-Solicitation Agreement with respect to David Clarke and unlawful termination of the Commercial Lease and the Operations Agreement. Ecoasis seeks damages for those violations.

Position of Ecoasis

272. Ecoasis cites *Howeling Nurseries Ltd. v. Fisons Western Corp.*, 1988 CarswellBC 471 (BCCA) for the proposition that damages for lost profits caused by breach of contract may not be capable of precise calculation. Ecoasis cites *2502731 Nova Scotia Ltd. v. Plaza Corp Retail Properties Ltd.*, 2009 NSCA 40 for the principle that a methodology for assessment of damages can assist when quantum cannot be proved with exactitude. Ecoasis further cites case and text authorities in relation to damages being allowed for diminution of value and loss of profits, goodwill and business reputation.

273. Ecoasis identifies 10 separate breaches of contract by Hotel that collectively served to disrupt and devalue the golf and tennis business – including denying access to the members lounge by virtue of ongoing construction. Ecoasis submits that Hotel did not adduce any substantive evidence at the hearing to challenge the business losses described in the evidence of Mr. Matthews or even cross-examine Mr. Matthews in respect of those claimed damages. Ecoasis submits that the quantum of damages is uncontroverted. Accordingly, Ecoasis seeks relief in the nature of a finding of damages as set out in the list of damages contained at Exhibit "A" of the witness statement of Mr. Matthews dated December 16, 2020. Business losses were $1,799,699 and lost revenue was $549,921.

Position of Hotel

274. Hotel denies that the golf and tennis business was disrupted in any way by construction related to hotel renovations. Scaffolding erected to the exterior of the hotel did not block access to the premises leased by Ecoasis. In respect of the allegation that the golf and tennis business was disrupted by breach of the obligation to provide food and beverage services, Hotel submits that Ecoasis failed to pay for those services with a resulting suspension of service.

275. Hotel submits that the testimony of golf members, Mr. Edwards and Mr. Richards, revealed a breakdown in communications between Ecoasis and its members, including a failure to advise members that invoices for food and beverage services were not being paid. Both Mr. Richards and Mr. Edwards confirmed the sentiment that the hotel renovations were a benefit.

276. Hotel submits that the golf and tennis business operations were never disrupted and that there was no blocking of access to premises leased by Ecoasis. Hotel submits that any difficulty in golf members dealing with hotel outlets was a direct result of Ecoasis unilaterally separating its point-of-sale system. Hotel submits that the failure of Ecoasis to provide its members with complete information has resulted in misguided animosity toward Hotel. Hotel emphasizes the continuing refusal of Ecoasis to pay food and beverage invoices. Hotel says Ecoasis could have mitigated any damages by paying all outstanding invoices and later disputing them. Hotel seeks relief including a declaration

that Hotel did not interfere with or disrupt Ecoasis' ability to carry on its business.

Analysis

277. Even though the damages listed by Mr. Matthews were not challenged it would not be appropriate to order payment of those damages at this time. All of the claims for damages for disruption of business repeat damages claimed under other heads. It is not clear that the effect of multiple breaches of contract give rise to a cumulative loss greater than the sum of the parts addressed under each individual issue. To the extent that Ecoasis seeks to prove the losses set out at Exhibit "A" to the witness statement of Mr. Matthews on an assessment of damages on issues already reserved to a further hearing, there is no impediment to seeking to prove any loss associated with any particular breach of contract that is causally connected. To the extent that a combination of breaches gives rise to a loss greater than the sum of losses caused by individual breaches, it is open to Ecoasis to make a causation argument on a future assessment of damages.

Issue #13 – Termination of the Commercial Lease

278. Hotel seeks a declaration that there was a valid termination of the Commercial Lease based on Ecoasis' unauthorized use of areas outside the leased premises as discussed under Issue #7 and the failure of Ecoasis to pay utilities bills. On April 14, 2020, counsel for Hotel gave notice of termination of the Commercial Lease.

Position of Ecoasis

279. Ecoasis submits that use of property by a tenant without authority does not constitute a breach of a lease. In *1328773 Ontario Inc. v. 2047152 Ontario Ltd.*, 2013 ONSC 4953, it was held that ancillary use of property belonging to the landlord does not involve a breach of the lease *per se*. Ecoasis submits that any alleged breaches were, in any event, cured prior to the notice of termination in April 2020.

280. Ecoasis relies upon the decision of the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 SCR 490 for the principle that relief against forfeiture is a discretionary equitable remedy having regard to the gravity of an alleged breach. In *Caromar Sales Ltd. v. Shura Real Estate Development Co.*, 2011 BCSC 1088, it was held that s. 24 of the *Law and Equity Act* of British Columbia provides a broad discretion to provide relief from forfeiture.

281. Ecoasis says Mr. Matthews was not aware of any unpaid utility invoices until April 7, 2020 and made immediate payment thereafter. The amount of the outstanding utility bill approximating $1,800 was minimal compared to the monthly rent payment of more than $27,000. Any unauthorized use of Limited Common Property is said to be minimal, and that there is a significant disparity between the property to be forfeited and the

alleged damage. Ecoasis seeks a finding that the Commercial Lease has not been lawfully terminated, or in the alternative a finding that it is entitled to relief from forfeiture.

Position of Hotel

282. Hotel submits that use of unauthorized areas by Ecoasis was a contravention of the Commercial Lease. Hotel submits that Ecoasis breached Section 7.3 of the Commercial Lease by failure to pay utilities accounts and Section 11.1 by constructing a storage room for liquor. Hotel further submits that Ecoasis breached Section 14 of the Commercial Lease by storing golf carts in the golf cart staging area on Limited Common Property. Hotel submits that while the utilities bill was paid prior to notice of termination, Ecoasis did not address the other contraventions.

283. In response to the request for relief from forfeiture, Hotel relies upon the principles set out by the Supreme Court of Canada in *Saskatchewan River Bungalows* requiring consideration of the reasonableness of the conduct, the gravity of the breaches, and the disparity in damages. Hotel submits that Ecoasis does not come to the arbitration with clean hands regarding the NLRC Lease and liquor licences. Hotel says Ecoasis has generally been uncooperative, unresponsive and difficult.

284. Hotel submits that Ecoasis was repeatedly advised of breaches of the Commercial Lease, and that termination of the lease was justified on the basis of a fundamental breach as described in *Kariml v. Gu*, 2016 BCSC 1060. Relevant factors are the nature and purpose of the contract, the intended benefit to the innocent party, the material consequences of the breach and the cumulative effect of a number of violations. Hotel emphasizes the continuing breach by Ecoasis of the unauthorized use areas. Such unauthorized use is said to go to the root of the Commercial Lease, and that such continued and rebellious use is a fundamental breach. Hotel seeks relief including a declaration that Hotel had a valid basis for terminating the Commercial Lease and that Ecoasis is not entitled to relief from forfeiture. Hotel seeks an order that Ecoasis immediately vacate the leased premises.

Analysis

285. As discussed under Issue #7, there was no breach by Ecoasis in respect of the use of the alleged unauthorized use areas. In respect of the alleged breach by failure to pay the utilities bill, there can be no finding of breach where the relatively small amount of the utilities bill was paid shortly after coming to the attention of Ecoasis. In any event, it would clearly be a case for relief from forfeiture given the amount of the utilities bill and the disparity in the consequences of the lease being terminated. The request by Hotel for a declaration that there was a valid termination of the Commercial Lease is dismissed.

Issue #14 – Termination of the Operations Agreement

286. By mid-April 2020, relations between the parties had deteriorated to such an extent that Hotel gave notice of termination of the Operations Agreement. The basis for termination was non-payment of invoices, most of which related to food and beverage services. The propriety of those invoices was addressed under Issue #2, Food and Beverage, and Issue #10, Accounting Services.

Position of Ecoasis

287. Ecoasis submits that Hotel had no reasonable basis for terminating the Operations Agreement. The primary basis for termination was the alleged non-payment of invoices mostly relating to food and beverage services. Ecoasis repeats its position that the invoices were improper insofar as Hotel was charging more for food and beverage services than was permitted under Section 4.2 of the Operations Agreement and because Hotel failed to provide the financial statements showing food costs that were necessary to determine the correct amount owing.

288. Ecoasis submits that Hotel waited until December 2019 and February 2020 to issue invoices and that even in February 2020 the requisite financial statements were not provided. Ecoasis says that the financial statements necessary for the calculation of food costs under Section 4.2 were not provided until December 2020, long after Hotel purported to terminate the Operations Agreement. Even when financial statements were provided in the course of the arbitration proceedings, Ecoasis says the invoices were incorrect because they included labour costs that were not contemplated under Section 4.2 of the Operations Agreement.

289. Ecoasis submits that Hotel was not allowed to terminate the Operations Agreement as that agreement specified the protocol to be followed for a breach. Section 9 of the Operations Agreement provided that in the event of a default in the payment of any amount required, Hotel has the right to either bring proceedings seeking specific performance, injunction or other equitable remedy or bring an action to recover damages. There is no provision for the Operations Agreement to be terminated upon default.

290. Ecoasis seeks a finding that the Operations Agreement continues in full force and effect.

Position of Hotel

291. Hotel submits that there were numerous invoices that remained unpaid as at mid-April 2020, primarily relating to food and beverage services. Payment of these invoices remain outstanding. Hotel submits that under Section 9 of the Operations Agreement, a party is in default for non-payment of amounts required to be paid. On April 14, 2020,

counsel for Hotel accordingly sent Ecoasis notice of termination of the Operations Agreement. In addition, Hotel submits that other invoices relating to hotel rooms, issued after April 14, 2020 pursuant to Section 5.2 of the Operations Agreement, remain unpaid.

292. Hotel says the wholesale non-payment of invoices required to be paid under the Operations Agreement constitutes a fundamental breach of the Operations Agreement for the same reasons that were argued under Issue #13 relating to the Commercial Lease. Hotel says the breaches by Ecoasis go to the very root of the Operations Agreement, depriving Hotel of the whole or substantially the whole of the benefit of the Agreement. Hotel says it was not open to Ecoasis to simply refuse to pay outstanding invoices. Rather, Ecoasis should have paid the invoices and disputed the amount under the provisions for dispute resolution.

293. Hotel seeks relief including a declaration that there was a valid termination of the Operations Agreement and that the Agreement is terminated.

Analysis

294. As discussed earlier, Hotel was in breach of the duty to issue proper invoices for food and beverage services and to provide proper accounting reports for the period July 2019 to the end of January 2020. Ecoasis was not obliged to pay whatever amount Hotel decided to charge for food, even on a partial basis. The Operations Agreement did not contemplate a right of termination in respect of disputed invoices but rather provided a mechanism for dispute resolution. There was no valid basis for Hotel to give notice of termination of the Operations Agreement on April 14, 2020. The Operations Agreement continues in full force and effect.

Issue #15 – Breach of the Non-Solicitation Agreement

295. As part of the package of agreements signed in July 2019 relating to the sale of the hotel and Hotel hiring scheduled employees, the parties entered into a Non-Competition and Non-Solicitation Agreement. Under that Agreement, the parties were prohibited from employing or otherwise enticing any individual currently employed by the other. The remedies provided for breach of the non-solicitation obligation included acknowledgement of irreparable harm should there be a violation.

296. Hotel entered into a consulting agreement with Mr. Clarke immediately after he left employment with Ecoasis. Mr. Clarke provided a witness statement in which he detailed a breakdown in relations with Ecoasis largely having to do with disagreements on personal matters. He said there was a steady decline in his treatment by Ecoasis as a result of his marrying an employee. In August 2019 he decided to not renew his employment contract when it came to an end in December. In January 2020, Mr. Clarke and Ecoasis entered into a consulting agreement for a three-month transition. On

March 9, 2020, he was told by Dan Matthews that Ecoasis no longer wanted him on site. Thereafter Mr. Clarke was hired as a consultant by Hotel. Mr. Clarke says that his decision to leave the employment of Ecoasis had nothing to do with any enticement or inducement from any outside source.

Position of Ecoasis

297. Ecoasis submits that as the CFO, David Clarke was critically involved in the sale of the hotel and in dealing with Hotel after the sale. Ecoasis says Mr. Clarke immediately began working for Hotel upon leaving his employment with Ecoasis.

298. In preparation for the arbitration proceedings Ecoasis discovered that Mr. Clarke had been working with Mr. Malak as early as May 2019 and was discussing terms of employment as a consultant prior to the sale of the hotel. Ecoasis also discovered that Mr. Clarke was providing services to Hotel while employed by Ecoasis. Ecoasis says the split loyalty of Mr. Clarke is of concern in light of the degree to which Ecoasis relied upon Mr. Clarke.

299. Ecoasis discovered communications between Mr. Clarke and Hotel in May 2019 in which Mr. Clarke proposed an agreement to perform services for Hotel including assistance in the transfer of the Marriott franchise, transfer of liquor licences, transfer of agreements relating to food and beverage operations, transition of all banking, liaison with strata owners, purchase of the NLRC and purchase of strata units in the hotel and Fairways Building. On that same day in May 2019 Mr. Clarke advised Marriott representatives that he would be the director of the hotel company and act as the go-between with Ecoasis and Hotel. Ecoasis states that neither Mr. Clarke nor Mr. Malak made disclosure of these arrangements.

300. On May 28, 2019, Mr. Malak communicated with Mr. Clarke regarding their proposed consulting agreement and attached an additional agreement for services that included Mr. Clarke acting as a facilitator in integration of the hotel and golf businesses, staffing reviews, acting as liaison with Marriott, representing Hotel in all negotiations with strata owners, acting as signatory in all bank accounts and meeting with Hotel to review financials. Mr. Malak advised Mr. Clarke on June 3, 2019 that he was anxious to sign the consulting agreement soon thereafter.

301. Ecoasis says that while Mr. Clarke was employed to act in the best interests of Ecoasis he was offering services to Mr. Malak including purchase of quarter-shares in the hotel and Fairway Buildings that would dilute Ecoasis' vote on decisions materially impacting the golf business. In addition, Mr. Clarke was negotiating with Marriott and Hilton on behalf of Hotel as well as the spa operator starting in August 2019. None of the work done by Mr. Clarke for Mr. Malak was disclosed to Ecoasis.

302. Mr. Malak also entered into agreements with Mr. Clarke's wife relating to the purchase

of strata units, for which she was paid approximately $27,000. This conflict of interest was not disclosed to Ecoasis. Mr. Malak said a decision was taken to not sign the consulting agreement with Mr. Clarke prior to the purchase of the hotel. Ecoasis notes that Mr. Clarke and Mr. Malak failed to produce any copies of consulting agreements that would indicate the date on which Mr. Clarke was engaged to provide services to Mr. Malak.

303. Ecoasis submits that it is uncontroverted that Mr. Clarke was employed by Ecoasis at the time the Non-Solicitation Agreement was signed, that Mr. Clarke was employed by Hotel within the three-year non-solicitation period, and that Hotel failed to obtain consent for such employment. Ecoasis says the breach of the Non-Solicitation Agreement is clear.

304. Ecoasis seeks relief including a finding that Hotel breached the Non-Solicitation Agreement, and damages linked to the cost of the arbitration proceeding and linked to the disruption of services caused by Hotel.

Position of Hotel

305. Hotel submits that Mr. Clarke is not now and never was an employee of Hotel. Hotel says Mr. Clarke was first engaged as a part-time consultant in January 2020 and became a full-time consultant in April 2020. Hotel says Mr. Clarke assisted Hotel after the purchase only with respect to items for which Ecoasis no longer held an interest or in respect of which Mr. Clarke was providing transitional assistance from Ecoasis to Hotel. Hotel submits that Mr. Clarke's services on behalf of Hotel did not conflict with his duty to Ecoasis, citing such services as matters involving strata owners and negotiations with the spa operator, the City of Langford and Marriott.

306. In respect of the services provided by Mr. Clarke and his wife regarding acquisition of strata units in the hotel and Fairways Building, Hotel submits that Ecoasis no longer had any interest. Hotel submits that no offer was made to employ Mr. Clarke or to solicit or entice Mr. Clarke to leave the employment of Ecoasis. Hotel says Mr. Clarke was planning to leave Ecoasis for reasons unrelated to Hotel.

307. Hotel seeks a declaration that there was no breach of the Non-Competition and Non-Solicitation Agreement.

Analysis

308. Hotel breached the Non-Competition and Non-Solicitation Agreement by working with Mr. Clarke behind the back of Ecoasis after July 11, 2019 and by entering into a consulting agreement with him in 2020. Mr. Clarke was the key person in the sale of the hotel and in the ongoing operation of the hotel and golf and tennis businesses. It is impossible to gauge the extent to which this duplicity contributed to the breakdown in

relations between the parties.

309. Both Mr. Malak and Mr. Clarke were sophisticated businessmen who were aware of the serious breach of trust inherent in their business dealings. The duty of loyalty owed to Ecoasis by an employee in the position of Mr. Clarke is one of the most significant obligations recognized in law. Hotel is liable for damages to be assessed or cost consequences caused by breach of the Non-Competition and Non-Solicitation Agreement.

Summary of Award

310. The parties agreed in the Summer of 2019 that Hotel would purchase the Westin Hotel at the Bear Mountain Resort and that thereafter the hotel and the golf and tennis businesses would be operated cooperatively in much the same manner as before the sale. Not long after the purchase the parties began to fall apart. Mr. Malak was not happy with the deal that had been made for the provision of accounting services and food and beverage services – and quickly moved to first renegotiate and then terminate those services. At the same time, Mr. Malak was very aggressive in pursuing collection of accounts for food and beverage services while refusing to provide the back-up necessary to validate those invoices.

311. As disagreements were ongoing between Hotel and Ecoasis, the CFO of Ecoasis, David Clarke, was secretly working for Hotel and making agreements on behalf of Ecoasis for increases in compensation for such things as accounting services, and ultimately the termination of accounting services, without the authorization of Ecoasis.

312. Within a year of having purchased the hotel, Mr. Malak gave notice of termination of the Operations Agreement and the Commercial Lease and sought to have Ecoasis removed from the premises. The impact of the terminations was devastating on the golf and tennis business. The financial consequences of Hotel's breaches of the Operations Agreement and the Non-Competition and Non-Solicitation Agreement will be assessed on a further hearing for the assessment of damages. The rulings on each of the issues are summarized as follow:

Issue #1 – Equipment Lease Payments

313. The parties appear to have amicably resolved this issue. If there is any issue that remains outstanding the parties are at liberty to apply.

Issue #2 – Food and Beverage

314. Hotel is liable for damages to be assessed for breach of Sections 4.2(a) and 4.2(b) of the Operations Agreement. Hotel is ordered to reissue invoices for food costs based on the food cost in the previous month's financial statements plus 20%.

Issue #3 – Liquor Licence

315. The relief requested by Ecoasis seeking rectification of the Asset Purchase Agreement or implication of a term to either remove the Valley Golf Course portion of Licence #54 or transfer the members lounge portion of Licence #54 back to Ecoasis is denied.

316. The relief sought by Hotel seeking declarations that the parties intended that Hotel own liquor licences over the Valley Golf Course and the members lounge is denied.

Issue #4 – December 2019 Meeting

317. No enforceable oral contract was made in the December meeting. The required certainty of essential terms was absent and any modification of the Operations Agreement would require an agreement in writing under the entire agreement clause in Section 13.6.

Issue #5 – Hotel Rates and Discounts

318. There is no finding that Hotel breached Sections 5.2, 5.3 or 5.4 of the Operations Agreement.

319. Hotel violated the obligation under Section 5.5 of the Operations Agreement to provide Marriott privileges to Ecoasis employees and is liable for damages to be assessed.

Issue #6 – Driving Range Access

320. It was not an implied term of the Operations Agreement that Hotel should pay for driving range usage by guests. There is no basis upon which a claim for *quantum meruit* can stand.

Issue #7 – Limited Common Property and Additional Areas of Use

321. Hotel's claim for trespass on the Limited Common Property is dismissed. Ecoasis is entitled to use the Limited Common Property areas related to the members lounge patio and the cart staging area outside the pro shop without additional lease payment.

Issue #8 – Golf and Tennis Member and Social Member Access to the North Langford Recreation Centre

322. Ecoasis is ordered to pay Hotel the amount of $54,091.26 for Golf and Tennis Member access to the NLRC.

323. The order for Ecoasis to pay Hotel for access to the NLRC by Social Members is reserved pending further agreement of the parties or further submissions regarding verification of amounts owing.

324. The order in respect of payment of the invoice for Regular Members is reserved pending further agreement of the parties or further submissions confirming verification of amounts owing.

Issue #9 – Additional Outstanding Invoices and Issues Related to Invoices Generally

325. The claim by Hotel for separate payment for accounting services for Horticulture and Parkway Maintenance is dismissed.

326. Hotel is ordered to pay Ecoasis invoices for Horticulture services in the amounts of $7,114.09 and $2,569.60.

327. Amounts owed for such items as food and beverage services and hotel stays will depend upon the provision of proper back-up as detailed in this award under Issue #10 – Accounting Services.

Issue #10 – Accounting Services

328. Hotel breached its obligation under Section 4.1 of the Operations Agreement to provide accounting services. Hotel must provide Ecoasis with complete financial information as broadly defined in the letter from Mr. Lee dated August 4, 2020. Hotel must provide up-to-date statements of accounts receivable and accounts payable with complete back-up data. Hotel is liable for damages caused by the breach of Section 4.1 of the Operations Agreement with damages to be assessed.

Issue #11 – Termination of the NLRC Lease

329. The request for a declaration that Ecoasis was in breach of the Asset Purchase Agreement for failure to assign the expired Lease for the NLRC is dismissed.

Issue #12 – Disruption of Ecoasis Business Operations

330. To the extent that Ecoasis seeks to prove the losses set out at Exhibit "A" to the witness statement of Mr. Matthews on an assessment of damages on issues already reserved to a further hearing, there is no impediment to seeking to prove any loss associated with any particular breach of contract that is causally connected. To the extent that a combination of breaches gives rise to a loss greater than the sum of losses caused by individual breaches, it is open to Ecoasis to make a causation argument on a future assessment of damages.

Issue #13 – Termination of the Commercial Lease

331. The request by Hotel for a declaration that there was a valid termination of the Commercial Lease is dismissed. The Commercial Lease continues in full force and effect.

Issue #14 – Termination of the Operations Agreement

332. There was no valid basis for Hotel to give notice of termination of the Operations Agreement on April 14, 2020. The Operations Agreement continues in full force and effect.

Issue #15 – Breach of the Non-Competition and Non-Solicitation Agreement

333. Hotel breached the Non-Competition and Non-Solicitation Agreement. An assessment of damages or cost consequences is reserved to a further hearing.

PARTIAL FINAL AWARD

1. Further to the advice of counsel on January 5, 2021 that Bear Mountain Resort & Spa Ltd, BM Management Holdings Ltd. and BM Resort Assets Ltd. (collectively "Hotel") are proper parties to the arbitration and have agreed to be bound by the result, each of those entities is jointly and severally liable for the matters for which Hotel is held liable.

2. Hotel is ordered to reissue invoices for food costs based on the food cost in the previous month's financial statements plus 20%. Hotel is liable for damages to be assessed for breach of the obligations under Section 4.2(a) and 4.2(b) of the Operations Agreement to provide food and beverage service and a 20% discount to Ecoasis members.

3. Hotel is liable for damages to be assessed for breach of the obligation under Section 5.5 of the Operations Agreement to provide Marriott privileges to Ecoasis employees.

4. Ecoasis is ordered to pay Hotel the amount of $54,091.26 for Golf and Tennis Member access to the NLRC.

5. Ecoasis is ordered to pay Hotel for access to the NLRC by Social Members and Regular Members in amounts to be assessed.

6. Hotel is ordered to pay Ecoasis for Horticulture services in the amounts of $7,114.09 and $2,569.60.

7. Hotel is liable for damages to be assessed for breach of the obligation under Section 4.1 of the Operations Agreement to provide accounting services. Hotel must provide Ecoasis with complete financial information as broadly defined in the letter from Mr. Lee dated August 4, 2020. Hotel must provide up-to-date statements of accounts receivable and accounts payable with complete back-up data.

8. Hotel is liable for damages or costs to be assessed for breach of the Non-Competition and Non-Solicitation Agreement.

9. Claims by Hotel that the parties intended that Hotel own liquor licences over the Valley Golf Course and the members lounge, that an enforceable oral contract was made in the December meeting, that Ecoasis is obliged to pay rent for use of Limited Common Property, that separate payment is required by Ecoasis for accounting services for Horticulture and Parkway Maintenance, that Ecoasis was in breach of the Asset Purchase Agreement for failure to assign the expired Lease for the NLRC and that there were valid terminations of the Operations Agreement and the Commercial Lease are dismissed.

10. Claims by Ecoasis that rectification of the Asset Purchase Agreement should be ordered

or a term implied to remove the Valley Golf Course portion of Licence #54 and transfer the members lounge portion of Licence #54 back to Ecoasis, that Hotel breached Sections 5.2, 5.3 and 5.4 of the Operations Agreement, that Hotel breached a right to quiet enjoyment of the premises leased by Ecoasis and that it was an implied term of the Operations Agreement that Hotel should pay for driving range use by guests are dismissed.

11. The matter of costs is reserved.

MADE at the City of Vancouver, Province of British Columbia, February 26, 2021.

Murray L. Smith Q.C.,
Arbitrator

This is **Exhibit "B"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.

A Commissioner for taking Affidavits for British Columbia

S-213239

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BEAR MOUNTAIN RESORT & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD.

PETITIONERS

AND:

ECOASIS RESORT AND GOLF LLP

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

ECOASIS RESORT AND GOLF LLP
1900-885 West Georgia Street
Vancouver, BC

This proceeding is brought for the relief set out in Part 1 below, by

☑ BEAR MOUNTAIN GOLF & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD., the Petitioners

If you intend to respond to this Petition, you or your lawyer must

(a) file a Response to Petition in Form 67 in the above-named registry of this court within the time for Response to Petition described below, and

(b) serve on the Petitioners

(i) 2 copies of the filed Response to Petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to Petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to Petition must be filed and served on the Petitioners

(a) if you were served with the Petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the Petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the Petitioners is: BOUGHTON LAW CORPORATION 700 – 595 Burrard Street Vancouver, BC V7X 1S8 Attn: Martin C. Sennott Fax number address for service of the Petitioners: (604)-683-5317 E-mail address for service of the Petitioners: N/A
(3)	The name and office address of the Petitioners' lawyer is: Same as above.

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

The Petitioners apply for the following orders:

1. the date and time for the hearing of the petition will be fixed by the court;

2. the decision of Murray L. Smith, Q.C., Arbitrator, sitting as a single arbitrator, dated February 26, 2021 is set aside; and

3. Costs.

Part 2: FACTUAL BASIS

Parties

1. The Petitioners in this proceeding are:

(a) BM Resort Assets Ltd. ("**BM Assets**"),a company incorporated pursuant to the laws of British Columbia with a registered and records office located at PO Box 49290, 1000 – 595 Burrard Street, Vancouver, BC.

(b) BM Management Holdings Ltd. ("**BM Management**"), a company incorporated pursuant to the laws of British Columbia with a registered and records office located at 1200 - 925 West Georgia Street, Vancouver, BC.

(c) Bear Mountain Resort & Spa Ltd. ("**BM Resort & Spa**"), a company incorporated pursuant to the laws of British Columbia with a registered and records office located at 7th Floor, 1175 Douglas Street, Victoria, BC.

2. The Respondent, Ecoasis Resort and Golf LLP ("**GT Operator**") is a company incorporated pursuant to the laws of British Columbia with an address for service in this proceeding at 1900-885 West Georgia Street, Vancouver, BC.

Background

3. Prior to July 11, 2019, GT Operator owned the Westin Bear Mountain Golf Resort & Spa near Victoria, BC, consisting largely of a hotel and two golf courses.

4. On July 8, 2019, 1210110 B.C. Ltd. (now BM Resort & Spa) and 2600 Viking Way Ltd. (now BM Management) (collectively, "**Hotel Operator**") signed an agreement ("**Asset Purchase Agreement**") to purchase all of the property, assets and undertakings used in the business of operating the hotel ("**Hotel Business**") from GT Operator. Hotel Operator completed the purchase ("**Asset Purchase**") on July 11, 2019.

5. As a result of the Asset Purchase, Hotel Operator became the owner of certain capital assets, goodwill and third party trade, service, supplier, hotel management and licensing agreements used to run the Hotel Business ("**Hotel Purchased Assets**").

6. Certain items were specifically excluded from the Hotel Purchased Assets, including the lands, premises and assets owned by GT Operator and used in its golf and tennis business ("**Golf and Tennis Business**").

7. Following the Asset Purchase, GT Operator continues to run the Golf and Tennis Business, with Hotel Operator now operating the Hotel Business.

8. As part of the Asset Purchase and as a direct result of the Hotel Business and the Golf and Tennis Business now being separate businesses, Hotel Operator and GT Operator entered into various agreements including a:

(a) Commercial Lease dated July 11, 2019 ("**Commercial Lease**") entered into between Hotel Operator, as landlord, and GT Operator, as tenant;

(b) Hotel, Golf Course and Tennis Operations Agreement dated July 11, 2019 ("**Operations Agreement**"); and

(c) Non-Competition and Non-Solicitation Agreement dated July 11, 2019.

9. The Commercial Lease was entered into so GT Operator could continue to use areas of the Hotel Purchased Assets for its Golf and Tennis Business.

10. The Operations Agreement was necessary as GT Operator agreed Hotel Operator would provide certain services to GT Operator for its Golf and Tennis Business, including food and beverage and accounting services.

11. Issues arose between the parties with respect to obligations owed under the Operations Agreement, the Commercial Lease and the Non-Competition and Non-Solicitation Agreement.

Agreement to Arbitration and Selection of Arbitrator

12. On about June 5, 2020, the parties agreed to seek third-party binding resolution through arbitration with the Respondent's suggestion of Murray L. Smith, Q.C. as arbitrator ("**Arbitrator**").

13. On June 8, 2020, counsel for the Petitioners asked the Arbitrator to act for the parties, and the Arbitrator accepted.

14. The parties proceeded to arbitration pursuant to a submission agreement, rather than pursuant to any dispute resolution clause in any prior agreement between the parties.

15. Neither party filed a Notice of Arbitration, and there was no formal written agreement between the parties to arbitrate.

16. On September 14, 2020, the parties agreed to arbitrate a list of 15 issues, which was attached as Schedule "A" to formal terms of reference dated September 16, 2020.

Evans Aff #1, Exhibit A, page 1.

17. The issues to be decided by arbitration were as follows:

(a) Issue #1: equipment lease payments under the Asset Purchase Agreement;

(b) Issue #2: provision of, and payment for, food and beverage services under s. 4.2 of the Operations Agreement;

(c) Issue #3: ownership of the liquor licence under the Asset Purchase Agreement;

(d) Issue #4: whether an oral agreement was reached about food and beverage services between Hotel Operator and GT Operator at a December 2019 Meeting;

(e) Issue #5: hotel rates, event pricing and discounts for GT Operator employees under ss. 5.2 to 5.5 of the Operations Agreement;

(f) Issue #6: driving range access for Hotel Business guests;

(g) Issue #7: GT Operator's use of limited common property and additional areas not mentioned in the Commercial Lease;

(h) Issue #8: golf and tennis and social members access to the North Langford Recreation Centre ("NLRC");

(i) Issue #9: additional outstanding invoices and issues related to invoices generally under the Operations Agreement and otherwise;

(j) Issue #10: provision of accounting services under s. 4.1 of the Operations Agreement;

(k) Issue #11: assignment of the NLRC lease under the Assets Purchase Agreement and termination of this lease;

(l) Issue #12: disruption of GT Operator's business under s. 3.1 of the Operations Agreement and s. 8.1 of the Commercial Lease;

(m) Issue #13: termination of the Commercial Lease;

(n) Issue #14: termination of the Operations Agreement; and

(o) Issue #15: breach of the Non-Competition and Non-Solicitation Agreement.

18. On January 5, 2021, the parties agreed the *Arbitration Act*, SBC 2020, c. 2, would apply and the rules of procedure of the Vancouver International Arbitration Centre would be followed.

19. The evidentiary hearing took place between January 5 and 13, 2021, via Zoom videoconference, administered by Charest Legal Solutions Inc ("**Evidentiary Hearing**").

The Evidentiary Hearing

20. The following witness statements were tendered by the Petitioners at the Evidentiary Hearing:

(a) Witness Statement #1 of Raoul Malak, the sole director of BM Resort & Spa, dated December 16, 2020;

(b) Witness Statement #1 of David Clarke, former Chief Financial Officer of GT Operators, dated December 16, 2020; and

(c) Witness Statement #2 of Raoul Malak dated December 23, 2020.

21. The parties submitted written arguments on December 31, 2020, which were updated on January 21, 2021.

22. On January 22, 2021, the parties presented oral arguments.

The Arbitral Award - February 26, 2021 (Murray L. Smith, Q.C.)

23. The Arbitrator issued his written decision on February 26, 2021 ("Arbitral Decision").

Evans Aff #1, Exhibit B, page 14.

24. The Arbitrator decided the issues in the proceeding as follows, which were substantially decided in GT Operator's favour:

(a) Issue #2: food and beverage services: GT Operator's interpretation of the cost of food services under the Operations Agreement was accepted and the Hotel Operator breached ss. 4.2(a) and (b) of the Operations Agreement by not providing food and beverage services to GT Operator at those costs and by not providing a 20% discount for food and beverage on the Hotel Business premises to golf and tennis members. Hotel Operator is liable for damages to be assessed and must reissue invoices for food costs based on the previous month's financials plus 20%;

(b) Issue #3: ownership of liquor licence: both parties were unsuccessful. GT Operator wanted rectification or implication of a term to remove the Valley Golf Course portion of Licence #54 from the Asset Purchase Agreement or to have it transferred back. Hotel Operator's request for declarations that the parties intended it to own the Valley Golf Course liquor licences and the Golf and Tennis Business's members' lounge was denied;

(c) Issue #4: alleged oral agreement about food and beverage services made at December 2019 Meeting: no enforceable oral contract made;

(d) Issue #5: hotel rates, event pricing and discounts for GT Operator employees under ss. 5.2 to 5.5 of the Operations Agreement: Hotel Operator breached s. 5.5 of Operations Agreement by not providing Marriott privileges to GT Operator's employees and is liable for damages to be assessed. Hotel Operator did not breach: (1) s. 5.2 regarding discounted rates for GT Operator employees; (2) s. 5.3 regarding National Sports Agreements; and (3) s. 5.4 regarding event pricing.

(e) Issue #6: driving range access for Hotel Business guests: no implied term in the Operations Agreement requiring Hotel Operator to pay for driving range usage by GT Operator's guests;

(f) Issue #7: GT Operator's use of limited common property and additional areas not mentioned in the Commercial Lease: implied term in the Commercial Lease allowing GT Operator access to Hotel Operator's limited common property without payment. The additional areas were no longer in issue by the time of the Arbitration;

(g) Issue #8: golf and tennis and social members access to the North Langford Recreation Centre: GT Operator to pay Hotel Operator $54,091.26 for Golf Business member access to NLRC. The Arbitrator reserved his decision about social members' access and payment of invoices for regular members, pending further submissions;

(h) Issue #9: additional outstanding invoices and issues related to invoices generally under the Operations Agreement and otherwise: Hotel Operator's claim for payment for additional accounting services was dismissed and Hotel Operator liable to GT Operator for horticulture services;

(i) Issue #10: accounting services under s. 4.1 of the Operations Agreement: Hotel Operator breached the Operations Agreement by not providing accounting services in accordance with s. 4.1. Hotel Operator must provide complete financial information to GT Operator and is liable for damages to be assessed;

(j) Issue #11: assignment of the NLRC lease under the Assets Purchase Agreement and termination of the lease: GT Operator not in breach of the Asset Purchase Agreement for failure to assign NLRC lease to Hotel Operator. GT Operator did not interfere with Hotel Operator's ability to renew the lease;

(k) Issue #12: disruption of GT Operator's business under s. 3.1 of the Operations Agreement and s. 8.1 of the Commercial Lease: damages claimed by GT Operator repeated damages it claimed under other Issues so no decision on damages made regarding Issue #12. GT Operator has the right to prove damages for any breach of contract under the other Issues if they are causally connected to its alleged losses and it has the right to prove damages for a combination of breaches if it can show the combined breaches gave rise to a loss greater than a sum of the losses caused by Hotel Operator's individual breaches;

(l) Issue #13: termination of the Commercial Lease: Hotel Operator has no basis on which to terminate the Commercial Lease and it continues in full force and effect;

(m) Issue #14: termination of the Operations Agreement: Hotel Operator has no basis on which to give notice of termination of Operations Agreement, and it continues in full force and effect; and

(n) Issue #15: breach of the Non-Competition and Non-Solicitation Agreement: Hotel Operator breached Non-Competition and Non-Solicitation Agreement and is liable for damages or costs to be assessed.

25. Issue #1 concerning equipment lease payments under the Asset Purchase Agreement was resolved between the parties prior to the Arbitration.

Arbitrator's Warning Against Perjury

26. On January 12, 2021, the first day of Mr. Malak's testimony, the court reporter administered Mr. Malak's affirmation to tell the truth. The Arbitrator did not make any comments to Mr. Malak about his affirmation or otherwise before he began his testimony.

Evans Aff #1, Exhibit F, page 96.

27. On January 13, 2021, the second day of Mr. Malak's testimony, the Arbitrator reminded Mr. Malak of his affirmation to tell the truth as follows prior to cross-examination by opposing counsel:

> THE ARBITRATOR: Mr. Malak, welcome back. Thank you. I'll remind you that you're still under the compulsion of the affirmation to tell the truth, nothing but the truth, and that that will weigh not only on your conscience but also could lead to serious consequences. So that's the warning for this morning. Thanks.

Go ahead, Mr. Lee.

Transcript Jan. 13, 2021, Evans Aff #1, Exhibit G, page 98.

28. The Arbitrator's warning impacted Mr. Malak's emotional state during his testimony and led him to doubt the Arbitrator's impartiality. From that time forward, Mr. Malak felt it was inevitable that the Arbitrator would decide the Arbitration in the Respondent's favour.

Malak Aff #1.

29. At the close of the sixth day of proceedings, counsel for the Petitioners raised concerns with the Arbitrator, off the record, regarding the Arbitrator's warning to Mr. Malak. The Arbitrator's response was that the warning he gave was "standard."

30. The Arbitrator did not administer the oath or affirmation to any other witness in the proceeding, nor did he make any comments to any other witnesses reminding them of their oath or affirmation before they began their testimony.

31. In contrast, the Arbitrator responded unequivocally positively to the Respondent's witnesses. For example, after Mr. Matthews finished testifying, the Arbitrator said:

> THE ARBITRATOR: All right. Thank you very much. Mr. Matthews, I would like to thank you for your patience and your willingness to attend and your clear and very helpful testimony. So thank you very much for your service in the arbitration. [emphasis added]

Transcript Jan. 6, 2021, Evans Aff #1, Exhibit C, page 85.

32. After Mr. Malak finished testifying, the Arbitrator did not make any positive comments about the nature of Mr. Malak's evidence:

> THE ARBITRATOR: Mr. Malak, I know it's been a very long and trying process but we are grateful for your assistance and your patience in dealing with the scheduling and all that is entailed in a difficult process. So many thanks for attending today and yesterday.

Transcript Jan. 13, 2021, Evans Aff #1, Exhibit G, page 99.

Arbitrator's Acceptance of Hearsay Evidence over First-hand or Documentary Evidence

33. The Arbitrator preferred and accepted hearsay evidence supporting the Respondent's position, even where such evidence was directly controverted by admissions made on cross-examination or by documentary evidence, including in the following statements:

(a) that Mr. Matthews, the principal of GT Operator, stated there was no reason to doubt the ability of Hotel Operator to offer Marriott privileges to GT Operator employees (Arbitral Decision, para. 138), which the Arbitrator acknowledged as hearsay but nevertheless accepted, when in fact:

(i) Mr. Matthews admitted on cross-examination that when he reached out to Marriott to obtain Marriott rewards for GT Operator's staff, Marriott was unable to provide these benefits; and

Transcript Jan. 6, 2021, Evans Aff #1, Exhibit C, page 81-83.

(ii) Hotel Operator submitted the hotel Employee Handbook and the Marriott Explore Program Rules, which clearly state discounts were only available for hotel employees, owners, franchisees and licensees;

Marriott Explore Program Rules, Evans Aff #1, Exhibit H, page 100.

Marriott Employee Handbook, Evans Aff #1, Exhibit I, page 109.

(b) that David Clarke would ultimately be employed by Hotel Operator, potentially as its Chief Executive Officer (Arbitral Decision, para. 28), which was hearsay evidence from Mr. Clarke, who did not appear as a witness and whom the Respondent declined to cross-examine.

Witness Statement of D. Matthews, Evans Aff #2, Exhibit D, page 90-97.

Arbitrator's Failure to Decide Petitioners' Claims

34. During the arbitration proceedings, the Petitioners made an application objecting to portions of Mr. Matthew's witness statement for violation of the parol evidence rule. Both parties tendered written submissions regarding the application.

Bear Mountain's Submissions re: Parol Evidence Rule, Evans Aff #3, Exhibit E, page 334.

Ecoasis' Submissions re: Parol Evidence Rule, Evans Aff #3, Exhibit F, page 343.

35. Instead of deciding Hotel Operator's application objecting to certain paragraphs of Mr. Matthews's Witness Statement which violated the parol evidence rule, the Arbitrator accepted the evidence for consideration and made no ruling on the application (Arbitral Decision, para 15).

36. During the arbitration proceedings, Hotel Operator requested that the Arbitrator draw an adverse inference against GT Operator for failing to cross-examine Mr. Clarke regarding the words and conduct attributed to him in the Respondents' witness statements. The Arbitrator instead stated that an adverse inference could be drawn against Mr. Clarke for failure to refute the GT Operator's statements (Arbitral Decision, para. 78). Mr. Clarke was not a party to the proceedings.

37. The Arbitrator failed to make a decision regarding the Hotel Operator's outstanding invoices to the GT Operator for $57,400,79, which remained unpaid (Arbitral Decision, para. 220). The Arbitrator failed to make a decision regarding payment of these invoices even after finding there was no issue regarding the room rates charged by Hotel Operator (Arbitral Decision, para. 137-141).

Arbitrator's Misstatement of Petitioners' Position and Disregard of Evidence That Supported the Petitioners' Position

38. Throughout Arbitral Decision, the Arbitrator misstated the Petitioner's position and evidence, and made findings of fact that disregard the Petitioners' evidence including in the following statements:

(a) that Hotel Operator advised GT Operator to cease selling alcohol in the members lounge because GT Operator was required to obtain its liquor from Hotel Operator pursuant to the Operations Agreement (Arbitral Decision, para. 62), when an additional reason given by Hotel Operator was that the members lounge was covered by the hotel liquor license, as affirmed by Mr. Laroque, the manager of the Golf Business, who admitted to breaching the hotel's license;

Transcript Jan. 6, 2021, Evans Aff #1, Exhibit C, page 81-83.

(b) that Hotel Operator failed to provide proper back-up for its food and beverage invoices (Arbitral Decision, paras. 64 and 77), without acknowledging that Hotel Operator was unable to provide proper accounting services, which impacted the availability of back-up documents, and ignoring the fact that Hotel Operator had provided the full extent of information available to it for months; and

Transcript Jan 12, 2021, Evans Aff #5, Exhibit B, page 12.

(c) that the issue of GT Operator's use of limited common property and additional areas not covered by the Commercial Lease emerged after "*months of deteriorating relations*" (Arbitral Decision, para. 161), without acknowledging that Mr. Harrington, the hotel manager, gave evidence confirming Hotel Operator discovered GT Operators' unauthorized use of the areas not defined in the Commercial Lease in December 2019 and brought this issue to GT Operator's attention, before the parties' relationship deteriorated.

Harrington Transcript Jan. 8, 2021, Evans Aff #5, Exhibit C, page 17.

(d) that the Petitioners' summary of the content of s. 4.2(a) of the Operations Agreement was "argument," when the summary was non-contentious and was easily verified as accurate by looking at the provision (Arbitral Decision, para. 61);

(e) that the use of a sublease agreement to resolve the liquor licensing issue was too complex to allow for a conclusion that any such arrangement would be possible, it would be "too complex" to determine if arrangement would be possible (Arbitral Decision, paras. 107), without acknowledging that the expert, Mr. Hicks, called the LCRB and was told their first impression was that such a sublease arrangement would work.

Transcript Jan. 11, 2021, Evans Aff #1, Exhibit E, page 94.

Arbitrator's Unqualified Acceptance of the Respondent's Allegations as Facts

39. In the "Factual Background" section of the Arbitral Decision, the Arbitrator portrays several submissions of GT Operator as unassailable facts, including the following:

(a) that Hotel Operator did not bring food and beverage invoices to GT Operator's attention until October 2019 (Arbitral Decision, para. 29), which was a disputed allegation, not a fact;

(b) that Mr. Matthews made repeated requests for a meeting about the food and beverage invoices (Arbitral Decision, para. 31), without acknowledging that Hotel Operator had also attempted to meet with Mr. Matthews for weeks at this point;

(c) that in February 2020, GT Operator learned that Hotel Operator was not providing the employee discount for hotel stays (Arbitral Decision, para 35), which was GT Operator's allegation, not a fact;

(d) that Hotel Operator discovered GT Operator was using areas outside the lease agreement in March 2020 (Arbitral Decision, para. 36), when Hotel Operator's evidence was that they discovered this in December 2019, which was confirmed by hotel manager Mr. Harrington; and

(e) that on April 8, 2020, Hotel Operator entered the areas not expressly defined in the Commercial Lease, cut locks and threatened to tow golf carts (Arbitral Decision, para. 36), without acknowledging that Hotel Operator had attempted to settle the matter several times over the previous 8 months.

40. This pattern of accepting the Respondent's contested allegations as fact continued throughout the Arbitral Decision, including that Mr. Richards and Mr. Edwards (Golf and Tennis Members) confirmed that discounts on food and beverages were not being provided (Arbitral Decision, para. 58), when their actual evidence was that food and beverage discounts were provided, but there were no discounts on liquor only;

Transcript Jan. 7, 2021, Evans Aff #1, Exhibit D, page 87-90.

Part 3: LEGAL BASIS

1. This Petition is brought under *Supreme Court Civil Rule* 2-1(2)(b) and *Arbitration Act*, ss. 58(1)(g) and (3).

Requirement for Impartiality

2. An arbitrator must be independent of the parties, unless otherwise agreed, and must be impartial and act impartially: *Arbitration Act*, SBC 2020, c 2, ss. 16(1)-(2) and 58(1)(g).

3. An arbitrator has an ongoing obligation to, without delay, disclose any circumstances likely to give rise to justifiable doubts as to their independence or impartiality—this obligation applies from the time of the arbitrator's appointment and continues throughout the arbitral proceedings: *Arbitration Act*, ss. 16(3)-(4) and 58(1)(g).

4. Justifiable doubts as to the arbitrator's independence or impartiality means "a real danger of bias on the part of the arbitrator in conducting the arbitration": *Arbitration Act*, ss. 58(g).

5. At no time did the Arbitrator disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

Setting Aside Arbitral Awards for Bias

6. On September 1, 2020, the *Arbitration Act*, SBC 2020, c 2 came into force. It states that a party may apply to set aside an arbitral award if there are justifiable doubts as to the arbitrator's independence or impartiality: ss. 58(1)(g).

7. There are justifiable doubts as to the arbitrator's independence or impartiality if there was a real danger of bias on the part of the arbitrator in conducting the arbitration: ss. 58(3).

8. The time period for setting an arbitral award aside for lack of independence or impartiality is no more than 30 days after the date on which the applicant receives the arbitral award: s. 60. The parties received the Arbitral Decision on March 1, 2021.

9. Arbitrators owe a duty of fairness to the parties to an arbitration. Avoiding both a biased state of mind and the appearance of bias is part of that duty.

Atlantic Industries Ltd v SNC-Lavalin Constructors (Pacific) Inc., 2017 BCSC 1263, para. 18

10. Actual bias has been defined as "the deliberate or wilful intent to favour one side over the other to advance personal benefit" whereas reasonable apprehension of bias relates to "the exposure of the mind to specific and identifiable influences that are entirely extraneous to the issue to be determined, are hidden from view, and thus are unable to be addressed by the party against whom they may hold sway."

Tepei v. Insurance Corp. of British Columbia, 2007 BCSC 1694, aff'd 2009 BCCA, para. 113

11. Under the previous *Arbitration Act*, RSBC 1996, c. 55, the test for whether an arbitral award should be set aside for bias was whether there was a reasonable apprehension of bias; evidence of actual bias was not necessary.

Atlantic Industries, para. 19; *Tepei*, para. 113

12. The test for a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

Atlantic Industries, para. 19

13. Courts have not yet ruled on whether anything more is required to demonstrate a "real danger" of bias as opposed to a reasonable apprehension.

14. An arbitrator's comments during the arbitration hearing indicating he had already made up his mind regarding the facts underpinning his decision give rise to a reasonable apprehension of bias.

McClintock v Karam, 2015 ONSC 1024

15. In the case at bar, an objective person reviewing the transcripts, the submissions, the evidence and the Arbitral Decision would conclude there was a real danger of bias on the part of the Arbitrator. The Arbitrator's remarkable warning to Mr. Malak, on the second day of his testimony, about the need for him to be truthful during the Evidentiary Hearing, alone indicates a real danger the Arbitrator was not impartial. However, when this event is considered in light of a number of other indicators of potential bias, the real danger threshold is certainly met.

16. These indicators of potential bias, which would lead a reasonably informed person to conclude that there was a real danger of bias affecting the Arbitrator's ability to make a decision on the merits alone are as follows:

(a) accepting hearsay evidence tendered by the Respondent over evidence from first-hand testimony and/or documents;

(b) failing to address the Petitioners' application to strike portions of the Respondent's evidence that violated the parol evidence rule;

(c) misstating the Petitioners' position and evidence;

(d) disregarding evidence that supported the Petitioners' position;

(e) unqualified acceptance of the Respondent's allegations as facts; and

(f) characterizing uncontroversial facts as the Petitioners' allegations.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Raoul Malak, sworn March 24, 2021.

2. Affidavits #1, 2, 3, 4 and 5 of Sherri Evans, sworn March 31, 2021.

The Petitioners estimate that the hearing of the Petition will take 4 days.

Dated: March 31, 2021

Signature of Lawyer for Petitioners
Martin C. Sennott

To be completed by the court only

Order made:

☐ on the terms requested in paragraphs _____ of Part 1 of this Petition

☐ with the following variations and additional terms

_____

_____

_____

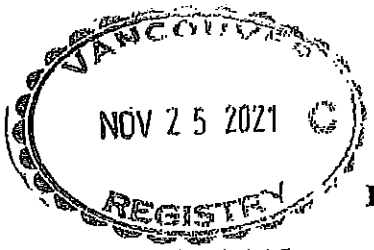
_____

Date: _____

_____
Signature of ☐ Judge ☐ Master

This is **Exhibit "C"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.

A Commissioner for taking Affidavits for British Columbia



No. S213239
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BEAR MOUNTAIN GOLF & SPA LTD., BM MANAGEMENT HOLDINGS LTD. and BM RESORT ASSETS

PETITIONERS

AND:

ECOASIS RESORT AND GOLF LLP

RESPONDENT

NOTICE OF HEARING

To: the Respondent, Ecoasis Resort and Golf LLP

TAKE NOTICE that the petition of Bear Mountain Golf & Spa Ltd., BM Management Holdings Ltd. and BM Resort Assets dated March 31, 2021 will be heard at the courthouse at 800 Smithe Street, Vancouver, BC, for two (2) days commencing January 20, 2022 at 9:45 a.m.

Counsel for the Petitioners: Martin C. Sennott at msennott@boughtonlaw.com Telephone: 604-647-4106
Counsel for the Respondent: Roger Lee at roger.lee@dlapiper.com. Telephone: 604-687-1612

1. Date of hearing

   The parties have agreed as to the date of the hearing

2. Duration of hearing

   The parties have agreed as to how long the hearing will take

3. Jurisdiction

   This matter is not within the jurisdiction of a master.

Dated: November 25, 2021

Signature of Lawyer for Petitioners,
Martin C. Sennott

This NOTICE OF HEARING is filed by Martin C. Sennott of Martin C. Sennott Law Corporation on behalf of Boughton Law Corporation, whose place of business and address for delivery is PO Box 49290, 700 - 595 Burrard Street, Vancouver, BC V7X 1S8, 604-687-6789. (File No. 92809.4)

S-213239

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BEAR MOUNTAIN RESORT & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD.

PETITIONERS

AND:

ECOASIS RESORT AND GOLF LLP

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

ECOASIS RESORT AND GOLF LLP
1900-885 West Georgia Street
Vancouver, BC

This proceeding is brought for the relief set out in Part 1 below, by

☑ BEAR MOUNTAIN GOLF & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD., the Petitioners

If you intend to respond to this Petition, you or your lawyer must

(a) file a Response to Petition in Form 67 in the above-named registry of this court within the time for Response to Petition described below, and

(b) serve on the Petitioners

(i) 2 copies of the filed Response to Petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to Petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to Petition must be filed and served on the Petitioners

(a) if you were served with the Petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the Petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the Petitioners is: BOUGHTON LAW CORPORATION 700 – 595 Burrard Street Vancouver, BC V7X 1S8 Attn: Martin C. Sennott Fax number address for service of the Petitioners: (604)-683-5317 E-mail address for service of the Petitioners: N/A
(3)	The name and office address of the Petitioners' lawyer is: Same as above.

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

The Petitioners apply for the following orders:

1. the date and time for the hearing of the petition will be fixed by the court;

2. the decision of Murray L. Smith, Q.C., Arbitrator, sitting as a single arbitrator, dated February 26, 2021 is set aside; and

3. Costs.

Part 2: FACTUAL BASIS

Parties

1. The Petitioners in this proceeding are:

(a) BM Resort Assets Ltd. ("**BM Assets**"),a company incorporated pursuant to the laws of British Columbia with a registered and records office located at PO Box 49290, 1000 – 595 Burrard Street, Vancouver, BC.

(b) BM Management Holdings Ltd. ("**BM Management**"), a company incorporated pursuant to the laws of British Columbia with a registered and records office located at 1200 - 925 West Georgia Street, Vancouver, BC.

(c) Bear Mountain Resort & Spa Ltd. ("**BM Resort & Spa**"), a company incorporated pursuant to the laws of British Columbia with a registered and records office located at 7th Floor, 1175 Douglas Street, Victoria, BC.

2. The Respondent, Ecoasis Resort and Golf LLP ("**GT Operator**") is a company incorporated pursuant to the laws of British Columbia with an address for service in this proceeding at 1900-885 West Georgia Street, Vancouver, BC.

Background

3. Prior to July 11, 2019, GT Operator owned the Westin Bear Mountain Golf Resort & Spa near Victoria, BC, consisting largely of a hotel and two golf courses.

4. On July 8, 2019, 1210110 B.C. Ltd. (now BM Resort & Spa) and 2600 Viking Way Ltd. (now BM Management) (collectively, "**Hotel Operator**") signed an agreement ("**Asset Purchase Agreement**") to purchase all of the property, assets and undertakings used in the business of operating the hotel ("**Hotel Business**") from GT Operator. Hotel Operator completed the purchase ("**Asset Purchase**") on July 11, 2019.

5. As a result of the Asset Purchase, Hotel Operator became the owner of certain capital assets, goodwill and third party trade, service, supplier, hotel management and licensing agreements used to run the Hotel Business ("**Hotel Purchased Assets**").

6. Certain items were specifically excluded from the Hotel Purchased Assets, including the lands, premises and assets owned by GT Operator and used in its golf and tennis business ("**Golf and Tennis Business**").

7. Following the Asset Purchase, GT Operator continues to run the Golf and Tennis Business, with Hotel Operator now operating the Hotel Business.

8. As part of the Asset Purchase and as a direct result of the Hotel Business and the Golf and Tennis Business now being separate businesses, Hotel Operator and GT Operator entered into various agreements including a:

(a) Commercial Lease dated July 11, 2019 ("**Commercial Lease**") entered into between Hotel Operator, as landlord, and GT Operator, as tenant;

(b) Hotel, Golf Course and Tennis Operations Agreement dated July 11, 2019 ("**Operations Agreement**"); and

(c) Non-Competition and Non-Solicitation Agreement dated July 11, 2019.

9. The Commercial Lease was entered into so GT Operator could continue to use areas of the Hotel Purchased Assets for its Golf and Tennis Business.

10. The Operations Agreement was necessary as GT Operator agreed Hotel Operator would provide certain services to GT Operator for its Golf and Tennis Business, including food and beverage and accounting services.

11. Issues arose between the parties with respect to obligations owed under the Operations Agreement, the Commercial Lease and the Non-Competition and Non-Solicitation Agreement.

Agreement to Arbitration and Selection of Arbitrator

12. On about June 5, 2020, the parties agreed to seek third-party binding resolution through arbitration with the Respondent's suggestion of Murray L. Smith, Q.C. as arbitrator ("**Arbitrator**").

13. On June 8, 2020, counsel for the Petitioners asked the Arbitrator to act for the parties, and the Arbitrator accepted.

14. The parties proceeded to arbitration pursuant to a submission agreement, rather than pursuant to any dispute resolution clause in any prior agreement between the parties.

15. Neither party filed a Notice of Arbitration, and there was no formal written agreement between the parties to arbitrate.

16. On September 14, 2020, the parties agreed to arbitrate a list of 15 issues, which was attached as Schedule "A" to formal terms of reference dated September 16, 2020.

Evans Aff #1, Exhibit A, page 1.

17. The issues to be decided by arbitration were as follows:

(a) Issue #1: equipment lease payments under the Asset Purchase Agreement;

(b) Issue #2: provision of, and payment for, food and beverage services under s. 4.2 of the Operations Agreement;

(c) Issue #3: ownership of the liquor licence under the Asset Purchase Agreement;

(d) Issue #4: whether an oral agreement was reached about food and beverage services between Hotel Operator and GT Operator at a December 2019 Meeting;

(e) Issue #5: hotel rates, event pricing and discounts for GT Operator employees under ss. 5.2 to 5.5 of the Operations Agreement;

(f) Issue #6: driving range access for Hotel Business guests;

(g) Issue #7: GT Operator's use of limited common property and additional areas not mentioned in the Commercial Lease;

(h) Issue #8: golf and tennis and social members access to the North Langford Recreation Centre ("NLRC");

(i) Issue #9: additional outstanding invoices and issues related to invoices generally under the Operations Agreement and otherwise;

(j) Issue #10: provision of accounting services under s. 4.1 of the Operations Agreement;

(k) Issue #11: assignment of the NLRC lease under the Assets Purchase Agreement and termination of this lease;

(l) Issue #12: disruption of GT Operator's business under s. 3.1 of the Operations Agreement and s. 8.1 of the Commercial Lease;

(m) Issue #13: termination of the Commercial Lease;

(n) Issue #14: termination of the Operations Agreement; and

(o) Issue #15: breach of the Non-Competition and Non-Solicitation Agreement.

18. On January 5, 2021, the parties agreed the *Arbitration Act*, SBC 2020, c. 2, would apply and the rules of procedure of the Vancouver International Arbitration Centre would be followed.

19. The evidentiary hearing took place between January 5 and 13, 2021, via Zoom videoconference, administered by Charest Legal Solutions Inc ("**Evidentiary Hearing**").

The Evidentiary Hearing

20. The following witness statements were tendered by the Petitioners at the Evidentiary Hearing:

(a) Witness Statement #1 of Raoul Malak, the sole director of BM Resort & Spa, dated December 16, 2020;

(b) Witness Statement #1 of David Clarke, former Chief Financial Officer of GT Operators, dated December 16, 2020; and

(c) Witness Statement #2 of Raoul Malak dated December 23, 2020.

21. The parties submitted written arguments on December 31, 2020, which were updated on January 21, 2021.

22. On January 22, 2021, the parties presented oral arguments.

The Arbitral Award - February 26, 2021 (Murray L. Smith, Q.C.)

23. The Arbitrator issued his written decision on February 26, 2021 ("Arbitral Decision").

Evans Aff #1, Exhibit B, page 14.

24. The Arbitrator decided the issues in the proceeding as follows, which were substantially decided in GT Operator's favour:

(a) Issue #2: food and beverage services: GT Operator's interpretation of the cost of food services under the Operations Agreement was accepted and the Hotel Operator breached ss. 4.2(a) and (b) of the Operations Agreement by not providing food and beverage services to GT Operator at those costs and by not providing a 20% discount for food and beverage on the Hotel Business premises to golf and tennis members. Hotel Operator is liable for damages to be assessed and must reissue invoices for food costs based on the previous month's financials plus 20%;

(b) Issue #3: ownership of liquor licence: both parties were unsuccessful. GT Operator wanted rectification or implication of a term to remove the Valley Golf Course portion of Licence #54 from the Asset Purchase Agreement or to have it transferred back. Hotel Operator's request for declarations that the parties intended it to own the Valley Golf Course liquor licences and the Golf and Tennis Business's members' lounge was denied;

(c) Issue #4: alleged oral agreement about food and beverage services made at December 2019 Meeting: no enforceable oral contract made;

(d) Issue #5: hotel rates, event pricing and discounts for GT Operator employees under ss. 5.2 to 5.5 of the Operations Agreement: Hotel Operator breached s. 5.5 of Operations Agreement by not providing Marriott privileges to GT Operator's employees and is liable for damages to be assessed. Hotel Operator did not breach: (1) s. 5.2 regarding discounted rates for GT Operator employees; (2) s. 5.3 regarding National Sports Agreements; and (3) s. 5.4 regarding event pricing.

(e) Issue #6: driving range access for Hotel Business guests: no implied term in the Operations Agreement requiring Hotel Operator to pay for driving range usage by GT Operator's guests;

(f) Issue #7: GT Operator's use of limited common property and additional areas not mentioned in the Commercial Lease: implied term in the Commercial Lease allowing GT Operator access to Hotel Operator's limited common property without payment. The additional areas were no longer in issue by the time of the Arbitration;

(g) Issue #8: golf and tennis and social members access to the North Langford Recreation Centre: GT Operator to pay Hotel Operator $54,091.26 for Golf Business member access to NLRC. The Arbitrator reserved his decision about social members' access and payment of invoices for regular members, pending further submissions;

(h) Issue #9: additional outstanding invoices and issues related to invoices generally under the Operations Agreement and otherwise: Hotel Operator's claim for payment for additional accounting services was dismissed and Hotel Operator liable to GT Operator for horticulture services;

(i) Issue #10: accounting services under s. 4.1 of the Operations Agreement: Hotel Operator breached the Operations Agreement by not providing accounting services in accordance with s. 4.1. Hotel Operator must provide complete financial information to GT Operator and is liable for damages to be assessed;

(j) Issue #11: assignment of the NLRC lease under the Assets Purchase Agreement and termination of the lease: GT Operator not in breach of the Asset Purchase Agreement for failure to assign NLRC lease to Hotel Operator. GT Operator did not interfere with Hotel Operator's ability to renew the lease;

(k) Issue #12: disruption of GT Operator's business under s. 3.1 of the Operations Agreement and s. 8.1 of the Commercial Lease: damages claimed by GT Operator repeated damages it claimed under other Issues so no decision on damages made regarding Issue #12. GT Operator has the right to prove damages for any breach of contract under the other Issues if they are causally connected to its alleged losses and it has the right to prove damages for a combination of breaches if it can show the combined breaches gave rise to a loss greater than a sum of the losses caused by Hotel Operator's individual breaches;

(l) Issue #13: termination of the Commercial Lease: Hotel Operator has no basis on which to terminate the Commercial Lease and it continues in full force and effect;

(m) Issue #14: termination of the Operations Agreement: Hotel Operator has no basis on which to give notice of termination of Operations Agreement, and it continues in full force and effect; and

(n) Issue #15: breach of the Non-Competition and Non-Solicitation Agreement: Hotel Operator breached Non-Competition and Non-Solicitation Agreement and is liable for damages or costs to be assessed.

25. Issue #1 concerning equipment lease payments under the Asset Purchase Agreement was resolved between the parties prior to the Arbitration.

Arbitrator's Warning Against Perjury

26. On January 12, 2021, the first day of Mr. Malak's testimony, the court reporter administered Mr. Malak's affirmation to tell the truth. The Arbitrator did not make any comments to Mr. Malak about his affirmation or otherwise before he began his testimony.

Evans Aff #1, Exhibit F, page 96.

27. On January 13, 2021, the second day of Mr. Malak's testimony, the Arbitrator reminded Mr. Malak of his affirmation to tell the truth as follows prior to cross-examination by opposing counsel:

> THE ARBITRATOR: Mr. Malak, welcome back. Thank you. I'll remind you that you're still under the compulsion of the affirmation to tell the truth, nothing but the truth, and that that will weigh not only on your conscience but also could lead to serious consequences. So that's the warning for this morning. Thanks.

Go ahead, Mr. Lee.

Transcript Jan. 13, 2021, Evans Aff #1, Exhibit G, page 98.

28. The Arbitrator's warning impacted Mr. Malak's emotional state during his testimony and led him to doubt the Arbitrator's impartiality. From that time forward, Mr. Malak felt it was inevitable that the Arbitrator would decide the Arbitration in the Respondent's favour.

Malak Aff #1.

29. At the close of the sixth day of proceedings, counsel for the Petitioners raised concerns with the Arbitrator, off the record, regarding the Arbitrator's warning to Mr. Malak. The Arbitrator's response was that the warning he gave was "standard."

30. The Arbitrator did not administer the oath or affirmation to any other witness in the proceeding, nor did he make any comments to any other witnesses reminding them of their oath or affirmation before they began their testimony.

31. In contrast, the Arbitrator responded unequivocally positively to the Respondent's witnesses. For example, after Mr. Matthews finished testifying, the Arbitrator said:

> THE ARBITRATOR: All right. Thank you very much. Mr. Matthews, I would like to thank you for your patience and your willingness to attend and <u>your clear and very helpful testimony</u>. So thank you very much for your service in the arbitration. [emphasis added]

Transcript Jan. 6, 2021, Evans Aff #1, Exhibit C, page 85.

32. After Mr. Malak finished testifying, the Arbitrator did not make any positive comments about the nature of Mr. Malak's evidence:

> THE ARBITRATOR: Mr. Malak, I know it's been a very long and trying process but we are grateful for your assistance and your patience in dealing with the scheduling and all that is entailed in a difficult process. So many thanks for attending today and yesterday.

Transcript Jan. 13, 2021, Evans Aff #1, Exhibit G, page 99.

<u>Arbitrator's Acceptance of Hearsay Evidence over First-hand or Documentary Evidence</u>

33. The Arbitrator preferred and accepted hearsay evidence supporting the Respondent's position, even where such evidence was directly controverted by admissions made on cross-examination or by documentary evidence, including in the following statements:

(a) that Mr. Matthews, the principal of GT Operator, stated there was no reason to doubt the ability of Hotel Operator to offer Marriott privileges to GT Operator employees (Arbitral Decision, para. 138), which the Arbitrator acknowledged as hearsay but nevertheless accepted, when in fact:

(i) Mr. Matthews admitted on cross-examination that when he reached out to Marriott to obtain Marriott rewards for GT Operator's staff, Marriott was unable to provide these benefits; and

Transcript Jan. 6, 2021, Evans Aff #1, Exhibit C, page 81-83.

(ii) Hotel Operator submitted the hotel Employee Handbook and the Marriott Explore Program Rules, which clearly state discounts were only available for hotel employees, owners, franchisees and licensees;

Marriott Explore Program Rules, Evans Aff #1, Exhibit H, page 100.

Marriott Employee Handbook, Evans Aff #1, Exhibit I, page 109.

(b) that David Clarke would ultimately be employed by Hotel Operator, potentially as its Chief Executive Officer (Arbitral Decision, para. 28), which was hearsay evidence from Mr. Clarke, who did not appear as a witness and whom the Respondent declined to cross-examine.

Witness Statement of D. Matthews, Evans Aff #2, Exhibit D, page 90-97.

Arbitrator's Failure to Decide Petitioners' Claims

34. During the arbitration proceedings, the Petitioners made an application objecting to portions of Mr. Matthew's witness statement for violation of the parol evidence rule. Both parties tendered written submissions regarding the application.

Bear Mountain's Submissions re: Parol Evidence Rule, Evans Aff #3, Exhibit E, page 334.

Ecoasis' Submissions re: Parol Evidence Rule, Evans Aff #3, Exhibit F, page 343.

35. Instead of deciding Hotel Operator's application objecting to certain paragraphs of Mr. Matthews's Witness Statement which violated the parol evidence rule, the Arbitrator accepted the evidence for consideration and made no ruling on the application (Arbitral Decision, para 15).

36. During the arbitration proceedings, Hotel Operator requested that the Arbitrator draw an adverse inference against GT Operator for failing to cross-examine Mr. Clarke regarding the words and conduct attributed to him in the Respondents' witness statements. The Arbitrator instead stated that an adverse inference could be drawn against Mr. Clarke for failure to refute the GT Operator's statements (Arbitral Decision, para. 78). Mr. Clarke was not a party to the proceedings.

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Arbitrator's Misstatement of Petitioners' Position and Disregard of Evidence That Supported the Petitioners' Position

38. Throughout Arbitral Decision, the Arbitrator misstated the Petitioner's position and evidence, and made findings of fact that disregard the Petitioners' evidence including in the following statements:

(a) that Hotel Operator advised GT Operator to cease selling alcohol in the members lounge because GT Operator was required to obtain its liquor from Hotel Operator pursuant to the Operations Agreement (Arbitral Decision, para. 62), when an additional reason given by Hotel Operator was that the members lounge was covered by the hotel liquor license, as affirmed by Mr. Laroque, the manager of the Golf Business, who admitted to breaching the hotel's license;

Transcript Jan. 6, 2021, Evans Aff #1, Exhibit C, page 81-83.

(b) that Hotel Operator failed to provide proper back-up for its food and beverage invoices (Arbitral Decision, paras. 64 and 77), without acknowledging that Hotel Operator was unable to provide proper accounting services, which impacted the availability of back-up documents, and ignoring the fact that Hotel Operator had provided the full extent of information available to it for months; and

Transcript Jan 12, 2021, Evans Aff #5, Exhibit B, page 12.

(c) that the issue of GT Operator's use of limited common property and additional areas not covered by the Commercial Lease emerged after "*months of deteriorating relations*" (Arbitral Decision, para. 161), without acknowledging that Mr. Harrington, the hotel manager, gave evidence confirming Hotel Operator discovered GT Operators' unauthorized use of the areas not defined in the Commercial Lease in December 2019 and brought this issue to GT Operator's attention, before the parties' relationship deteriorated.

Harrington Transcript Jan. 8, 2021, Evans Aff #5, Exhibit C, page 17.

(d) that the Petitioners' summary of the content of s. 4.2(a) of the Operations Agreement was "argument," when the summary was non-contentious and was easily verified as accurate by looking at the provision (Arbitral Decision, para. 61);

(e) that the use of a sublease agreement to resolve the liquor licensing issue was too complex to allow for a conclusion that any such arrangement would be possible, it would be "too complex" to determine if arrangement would be possible (Arbitral Decision, paras. 107), without acknowledging that the expert, Mr. Hicks, called the LCRB and was told their first impression was that such a sublease arrangement would work.

Transcript Jan. 11, 2021, Evans Aff #1, Exhibit E, page 94.

Arbitrator's Unqualified Acceptance of the Respondent's Allegations as Facts

39. In the "Factual Background" section of the Arbitral Decision, the Arbitrator portrays several submissions of GT Operator as unassailable facts, including the following:

(a) that Hotel Operator did not bring food and beverage invoices to GT Operator's attention until October 2019 (Arbitral Decision, para. 29), which was a disputed allegation, not a fact;

(b) that Mr. Matthews made repeated requests for a meeting about the food and beverage invoices (Arbitral Decision, para. 31), without acknowledging that Hotel Operator had also attempted to meet with Mr. Matthews for weeks at this point;

(c) that in February 2020, GT Operator learned that Hotel Operator was not providing the employee discount for hotel stays (Arbitral Decision, para 35), which was GT Operator's allegation, not a fact;

(d) that Hotel Operator discovered GT Operator was using areas outside the lease agreement in March 2020 (Arbitral Decision, para. 36), when Hotel Operator's evidence was that they discovered this in December 2019, which was confirmed by hotel manager Mr. Harrington; and

(e) that on April 8, 2020, Hotel Operator entered the areas not expressly defined in the Commercial Lease, cut locks and threatened to tow golf carts (Arbitral Decision, para. 36), without acknowledging that Hotel Operator had attempted to settle the matter several times over the previous 8 months.

40. This pattern of accepting the Respondent's contested allegations as fact continued throughout the Arbitral Decision, including that Mr. Richards and Mr. Edwards (Golf and Tennis Members) confirmed that discounts on food and beverages were not being provided (Arbitral Decision, para. 58), when their actual evidence was that food and beverage discounts were provided, but there were no discounts on liquor only;

Transcript Jan. 7, 2021, Evans Aff #1, Exhibit D, page 87-90.

Part 3: LEGAL BASIS

1. This Petition is brought under *Supreme Court Civil Rule* 2-1(2)(b) and *Arbitration Act*, ss. 58(1)(g) and (3).

Requirement for Impartiality

2. An arbitrator must be independent of the parties, unless otherwise agreed, and must be impartial and act impartially: *Arbitration Act*, SBC 2020, c 2, ss. 16(1)-(2) and 58(1)(g).

3. An arbitrator has an ongoing obligation to, without delay, disclose any circumstances likely to give rise to justifiable doubts as to their independence or impartiality—this obligation applies from the time of the arbitrator's appointment and continues throughout the arbitral proceedings: *Arbitration Act*, ss. 16(3)-(4) and 58(1)(g).

4. Justifiable doubts as to the arbitrator's independence or impartiality means "a real danger of bias on the part of the arbitrator in conducting the arbitration": *Arbitration Act*, ss. 58(g).

5. At no time did the Arbitrator disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

Setting Aside Arbitral Awards for Bias

6. On September 1, 2020, the *Arbitration Act*, SBC 2020, c 2 came into force. It states that a party may apply to set aside an arbitral award if there are justifiable doubts as to the arbitrator's independence or impartiality: ss. 58(1)(g).

7. There are justifiable doubts as to the arbitrator's independence or impartiality if there was a real danger of bias on the part of the arbitrator in conducting the arbitration: ss. 58(3).

8. The time period for setting an arbitral award aside for lack of independence or impartiality is no more than 30 days after the date on which the applicant receives the arbitral award: s. 60. The parties received the Arbitral Decision on March 1, 2021.

9. Arbitrators owe a duty of fairness to the parties to an arbitration. Avoiding both a biased state of mind and the appearance of bias is part of that duty.

Atlantic Industries Ltd v SNC-Lavalin Constructors (Pacific) Inc., 2017 BCSC 1263, para. 18

10. Actual bias has been defined as "the deliberate or wilful intent to favour one side over the other to advance personal benefit" whereas reasonable apprehension of bias relates to "the exposure of the mind to specific and identifiable influences that are entirely extraneous to the issue to be determined, are hidden from view, and thus are unable to be addressed by the party against whom they may hold sway."

Tepei v. Insurance Corp. of British Columbia, 2007 BCSC 1694, aff'd 2009 BCCA, para. 113

11. Under the previous *Arbitration Act*, RSBC 1996, c. 55, the test for whether an arbitral award should be set aside for bias was whether there was a reasonable apprehension of bias; evidence of actual bias was not necessary.

Atlantic Industries, para. 19; *Tepei*, para. 113

12. The test for a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

Atlantic Industries, para. 19

13. Courts have not yet ruled on whether anything more is required to demonstrate a "real danger" of bias as opposed to a reasonable apprehension.

14. An arbitrator's comments during the arbitration hearing indicating he had already made up his mind regarding the facts underpinning his decision give rise to a reasonable apprehension of bias.

McClintock v Karam, 2015 ONSC 1024

15. In the case at bar, an objective person reviewing the transcripts, the submissions, the evidence and the Arbitral Decision would conclude there was a real danger of bias on the part of the Arbitrator. The Arbitrator's remarkable warning to Mr. Malak, on the second day of his testimony, about the need for him to be truthful during the Evidentiary Hearing, alone indicates a real danger the Arbitrator was not impartial. However, when this event is considered in light of a number of other indicators of potential bias, the real danger threshold is certainly met.

16. These indicators of potential bias, which would lead a reasonably informed person to conclude that there was a real danger of bias affecting the Arbitrator's ability to make a decision on the merits alone are as follows:

(a) accepting hearsay evidence tendered by the Respondent over evidence from first-hand testimony and/or documents;

(b) failing to address the Petitioners' application to strike portions of the Respondent's evidence that violated the parol evidence rule;

(c) misstating the Petitioners' position and evidence;

(d) disregarding evidence that supported the Petitioners' position;

(e) unqualified acceptance of the Respondent's allegations as facts; and

(f) characterizing uncontroversial facts as the Petitioners' allegations.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Raoul Malak, sworn March 24, 2021.

2. Affidavits #1, 2, 3, 4 and 5 of Sherri Evans, sworn March 31, 2021.

The Petitioners estimate that the hearing of the Petition will take 1 day.

Dated: March 31, 2021

Signature of Lawyer for Petitioners
Martin C. Sennott

To be completed by the court only

Order made:

☐ on the terms requested in paragraphs _____ of Part 1 of this Petition

☐ with the following variations and additional terms

_____

_____

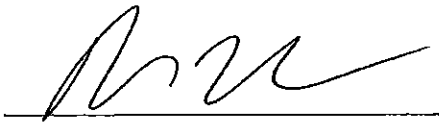
_____

_____

Date: _____

_____
Signature of ☐ Judge ☐ Master

This is **Exhibit "D"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.



A Commissioner for taking Affidavits for British Columbia

No. S213239
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BEAR MOUNTAIN RESORT & SPA LTD., BM MANAGEMENT HOLDINGS LTD. and BM RESORT ASSETS LTD.

PETITIONERS

AND:

ECOASIS RESORT AND GOLF LLP

RESPONDENT

NOTICE OF DISCONTINUANCE

Filed by: the Petitioners, Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd. and BM Resort Assets Ltd.

TAKE NOTICE that the Petitioners

x discontinue this proceeding against the Respondent, Ecoasis Resort and Golf LLP

x Notice of Hearing has been filed and this discontinuance is:

x with the consent of all parties of record

☐ by leave of the court

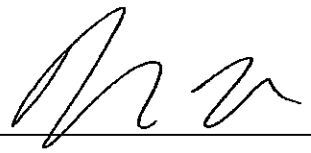
Dated: January 18, 2022

Signature of Lawyer for Filing Party

Martin C. Sennott

This NOTICE OF DISCONTINUANCE is filed by Martin C. Sennott of Martin C. Sennott Law Corporation on behalf of Boughton Law Corporation, whose place of business and address for delivery is PO Box 49290, 700 - 595 Burrard Street, Vancouver, BC V7X 1S8, 604-687-6789. (File No. 92809.4)

This is **Exhibit "E"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.



A Commissioner for taking Affidavits for British Columbia

IN THE MATTER OF AN ARBITRATION PURSUANT TO:

Asset Purchase Agreement, Commercial Lease, Hotel, Golf Course and Tennis Operations Agreement and Non-Competition and Non-Solicitation Agreement dated July 11, 2019, between Ecoasis Resort and Golf LLP, 1210110 B.C. Ltd, BM Resort Assets Ltd. and 2600 Viking Way Limited,

BETWEEN:

ECOASIS RESORT AND GOLF LLP

AND:

BEAR MOUNTAIN RESORT & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD.

Procedural Order #9
02/08/24

1. A case management conference call was convened on August 2, 2024 to discuss procedural steps in advance of evidentiary hearings scheduled to begin September 23, 2024. Martin Sennott appeared on behalf of Bear Mountain Resort & Spa Ltd, BM Management Holdings Ltd. and BM Resort Assets Ltd. (collectively "Hotel"). Roger Lee and Struan Robertson appeared on behalf of Ecoasis Resort and Golf LLP ("Ecoasis").

2. Mr. Sennott objected to the case management conference being held. He attended the meeting but did not participate in the discussion of procedural issues. Mr. Sennott wrote on August 1, 2024 to say: "In the circumstances, the Hotel cannot participate in your suggested hearing (and I am unavailable tomorrow in any event...)". The refusal to participate was premised on a position that there is no jurisdiction in the arbitral tribunal to proceed.

3. The case management conference was convened to consider procedural applications brought by Hotel that remain outstanding, arrangements for hearings to start in September and steps, if any, to be taken under s. 33 of the *Arbitration Act* for Hotel's failure to comply with the procedural time limit to pay deposits for arbitration costs.

4. Mr. Sennott wrote on July 5, 2024 to respond to requests for long overdue payment of deposits for arbitration costs. He stated Hotel would not pay deposits for ongoing arbitration costs and unpaid arbitrator fees saying Ecoasis must make

payment first. On July 9, 2024 I wrote to say I would not be able to continue without being paid for my services and delivered a final account for services rendered to date.

5. Mr. Lee wrote on July 13, 2004 to say Ecoasis would provide the required deposits forthwith. Mr. Sennott wrote on July 14, 2024 to say I had "withdrawn" and that my mandate was terminated. I wrote on July 15, 2024 to advise that I had not withdrawn and terminated my mandate and had only given notice that I could not proceed without deposits for arbitrator fees.

6. Ecoasis made the required deposit payment on July 15, 2024. On July 22, 2024, Mr. Sennott made payment of unpaid arbitrator fess to date but stated Hotel would not provide security for arbitration costs going forward.

7. The first issue considered at the case management conference was the response to Hotel's default in complying with the procedural time limit imposed under section 32(2) (b) of the *Arbitration Act* for provision of security for arbitral tribunal fees. Mr. Lee and Mr. Robertson participated in discussions but Mr. Sennott made no comment.

8. Mr. Lee advised there were five procedural applications outstanding for which Ecoasis required two weeks to complete a response. The applications included requests to exclude pleadings and evidence tendered by Ecoasis on the basis of delay, an application for a declaration that Ecoasis breached obligations of confidentiality and applications for subpoenas.

9. Given the refusal to provide security for arbitration tribunal fess and to participate in arbitral proceedings, all outstanding procedural requests by Hotel are dismissed as abandoned.

10. Issues of liability were decided in a Partial Final Award dated February 26, 2021. Since that time there have been an inordinate number of delays. It is essential that evidentiary hearings proceed as currently scheduled. Hotel opposes continuation of proceedings but has not brought an application in the arbitration for a stay of proceedings. Hotel is not entitled to unilaterally impose a stay of proceedings by arguing there has been a loss of jurisdiction.

11. Hearings are scheduled to be held at the premises of Hotel on Vancouver Island commencing September 23, 2024. Given Hotel's refusal to participate, the evidentiary hearings will be held in Vancouver. Counsel for Ecoasis are asked to make arrangements for in-person hearings. Notwithstanding Hotel's default in participating, Ecoasis will be required to prove its case for damages.

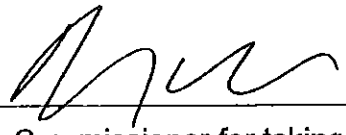
12. Hotel may elect to not abandon claims in the arbitration by providing security for arbitration tribunal fees. Failing such payment by August 16, 2024 an order will be made under section 33 of the *Arbitration Act* that terminates arbitral

proceedings in relation to Hotel's claims and precludes Hotel from taking any procedural step.

This Procedural Order is made at Vancouver, British Columbia, Canada, August 2, 2024.

Murray L. Smith K.C.

This is **Exhibit "F"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.



A Commissioner for taking Affidavits for British Columbia

No. S245287
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF AN ARBITRATION PURSUANT TO:
ASSET PURCHASE AGREEMENT, COMMERCIAL LEASE, AND THE HOTEL, GOLF COURSE AND TENNIS AGREEMENT, BETWEEN ECOASIS RESORT AND GOLF LLP, 1210110 B.C. LTD. AND 2600 VIKING LIMITED DATED JULY 11, 2019

(BEFORE THE HONOURABLE JUSTICE MAISONVILLE)

Vancouver, BC
August 7, 2024

BETWEEN:

BEAR MOUNTAIN RESORT & SPA LTD.,
BM MANAGEMENT HOLDINGS LTD., and
BM RESORT ASSETS LTD.

Petitioners

AND:

ECOASIS RESORT AND GOLF LLP

Respondent

PROCEEDINGS IN CHAMBERS

COPY

No. S245287
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF AN ARBITRATION PURSUANT TO:
ASSET PURCHASE AGREEMENT, COMMERCIAL LEASE, AND THE HOTEL, GOLF COURSE AND TENNIS AGREEMENT, BETWEEN ECOASIS RESORT AND GOLF LLP, 1210110 B.C. LTD. AND 2600 VIKING LIMITED DATED JULY 11, 2019

(BEFORE THE HONOURABLE JUSTICE MAISONVILLE)

Vancouver, BC
August 7, 2024

BETWEEN:

BEAR MOUNTAIN RESORT & SPA LTD.,
BM MANAGEMENT HOLDINGS LTD., and
BM RESORT ASSETS LTD.

Petitioners

AND:

ECOASIS RESORT AND GOLF LLP

Respondent

PROCEEDINGS IN CHAMBERS

Counsel for the Petitioners: M.C. Sennott

PROCEEDINGS IN CHAMBERS
AUGUST 7, 2024

PROCEEDINGS

Witness	Proceedings	Page
	Submissions by Cnsl M. Sennott	1
	Reporter certification	28

EXHIBITS

Exhibit	Description	Page

No exhibits marked.

1
Submissions by Cnsl M. Sennott

August 7, 2024
Vancouver, BC

(PROCEEDINGS COMMENCED AT 3:21 PM)

THE CLERK: Calling matter number 19 on the list, Justice, in the matter of Bear Mountain Resort & Spa Limited versus Ecoasis Resort and Golf LLP, with the time estimate of 30 minutes.

THE COURT: Yes, thank you.

CNSL M. SENNOTT: Good afternoon, Justice. My name is Sennott, S-e-n-n-o-t-t, first initial M. My pronouns are he/him. I'm appearing on behalf of the applicant/petitioner. We're seeking an order today for a stay of the underlying arbitration proceedings, and if I may, Justice, I'll just take a 40,000-foot nutshell, and then I can dive into the application proper.

THE COURT: All right. And why no notice has been given.

CNSL M. SENNOTT: I anticipated your question. What has happened as the basis of the petition is a declaration is being sought from the court as to whether or not the arbitrator has withdrawn as an arbitrator and whether he's functus.

The arbitrator provided an email essentially saying, you haven't paid your deposits; I cannot continue; here is my final account. It's a little more than that, but that's sufficient for the nutshell.

THE COURT: Who hasn't paid the deposits?

CNSL M. SENNOTT: It's a little more --

THE COURT: Okay. I'm just wondering, though.

CNSL M. SENNOTT: Originally it was both parties. My client, the hotel -- it's the Bear Mountain in Vancouver Island -- is the -- one of the parties. We had a concern that the opposing party was insolvent, could not afford to pay, took a position that we wouldn't pay until the other party paid. There's no arbitration agreement. There are terms of reference, but none of that deals with deposits and retainers for the arbitrator.

In any event, the arbitrator provided that email. The hotel took that as a withdrawal. The other party subsequently paid the deposits. Hotel maintained its position that the arbitrator

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Submissions by Cnsl M. Sennott

had withdrawn, and simply paying the deposits not cure that.

And again, just in a nutshell very briefly, Justice. If an arbitrator withdraws, pursuant to the *Arbitration Act* there's a substitution of arbitrator, and the process is that, however the first arbitrator was appointed is how the substituted arbitrator would be appointed. In this case it was by agreement.

So your question about why is this without notice, the positions were made clear. There's emails back and forth -- it's all in the evidence. The arbitrator called on Thursday last a case management meeting. Neither of the parties called for it; the arbitrator did that -- did so. I advised the arbitrator that we maintain our position that he was functus, but that we wanted to attend to --

THE COURT: Wanted to attend to?

CNSL M. SENNOTT: To speak about his jurisdiction. Not about the substantial elements of the arbitration. Of course my client does not want to attorn to his jurisdiction.

The arbitrator set the matter for Friday, knowing that counsel -- I was not available, although I did attend by telephone. Others in my firm were not available.

THE COURT: For this Friday?

CNSL M. SENNOTT: Last Friday.

THE COURT: Okay.

CNSL M. SENNOTT: So all of the parties, including the arbitrator, was aware that we were bringing this petition to have the court determine whether or not he had withdrawn and was therefore functus, proceeded with the hearing, and he granted an order, after receiving the petition -- he granted an order yesterday morning, a very significant and prejudicial order to my client, when he had, during the hearing, indicated he would make an order at the end of this week.

So the apprehension that my client has, whether it's right or whether it wrong, is that, when the arbitrator became aware of this petition, he issued --

THE COURT: Which petition?

CNSL M. SENNOTT: The petition which is before the court.

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Submissions by Cnsl M. Sennott

THE COURT: Okay.
CNSL M. SENNOTT: About his jurisdiction. He moved his timetable up. He issued a decision 7:00 AM Tuesday. The order and the transcript of the hearing are in evidence before you.

We have numerous problems with this, the least of which is procedural fairness, but the way and the timing of how this occurred -- and a little bit of background needs to be provided to you for context.

There are five extant applications that the hotel made relating to exclusion of evidence and experts' reports which have been extant -- the youngest has been extant since May. No response from opposing parties. No orders of the arbitrator to move things along.

What the arbitrator did yesterday morning was to dismiss all of those applications as abandoned. We of course have an issue about the applications being abandoned because they were not.

In any event, whether or not receipt of this petition by the arbitrator was the impetus for his decision to move his timetable up four days, not allowing my client the opportunity to come before this court and obtain the stay -- and he mentions that in his procedural order, that no stay has been granted. So he was aware, and the petition itself seeks a stay. So when he granted his decision Tuesday morning, and presuming that he read his email, because the petition materials were provided to him by email, he would have been aware that we were seeking a stay.

THE COURT: I'm sorry, I thought you said you'd done this without notice.
CNSL M. SENNOTT: Correct, but the petition itself, one of the prayers for relief in the petition is a stay.
THE COURT: And you served that?
CNSL M. SENNOTT: And we provided it by email to -- which has been the common way of communicating. These arbitration proceedings have been ongoing for two years plus.

I've spoken to opposing party's counsel, and we're discussing dates for the hearing of this petition. Relatively short timeframe. We're speaking about next Monday or Tuesday.

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Submissions by Cnsl M. Sennott

THE COURT: For the hearing of the petition?
CNSL M. SENNOTT: For the hearing of the petition proper. So opposing counsel is not requiring us to get short leave. They're going to consent, and we're going to pick a date.
THE COURT: For the hearing of the petition.
CNSL M. SENNOTT: For the hearing of the petition. The main thrust of the petition is whether or not the arbitrator has withdrawn.

So this is not your typical jurisdiction argument about, is it under this act, is it under this arbitration clause, should it be in Alberta or BC. It's not one of those jurisdiction issues. It's whether or not factually the arbitrator withdrew, and if he withdrew, the *Arbitration Act* has a process and consequences for that. If he withdraws, his mandate is terminated, and he's able to withdraw under the act. As I mentioned, there's no arbitration agreement between the parties and the arbitrator.

So coming full circle to your question, Justice, why is this without notice, my client has an apprehension that, not necessarily the opposing party, but just based on the events that recently transpired, notice of something of this nature seems to spur on some type of action or activity in the arbitration.

And if I can -- I'm already well off my notice of application format, but if I can explain a little bit how this is procedurally unfair, is that we have, what we say -- whether we're right or wrong, Justice, we say that we have a legitimate concern about his jurisdiction, and it's not a matter that he can decide himself, because this is not your normal jurisdiction matter.

He's taken the position that his black-and-white email is not a withdrawal; it was a warning to the parties to pay their deposits. I'll take you to the emails, because I think they're important for you to see, but --

THE COURT: And so what are you seeking today?
CNSL M. SENNOTT: We're seeking a stay of the arbitration pending determination by this court of the facts set out in the petition, in particular whether or not this arbitrator continues with his mandate or whether or not he

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Submissions by Cnsl M. Sennott

withdrew.
THE COURT: All right.
CNSL M. SENNOTT: I've got a case law binder, Justice, that I would like to hand up. I don't want you to be concerned about this. I put every case that we're relying on in the petition in here as well, depending on how far you wanted to dive into it.
THE COURT: All right.
CNSL M. SENNOTT: But essentially I'm relying on *RJR-MacDonald*.

I think, Justice, maybe I'll take direction from you. Would you like to see the arbitrator's email --
THE COURT: Yes.
CNSL M. SENNOTT: -- to start? If I can take you, then, to Exhibit -- sorry -- to tab 2. It is page 130, top right-hand corner of that affidavit.
THE COURT: I'm there.
CNSL M. SENNOTT: So middle of the page there's an email from Mr. Smith dated July 9th, 2024, 10:48 AM. It's addressed to myself, members of my team. Mr. Lee and Mr. Robertson are counsel for opposing party. And his email -- and it's short, so I'll just read it out:

> Dear all: I am dismayed to learn that deposits for arbitration costs and overdue arbitrator fees have not been made. I made a request for a deposit from each party in the amount of $50,000 by December 14, 2023. That request was ignored. I made a further request for a deposit from each party in the amount of $75,000 by June 19, 2024. Neither Party has made the deposit. In the circumstances I am not able to continue with the arbitration. I am attaching my final account for fees leaving a total owing in the amount of $34,723.00. Each party is jointly and severally liable for payment of the outstanding sum. Please make payment forthwith.

And Justice, in my submission, just the plain wording of his email, I think, is sufficient to pass the first test of the *RJR-MacDonald*, which

is whether or not there's a serious question to be determined.

I'm cognisant of the court's time and how many others are behind me, so I'm --

THE COURT: I don't think that there's going to be time to hear many other matters today, so you have the 30 minutes that you've set out in your application.

CNSL M. SENNOTT: Thank you. I should be able to complete anything and answer -- I've estimated time for questions as well from you, Justice.

THE COURT: All right.

CNSL M. SENNOTT: So if I can then take you to the next page over on page 131 -- actually, to 132. So these are in reverse order, so page 132 is the beginning of the email string. Pagination is a little bit unfortunate, so page 131, you can see at the very bottom, June 25th, 2024, 3:45. This is an email from Mr. Smith. He emails:

> Further to my earlier question for confirmation on payment of deposits for arbitration costs, please -- attached please find wire instructions. Please let me know as soon as possible if there's any problem in using this facility.

THE COURT: Where does that fall in terms of the other one that we've just --

CNSL M. SENNOTT: It's before.

THE COURT: Okay. All right.

CNSL M. SENNOTT: So this is the beginning. So on page 131 --

THE COURT: Is this one entire string?

CNSL M. SENNOTT: Yes.

THE COURT: All right.

CNSL M. SENNOTT: I can be quiet, Justice, if you want to just read it from the back to the front, or I can highlight the --

THE COURT: Go ahead.

CNSL M. SENNOTT: Thank you.

So my response is -- it starts at the top of page 131, and what I say is:

> Hi, Murray. I canvassed your request for a further retainer to stand as security for fees relating to the upcoming hearing. Our

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Submissions by Cnsl M. Sennott

client has two main concerns about this request: Firstly, as previously voiced, and as a result of recent filings and proceedings between Ecoasis --

That's the opposing party:

-- and Sanovest, the hotel is concerned that Ecoasis is not solvent and therefore not able to pay its portion of the requested retainer. As there is no formal arbitration agreement dealing with the event where one party fails to make a payment and the other has provided a retainer, the hotel is concerned that it may be in the position where fees are taken fully from its retainer with no recourse against Ecoasis.

As a result of this concern, the hotel will only provide its portion of the requested retainer upon confirmation that Ecoasis has done so.

So that's the position the hotel took, right or wrong.

Secondly, we have outstanding matters yet to be decided that may affect the ability of the parties to keep the currently scheduled hearing dates. The hotel has provided its application materials to you in relation to a significant portion of Ecoasis evidence and submissions, including the ability of Ecoasis to submit any further submissions, evidence, experts' reports.

The parties have not agreed as to dates, and the concern is spelled out in our correspondence previously. There is very little excess time between now and the scheduled hearing dates.

Which commences at the end of September.

We are awaiting your decision or direction on the timing issues currently.

THE COURT: I'm sorry, so those further scheduled

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Submissions by Cnsl M. Sennott

hearing dates were when?
CNSL M. SENNOTT: September 22nd is when they commence, and they go in -- it's a little hectic. There's, I think, eight or nine hearing days in total, but they're chopped up into, like, three days here, four here and the balance at the end.
In terms of these extant applications, some of them date back to last year, and so the hotel has been prompting and pushing to get answers, not only from opposing counsel, but also from the arbitrator as to direction as to what's happening with these, and, like I said, there's five of them. The arbitrator -- there's a transcript of the hearing that happened on Friday. He's well aware of how old these are and, as I indicated, his ultimate decision was to find the hotel in default for not paying its deposit and dismissing all of the applications for abandonment.
THE COURT: Do you have that here, or you're just telling me?
CNSL M. SENNOTT: No, it's in the materials.
THE COURT: Oh, all right. Where is that located?
CNSL M. SENNOTT: That's actually -- so we have to file a new affidavit yesterday, because the transcript and the order only came out yesterday. So that's at tab 3.
THE COURT: All right.
CNSL M. SENNOTT: So the transcript -- this is not an official transcript, I should point out, Justice. This is one of my legal assistants listening to the recording, so I don't want to mislead you. It not an official transcript. It's transcribed by our office.
So starting at Exhibit A.
THE COURT: Where are you now?
CNSL M. SENNOTT: Page 2 of the exhibits.
THE COURT: Of tab 3?
CNSL M. SENNOTT: Tab 3.
THE COURT: All right. Where are the exhibit?
CNSL M. SENNOTT: The body of the affidavit is only two pages long, and is Exhibit A, I think, is just three pages in. I apologize if there's no page numbering.
THE COURT: All right. I have it.
CNSL M. SENNOTT: So I apologize. I didn't realize you were waiting on me.
So Lee is opposing counsel. Murray is

arbitrator. So he begins by saying:

> All right. So I'm convening this call to discuss moving forward with the arbitration.

I haven't taken you to the rest of the emails back and forth where I've made it very clear that I'm not available, that I want to attend. I'll still take you to those, but --

THE COURT: Were you looking at "we're convening this call"?

CNSL M. SENNOTT: Oh, it's page 2 of the transcript.

THE COURT: All right.

CNSL M. SENNOTT: Right at the Murray, first Murray. There's no line numbers.

THE COURT: I see. All right. And you were advising that you haven't put in the earlier matters.

CNSL M. SENNOTT: Right. So this is an introduction, essentially, and then he asks:

> Mr. Lee, are you ready to go?

Mr. Lee says:

> We're ready to go. I think there's some -- subject to the various things that we've got to deal with on the outstanding applications, but yes, we're ready to go.

So Mr. Lee has acknowledged there's outstanding applications which they have not responded to yet, but I'll get to that.

So the second Mr. Lee:

> I've got the hotel operator's application of June 14th, 2024.

That's the second line down. And midway through that paragraph he says:

> We've indicated that we will have a response by August 14th.

So the hotel kept pushing about responses. They wanted to respond by August 14th. We thought August 14th was too late to deal with these substantive matters, because we'd be weeks

away -- there's some five, six or seven experts that are going to be testifying. In any event, Mr. Lee was prepared to respond to all of these applications by the 14th.

It's the next page or so is a little concerning, because the arbitrator wasn't really up to speed on what all the extant applications were before him, and so the next page or so is Mr. Lee filling him in on the five extant applications.

THE COURT: Carry on.

CNSL M. SENNOTT: Thank you.

So I'm at page 4. So at the top Mr. Lee is now talking about number 3, and I only bring this to your attention because these subpoenas, which have been extant for months and months, definitely into last year, the arbitrator says:

> Well, I wanted to review them.

He's had them for quite a while.

> And I wanted them to be informed they can sign, but they can't be signed, because they list me as QC. They're so out of date, it's not possible to comply with the requests. Okay.

So that's number 3. And then he moves on to number 4, and Mr. Lee says:

> Procedural order number 8, to sort out timing for review witness and attendance of --

THE COURT: Where are you now? Sorry.

CNSL M. SENNOTT: Oh, still page 4, second Lee paragraph.

THE COURT: Okay, I'm there.

CNSL M. SENNOTT: So he's prompted him. We had an application before the arbitrator to have some of the hearings at the hotel, which is located just outside of Victoria, and also a tour of the property so that the arbitrator can have that fresh in his mind when he's hearing the next phase of this arbitration.

THE COURT: What is the arbitration about, in a

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nutshell?
CNSL M. SENNOTT: It will be a little bit of a big nutshell, but the arbitration involves three contracts, and just to make things fun, all three of those contracts have different arbitration clauses.

In any event, one is an asset purchase agreement, one is what's titled an operations agreement, and one is a lease. And so in the most basic of ways, my client purchased the hotel. So previously the hotel and the golf operations were under one roof, run by a company called -- or a partnership called Ecoasis. The hotel purchased the hotel assets, leased a portion of it back to Ecoasis to be used in their golf operations. There was an operations agreement that dealt with a number of things, the least of which was provision of food and beverage to their members' lounge, and then of course there's the asset purchase agreement itself.

The terms of reference outlined some 13 or 14 different issues for the arbitrator to resolve, and they all kind of overlap and, you know, they -- I don't want to go too far into it, but it's those three agreements.

By agreement of the parties, Mr. Smith was appointed as the arbitrator, and one of the agreements requires a panel of three. The parties agreed at that time, anyway, that a single arbitrator would suffice.
THE COURT: Thank you.
CNSL M. SENNOTT: So back to page 4. What I wanted to highlight is they were talking about procedural order number 8. Further down there is a new speaker, Struan, and at the third Struan paragraph, Struan indicate s:

> We intend on responding to that at the same time, because it is a supplemental application.

So the August date, 16th.

And the arbitrator acknowledges, okay -- that's at the bottom:

> Okay. So that's the fifth outstanding application.

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So over the page on page 5 is where it gets interesting. It's a long paragraph. This is the arbitrator speaking. He says:

> Okay. All right. We've got -- we've got a position from Martin --

That's myself.

> -- that he will not participate in these procedural matters, so it falls to me to deal with them and to decide whether the want of prosecution --

So this is the first time that phrase has been used. Nobody's brought it up, opposing counsel -- nobody's brought it up.

> -- warrants those matters, those applications, being struck out pursuant to section 33 of the *Arbitration Act*, and I will consider that over the weekend, such that it may obviate the need for you, Struan --

Opposing counsel.

> -- I guess, who's done the work, to get further responses prepared by August 14th to the applications which are not being pursued.

As I indicated earlier, we've got real problems with the characterization of that.

> The next issue is whether there should be a response to the failure of hotel to pay deposits for fees under section 33 --

I'll just note here, Justice, section 33 is failure to comply with procedural orders. There are no procedural orders related to deposits or retainers.

> -- for either termination of arbitral proceedings in respect of all hotel's claims

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or a suspension of arbitral proceedings in respect of the hotel's claims.

That section there is the apprehension that my client has. We don't understand how the arbitrator can be making those comments, statements. It's not being asked for by opposing counsel. Opposing counsel is prepared to respond to our outstanding applications, and the nonpayment of his accounts, it's not frivolous. There's a reason, and it a justified reason, which has been well communicated to him.

About two-thirds of the way down he says:

> And then finally, under section 33(3), if a party fails to comply with the procedural timeline --

Which we haven't failed in any procedural --

THE COURT: So when you say that the refusal of hotel has been communicated to him, you mean the email that you just had taken me to?

CNSL M. SENNOTT: Yes, and there's more following that, and I can take you to those. But I mean, the first email makes it clear as well. So the other emails that follow essentially state the same position with a little more clarity and confirming that this petition is going to be brought imminently.

And then finally he says:

> Under section 33(3), if a party fails to comply with the procedural timeline --

Again, there's no procedural orders which the hotel is in default of.

THE COURT: Where are you reading from now? Okay, there.

CNSL M. SENNOTT: Oh, it's two-third --

THE COURT: I'm there. Thank you.

CNSL M. SENNOTT: Okay.

> ... which hotel has failed to comply with, that is the requirement to pay the deposits --

Again, no procedural order.

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-- within the time provided.

And Justice, I'll also point out, if the hotel failed, if his email is to be considered a procedural order, then both parties failed to pay by that same time. Because the payment that came from Ecoasis came weeks -- I think a month and a week over the deadline.

-- the arbitral tribunal may continue the proceedings, which I am doing, and make an order I consider appropriate, including an order that precludes hotel from taking any procedural steps. So that is another matter that lies for decision this weekend, and I propose that I will issue probably what I'll call procedural order number 9 in respect of what provisions I consider appropriate to address the refusal of hotel to pay their share of arbitral fees and to address their refusal to participate in the proceedings.

So on that front, Roger and Struan, do you have any submissions or comments or input that you want to provide on section 33?

So I brought you to this specifically, Justice, so that, you know, the full context can be understood. Opposing counsel was not making these submissions. The arbitrator brought these up. Opposing counsel responds:

I think at this point, Murray, no, we have no comments to put in at that stage. I think the positions have been well flushed out in terms of the email exchanges.

Which I haven't taken you through all of them.

I don't have anything to add to that, other than to say that we've made out [sic] position clear and the hotel's made their position clear.

So they're essentially saying no position, so they're not pushing this. He continues -- and

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I'll skip forward, Justice, but --
THE COURT: And you think he's referring there to the procedural matters that are referred to by the arbitrator directly above?
CNSL M. SENNOTT: Yeah, because he asked. The arbitrator says at the bottom -- he says:

> So on that front, Roger or Struan, do you have any submissions or comments or input that you want to provide on section 33?

So he's brought up section 33, I'm going to do this to the hotel. I'm going to strike. I'm going to do this. Meanwhile, no comment -- the arbitrator has been cc'd on all of the emails, so, you know, the reason for the nonpayment of the fees -- by the way, we paid one-half of his final account. He acknowledges that.
THE COURT: So he's cc'd with the -- I just haven't looked at the top part of that.
CNSL M. SENNOTT: Yeah, he's on -- he's on that whole email chain.
THE COURT: Chain, all right.
CNSL M. SENNOTT: So he does not address, aside from at the very beginning where he sort of briefly says, Martin has taken the position that I'm functus, but I'm going to proceed anyway.
THE COURT: I just have to ask you to pause for a moment, because I know there's other people in the courtroom. Their matters are not going to get on. You can have a seat for a moment.

(OTHER MATTERS SPOKEN TO)

THE COURT: How long do you think you're going to be, Mr. Sennott?
CNSL M. SENNOTT: I can speed this up. I'm kind of following your lead a little bit.
THE COURT: I will not be in a position to make a decision today.
CNSL M. SENNOTT: Understood.
THE COURT: So --
CNSL M. SENNOTT: I can finish my submissions in 15 minutes.
THE COURT: All right.
CNSL M. SENNOTT: Yeah, I mean, depending on questions.

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THE COURT: All right. Carry on.
CNSL M. SENNOTT: Thank you.
So I believe we're at the bottom of page 5. You had asked, and I think I had responded by indicating that Struan's response was to the arbitrator's musings about what if he does this and what if he does that, so inviting a position. No position was taken. So he continues on:

> So yeah, let's just, for the sake of argument, assume that I apply section 33 and make an order that precludes hotel from taking any procedural steps. Now, that would include the matter you put down as item number 4.

And he continues on and on, and counsel follows his lead and just basically says:

> I think you're correct. Okay.

And then in the middle of page 6, Mr. Lee:

> Okay, now one thing -- one thing I would raise, Murray, which I don't know the answer to, is something we're looking at right now, is whether the hotel is not a participant, and depending on the nature of your order, whether we need to issue subpoenas to have their witnesses attend to be cross-examined.

And the arbitrator responds, and this is where, you know, if we weren't sure where his mind was at before, we certainly are now:

> That presumes that an order is not made terminating all claims brought by the hotel.

And over the page, I'll skip those ones, but near the bottom, the second-to-last Murray:

> Okay, I've got you. I've got you. Okay. Well, that's where we're at. I will consider this over the weekend and try and get you a procedural order providing my assessment of what measures I should take under section 33 for a party in default and

have that to you before the end of next week.

So that would be this coming Friday.

THE COURT: And what decisions are you expecting from that?

CNSL M. SENNOTT: Well, he made it.

THE COURT: That's the one that he pulled ahead.

CNSL M. SENNOTT: He made it yesterday morning. Sent it out at 7 something in the morning.

THE COURT: All right.

CNSL M. SENNOTT: Prior to us getting in to court. His decision is -- just follows at Exhibit B. So his procedural order number 9, what's of interest is paragraph 12:

> Mr. Sennott objected to the case management conference being held. He attended the meeting, but did not participate.

I was at a family event, Justice. The other teammate within our firm was overseas, and another was in a board of directors meeting. We had advised that we weren't available.

THE COURT: So when -- so does this refer to it being set?

CNSL M. SENNOTT: He does. He says in paragraph 1:

> A case management conference call was convened on August 2nd.

THE COURT: And at that time you were away?

CNSL M. SENNOTT: Yes. I wasn't in the office. I wasn't available. I was at a family event.

THE COURT: Did you get notice of this?

CNSL M. SENNOTT: On August 1st.

THE COURT: And another member of your office was overseas that was familiar with this?

CNSL M. SENNOTT: Yeah, there's two other lawyers, two associates, that are working with me on this. One is overseas, returning at the end of this week, and one that was in a board of directors meeting that was scheduled for the entire day, or at least the afternoon. Don't quote me on the entire day, please.

And that unavailability was communicated to the arbitrator, and I'll take you to those

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emails.
THE COURT: On August 1st?
CNSL M. SENNOTT: Yes, and on August 2nd in the morning.
THE COURT: All right.
CNSL M. SENNOTT: So paragraph 2 he quotes me from one of my emails:

> In the circumstances, the hotel cannot participate in your suggested hearing, and I am unavailable tomorrow, in any event.

So he acknowledges that I was not available.

> The refusal to participate was premised on a position that there was no jurisdiction in the arbitral tribunal to proceed.

That's a little bit of a misstatement, and I'll take you to the exact emails after we finish with this.

Paragraph 4 he summarizes the position the hotel took in saying that Ecoasis needs to pay first, and I took you to that already.

He refers to his email, and this is how he refers to it:

> On July 9th, 2024, I wrote to say I would not be able to continue without being paid for my services and delivered a final account for services rendered to date.

That's a little bit of a misstatement as well, and I took you exactly to his email. He summarizes Mr. Lee -- so he's summarizing the emails back and forth, Justice, and I'll take you to the exact emails. He confirms that Ecoasis made the payment in paragraph 6.

> The first issue considered at the case --

So there was no agenda, no matters put before the arbitrator by opposing counsel, and so he doesn't explain that.

> The first issue considered at the case management conference was the response to

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> hotel's default in complying with the procedural time limit imposed under section 32(b).

I've already said what our position is going to be on that. There's no -- there was no order.

> Mr. Lee advised that there were five procedural applications outstanding for which Ecoasis required two weeks to complete a response. The applications included ...

And he generalizes them. Paragraph 9:

> Given the refusal to provide security for arbitral tribunal fees and to participate in arbitral proceedings, all outstanding procedural requests by hotel are dismissed as abandoned.

And we have some really serious issues with that president.

> Issues of liability were decided in the partial final award. Since that time there have been an inordinate number of delays.

Again, we've got a concern with that. We have been banging the drum about responses to our outstanding applications.

> It is essential that evidentiary hearings proceed as currently scheduled.

He doesn't explain why.

> Hotel opposes continuation of the proceedings, but has not brought an application in the arbitration for a stay of proceedings.

We made it clear, Justice, if he's functus, he doesn't have jurisdiction to make a determination for a stay, and we considered this. And the reason why I explained earlier that this is not your normal jurisdiction issue, being geographical or which statute applies, this is

jurisdiction and the mandate being terminated by withdrawal. So I can't imagine how it would be appropriate that the person who withdrew and who wrote the email that's the subject of this withdrawal would be the one to make a decision. And, to make it even more interesting, if we made an application to Mr. Smith for a stay, wouldn't we be attorning to his jurisdiction? I mean, it would be an argument.

In any event, he points out that no application has been made. I'll point out that, by the time he issued this award, the petition and the supporting material were before him, and the application for a stay is part of the petition.

He says at paragraph 12 at the very bottom:

> Hotel may elect to not abandon claims in the arbitration by providing security for arbitral tribunal fees.

So he has now dismissed the applications. They're gone. But in order to continue to advance our claims, he's given us until August 16th to pay.

I think it's worthy to note, Justice, I have the funds in my trust account to make the payment. If this court ultimately decides that we are wrong and this arbitrator continues with jurisdiction, we have the funds. This has never been a funds issue for the hotel.

That's all I waned to take you to in his decision, and I think, just to go back to where we left off with the email string, we were at page 130 of tab 2.

THE COURT: I'm there.

CNSL M. SENNOTT: Sorry, I thought you needed to flip to it.

So at the top of page 130:

> Hi, Murray. My sincere apologies for the delay in responding to your email. I have been preoccupied with other matters. I have spoken with my client today. I am advised that you will have the 75,000 by Wednesday, at the latest, if not Tuesday.

So this is well past his deadline.

> I have impressed to my client the importance of prompt payment going forward. They fully understand ...

Et cetera. And over the page to 129, that same -- so that was July 13th, Mr. Lee's email. On the 14th is my email:

> Hi, Roger. Mr. Smith has withdrawn and provided his final account. Simply curing the nonpayment at this point does not restore his mandate as arbitrator. I will communicate with you directly on the procedure to substitute an arbitrator that has withdrawn.
>
> Mr. Smith, I will also arrange with Mr. Lee the payment of your last invoice, the hotel's concern regarding accounts highlighted by your statement that both parties are jointly and severally liable. Had the hotel made the request payments and assuming the joint and several liability, your accounts would have been paid solely from the hotel's funds. As such, I am instructed that the hotel will make its payment once Ecoasis has done so, and I will endeavour to arrange that with Mr. Lee.

I'm referring to only his final account, not to the deposits that he's requesting.

THE COURT: Where is the request on the deposits again? The one over on page 130?

CNSL M. SENNOTT: Yeah. That's not the original request, but he does -- he gives the date when he requested it, June 19th, and the previous requests for the 50,000 was December 14th, 2023.

THE COURT: Sorry? Oh, December 14th.

CNSL M. SENNOTT: Yeah, 2023.

THE COURT: I'm really getting concerned about the time now. How much longer are you going to be?

CNSL M. SENNOTT: I'm just going to finish that email string, and that's it. So it's -- I think that we're almost at the end of it.

THE COURT: What in the tab 2 is it that you're going to be drawing to my attention?

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CNSL M. SENNOTT: Well, tab 2 is -- in my submission, it's a bit of overkill, Justice. I've put in a lot of the case law on the actual hearing of the petition. I've got *RJR-MacDonald*, which I can go through it, if you like, but it -- you know, the test is fairly well settled for an injunction.

THE COURT: I'm talking about the affidavit at tab 2.

CNSL M. SENNOTT: Oh, I apologize. That is going to be of more importance on the hearing of the petition. So it's got the arbitration clauses in the three different agreements, and it's got the terms of reference.

THE COURT: Do you have any authority for the -- I have your position with respect to the no service. Do you have any authority in respect of courts granting that order?

CNSL M. SENNOTT: Yes, inside the sleeve of the case law binder that I gave to you.

THE COURT: Yes.

CNSL M. SENNOTT: Is -- the facts are a little bit different, Justice, but this is a decision of our court of appeal. It's a 2002 decision. It's a decision of Justice Smith. This is an application for a stay of arbitral proceedings pending an appeal. And like I said, the underlying facts are a little bit different. There was a concern about a certain party not being a party to the arbitral proceedings and whether or not that party needed to be, should a new arbitration proceed.

They had a hearing set for the next week, and in this case the court stayed the arbitration proceeding pending the outcome of this appeal.

THE COURT: What about the no service, though?

CNSL M. SENNOTT: The without-notice, Justice?

THE COURT: Without notice, yes.

CNSL M. SENNOTT: I did not bring any specific authority on it. I'm relying on the apprehension of prejudice, and the fact that, despite objections and what I would say is a conscientious objection to a hearing going ahead on Friday when counsel is not available, knowing that, in my submission, a legitimate question as to jurisdiction is going ahead, that the actions of the arbitrator are sufficient to show that my client is exposed to significant prejudice, if notice is given.

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And we point to the fact that the arbitrator was going to take a week to provide it -- provide his decision, which would have given us a week to have this hearing, potentially get a stay at the hearing of the petition, and issued it ahead of time.

Now, I want to be fair. It could be that the arbitrator found time during the weekend to do this. It could be completely innocent, but the order that was made is so prejudicial, and in these circumstances that our submission is that the without-notice is appropriate.

THE COURT: It's so prejudicial. Okay. So where he -- where is the reference to where he issued it ahead of time? Or is it just from what you're telling me factually that I know that?

CNSL M. SENNOTT: No. I don't know if the email from him is attached, but the date of his decision --

THE COURT: So which -- where was it that he said, I'll be able to be in a position to do it Friday?

CNSL M. SENNOTT: That was in the transcript.

THE COURT: All right.

CNSL M. SENNOTT: And it -- I'll give you the page or the pinpoint. Page 7, three-quarters of the way down:

> Okay, I've got you. I've got you. Okay, that's where we're at. I will consider this over the weekend and try and get you a procedural order providing my assessment of what measures I should take under section 33 for a party in default and have that to you before the end of next week.

THE COURT: All right.

CNSL M. SENNOTT: Our materials were delivered on Friday. They were unfiled, but they were delivered, and then his decision -- he's dated his decision August the 2nd, but it came on the Tuesday morning.

THE COURT: Which was?

CNSL M. SENNOTT: Yesterday morning. The 6th.

So the length of the potential stay is only until this court has had an opportunity to dispose of the matters within the petition.

My friend and I, opposing counsel, are discussing dates as early as next Monday/next

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Tuesday.
THE COURT: How long are you estimating it's going to take for the matter to be heard?
CNSL M. SENNOTT: I have not spoken to my friend. I don't know what materials he will file in response. I would say it's going to be a two-hour hearing, with the caveat that my friend might say longer.
THE COURT: All right.
CNSL M. SENNOTT: So the length -- so this is always a consideration for the court, like, how intrusive is the potential stay. It's a short period of time. The prejudice has already been shown. I do have a vetted order also in the sleeve, I think, of the application binder.
What courts will do sometimes to cure any concern --
THE COURT: Let me just find that. I have a notice of application without notice, the petition to the court. You mean the order sought in the petition?
CNSL M. SENNOTT: No, there should be a draft order that's vetted by the court. I believe I put it in the sleeve of the application binder.
THE COURT: You mean in the sleeve of the binder?
CNSL M. SENNOTT: Yes.
THE COURT: Yeah, I don't have it. I've got notice of application and the petition.
CNSL M. SENNOTT: Maybe just check the case law binder, then, Justice. I may have -- I thought I put it in the application binder. Maybe I put it into the case law binder.
THE COURT: Yes, it's in there.
CNSL M. SENNOTT: So the point that I wanted to make is the intrusion -- there isn't anything scheduled, so this would have almost zero intrusion. If the matter is heard next week, then, you know, the length of time that it's outstanding will be fairly short.
But the concern and the potential prejudice -- like, regardless of any steps that they take, the hotel cannot participate, for good reason, until this issue is dealt with, and dealing with substantive matters, knowing that the hotel cannot participate, is -- I mean, it's procedurally unfair, but it's -- it's just so prejudicial.

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THE COURT: And you can't participate because of your concern that if you attorn to the jurisdiction, you've got the arbitrator. And if you could summarize, then, the points of where you say his actions are clearly such that this should be going without notice again.

CNSL M. SENNOTT: So it's -- I mean, the prejudice has already been shown. So usually people, when they're seeking a stay, will talk about, you know, potential prejudice. The hotel's already suffered prejudice. If he is confirmed to be the arbitrator, the hotel is going to have to now take --

THE COURT: Because of the striking of the -- of the claims?

CNSL M. SENNOTT: Right.

THE COURT: The striking of the -- sorry -- of the --

CNSL M. SENNOTT: The five applications.

THE COURT: And your position on those is that it was for Ecoasis to respond. In any event, the matters weren't -- there was nothing that the hotel had done to not advance those.

CNSL M. SENNOTT: They were fully advanced. All of our materials were in written form, all of the evidence. Everything that the hotel needed to do, except for, potentially, an oral hearing, if the arbitrator decided an oral hearing was required, everything was done.

THE COURT: Okay, and what's the next point? What do you say?

CNSL M. SENNOTT: In terms of the without-notice portion?

THE COURT: No. Yeah, where do you say that the prejudice has already been shown of the arbitrator?

CNSL M. SENNOTT: Oh, yeah, so the prejudice in the arbitrator's posture in proceeding. So opposing counsel gave dates this week as well for this procedural order hearing. The arbitrator decided to move ahead on Friday knowing that I wasn't available. I did indicate that I wanted to be present so that I could speak about jurisdiction only, not to attorn to his jurisdiction.

He proceeded only, and so the posture of the arbitrator, the timing of his issuance of this order, the content of the order, the inappropriateness of the order, is, to an extent,

that the apprehension of further prejudice is real.

What the courts have done on occasion, Justice, to eliminate a concern about the without-prejudice notice is to add in a term of the order that it can be set aside on two days' notice or one day's notice or what have you. And so if there was going to be prejudice in the delay, I mean, I would certainly accommodate my friend, my opposing counsel, in his timeliness to return to court.

Like I said, we're cooperatively seeking dates next Monday/next Tuesday.

THE COURT: All right. We're really running out of time. I'm concerned that we have -- I have to review this more before I make an order, so I'm wondering if -- I have a full day tomorrow, as well as on Friday, but I could make myself available for Friday at 1:30.

CNSL M. SENNOTT: I'll be here.

THE COURT: All right. If we could just put that down for then, please, Madam Registrar.

THE CLERK: Yes, Justice. Would you like me to give scheduling a call or --

THE COURT: Yes, please, and just make sure that that's put any.

THE CLERK: Okay. I can call off record.

THE COURT: That's fine, yes.

Other than that, Mr. Sennott, is there other -- did I miss anything there in terms of --

CNSL M. SENNOTT: No. I think the only thing that I would ask, Justice -- and I apologize. I'm sure it's an annoyance to the bench when counsel try and give homework to the bench, but the only thing I would ask is I didn't take you through all of those emails. Although you've got the highlights of the emails back and forth, you'll see --

THE COURT: So where are they?

CNSL M. SENNOTT: It's at --

THE COURT: All of the ones at tab 2?

CNSL M. SENNOTT: Yeah, yeah.

THE COURT: And that starts at where? At what page?

CNSL M. SENNOTT: It starts at.

THE COURT: E? Is it Exhibit E?

CNSL M. SENNOTT: Yeah, it's 131 to -- well, I'm going backwards. So it starts at page 116, and this is

reverse order.
THE COURT: I'm there.
CNSL M. SENNOTT: Yeah. And it goes to 131.
THE COURT: All right.
CNSL M. SENNOTT: Well, we got past 131.
THE COURT: And what do you say that this captures?
CNSL M. SENNOTT: It captures what happened on the Friday in the morning.
THE COURT: Can you give me the date again.
CNSL M. SENNOTT: Oh, that was the 2nd.
THE COURT: August 2nd. All right.
CNSL M. SENNOTT: Yeah, and the -- I believe that I took you through to 123. No, I did not. I apologize. I took you through to 126.
THE COURT: And --
CNSL M. SENNOTT: So there's nine -- there's nine pages of emails back and forth, and I put them all in in their entirety.
THE COURT: Are these reflected in the application facts?
CNSL M. SENNOTT: Yes.
THE COURT: All right. I'll review them.
CNSL M. SENNOTT: Because of the haste, the pinpoints aren't tabbed, but there's only two affidavits.
THE COURT: All right. So, then, this matter is going to be adjourned to 1:30 on this Friday, which is going to be August the 9th.
CNSL M. SENNOTT: Thank you, Justice, and I appreciate running overtime and to Madam Clerk as well.
THE CLERK: Just to clarify, that's adjourning for reasons? No more submissions, Justice.
THE COURT: Unless I have questions.
THE CLERK: Okay, yes.
THE COURT: Thank you.
THE CLERK: There were also just two affidavits that were with the -- not with the binder, but loose, so it needs to be included, just to make sure she has everything.
CNSL M. SENNOTT: I think I put those in, because we just filed them in morning, so these are the filed copies. I don't know if you need them. They're in the binder already.
THE COURT: If they're in the binder, that's fine.
THE CLERK: And with that, we're adjourned. Thank you.
THE COURT: Thank you.

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Reporter certification

THE CLERK: Order in chambers. Chambers is adjourned.

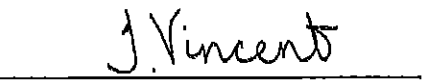
(PROCEEDINGS ADJOURNED AT 4:29 PM TO AUGUST 9, 2024)

REPORTER CERTIFICATION

I, Tiffany Vincent, Official Reporter in the Province of British Columbia, Canada, BCSRA No. 576, do hereby certify:

That the proceedings were transcribed by me from audio provided of recorded proceedings, and the same is a true and correct and complete transcript of said proceedings to the best of my skill and ability.

IN WITNESS WHEREOF, I have hereunto subscribed my name on this day, the 9th of August, 2024.



Tiffany Vincent
Authorized Reporter

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No. S245287
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF AN ARBITRATION PURSUANT TO:
ASSET PURCHASE AGREEMENT, COMMERCIAL LEASE, AND THE HOTEL, GOLF COURSE AND TENNIS AGREEMENT, BETWEEN ECOASIS RESORT AND GOLF LLP, 1210110 B.C. LTD. AND 2600 VIKING LIMITED DATED JULY 11, 2019

(BEFORE THE HONOURABLE JUSTICE MAISONVILLE)

Vancouver, BC
August 8, 2024

BETWEEN:

BEAR MOUNTAIN RESORT & SPA LTD.,
BM MANAGEMENT HOLDINGS LTD., and
BM RESORT ASSETS LTD.

Petitioners

AND:

ECOASIS RESORT AND GOLF LLP

Respondent

PROCEEDINGS IN CHAMBERS

COPY

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Respondent

PROCEEDINGS IN CHAMBERS

Counsel for the Petitioners: M.C. Sennott

PROCEEDINGS IN CHAMBERS
AUGUST 8, 2024

PROCEEDINGS

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EXHIBITS

Exhibit	Description	Page
	No exhibits marked.	

1
Discussion re proceedings

August 8, 2024
Vancouver, BC

(PROCEEDINGS COMMENCED AT 4:05 PM)

THE CLERK: Calling the matter -- in the matter of an arbitration pursuant to asset purchase agreement, commercial lease of Ecoasis versus the Bear Mountain Resort & Spa and others, Justice.

THE COURT: Yes, thank you. Thank you for coming on short notice, Mr. Sennott.

I have carefully reviewed the materials again. I am not going to proceed with your application. I'm finding that there should be, and pursuant to rule 22(8) that there may be directions, however, that this matter can proceed by way of short leave, and that can be set down.

I won't -- I can just advise that I was not satisfied that there weren't, in all of the circumstances -- there wasn't, given what's already transpired, a reason to proceed *ex parte* on this matter.

CNSL M. SENNOTT: Understood. Thank you, Justice.

THE COURT: All right.

CNSL M. SENNOTT: So you had mentioned directions on short leave.

THE COURT: Yes. That it can do by short leave if --

CNSL M. SENNOTT: If necessary. I should advise you, Justice, that we've settled on a date for the hearing of the petition.

THE COURT: All right.

CNSL M. SENNOTT: Which is the 13th, which is next Tuesday.

THE COURT: All right. That's very quick.

CNSL M. SENNOTT: It's quick, and I'll give credit to my friend, opposing counsel, for not requiring me to get short leave for the petition. And so I think there was more urgency that my client felt on Tuesday, upon receiving that decision from the arbitrator, but now -- we couldn't get into court on Tuesday. We got in yesterday, and so short leave, even to be fair to opposing counsel, would likely have to go to, I would say, Monday. I don't know.

But if we're dealing with this on Monday and then we're dealing with the petition proper on Tuesday, and one of the prayers for relief in the

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Discussion re proceedings

petition is also the leave --
THE COURT: I leave that for you to --
CNSL M. SENNOTT: Sorry, not the leave, the stay.
THE COURT: Yes.
CNSL M. SENNOTT: So I don't want to waste -- I don't want to waste the court's time to have a hearing on Monday and then hearing the petition proper Tuesday.
THE COURT: All right.
CNSL M. SENNOTT: I think -- I appreciate the direction of a potential short leave application. I don't have instructions, but I'm going to recommend to my client -- and I'm quite sure they'll take my advice -- that getting in on Monday, when we have a Tuesday hearing, isn't an efficient use of the court's time.
THE COURT: All right. So how would you like that order to go, then?
CNSL M. SENNOTT: I think you weren't --
THE COURT: Just that this matter will be -- is --
CNSL M. SENNOTT: Set to the 13th. We can just put it over to the 13th. I'll provide my application material --
THE COURT: That the matter can be addressed on the 13th. Either that or it would be directions, because it has to be served. That's my direction, is that it has to be served on the --
CNSL M. SENNOTT: I'll serve it tonight.
THE COURT: Yes.
CNSL M. SENNOTT: Or when I get back to the office. And I'll advise my friend that -- I'll give him the history and how the court wasn't prepared to go *ex parte* or without notice, and that it will be addressed on Tuesday. And I'll give him the material as well, because there's additional materials that were in this application that weren't included with the petition materials, in particular Sherri Evans' affidavit #2 with the arbitrator's decision and the transcript.
THE COURT: So are you interpreting this as that the matter can proceed on Tuesday, or are you how --
CNSL M. SENNOTT: Or it can -- I mean, I would -- my suggestion would be leave it to the judge on Tuesday --
THE COURT: Yes.
CNSL M. SENNOTT: -- to decide.
THE COURT: At the discretion of the hearing judge,

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Discussion re proceedings

but that, in any event, the direction is that there has to be service.
CNSL M. SENNOTT: Right, and I'll effect that today.
THE COURT: All right.
CNSL M. SENNOTT: Tonight. And I'll give my friend the background of the attendance and your decision on that matter, and I'll give the additional materials.
I want to be fair to my friend, because if we're hurrying this up and he's agreeing to a date instead of making me get short leave on the petition proper, then I want him -- in any event, I was going to give him everything today anyway.
THE COURT: All right. And I leave it to the discretion of the judge who's hearing the matter on Tuesday.
CNSL M. SENNOTT: Yes.
THE COURT: All right.
CNSL M. SENNOTT: Yeah, I don't have an order, of course, prepared for that, but I can prepare one and bring it up, or maybe I can have my articled student bring it up tomorrow.
THE COURT: So --
CNSL M. SENNOTT: If you think that an order is necessary. I'm in your hands on that.
THE COURT: In essence, are you asking that I'm basically giving you short leave to bring this matter on Tuesday, or what? Because that's not what I had in mind here.
CNSL M. SENNOTT: Yeah.
THE COURT: I need you to -- you need to serve your friend first.
CNSL M. SENNOTT: Yeah.
THE COURT: So let's leave it at that. You have the ability -- the order would be that you can proceed on short leave, if you so -- if you get those instructions. If not, I leave it for the judge who's hearing the matter on Tuesday to determine. You may want to renew that at that time.
CNSL M. SENNOTT: Yeah. I think what's important for Tuesday, the application for a stay, it's not exactly the same, but it's overlapping 90 percent with the request for the stay in the petition, and so --
THE COURT: In essence, you're applying for short leave for the matter to be heard on Tuesday.

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Reporter certification

CNSL M. SENNOTT: Proper.
THE COURT: Right.
CNSL M. SENNOTT: Which includes --
THE COURT: But that would be the short leave application would be on Tuesday.
CNSL M. SENNOTT: For --
THE COURT: Yes. So my order is that you can proceed by short leave. If you so choose to do it, that you would do it on Tuesday, I guess, is what you're saying, because you want to give your learned friend on the other side the ability to respond, and that the only other direction is that the matter be served.
CNSL M. SENNOTT: Understood.
THE COURT: All right. Thank you very much.
CNSL M. SENNOTT: Thank you. And thank you for hearing me again somewhat out of normal hours.
THE COURT: Yes. You're welcome.
THE CLERK: Order in chambers. Chambers is adjourned.

(PROCEEDINGS ADJOURNED AT 3:10 P.M.)

REPORTER CERTIFICATION

I, Tiffany Vincent, Official Reporter in the Province of British Columbia, Canada, BCSRA No. 576, do hereby certify:

That the proceedings were transcribed by me from audio provided of recorded proceedings, and the same is a true and correct and complete transcript of said proceedings to the best of my skill and ability.

IN WITNESS WHEREOF, I have hereunto subscribed my name on this day, the 9th of August, 2024.

T. Vincent

Tiffany Vincent
Authorized Reporter

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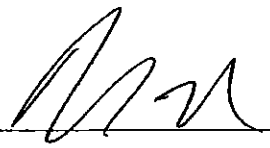
This is **Exhibit "G"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.



A Commissioner for taking Affidavits for British Columbia

DLA PIPER

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September 17, 2024

FILE NUMBER: 104687-00001

DELIVERED BY EMAIL

Boughton Law Corporation
Suite 700 – 595 Burrard Street
P.O. Box 49290
Vancouver, BC V7X 1S8

Attention: Martin C. Sennott

Smith Barristers
2001 – 1228 West Hastings St.
Vancouver, BC V6E 4S6

Attention: Murray L. Smith, K.C.

Dear Sirs/Mesdames:

Re: Ecoasis Resort and Golf LLP (the "GT Operator" or "Ecoasis") and Bear Mountain Resort & Spa Ltd. (the "Hotel Operator")
Section 18(2) of the *Arbitration Act*, SBC 2020, c.2 (the "Act")

A. Overview

1. Ecoasis does not agree with the Hotel Operator's challenge brought pursuant to s. 17(1)(b) of the Act to remove the arbitrator on the basis of bias.

2. While the Act does not expressly require or provide Ecoasis with standing to set out its opposition, to the extent it is helpful to the arbitrator, the reasons for not agreeing are set out in this letter.

3. The bias allegation is concocted.

4. The Hotel Operator bears the onus of showing whether a reasonable and right-minded person, informed of all the circumstances, viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that Murray Smith, K.C did not conduct the case management conference held on August 2, 2024 fairly as a result of bias.

5. The genesis of the bias allegation is derived from the Hotel Operator's own decision to allege the arbitrator had withdrawn from the arbitration. The Hotel Operator made it crystal clear that it would not participate in the arbitration. It can not now complain of directions that were made in its absence after its decision not to participate in the arbitration was deliberately made.

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B. Factual Background

6. The Hotel Operator's notice of August 15 and the background provided omits key facts leading up to the issuance of Procedural Order #9. The following chronology provides a more comprehensive overview of what transpired leading up the Hotel Operator's decision to not participate in the arbitration and subsequent steps taken by the Arbitrator in response:

(a) **June 25, 2024** – the Arbitrator writes to counsel for both parties:

> Further to my earlier request for confirmation of payment of deposits for arbitration costs attached pleased find wire transfer instructions. Please let me know as soon as possible if there is any problem in using this facility.

(b) **July 5, 2024** – counsel for the Hotel Operator writes to the Arbitrator and advises it has concerns about the solvency of Ecoasis and therefor will only provide its portion of the requested retainer upon confirmation that Ecoasis has done so.

(c) **July 9, 2024** – the Arbitrator writes to counsel for both parties:

> Dear All: I am dismayed to learn that deposits for arbitration costs and overdue arbitrator fees have not been made. I made a request for a deposit from each party in the amount of $50,000 by December 14, 2023. That request was ignored. I made a further request for a deposit from each party in the amount of $75,000 by June 19, 2024. Neither Party has made the deposit. In the circumstances I am not able to continue with the arbitration. I am attaching my final account for fees leaving a total owing in the amount of $34,723.00. Each party is jointly and severally liable for payment of the outstanding sum. Please make payment forthwith.

(d) **July 13, 2024** – counsel for Ecoasis responds to the Arbitrator's email of July 9, 2024:

> Hi Murray –
> My sincere apologies for the delay in responding to your email. I have been preoccupied with other matters.
> I have spoken with my client today. I am advised that you will have the $75,000 by Wednesday at the latest, if not Tuesday.
> I have impressed on my client the importance of prompt payment going forward if there are any other requests from you. They fully understand. I can also advise that Ecoasis has taken steps internally to ensure that there would be no impediment such payments going forward.

(e) **July 14, 2024** – counsel for the Hotel Operator responds to counsel for Ecoasis as follows:

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Hi Roger,

Mr. Smith has withdrawn and provided his final account. Simply curing the nonpayment at this point does not restore his mandate as Arbitrator.

I will communicate with you directly on the procedure to substitute an arbitrator that has withdrawn.

Mr. Smith, I will also arrange with Mr. Lee the payment of your last invoice. The hotel's concern regarding accounts is highlighted by your statement that both parties are jointly and severally liable. Had the hotel made the requested payments, and assuming the joint and several liability, your accounts would have been paid solely from the Hotel's funds. As such, I am instructed that the Hotel will make its payment once Ecoasis has done so and I will endeavour to arrange that with Mr. Lee.

(f) **July 15, 2024** – the Arbitrator writes to counsel for both parties:

Dear Counsel:

This is to advise that I have not terminated my mandate in this reference. My message of July 9, 2024 was notice only that I could not continue without deposits being paid. It now appears that deposits will be paid and proceedings may continue when that is done.

(g) **July 16, 2024** – counsel for the Hotel Operator advised counsel for Ecoasis and the Arbitrator:

I want to advise both Roger and Murray that despite Mr. Smith's most recent email, the Hotel takes the position that Mr. Smith withdrew and is now functus.

I am in court today, but I will send a formal letter shortly outlining this position, but I wanted to advise the parties immediately.

(h) **July 17, 2024** – Ecoasis paid the deposit of $75,000 to the Arbitrator.

(i) **July 19, 2024** – counsel for Ecoasis advised counsel for the Hotel Operator and the Arbitrator:

Martin –

When may we expect the letter with the Hotel's explanation for its position? We expect the letter to be in the form of a formal application to request the arbitrator to rule on whether he withdrew and is functus. The sooner you provide it the sooner Ecoasis can respond and the sooner the arbitrator can rule on the issue.

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In the meantime, please confirm that the Hotel has paid its $75,000 to the arbitrator and if not, when that will be paid. Until there is a formal ruling to the contrary, the arbitration is still proceeding and the arbitrator is still in place. If the Hotel refuses to pay the $75,000 then Ecoasis will take the position the Hotel is in breach of its obligations and may apply for judgment in default.

(j) **July 22, 2024** – counsel for the Hotel Operator advised counsel for Ecoasis (without a copy to the Arbitrator):

Hi Roger,

I have removed Murray from this email string as he has no role at this point.

I have been occupied on other matters, but I will get a letter to you later today. However, I will point out here that the hotel is in no way in breach of any term of any agreement.

We can discuss next steps directly on Wednesday (I am in court tomorrow). I have good availability in the afternoon.

(k) **July 22, 2024** – counsel for Ecoasis advised counsel for the Hotel Operator (without a copy to the Arbitrator):

Martin –

I am generally free Wednesday afternoon other than a call at 3:00 pm. Just let me know when you wish to speak.

However, a single party cannot unilaterally say the arbitrator is no longer empowered. What you are saying is essentially that the arbitrator has lost jurisdiction. That is an argument and requires an application for the arbitrator to rule on the point. You need to make that application.

In the meantime, the arbitration continues and there are time sensitive matters to be determined. If the Hotel does not make a payment as required we will apply for a form of default against it to maintain the scheduling.

(l) **July 22, 2024** – counsel for the Hotel Operator advised counsel for Ecoasis (without a copy to the Arbitrator):

Hi Roger,

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I have been preparing for court tomorrow, and I have been given a reprieve! My matter has been resolved, and I will be in the office tomorrow. I will send you a letter as promised, but now due to timing of my other matters, I have not completed it yet and expect to send it tomorrow morning.

I disagree with your characterization of the situation below, but I will address the same in my letter to you. I will say here though that it is Murray's actions and words that create the withdrawal, not any action on the Hotel's part. We can discuss next steps as early as tomorrow, but I also disagree that there is some obligation on the Hotel to make an application to Murray (who is functus in any event). I will outline what the correct steps are going forward in my letter.

(m) **July 22, 2024** – the Arbitrator advised counsel for both parties:

Dear All: This will acknowledge receipt of a cheque from Boughton Law Corp. in the amount of $17,361.50 in payment of half of my July now interim account for arbitration costs of $34,723.00 including the amount of $23,383.00 in arrears. Ecoasis paid the required deposit amount of $75,000.00 on July 17, 2024 by wire transfer. After deducting $17,361.50 for the Ecoasis half of the outstanding account and a $16 handling fee for the wire transfer, the balance on deposit for arbitration costs in this matter is $57,622.50 (all paid by Ecoasis). The Bear Mountain parties are obliged to pay the balance of deposit owing in the amount of $57,638.50. If that amount is paid by wire transfer, there will be an equal handling fee of $16 and the sides will be even. Otherwise we will adjust for that small discrepancy. Please let me know if my math is wrong.

(n) **July 22, 2024** – counsel for the Hotel Operator advised the Arbitrator and counsel for Ecoasis:

The hotel maintains that you have withdrawn from the arbitration in your email of July 9th and provision of your final account. As such, the Hotel has paid its ½ of the final account and does not acknowledge an obligation to pay the balance of the deposit you mention in your email below.

(o) **July 24, 2024** – counsel for the Hotel Operator wrote a letter to counsel for Ecoasis (without a copy to the Arbitrator) in which he advised:

...we see no basis for the GT Operator 's position that the Hotel Operator is required to make an application to Mr. Smith regarding these issues. Given his withdrawal, he is functus officio and can make no further orders with respect to arbitration proceedings between the parties. To the extent that the GT Operator now desires to alter that status quo, we suggest that it will be necessary for the GT Operator to obtain an order of the court...

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(p) **July 29, 2024** – counsel for Ecoasis responded to counsel for the Hotel Operator's letter of July 24th and advised:

Martin –

I have considered your letter of July 24th. The fundamental flaw with your reasoning is that it presupposes a finding or determination that the arbitrator has withdrawn pursuant to s. 20(1)(a) of the Arbitration Act. The arbitrator himself made it clear in his email of July 15th that he has not terminated his mandate, and Ecoasis is of the same view.

We will be writing to the arbitrator to ask him to continue with the arbitration and to make rulings both on the outstanding procedural issues (e.g. timing) and applications. The Hotel Operator can choose not to participate based on its view that the arbitrator has withdrawn. It does so at its own risk.

C. Case Management Conference

7. The following correspondence led to the Case Management Conference on August 2, 2024.

(a) **July 29, 2024** – counsel for Ecoasis wrote to the Arbitrator and advised:

We received a letter from Martin on July 24th. Ecoasis is not persuaded that you have withdrawn from the arbitration.

You yourself made it clear in your email of July 15th that you had not terminated your mandate. Ecoasis agrees. The Hotel Operator cannot unilaterally declare that the arbitrator does not have jurisdiction. If it believes it has an argument that you did withdraw and no longer has jurisdiction, then it must seek a ruling to that effect.

As such, Ecoasis would like to move forward with the arbitration and seeks your rulings on the outstanding applications. We anticipate being in position to respond to the Hotel Operator's June 14th letter/application by August 14th, as set out in Struan's June 17th email.

If the Hotel Operator refuses to acknowledge your jurisdiction as the arbitrator in this matter and it declines to participate, Ecoasis hereby gives notice it will still proceed in the Hotel Operator's absence and seek damages at the hearing.

(b) **July 30th, 2024** – counsel for the Hotel Operator wrote to the counsel for Ecoasis and the Arbitrator and advised:

Hi Roger/Murray,

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This is an unfortunate position for all, but Mr. Smith's email and issuance of his "final account" is a clear withdrawal. As we do not have a formal arbitration agreement, there is nothing preventing Mr. Smith from withdrawing, and nothing allowing his recommencement of his mandate once withdrawn. As I explained to Roger previously, the steps to substitute an arbitrator are contained in the current act; which is essentially an appointment of a substitute in the same way Mr. Smith was appointed. As we have three agreements with three different arbitration clauses, the appointment of Mr. Smith became one by consent of both parties, and both parties agreed at that point to a single arbitrator despite one of the agreements requiring a panel of three. In my respectful opinion, the correct next step is to try and reach agreement on panel size and substitution.

Your client's urgency is a recent development, considering the reason Mr. Smith withdrew was your client's failure to address his retainer, failure to address the outstanding issues, failure to provide materials on time, etc. (the elusive expert's report has been notably dropped from your communications). At this point, there is no way to salvage the dates we had selected for the damages hearings, and your suggestion that a response to our application (which was provided months ago) in mid-August is not sufficient even absent the withdrawal of Mr. Smith. The outstanding application has a significant impact on what your client may present as evidence, and therefore what the Hotel must properly respond to and prepare for prior to the hearing. Considering the pace of the arbitration to date, having such large issues outstanding and yet to be determined mere days/weeks before the hearing is untenable.

If your client maintains the position that it intends to proceed in our absence, and if Mr. Smith agrees to the same (please note that the Hotel does not attorn to Mr. Smith's jurisdiction even if Mr. Smith agrees with Ecoasis), I have instructions to bring an application to the Supreme Court of B.C. to confirm the withdrawal of Mr. Smith and for directions to proceed to substitute the arbitrator as I have suggested.

(c) **July 30th, 2024** – counsel for Ecoasis advised counsel for the Hotel Operator and the Arbitrator:

Martin –

I would simply note that if the Hotel Operator does proceed with an application the Supreme Court of B.C. to allege the arbitrator has withdrawn, then:

1. Ecoasis will say such application is premature, in that the Hotel Operator needs to request the arbitrator make a ruling on his jurisdiction first; and

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2. absent a stay order, Ecoasis will continue with the arbitration even while the application is pending.

(d) **July 30, 2024** – counsel for the Hotel Operator advised counsel for Ecoasis and the Arbitrator:

Roger,

I disagree with you. Firstly, if we are correct, Mr. Smith has no jurisdiction at all to make any decisions.

Secondly, the hotel will not attorn to Mr. Smith's jurisdiction, which would be contrary to its position.

Thirdly, a stay is not required if Mr. Smith has no jurisdiction as anything decided would be a nullity.

I suggest that we work together on next steps to avoid inefficiency.

I am available tomorrow after 10am if you would like to discuss by telephone.

(e) **August 1, 2024** – the Arbitrator wrote to counsel for the Hotel Operator and counsel for Ecoasis and advised:

Dear All: Please advise as to availability for a case management conference call on Friday August 2 at 3:00 pm or later in the day. If Friday is not available please provide available times over the weekend or on Monday August 5TH. The topics for discussion will include consideration of outstanding applications, arrangements for hearings to start September 23rd and steps, if any, to be taken under s. 33 of the Arbitration Act for failure to comply with the procedural time limit for deposits for arbitration costs.

(f) **August 1, 2024** – counsel for Ecoasis wrote to the Arbitrator and counsel for the Hotel Operator:

Hi Murray –

Struan and I would prefer tomorrow (Friday) at 3:00 pm, but if that is not available for Martin, then any day on the weekend or Monday between 1230-200 pm works for us.

(g) **August 1, 2024** – counsel the Hotel Operator wrote to the Arbitrator and counsel for Ecoasis:

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Hi Murray,

As mentioned previously, the Hotel takes the position that you have withdrawn and therefore you have no jurisdiction. We are instructed to bring an application to the Supreme Court for a determination on that issue, and we hope to have that material delivered to you and Roger after this long weekend.

In the circumstances, the Hotel cannot participate in your suggested hearing (and I am unavailable tomorrow in any event and I am also away for the weekend, including the 5th which is a holiday) [emphasis added].

(h) **August 1, 2024** – counsel for Ecoasis confirmed they could proceed with the call on August 2, 2024.

(i) **August 1, 2024** – the Arbitrator wrote to counsel for the Hotel Operator and counsel for Ecoasis and advised:

We will convene a call tomorrow at 3:00 pm at the conference call numbers.

(j) **August 1, 2024** – counsel the Hotel Operator wrote to the Arbitrator and counsel for Ecoasis:

All,

I do not see the reason for a call tomorrow in any event. This matter has not proceeded with any haste despite our complaints about the lack of response from Ecoasis to our extant applications, and I have not heard any type of urgency.

If the hotel is correct and Mr. Smith is functus, anything that occurs tomorrow is a nullity. If the hotel is incorrect, proceeding in this way (one day notice, counsel not available etc.) is prejudicial to the extreme.

I suggest that any steps be delayed until our Petition is heard on the jurisdiction issue. If you proceed tomorrow in our absence, I trust that you will record the call or teams meeting.

(k) **August 2, 2024** – the call occurred on August 2 and counsel for Ecoasis, and the Hotel Operator attended the call.

Counsel for the Hotel Operator surreptitiously recorded the call.

(l) **August 6, 2024** – the Arbitrator issues his procedural Order #9 which stated:

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2. Mr. Sennott objected to the case management conference being held. He attended the meeting but did not participate in the discussion of procedural issues. Mr. Sennott wrote on August 1, 2024 to say: "In the circumstances, the Hotel cannot participate in your suggested hearing (and I am unavailable tomorrow in any event...)". The refusal to participate was premised on a position that there is no jurisdiction in the arbitral tribunal to proceed.

3. The case management conference was convened to consider procedural applications brought by Hotel that remain outstanding, arrangements for hearings to start in September and steps, if any, to be taken under s. 33 of the Arbitration Act for Hotel's failure to comply with the procedural time limit to pay deposits for arbitration costs.

...

9. Given the refusal to provide security for arbitration tribunal fess and to participate in arbitral proceedings, all outstanding procedural requests by Hotel are dismissed as abandoned.

...

10. Issues of liability were decided in a Partial Final Award dated February 26, 2021. Since that time there have been an inordinate number of delays. It is essential that evidentiary hearings proceed as currently scheduled. Hotel opposes continuation of proceedings but has not brought an application in the arbitration for a stay of proceedings. Hotel is not entitled to unilaterally impose a stay of proceedings by arguing there has been a loss of jurisdiction.

...

12. Hotel may elect to not abandon claims in the arbitration by providing security for arbitration tribunal fees. Failing such payment by August 16, 2024 an order will be made under section 33 of the Arbitration Act that terminates arbitral proceedings in relation to Hotel's claims and precludes Hotel from taking any procedural step.

(m) **August 22, 2024** – Madam Justice Lamb dismissed the Hotel Operator's application seeking a finding that the arbitrator had withdrawn. Justice Lamb found that (1) the application should have first been made to the arbitrator and (2) that the in event, the arbitrator had not withdrawn.

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D. Legal Principles Regarding Bias

8. The Supreme Court of Canada has articulated the test for bias that should be applied in its decision of R v. S (RD), 3 S.C.R. 484, [1997]:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369 (S.C.C.), at p. 394.
>
> the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See Bertram, supra, at pp. 54-55; Gushman, supra, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": R. v. Elrick (November 4, 1983), Osler J. (Ont. H.C.), at para. 14. See also Stark, supra, at para. 74; R. v. Lin (April 27, 1995), Doc. Vancouver CC950475 (B.C. S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

9. In A.T. Kearney Ltd. v. Harrison, [2003] O.J. No. 438 (S.C.J.) at paras. 6 and 7 ("Harrison"), the Ontario Superior Court of Justice stated:

> 6 It is common ground that the test of reasonable apprehension of bias applies to arbitrators in the same manner as it applies to courts. The test was articulated in the dissenting reasons of Mr. Justice de Grandpré in Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369 (S.C.C.), at 394-395 and subsequently adopted by the Supreme Court of Canada in R. v. S. (R.D.), [1997] 3 S.C.R. 484 (S.C.C.), at 530-531. The test is whether a reasonable and right-minded person, informed of all the circumstances, viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that Arbitrator Kuretsky would not decide fairly.
>
> 7 The threshold for a finding of real or perceived bias is a high one since it calls into question both the personal integrity of the adjudicator and the integrity of the

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administration of justice. The grounds must be substantial and the onus is on the party seeking to disqualify to bring forward evidence to satisfy the test: R. v. S. (R.D.) , supra.

...

10 In G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada, a pre-trial management judge in a major products liability case who had decided numerous interlocutory motions, was not disqualified because his brother was associated with the plaintiff's law firm. In that case, the Court observed that until the allegation of perceived bias was raised, there was no criticism about any of the many rulings or directions of the pre-trial management judge. Similarly, there is no allegation nor evidence here that throughout the twenty-six days of evidence and oral argument in the arbitration, the Arbitrator conducted himself otherwise than in an entirely even-handed and judicious manner.

...

15 In G.W.L. Properties, supra, former Chief Justice McEachern observed that while care must always be taken to insure that there is no appearance of unfairness, that does not mean that the Court should yield to "every angry objection that is voiced about the conduct of litigation". He went on to state:

> We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.

16 In my view, this was an opportunistic attack on the arbitration. If the applicants had concerns, these could have been addressed immediately if they had simply informed the Arbitrator that they preferred that his law firm not act in the wrongful dismissal claim. Instead of doing this, they raised the challenge on questionable grounds and put a lengthy arbitration at risk. This looks to me like an attempt to derail the arbitration, perhaps because the applicants perceive that the Arbitrator's award will favour the respondent and they hoped to require him to incur the costs of arbitrating his claim again, or to abandon it. These kinds of tactics should be discouraged.

10. In Palmieri v. Alaimo, 2015 ONSC 4336 ("Palmieri"), the Ontario Superior Court of Justice stated:

> "73 An allegation of bias strikes at the character and morals of the arbitrator. It should not be initiated lightly."

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11. The Ontario of Court of Appeal has stated:

> 53 Judicial partiality is not a matter of personal perception. The personal characteristics of a litigant, such as race, may well affect the litigant's personal view of judicial partiality, but they cannot create a reasonable apprehension of bias where one would otherwise not exist. The outcome of a bias inquiry cannot turn on the perspective of the party advancing that claim. There either is or there is not a reasonable apprehension of bias.
>
> 54 It is not unusual that a losing litigant honestly and, from his or her perspective, reasonably perceives the proceedings as unfair and the judge as partial. To equate that personal perception of bias with a reasonable apprehension of bias is to use a subjective and inherently partial perspective to decide whether a proceeding was conducted impartially...
>
> Peart v. Peel (Regional Municipality) Police Services Board, 2006 CarswellOnt 6912 (ONCA)("Peel")

12. In La Fontaine v. Maxwell, 2018 ONSC 5123 ("Maxwell") the Ontario Superior Court of Justice, in the context of an arbitration involving a matrimonial dispute stated:

> I disagree. An informed person viewing the matter realistically and practically - and having thought the matter through — could not possibly conclude that an arbitrator is biased simply because he or she rules on a disputed matter against one party, even if that occurs on more than one occasions. Ruling on a disputed issue is the essence of the arbitrator's role. If Mr. Maxwell was of the view that the arbitrator's awards were wrongly decided, his legal remedy was to appeal those decisions. He did not.

13. In Driscoll v. Hautz, 2018 ABCA 272 ("Hautz") the Alberta Court of Appeal stated the following in the context of alleged bias of an arbitrator presiding over another matrimonial dispute:

> 11 The applicant also argues that the very outcome of the arbitration demonstrates bias. He argues that the division of property is unbalanced, "ridiculously one-sided", and a miscarriage of justice. Errors in assessing the evidence and credibility of the parties, the findings of fact, and the law applied by the arbitrator reflect such significant error that "a rational observer would . . . see bias in the ruling". This is just an indirect attempt to appeal findings of fact, and reargue the errors of law alleged in the previous appeal. The applicant is obviously disappointed with the outcome of the arbitration, but there is no plausible argument about bias to be made.

14. The Ontario Superior Court of Justice has recently stated the following in Kingston Automation Technology Inc. v. Montebello Packaging, 2021 ONSC 5924 ("Kingston"):

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> 67 The preference of one party's evidence over the other is not inherently unfair, nor does it give rise to a reasonable apprehension of bias. If that were the case, virtually every losing party at arbitration could seek to set aside the award under s. 46(1).

15. In summary, the relevant legal principles related to an allegation of bias are as follows:

(a) The threshold for a finding of real or perceived bias is a high one as it "calls into question both the personal integrity of the adjudicator and the integrity of the administration of justice. The grounds must be substantial and the onus is on the party seeking to disqualify to bring forward evidence to satisfy the test".

Harrison, at para. 7

(b) An allegation of bias strikes at the character and morals of the arbitrator. It should not be initiated lightly.

Palmieri, at para. 73

(c) A synthesis of the test for whether or not there is a reasonable apprehension of bias exists is, in light of the above, "whether a reasonable and right-minded person, informed of all the circumstances, viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that [the arbitrator] would not decide fairly".

Harrison, at para. 6

(d) As stated in R. v. S. (R.D.), [1997] 3 S.C.R. 484 (S.C.C.), at para. 111, the precise phrasing of the test is not crucial, if the substance is plain. It is interchangeably expressed as a "reasonable apprehension", "real likelihood" or "real danger" of bias, a "reasonable suspicion" of prejudice or taint, and so forth. Whatever the exact formulation of the test, the essence of the inquiry is the same; namely, the test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude".

(e) Judicial partiality is not a matter of personal perception. The personal characteristics of a litigant, such as race, may well affect the litigant's personal view of judicial partiality, but they cannot create a reasonable apprehension of bias where one would otherwise not exist. The outcome of a bias inquiry cannot turn on the perspective of the party advancing that claim. There either is or there is not a reasonable apprehension of bias.

Peel, at para. 53

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(f) It is not unusual that a losing litigant honestly and, from his or her perspective, reasonably perceives the proceedings as unfair and the judge as partial. To equate that personal perception of bias with a reasonable apprehension of bias is to use a subjective and inherently partial perspective to decide whether a proceeding was conducted impartially.

Peel, at para. 54

(g) The preference of one party's evidence over the other is not inherently unfair, nor does it give rise to a reasonable apprehension of bias. If that were the case, virtually every losing party at arbitration could seek to set aside the award under the relevant statute.

Kingston, at para. 67

(h) An informed person viewing the matter realistically and practically - and having thought the matter through - could not possibly conclude that an arbitrator is biased simply because he or she rules on a disputed matter against one party, even if that occurs on more than one [occasion]. Courts have noted that "[r]uling on a disputed issue is the essence of the arbitrator's role" and if a party believed the awards were wrongly decided, that party's "legal remedy was to appeal those decisions".

Maxwell, at paras. 41-42; See also Hautz, at para. 11

E. Argument

The petition to remove the arbitrator on the basis he withdrew was a blatant attempt to delay or derail Ecoasis' multi-million dollar claim for damages against the Hotel Operator. This bias application is in the same vein.

The arbitrator was not required to accommodate the Hotel Operator for the Case Management Conference. The Hotel Operator made its position abundantly clear – it was of the view that the arbitrator had withdrawn and lost jurisdiction. The Hotel Operator made its position clear on the following dates when it advised:

(i) **July 14th** – " **Mr. Smith has withdrawn** and provided his final account. Simply curing the nonpayment at this point does not restore his mandate as Arbitrator…I will communicate with you [Roger Lee] directly on the procedure to **substitute an arbitrator that has withdrawn.**

(j) **July 16th** – "I want to advise both Roger and Murray that despite Mr. Smith's most recent email, the Hotel takes the position that **Mr. Smith withdrew and is now functus.**"

(k) **July 22, 2024** – "I have removed Murray from this email string as **he has no role at this point.**"

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(l) **July 22, 2024** – ... **"I will say here though that it is Murray's actions and words that create the withdrawal, not any action on the Hotel's part.** We can discuss next steps as early as tomorrow, but I also disagree that there is some obligation on the Hotel to make an application to Murray (who is functus in any event)."

(m) **July 22, 2024** – **"The hotel maintains that you [Mr. Smith, K.C.] have withdrawn from the arbitration** in your email of July 9th and provision of your final account. As such, the Hotel has paid its ½ of the final account and does not acknowledge an obligation to pay the balance of the deposit you mention in your email below."

(n) **July 24, 2024** –...we see no basis for the GT Operator 's position that the Hotel Operator is required to make an application to Mr. Smith regarding these issues. **Given his withdrawal, he is functus officio and can make no further orders with respect to arbitration proceedings between the parties.** To the extent that the GT Operator now desires to alter that status quo, we suggest that it will be necessary for the GT Operator to obtain an order of the court...

(o) **July 30th – This is an unfortunate position for all, but Mr. Smith's email and issuance of his "final account" is a clear withdrawal.** As we do not have a formal arbitration agreement, there is nothing preventing Mr. Smith from withdrawing, and nothing allowing his recommencement of his mandate once withdrawn. As I explained to Roger previously, the steps to substitute an arbitrator are contained in the current act; which is essentially an appointment of a substitute in the same way Mr. Smith was appointed...

(p) **July 30th** - I disagree with you. Firstly, if we are correct, Mr. Smith has no jurisdiction at all to make any decisions.

Secondly, **the hotel will not attorn to Mr. Smith's jurisdiction**, which would be contrary to its position.

Thirdly, a stay is not required if Mr. Smith has no jurisdiction as anything decided would be a nullity.

(q) **August 1, 2024 -- As mentioned previously, the Hotel takes the position that you have withdrawn and therefore you have no jurisdiction.** We are instructed to bring an application to the Supreme Court for a determination on that issue, and we hope to have that material delivered to you and Roger after this long weekend.

In the circumstances, **the Hotel cannot participate in your suggested hearing** (and I am unavailable tomorrow in any event and I am also away for the weekend, including the 5th which is a holiday) [emphasis added].

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The Hotel Operator cannot have it both ways. It cannot take the position that the arbitrator has withdrawn and refuse to participate in the arbitration, but also insist that nothing proceed in the arbitration without it. The Hotel Operator's view of the legal situation was found to be wrong. The Supreme Court found that the arbitrator had not withdrawn. It was perfectly reasonable for the arbitrator to proceed in light of the Hotel Operator's ill-conceived position. This was not driven by bias, it was driven by the correct legal approach in the circumstances.

The Hotel Operator first took the position that the arbitrator withdrew on July 14th. It took no steps to prevent the arbitration from proceeding over the subsequent two weeks. The Hotel Operator could have immediately brought a stay application before the arbitrator. It did not. Applying for a stay before the arbitrator would not be attornment – the Act expressly contemplates that the arbitrator can decide on their own jurisdiction (see s. 23). The Hotel Operator never presented any authority for the proposition that an application for a stay before the arbitrator would have been an attornment to the arbitrator's jurisdiction.

A reasonable and right-minded person, informed of all the circumstances, viewing the matter realistically and practically, and having thought the matter through, **could in no way** conclude that it was more likely than not that Murray Smith, K.C did not conduct the case management conference held on August 2, 2024 fairly as a result of bias.

The Hotel Operator brought about its own predicament. It chose to take an ill-conceived position that the arbitrator had withdrawn. The consequence of this action was that its claims, whether substantive or procedural, were dismissed in accordance with s. 33 of the Act. There was nothing "biased" about this approach. It was the correct legal approach. The arbitrator was forced into the position by the Hotel Operator's outright and unilateral refusal to acknowledge the arbitrator's jurisdiction. The arbitrator had no choice but to proceed as Ecoasis' claim remained outstanding and a stay of the arbitration had not been ordered.

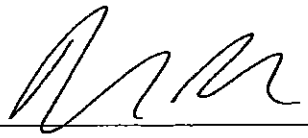
The Hotel Operator's challenge should be dismissed.

Sincerely,
DLA Piper (Canada) LLP
Per:

Struan Robertson

SQR:jid

This is **Exhibit "H"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.



A Commissioner for taking Affidavits for British Columbia

IN THE MATTER OF AN ARBITRATION PURSUANT TO:

Asset Purchase Agreement, Commercial Lease, Hotel, Golf Course and Tennis Operations Agreement and Non-Competition and Non-Solicitation Agreement dated July 11, 2019, between Ecoasis Resort and Golf LLP, 1210110 B.C. Ltd, BM Resort Assets Ltd. and 2600 Viking Way Limited

BETWEEN:

ECOASIS RESORT AND GOLF LLP

AND:

BEAR MOUNTAIN RESORT & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD.

Ruling on Challenge for Bias
September 23, 2024

1. By letters dated August 15, 2024 and September 13, 2024, Bear Mountain Resort & Spa Ltd, BM Management Holdings Ltd. and BM Resort Assets Ltd. (collectively "Hotel"), challenge the Tribunal for bias under section 17(1)(b) of the *Arbitration Act*, SBC 2020, c. 2 (the "*Arbitration Act*"). By letter dated September 17, 2024, Ecoasis Resort and Golf LLP ("Ecoasis") disagrees with the challenge.

2. Mr. Sennott, on behalf of Hotel, alleges bias based on the Tribunal's rulings in Procedural Order #9 dated August 2, 2024 in which orders were made in relation to the refusal of Hotel to participate in arbitration proceedings and pay arbitration fees.

3. Mr. Sennott announced on July 5, 2024 that Hotel would not pay arbitrator fees unless Ecoasis paid first. On July 9, 2024, I wrote to say proceedings would not continue without payment. On July 13, 2024 Ecoasis confirmed that it would forthwith pay fees. On July 14, 2024, Mr. Sennott wrote to say Hotel would only pay fees in arrears because the mandate of the arbitrator had expired with the refusal to continue without payment. I wrote on July 15, 2024 to say I had not withdrawn but Mr. Sennott maintained his position that I was *functus officio*.

4. Mr. Sennott took no steps over the next two weeks to seek a stay of arbitration proceedings or seek a ruling on the objection to jurisdiction. Long delayed evidentiary hearings were scheduled to start on September 23, 2024. It was critical to decide how and where hearings would take place in the absence of participation by Hotel. On August 1, 2024, I wrote to counsel to request

availability for a case management conference to consider outstanding applications and arrangements for evidentiary hearings about to begin.

5. Mr Sennott responded to say he refused to participate and was not available in any event. I ordered the case management conference call to proceed on August 2, 2024. Mr. Sennott was available and did attend the conference call but did not participate.

6. The case management conference proceeded with the participation of Mr. Lee and Mr. Robertson on behalf of Ecoasis. Procedural Order #9 was issued dismissing outstanding Hotel applications as abandoned and, given Hotel's refusal to participate in arbitration proceedings, varying a previous order for hearings to begin and a view to be taken at the premises of Hotel. Hearings were ordered to start instead in Vancouver. Hotel was allowed two weeks to avoid abandonment of its claims in the arbitration by providing security for arbitrator fees by August 16, 2024.

7. On August 6, 2024, Hotel filed an application in the Supreme Court of British Columbia for a declaration that the arbitrator's jurisdiction had been lost and seeking a stay of arbitration proceedings. The application was dismissed on August 22, 2024 by Madam Justice Lamb who ruled the arbitrator was not *functus officio* and the objection to jurisdiction should have been brought before the arbitrator.

8. Mr. Sennott nevertheless maintains his challenge for bias. The challenge is dismissed for the reasons that follow.

9. The Tribunal was in an impossible position on August 2, 2024. Mr. Sennott was refusing to pay arbitrator fees and was refusing to participate in arbitration proceedings. Evidentiary hearings were imminently to begin. There was no way to know when, if ever, Hotel would reverse its position and agree to pay fees or participate in hearings. Hotel was taking no steps to prosecute its objection to jurisdiction or seek a stay of arbitration proceedings. Applications by Hotel for subpoenas and exclusion of evidence for lateness and other grounds were not being prosecuted. It was necessary to decide how and where evidentiary hearings were to proceed. Procedural Order #9 was issued to decide the way forward. There was no animus toward Hotel. There was a critical need for expediency.

10. A challenge for bias is a serious allegation not to be brought lightly. Under the *Arbitration Act*, an arbitrator may only be challenged if there is a real danger of bias. When introducing the new real danger test the Attorney General, David Eby, noted an international trend toward a higher standard because of a concern that low merit challenges were being employed as a strategic tool to disrupt arbitrations. On April 12 2018, in the Legislature, he said: "This amendment, on its face, clearly does and is intended to raise the standard needed for a party to challenge an arbitrator's independence or impartiality."

11. The grounds raised by Mr. Sennott to allege bias fall far short of the standard to be met under the *Arbitration Act*. No reasonable and right-minded person, informed of the circumstances and viewing the matter realistically, could conclude that the case management conference and Procedural Order of August 2, 2024 were unfair or a foundation upon which to allege bias. Mr. Sennott refused to pay arbitrator fees or participate in arbitration proceedings. He was taken at his word. Orders were made to proceed accordingly. When the objection to jurisdiction was dismissed and Mr. Sennott chose to participate in the arbitration, he was allowed to renew the applications that were dismissed for want of prosecution. Hotel will still be allowed to conduct a view at the Hotel premises. There has been no prejudice to Hotel as a result of the case management conference of August 2, 2024 and Procedural Order #9. There is no legal basis for the challenge for bias.

Made at Vancouver, British Columbia, Canada, September 23, 2024.

Murray L. Smith K.C.
Arbitrator

This is **Exhibit "I"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.

A Commissioner for taking Affidavits for British Columbia

IN THE MATTER OF AN ARBITRATION PURSUANT TO:

Asset Purchase Agreement, Commercial Lease, Hotel, Golf Course and Tennis Operations Agreement and Non-Competition and Non-Solicitation Agreement dated July 11, 2019, between Ecoasis Resort and Golf LLP, 1210110 B.C. Ltd, BM Resort Assets Ltd. and 2600 Viking Way Limited,

BETWEEN:

ECOASIS RESORT AND GOLF LLP

AND:

BEAR MOUNTAIN RESORT & SPA LTD., BM MANAGEMENT HOLDINGS LTD. AND BM RESORT ASSETS LTD.

Second Partial Final Award
April 15, 2025

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Introduction

1. Ecoasis Resort and Golf LLP ("Ecoasis") owned The Westin Bear Mountain Golf Resort & Spa near Victoria, British Columbia – consisting mainly of the Westin hotel and two 18-hole Jack Nicklaus-designed golf courses. By purchase agreement dated July 11, 2019, 1210110 B.C. Ltd. and 2600 Viking Way Limited purchased the hotel and entered into an Operations Agreement and Commercial Lease for the integrated operation of the hotel and golf businesses. The purchasers changed names such that they are now Bear Mountain Resort & Spa Ltd, BM Management Holdings Ltd. and BM Resort Assets Ltd. (collectively "Hotel").

2. Hotel's purchase included two commercial strata lots in a building known as the Fairways Building and two strata lots in the Finlayson Building. Hotel's purchase also included the Ecoasis interest in a lease with the City of Langford of a recreational facility.

3. The remaining Ecoasis assets were the Mountain Golf Course, the Valley Golf Course, a practice facility and driving range. Ecoasis leased back space in the hotel for the operation of the Pro Shop, a members lounge and a real estate sales office.

4. The parties entered into an Operations Agreement for cooperative management of the hotel and golf businesses. Hotel was to provide, *inter alia*, food and beverage service and accounting services to Ecoasis.

5. Issues arose regarding requirements to be included in the accounting and food and beverage services. The relationship between the parties deteriorated to the point that 15 separate heads of disagreement arose with respect to obligations owed under the Operations Agreement, a Commercial Lease and a Non-Competition and Non-Solicitation Agreement.

6. The parties sought third-party binding resolution through arbitration. Proceedings were bifurcated into liability and quantum of damage issues. Following evidentiary hearings in January 2021, a Partial Final Award on liability was issued February 26, 2021 (the "Partial Final Award"). Phase two of the arbitration on quantum took place over the period September 23, 2024 to October 18, 2024. Matters that remain for decision on quantum track the following rulings on liability in the in the Partial Final Award:

   a) **Issue #2 – Food and Beverage:** Hotel is ordered to reissue invoices for food costs based on the food cost in the previous month's financial statements plus 20%. Hotel is liable for damages to be assessed for breach of the obligations under Section 4.2(a) and 4.2(b) of the Operations Agreement to provide food and beverage service and a discount to Ecoasis members.

b) **Issue #5 – Hotel Rates and Discounts:** Hotel is liable for damages to be assessed for breach of the obligation under Section 5.5 of the Operations Agreement to provide Marriott privileges to Ecoasis employees.

c) **Issue #8 –Access to the North Langford Recreation Centre:** Ecoasis is ordered to pay Hotel for access to the NLRC by Social Members and Regular Members in amounts to be assessed.

d) **Issue #9 – Additional Outstanding Invoices:** Amounts owed for such items as food and beverage services and hotel stays will depend upon the provision of proper backup as detailed under Issue #10 – Accounting Services.

e) **Issue #10 – Accounting Services:** Hotel is liable for damages to be assessed for breach of the obligation under Section 4.1 of the Operations Agreement to provide accounting services.

f) **Issue #12 – Disruption of Ecoasis Business Operations:** Ecoasis may seek to prove losses associated with a breach of contract that is causally connected. To the extent that a combination of breaches gives rise to a loss greater than the sum of losses caused by individual breaches, it is open to Ecoasis to make a causation argument.

g) **Issue #15 – Breach of the Non-Competition and Non-Solicitation Agreement:** Hotel is liable for damages or costs to be assessed for breach of the Non-Competition and Non-Solicitation Agreement.

7. The issues left for determination in the second phase of the arbitration are the reconciliation of amounts owing back and forth and damages for breaches of contract decided in the first phase. Both quantum issues are questions of fact. Each party must prove monies owing by the other on a balance of probabilities.

8. Damages for breach of contract are limited to reasonably foreseeable consequences of the breach. A party is liable for losses reasonably contemplated at the time the contract was made. Losses caused by a breach of contract but which were not reasonably foreseeable are excluded.

9. Causation is the key element of proof required. The innocent party must prove that the wrongdoer's breach of contract caused the loss claimed. Damages for breach of contract must, as far as money can do, place the innocent party in the same position as if the contract had been performed. Speculation is not permitted.

10. Quantifying a loss of future profits may, however, be a matter of estimation. It is only where there is an absence of evidence, and losses claimed are a matter of pure speculation, that a claim may be denied. Mathematical certainty may not be possible.

Nevertheless, quantum must be determined on the best evidence available. Where a party would have had a reasonable chance to earn a profit but for the wrongdoing of the other party, the innocent party is entitled to an award of damages for the lost opportunity.

11. Uncertainty in quantum may be addressed by the application of a discount factor. While the claimant must prove a loss of chance or opportunity, the wrongdoer must establish the foundation for a discount, usually based on the risk that the profits claimed may not have been realized, for example, because the innocent party lacked financial resources.

12. In *Houweling Nurseries Ltd. v. Fisons Western Corp.*, [1988] B.C. J. No. 306 (CA), leave to SCC refused, McLachlin J.A. (as she then was) wrote:

> Where it is shown with some degree of certainty that a specific contract was lost as a result of the breach, with a consequent loss of profit, that sum should be awarded. However, damages may also be awarded for loss of more conjectural profits, where the evidence demonstrates the possibility that contracts have been lost because of the breach, and also establishes that it is probable that some of these possible contracts would have materialized, had the breach not occurred.

13. In *Laredo Development Ltd. v. I.R. Capital Corp.* 1993 CarswellBC 395 (CA), the Court upheld a decision to award only 60% of anticipated profits because of uncertainties in the expenses that would be incurred.

Written Submissions and Procedural Rulings

14. Ecoasis is represented by Roger Lee and Struan Robertson of DLA Piper (Canada) LLP. Hotel is represented by Martin Sennott, Fred Troen, Lauren Morris and Susan Do of Boughton Law Corporation.

15. Hotel delivered Damages Submissions dated August 8, 2023 on Issues 2, 8, and 9. Ecoasis delivered Response Submissions on those issues dated April 15, 2024.

16. Ecoasis delivered Damages Submissions dated August 2, 2022 on Issues 2, 5, 10, 12, and 15. Hotel delivered Response Submissions on those issues dated August 21, 2023. Ecoasis delivered Reply Submissions dated May 6, 2024.

17. Ecoasis delivered Written Submissions dated November 30, 2023 on Issue 9, Unpaid Invoices. Hotel delivered Response Submissions dated April 15, 2024 and Ecoasis delivered its Reply dated June 17, 2024.

18. Evidentiary hearings were held between September 23, 2024 and October 18, 2024 both in person and virtually, as administered by Charest Legal Solutions. Full transcripts

were provided by Charest for live and virtual hearings.

19. Final Submissions on Damages were filed on November 15, 2024. Final oral arguments were heard on November 18, 2024.

20. By letters dated June 14, 2024, June 24, 2024 and August 27, 2024 Hotel sought orders excluding portions of Ecoasis Reply submissions dated May 6, 2024, witness statements #4 to #8 of Dan Matthews, witness statements #3 to #6 of Rob Larocque and the expert opinion dated April 26, 2024 of Ralph Miller. By letter dated September 17, 2024, Ecoasis opposed the applications. At the outset of evidentiary hearings on damages, oral rulings were made dismissing the applications to exclude Ecoasis Reply submissions and supporting evidence. Hotel was given liberty to renew objections going to the weight to be given to the supporting evidence. An objection to the expert report of Mr. Miller on grounds of bias was dismissed.

21. By letters dated August 15, 2024 and September 13, 2024, Hotel challenged the Tribunal for bias under section 17(1)(b) of the *Arbitration Act*, SBC 2020, c. 2. By letter dated September 17, 2024, Ecoasis opposed the challenge. A Ruling dismissing the challenge for bias was issued on September 23, 2024.

22. Subsequent to the close of evidentiary hearings and argument, Hotel applied for an order for production of the report of a receiver appointed for Ecoasis Developments LLP. By letter dated December 6. 2024 Hotel sought an order directing that Ecoasis produce the Receiver's Report dated October 25, 2024 authored by Alvarez and Marsal Canada Inc. pursuant to the order of Walker J. in proceedings involving Ecoasis Developments LLP, the parent of Ecoasis Resort and Golf LLP.

23. The Receiver's Report was ordered produced by ruling dated January 13, 2025. The Receiver produced two further reports. The third report was produced voluntarily. Production of the second report was opposed by Ecoasis. An application by Hotel dated January 22, 2025 for production of the second report was dismissed by ruling dated February 5, 2025.

24. Hotel filed supplementary closing submissions related to the First and Third Reports on February 14, 2025. Ecoasis responded on February 24, 2025 and Hotel filed its Reply on February 28, 2025.

Factual Background

25. Under the Operations Agreement, each party agreed to provide benefits and services related to the ongoing hotel and golf operations. The parties entered into a Non-Competition and Non-Solicitation Agreement, the relevant parts of which prohibited the solicitation of employees of the other party.

26. The parties acknowledged in the Operations Agreement that the ongoing operation of the business of one was an essential element of the business of the other, and that any

interruption in the operation of their respective businesses would be a detriment to the other.

27. Section 3.3 of the Operations Agreement provided:

> Each Party recognizes that the standard of operation and service are described in general terms and each Party is authorized to exercise reasonable discretion in modifying such services and privileges, or implementing operation rules and policies based on operational experience, if in the reasonable opinion of the applicable Party the same will ensure the delivery and availability thereof in a manner consistent with the Standards and will not result in any material loss of services, privileges, or rights to the other Party.

28. Standards were defined:

> (A) With respect to the Golf and Tennis Business, the standard of operation of the Golf and Tennis Business existing as of the date hereof; and
> (B) With respect to the Hotel Business, the standard of operation existing as of the date hereof.

29. Under Section 4 of the Operations Agreement Hotel agreed to provide food and beverage service and accounting services to Ecoasis.

Accounting Services

30. Section 4.1 of the Operations Agreement required that Hotel provide "accounting services for the Golf and Tennis Business, including processing of daily revenue, bi-weekly payroll, accounts payable and event billing."

31. Section 4.1(b) required that Hotel use commercially reasonable efforts to provide Shared Services including the accounting services "without interruption, and that an equal service level with respect to the Shared Services is provided to the GT Operator [Ecoasis] as is provided to the Hotel Operator."

32. Section 4.1(f) of the Operations Agreement provided:

> The Hotel Operator shall provide a reasonably detailed invoice of the Shared Services within five (5) days of the end of each month and the GT Operator shall pay such monthly invoice within ten (10) business days. Upon the Gt Operator's request, the Hotel Operator shall make available to the GT Operator any supporting materials and calculations used to create the invoice.

Food and Beverage Services

33. Section 4.2 of the Operations Agreement provided:

> (a) The Hotel Operator agrees to provide food and beverage services to the GT Operator for use in the course of the Golf Course Business, including, but not limited to sales to golf course and tennis members and guests at the takeout window, members lounge and comfort station. The GT

Operator shall pay the Hotel Operator's cost as set out on the Hotel Operator's financial statements for the preceding month for food cost, non-alcoholic beverage cost and liquor costs plus twenty percent (20%). The GT Operator may charge any price for such food and beverages, provided that same shall not be lower than those established by the Hotel Operator and charged to hotel guests and members of the general public. The GT Operator shall be entitled to all revenue it receives in its food and beverage sales.

(b) The Hotel Operator agrees to make all food and beverage prepared or provided on the Hotel available to Golf and Tennis Members at a twenty percent (20%) discount from the prices made available to its hotel guests and the general public.

(c) The Hotel Operator shall continue to offer executive members of the GT Operator and all employees and staff of Ecoasis Developments LLP a staff discount of 20% on all food and beverages.

34. Under section 5 of the Operations Agreement, registered hotel guests were entitled to pay "guest of member rates" for rounds of golf included in stay-and-play packages, employees of Ecoasis were entitled to current corporate hotel room rates and employees of Hotel were entitled to staff discounts in the Pro Shop and golf privileges. In addition, employees of Ecoasis were entitled to "maintain privileges through the hotel franchise agreement with Marriott to book hotel rooms at discounted rates through the Marriott Website."

Breakdown in Relationship

35. The CFO for Ecoasis was David Clarke. He was involved in finding a purchaser for the hotel and in negotiating the details of the purchase agreement, operations agreement and lease-back agreement. Mr. Clarke entered into personal negotiations with the principal of the purchaser, Raoul Malak, as early as May of 2019. In those negotiations it was agreed Mr. Clarke would ultimately be employed by Hotel, potentially as CEO. No disclosure was made to Ecoasis of this arrangement, nor of the fact that after the sale, Mr. Malak retained the services of Mr. Clarke's wife in purchasing strata units. Mr. Clarke's wife was paid approximately $27,000.

36. In October 2019, Hotel sent an email to David Clarke with invoices for a very large amount owing from Ecoasis for the reconciliation of cash and deposits relating to the July sale. The amount claimed owing was $1,447,508.90. These invoices were not brought to the attention of Ecoasis until December 3, 2019. Mr. Clarke left for a one-month honeymoon in early November 2019.

37. On December 3, 2019, Mr. Clarke brought the Reconciliation issue to the attention of Dan Matthews, the principal of Ecoasis. On that same day, Hotel invoiced Ecoasis for food and beverage charges. Mr. Matthews was concerned that there was no backup for the Reconciliation or for the invoice for food charges.

38. On December 18, 2019, Ecoasis requested backup for food invoices. Mr. Malak said backup would be provided in February 2020. Mr. Malak further advised Hotel would be cutting off food service to Ecoasis the following day. Mr. Matthews sought a meeting

to discuss matters including the Reconciliation, to which Mr. Malak responded that the amount of the Reconciliation must be paid immediately. On December 20, 2019, Hotel discontinued Marriott privileges to Ecoasis staff. On December 23, 2019, Mr. Matthews advised Ecoasis was providing a cheque for the full amount of the Reconciliation.

39. On January 3, 2020, food service was restored even though invoices for food and beverage service had not been paid and Ecoasis was demanding backup to prove that Hotel was charging for the cost of food plus 20% as provided under Section 4.2 of the Operations Agreement. On January 31, 2020, food and beverage services were again terminated with a demand by Mr. Malak that previous invoices be paid without the backup requested by Ecoasis.

40. At the same time that disagreements were unfolding in respect of accounting and food and beverage services, a dispute arose regarding liquor licences. At the time of the sale it was necessary for Ecoasis to transfer the liquor licence associated with the hotel restaurant and bar. There was a disagreement regarding whether portions of the liquor licence related to the Valley Golf Course and the members lounge were intended to be transferred or were instead to be transferred back to Ecoasis. Under liquor licensing regulations Hotel was not entitled to use the liquor licence for the members lounge or the golf course because Hotel did not control those premises. The position of Hotel was that the portions of the licence related to the members lounge and the golf course were intended to be registered in the name of Hotel. The position of Ecoasis was that those portions of the licence were intended to be transferred back to Ecoasis.

41. In late January 2020 issues emerged regarding invoices from Hotel relating to usage of the North Langford Recreation Centre ("NLRC"). On February 11, 2020 Hotel provided limited backup for food costs but did not provide the requested prior month's financial statements setting out the line item for food cost that Ecoasis maintained was necessary for an invoice under section 4 of the Operations Agreement. In February 2020 Ecoasis learned Hotel was not providing employee discounts as required under the Operations Agreement.

42. Invoices for food costs remained unpaid, ostensibly because the required accounting backup was not provided. In March 2020, Ecoasis sent Hotel an invoice for approximately $500,000 for hotel guest use of the driving range. Use of the driving range had not been addressed in the Operations Agreement. In March 2020, Hotel learned Ecoasis was using areas for staging golf carts not covered under the Commercial Lease and issued a demand that Ecoasis vacate the premises. On April 8, 2020 Hotel entered the areas said to be beyond the terms of the lease, cut locks and threatened to tow golf carts.

43. Counsel for Hotel wrote to advise the Operations Agreement and Commercial Lease were terminated on April 14, 2020 and to require Ecoasis vacate the entire hotel premises. A court proceeding was launched to enjoin Hotel from evicting Ecoasis. The

parties at that point agreed to resolve all outstanding disputes in arbitration.

44. Findings on liability were made in phase one of the arbitration proceedings in a Partial Final Award dated February 26, 2021. Damage issues were adjourned to phase two to be heard in the Fall of 2024.

Issues to be Determined in Second Phase

Issue #2 – Food and Beverage

45. Under Section 4.2 of the Operations Agreement, Hotel agreed to provide food and beverage service to Ecoasis at locations including but not limited to the takeout window, members lounge and comfort station. Hotel also agreed to provide a 20% discount on food and beverages to Golf and Tennis Members.

Ruling on Liability in Partial Final Award

46. Section 4.2(a) of the Operations Agreement provided:

> The GT Operator shall pay the Hotel Operator's cost as set out on the Hotel Operator's financial statements for the preceding month for food cost, non-alcoholic beverage cost, and liquor costs plus twenty percent (20%).

47. Hotel is ordered to reissue invoices for food costs based on the food cost in the previous month's financial statements plus 20%. Food costs were to be determined on the basis of the costs set out in Hotel's financial statements for the preceding month. Section 3 of the Operations Agreement required the standard of operations prior to the sale of the hotel be continued. Food cost in the hotel's financial statements was a line item separate from labour and other costs. There is no basis for construing the provisions of Section 4.2 to read the cost of food as set out in the financial statements for the preceding month plus any other costs for labour associated with the purchase and preparation of food that Hotel in its sole discretion may choose to include.

48. Hotel failed to provide backup for invoices for food and beverage services. It was not unreasonable in the circumstances for Ecoasis to refuse to pay the outstanding invoices. It was incumbent upon Hotel to provide the necessary backup if prompt payment was expected.

Position of Hotel on Damages

49. In Hotel's written Submissions on Damages dated August 8, 2023, a claim is made for $41,283.00 for unpaid invoices for food and beverage service. Hotel tendered the Expert Report of Melinda McKie dated June 9, 2023 to assist in the assessment of the amount owed to Hotel by Ecoasis for charges for food and beverage. Ms. McKie was accepted as qualified to provide expert opinion in matters of accounting and financial analysis and the amounts payable and receivable as between the parties.

50. Ms. McKie, calculated the amount owing to Hotel for food and beverage charges to Ecoasis in two ways. The first was to add an absolute 20% to the cost margin from the

previous month's financials providing a cumulative margin, giving an amount owing of $41,283.00. The second, was to add 20% of the cost margin from the previous month's financials giving an amount owing of $29,453.00.

51. Hotel relies upon the June 1, 2023 Expert Report and October 8, 2024 Supplementary Letter of Carrie Russell to quantify damages related to Hotel's wrongful suspension of food and beverage service in breach of section 4.2(a) of the Operations Agreement. Ms. Russel was accepted as qualified to provide expert opinion in matters of business valuation and revenue projection in the hospitality and food and beverage industries.

52. Ms. Russell calculated the loss incurred by Ecoasis related to food and beverage sales at $13,585.00 when the impact of the liquor licence suspension is included and $3,483 when excluding the liquor licence suspension. She is of the opinion the Ecoasis loss calculations fail to incorporate the cost of benefits associated with wages for service, salaries for staff to manage the food and beverage outlets, unallocated direct expenses not otherwise allocated to outlets and general and administrative expenses. Hotel submits the claim by Ecoasis under section 4.2(a) of the Operations Agreement fails to include fixed expenses for rent, general and administrative expenses such a management salaries and accounting service and a portion of insurance fees. Mr. Clarke estimated rental costs at $40,285.00.

53. In a supplementary report submitted after reviewing the Expert Report of Ralph R. Miller tendered by Ecoasis, Ms. Russell incorporated new information regarding Member rounds played to revise her Loss Due to Breach including liquor licence suspension by $864.00 to $14,449.00. She disagrees with Mr. Miller's estimate of a 15% Covid Hesitancy factor in 2020 and 5% in 2021, as far too low on the basis there is no research to support the estimate and her own researches indicating a significantly higher degree of hesitancy.

54. Hotel says no claim for damages may be made for its alleged interference with the Ecoasis attempts to obtain a liquor license for the members lounge and the take-out-window because that conduct was not found to constitute a breach of contract in the Partial Final Award. Hotel further submits no remedy may be provided for conduct related to interference with Ecoasis attempts to obtain a liquor licence for the members lounge and take out window because those events occurred after the date the jurisdiction of the arbitrator was established in Terms of Refence dated September 16, 2020.

55. Hotel submits the calculation of losses from its breach of section 4.2(a) of the Operations Agreement should be reduced because, without alcohol, customers would go to a food and beverage outlet such as Jack's Place that sold liquor. Ms. Russell estimates the inability to sell alcohol would have entirely eliminated revenue from the members lounge. Charts were provided showing the members lounge, take out window and Valley cart would not have generated net revenue without the sale of

alcohol. Hotel submits Ecoasis would have ceased operations at those facilities.

56. A failure to mitigate is argued for failure to set up alternative food and beverage service from the comfort station and the NLRC kitchen. Hotel argues the failure to use alternate facilities constitutes a failure to mitigate in respect of food and beverage losses claimed. Hotel further submits the refusal of its offer to reinstate food service in September 2022 was a failure to mitigate.

Position of Ecoasis on Damages

57. In Written Submissions dated April 15, 2024, Ecoasis argues the first method of calculation employed by Ms. McKie does not conform with the ruling on liability in the Partial Final Award. Ecoasis concedes the amount owing for food and beverage service of $29,453.00 based on her alternate second calculation.

58. In written Submissions dated May 6, 2024 Ecoasis claims $276,774.00 lost revenue resulting from Hotel's wrongful suspension of food and beverage service in breach of section 4.2(a) of the Operations Agreement. Losses are calculated at Exhibit "B" of the third witness statement of Rob Larocque dated August 1, 2022 as confirmed by the report of the expert Ralph R. Miller dated April 26, 2024. Mr. Larocque calculated gross revenue by multiplying the number of rounds played by the expected sales per round, adjusted for pandemic closures. He deducted the cost of food, service costs and direct expenses using historical data.

59. No claim is made for the loss of profits from minimum food and beverage charges for members. Claims in respect of the breach of section 4.2(b) of the Operations Agreement are left to be considered under claims for business disruption.

60. Ecoasis tendered the Expert Report of Ralph R. Miller dated April 26, 2024 in response to the Expert Report of Carrie Russell quantifying damages for breach of section 4.2(a) of the Operations Agreement. Mr. Miller was accepted as an expert on the operation and management of hospitality related businesses, including hotels, restaurants and golf courses as well as the quantification of business losses associated with hospitality related issues.

61. Mr. Miller concludes the opinion of Ms. Russell is flawed as based on inaccurate Member rounds played, that it includes a factor for Covid Hesitancy not supported by research, and that it erroneously includes costs for unallocated expenses. In his opinion, male golfers would not be as reluctant to get together in the members lounge as general members of the public would be to go to a restaurant.

62. Ecoasis submits Ms. Russell was misguided in considering unallocated expenses in her calculations. The inclusion of expenses for handling food is an attempt to go around the ruling in the Partial Final Award that food costs are to be based on the formula in

section 4 of the Operations Agreement excluding costs related to purchase, storage and preparation of food. If Hotel had honoured the contract, Ecoasis would not have been obliged to pay unallocated expenses, costs of a head chef or for training kitchen staff. Ecoasis submits the Russell error for unallocated expenses represents a difference of $225,342.00 in lost profits.

63. On the issue of mitigation, Mr. Miller says Ms. Russell did not consider costs or timing associated with the suggested mitigation activities. Catering companies were not an option. Ms. Russell did not know if the 15 catering companies mentioned were open in 2020 or 2021 or would have been able to serve the members lounge. She did not visit the comfort station and did not understand its limitations.

64. Ecoasis says Hotel's submission that the refusal of its offer to reinstate food service in September 2022 was a failure to mitigate is unsupported because the claim for lost revenues is for the period February 2020 to April 2022. Mr. Miller states Ecoasis suffered a loss of $276,774.00 from February 2020 to April 2022 at the members lounge, take-out window and Valley cart.

65. Ecoasis submits the losses should include liquor sales, assuming a liquor licence was in place in the relevant period. Ecoasis acknowledges it cannot seek damages for the failure of Hotel to transfer back portions of Licence #54 as determined in the Partial Final Award. Ecoasis says damages calculations should nevertheless include the failure of Hotel to provide food and beverage service assuming a liquor licence. The assumption is said to be reasonable because Hotel blocked attempts by Ecoasis to obtain a licence.

66. The timeline for Hotel's actions in blocking Ecoasis from obtaining a liquor licence for the members lounge, take out window and Valley course is set out at paragraph 91 of the fourth witness statement of Mr. Matthews dated August 2, 2022. Hotel suspended food and beverage service on January 31, 2020. On May 8, 2020, Hotel threatened an injunction to block Ecoasis from seeking a liquor licence. On May 13, 2020, Ecoasis asked Hotel to sign the structural change application necessary for the application for a new licence. Hotel refused to sign. On June 8, 2020 Ecoasis applied to add the Valley course to the licence for the Mountain course. The application for the Valley course was approved on July 31, 2020. On October 16, 2020, Ecoasis applied to have the members lounge added to the licence for the Mountain course. The application was held in suspension after Hotel advised there was a dispute regarding the operation and control of the members lounge.

67. The Partial Final Award was issued on February 26, 2021. The Partial Final Award included a ruling Ecoasis should apply for a new licence over the members lounge, patio and take out window. Hotel appealed. The appeal was dismissed on June 28, 2021. Hotel also filed a Petion in Supreme Court on March 31, 2021 seeking to have the Partial Final Award set aside for bias.

68. Relying upon the Partial Final Award, Ecoasis filed a new application for a liquor licence for the members lounge, patio and take out window. Hotel wrote to the LCRB on August 30, 2021 to oppose the cancellation of Hotel's licence for the members lounge, patio and take out window until after the Petition to set aside the Partial Final Award for bias was decided.

69. On October 1, 2021 the LCRB advised a new licence could not be issued until the court proceeding had been resolved. Two days before the hearing date, on January 9, 2022, Hotel abandoned the bias Petition. Ecoasis renewed the application on March 15, 2022 and on April 21 the application was approved. Ecoasis submits Hotel cannot rely upon its own bad faith actions as a basis for reducing damages related to losses arising from not having a liquor licence.

70. Ecoasis argues the kitchen facilities at the NLRC and the comfort station were inadequate to replace food service. The comfort station is an isolated location requiring a lengthy golf cart trip. Supply and staffing issues made consideration of the comfort station impractical.

Ruling on Damages

71. The alternate second method employed by Ms. McKie to calculate the amount owing by Ecoasis for food and beverage charges conforms with the ruling on this issue in the Partial Final Award. Ecoasis is ordered to pay Hotel the sum of $29,453.00 for food and beverage service.

72. The calculations in the Expert Report of Mr. Miller are accepted. The contrary opinion of Ms. Russell regarding a discount for Covid Hesitancy and unallocated expenses is not accepted. The opinion of Ms. Russell is based on hesitancy in public restaurants. Mr. Miller's view that a golfing foursome would not be so reluctant is the better approach. The unallocated and direct expenses taken into account by Ms. Russell were not appropriate. The instructions given to Ms. Russell by counsel for Hotel largely ignored the rulings in the Partial Final Award for the calculation of food costs. There is no support on the evidence for Ms. Russell's view on possible mitigation steps. The kitchens at the NLRC and the comfort station did not offer a reasonable alternative to food and beverage service in the members lounge. The evidence in support of a catering option was insufficient.

73. Hotel is not responsible for all of the losses resulting from the delay in obtaining a liquor licence for the members lounge and take out window. Hotel is, however, liable for the loss of opportunity for Ecoasis to earn profits from food and beverage sales caused by the breach of the Operations Agreement as found in the Partial Final Award. Such losses included profits from liquor sales that Ecoasis might have earned but for the breakdown in business operations caused by Hotel. It is impossible to calculate the

exact quantity of liquor sales if business had continued as usual with the cooperation and goodwill of Hotel. The Ecoasis claim for damages must be discounted to reflect the difficulty in obtaining a liquor licence and the uncertainty in estimating how long it would have taken to obtain a new licence with the required cooperation of Hotel.

74. Mr. Miller calculates the loss to Ecoasis at $276,744.00. There is always some degree of uncertainty in the calculation of a loss of opportunity. The applicable law suggests moderation in calculating a loss of profits. A discount factor of 30% is appropriate to acknowledge a risk that profits claimed may not have been realized including those from liquor sales. Hotel is ordered to pay Ecoasis $193,720.80 as damages for breach of section 4.2(a) of the Operations Agreement.

75. The Ecoasis claim related to Hotel's breach of section 4.2(b) of the Operations Agreement and the duty to provide a discount to members is combined with the claim for business disruption dealt with below.

Issue #5 – Hotel Rates and Discounts

76. Section 5 of the Operations Agreement provided for various discounts and benefits for Ecoasis employees. The relevant provisions of the Operations Agreement are:

> 5.5 Reciprocal Employee Benefits.
>
> The Parties agree that all employees of the Hotel Operator shall be entitled to staff discounts on retail products in the GT Operator's Pro Shop and tennis/golf privileges on the "Mountain Course" or the "Valley Course" that the GT Operator offers to its own staff (which, among other things, is subject to availability, frequency of play restrictions and the GT Operator's code of conduct) as per the Employee Handbook provided by the vendor (Ecoasis Resort and Golf LLP). The parties further agree that all employees of the GT Operator shall be entitled to current staff food and beverage discounts and to maintain privileges through the hotel franchise agreement with Marriott to book hotel rooms at discounted rates through the Marriott Website, subject to availability and subject to the current terms and conditions of this employee benefit.

Ruling on Liability in Partial Final Award

77. Hotel was obliged to provide Ecoasis employees with Marriott Reward privileges pursuant to Section 5.5 of the Operations Agreement. The contractual obligation to provide Marriott privileges is clearly set out in the Operations Agreement. Hotel was in violation of the obligation and is liable for damages to be assessed.

Position of Ecoasis on Damages

78. Ecoasis submits Marriott privileges have significant value and relies upon the expert opinion of Doug Watson to establish the uniqueness of the program and potential replacement cost. Mr. Watson was tendered as an expert able to provide an opinion on high-level operation and management as they relate to hospitality (hotels and

resorts), primarily in the U.S. hotel industry, and the nature, details and benefits of the Marriott Rewards program. Mr. Watson is of the opinion there is no viable alternative to replace the program. Some sort of increased compensation would need to be offered to employees to off-set the loss of the Marriott Rewards program.

79. Ecoasis submits it is not required to show direct damages flowing from the breach. It need only show the replacement cost of a benefit to which it had a right under the Operations Agreement. Ecoasis disputes the survey of Hotel staff conducted by Mr. Clarke based on individual recollections unsupported by Marriott records of usage. Mr. Clarke says the Rewards program would be used an average of 13 nights per year. The alternative offered by Mr. Albert, the Hotel Director of Rooms, to book rooms for Ecoasis employees at discounted rates was insufficient to replace Marriott privileges. The alternative was less beneficial financially and would require Ecoasis employees to reach out to hotel staff for authorization.

80. Ecoasis argues the value of the Rewards program can be estimated by the actual usage by Mr. Clarke in 2019. He saved $14,515 on travel using the benefit of the program. Mr. Watson was of the opinion an annual cash benefit to employees in the amount of $1,000 would pale in comparison to the Marriott Rewards program. The opinion of Mr. Milford, the Hotel expert, does not assist in valuation of the benefit because his report is focused on employee recruitment and retention, not valuation of the Rewards program lost.

81. Ecoasis estimates an annual cost of $136,000 for a cash travel benefit of $1,000 for 106 employees and $2,500 for12 executive/senior staff. Ecoasis submits that, while there is no end date for the loss of Marriott benefits, a reasonable period on which to calculate the loss would be five years. Ecoasis accordingly claims damages in the amount of $680,000.00 under this head.

Position of Hotel on Damages

82. Hotel submits the Marriott Rewards program was only available to hotel employees thus disqualifying golf course employees from eligibility.

83. Hotel submits the Marriott Rewards program has little value, relying upon the October 28, 2022 Expert Report of Ian Milford. Mr. Milford was qualified as an expert in the field of recruitment and employee retention in the Canadian golf, tourism and hospitality industries. His view is that an inability to offer a travel benefit will not negatively affect recruitment and retention of employees.

84. Hotel says the opinion of Mr. Milford should be preferred over the opinion of Mr. Watson because he is more expert in recruitment for the golf industry, is more focussed on Canada, addresses differences in disposable income for different categories of employees and is more independent in the sense that, unlike Mr. Watson, he does not

have an extensive employment history with Marriott International Inc.

85. Hotel says no damages or nominal damages should be awarded under this head to restore Ecoasis to the position it would have been in had there been no breach of section 5.5 of the Operations Agreement. Contrary to the opinion of Mr. Watson, Ecoasis is said to have suffered no significant limitation on the ability to attract and retain employees. Surveyed employees of Hotel hardly used the Rewards program.

86. Hotel says the use of the program by Mr. Clarke in 2019 is not a good metric for valuation because he went on a honeymoon that year. Some of his use was for the benefit of family and friends. Mr. Clarke says he would normally spend 13 nights per year in hotels, not the 44 nights for which he used the Rewards program in 2019.

87. Hotel argues Ecoasis did not take reasonable steps to mitigate damages and says the cash replacement program claimed by Ecoasis represents a significant improvement to the benefit lost. Hotel submits the refusal of the offer by Mr. Albert, the Director of Rooms, to provide Ecoasis employees a family and friends rate at Marriott properties is evidence of a failure by Ecoasis to mitigate. Hotel also argues any monetary loss suffered was borne by individual employees not recoverable by Ecoasis.

Ruling on Damages

88. Hotel's argument that the Marriott Rewards program was only available to hotel employees was dismissed in the Partial Final Award in the ruling that the evidence tendered fell far short of establishing that the Marriott franchise was in jeopardy or that Marriott privileges could not be offered to Ecoasis employees.

89. The task in assessing damages for the loss of something is to determine the value of the thing lost. The expert opinion of Mr. Milford does not speak directly to the value of the Marriott Rewards program. His opinion is largely focussed on whether or not Ecoasis would have difficulty attracting employees without the benefit of the program. The ability to attract and retain employees is not the critical issue. The critical issue is the cost of replacing the benefit that was lost. The opinion of Mr. Watson is that a cash travel benefit is the only realistic alternative and that an annual benefit of $1,000 would pale in comparison to the value of the Marriott Rewards program.

90. The determination of damages under this head does not turn on whether Ecoasis will have trouble recruiting and retaining employees or whether Ecoasis chooses to implement a replacement program. It does not turn on whether employees are unlikely to take full advantage of a travel program as suggested by the survey of Hotel employees. It does not turn on whether the employees and not Ecoasis suffered the loss. The damages for breach of section 5.5 of the Operations Agreement are the cost to replace the thing that was lost. It was not incumbent upon Ecoasis to accept an offer of an inferior friends and family discount. The duty to mitigate does not include a duty

to accept an inferior replacement for the thing that was lost.

91. The benefit of the Marriott Rewards program for Ecoasis employees was part of the consideration for the purchase and sale of the hotel. The Ecoasis claim for damages calculated on the basis of a cash benefit of $1,000 for employees and $2,500 for executive/senior staff is relatively modest considering the value of the benefit to Mr. Clarke in 2019 and his suggestion that average use of the program would be 13 nights per year. This would yield savings of approximately one third of his savings of $14,515 for 44 nights in 2019, or approximately $5,000 per year. The evidence of Mr. Clarke confirms the opinion of Mr. Watson that a cash benefit of much less per year per employee would pale in comparison to the value of the Marriott Rewards program.

92. Ecoasis claims damages for a period of five years. This is a modest claim for the loss of a valuable benefit with no end date.

93. It was not open to Hotel to renege on the deal to provide Ecoasis employees the benefit of the Marriott Rewards program. Hotel is ordered to pay Ecoasis the sum of $680,000.00 for the loss.

Issue #8 –Access to the North Langford Recreation Centre

94. Part of the combined hotel and golf operations at the time of the sale in July 2019 included use of the North Langford Recreation Centre ("NLRC"). The NLRC was owned by the City of Langford and leased to Ecoasis. As part of the sale, Ecoasis was obliged to assign the NLRC lease to Hotel.

95. There were different categories of members allowed access to the NLRC. Golf and Tennis Members were allowed access as part of their membership fees. There were also Social Members who, for the most part, were homeowners in the Bear Mountain Resort and were allowed access to the NLRC as part of fees paid for their Homeowner Card. In addition, hotel guests and members of the public were allowed to use the NLRC for a fee. They were classified as Regular Members.

96. Payments attributable to the NLRC were, for the most part, said to be credited to Ecoasis because Ecoasis collected the fees from Golf and Tennis Members, collected payment for the Homeowner Card issued to Social Members and, for accounting reasons, received fees attributable for NLRC usage by hotel guests and the general public. These latter fees were said to be deposited to the Ecoasis bank account.

97. Over the period December 2019 to the Spring of 2020, Hotel issued a number of invoices to Ecoasis including $54,091.26 for Golf and Tennis Members, $43,893.73 for Social Members, $2,581.98 for additional Social Members and $134,136.49 for Regular Members. Ecoasis disputed these invoices for reasons including an incorrect number of members claimed, an incorrect rate charged and the failure to provide necessary

accounting backup to show monies deposited to the accounts of Ecoasis.

Ruling on Liability in Partial Final Award

98. The amounts invoiced for Social Members have not been conceded absent the accounting backup necessary to verify the amounts claimed by Hotel. This backup may have formed part and parcel of the reconciliation latterly delivered by Hotel in January 2021, but it is not clear on the evidence that there has been sufficient verification. Accordingly, the order for Ecoasis to pay Hotel for access to the NLRC by Social Members was reserved pending further agreement of the parties or further submissions regarding verification of amounts owing.

99. Hotel says Ecoasis was invoiced for Regular Member usage of the NLRC in the amount of $134,136.49 with sufficient backup including IBS point-of-sale reports and spreadsheets of banking transactions. Hotel says that this accounting backup is sufficient to allow Ecoasis to verify the amount owing. Ecoasis has not conceded the adequacy of the accounting backup.

100. The many pages of accounting documents provided by Hotel in support of the invoices are not sufficiently clear to allow for a conclusion that the amount claimed for Regular Member usage is correct. As with the order in respect of Social Member fees, the order in respect of payment of the invoice for Regular Members was reserved pending further agreement of the parties or further submissions confirming verification of amounts owing.

Position of Hotel

101. In Hotel's written Submissions on Damages dated August 8, 2023, the claim is maintained for $46,465.71 for Social Member access to the NLRC and $134,136.00 for Regular Member access. Hotel relies upon the expert report of Melinda McKie and accounting records provided to Ecoasis since the date of the Partial Final Award to verify amounts owing. Ms. McKie was qualified to give opinion evidence on matters of accounting and financial analysis, with the expertise required to give opinion evidence about the amounts payable and receivable as between the parties.

102. Ms. McKie concludes an amount 8.6% less than claimed was owing based on a variance related to amounts that could not be reconciled on the accounting records as monies paid to Ecoasis. She applies the variance *pro rata* to all of the Hotel claims under this head. In the opinion of Ms. McKie, Ecoasis owes the sum of $134,136 less an 8.6 % variance for Member access to the NLRC.

103. Hotel argues it is not necessary to verify deposits to the Ecoasis bank account for amounts claimed in respect of Social Member access to the NLRC. The claim for $46,465.71 for Social Member access for the period July 11, 2019 to March 14, 2020 is

based on the evidence of Mr. Malak that Ecoasis agreed to pay $55 per month per member. Hotel submits that since the claim advanced is not based on any amounts actually collected or deposited, no verification should be needed. Hotel further submits Ecoasis subsequently agreed to pay a flat fee of $25 per month per Member.

104. Hotel says it was not paid directly for Social Members access to the NLRC. The funds are said to have been paid directly to Ecoasis.

Position of Ecoasis

105. Ecoasis notes the Hotel claim includes fees from Golf and Tennis Members that had already been paid by Ecoasis in the amount of $54,091.26. Ecoasis says there is no basis for a claim for fees for hotel guests and members of the public that are said to have been inexplicably deposited into Ecoasis bank accounts.

106. Ecoasis disputes the claims for access to the NLRC saying Hotel failed to verify amounts deposited to Ecoasis bank accounts as required under the Partial Final Award.

107. Ecoasis disputes the claim that Ms. McKie completed a reconciliation which confirmed amounts received by Ecoasis, noting the reservations at paragraphs 5.2.64 and 5.2.65 of her report that it was not possible to state amounts claimed by Hotel were deposited to the Ecoasis bank account. Ecoasis submits Hotel should have been able to prove deposits as it was Hotel that says it received and deposited those amounts.

108. Ecoasis says the claim made at paragraph 27 of the Hotel Submissions of August 8, 2023 confuses Regular Members and Golf and Tennis Members. The McKie Report at paragraph 4.4.1 likewise lumped Regular Members in with Golf and Tennis Members. The amount owing of $134,136.49 for Regular Members in the McKie Report double counted monies already paid by Ecoasis for Golf and Tennis Members and included people under the Regular Member category already claimed in the Social Member category.

109. Ecoasis submits Ms. McKie erred by crediting Hotel for accounts receivable on the books of Ecoasis in respect of monies billed but not collected by Hotel for Regular Member access without any proof that those accounts were collected by Ecoasis and without any recognition that there were likely amounts collected by Hotel after January 11, 2020.

110. Ecoasis argues the McKie Report does not verify the claim for $46,476.00 for Social Member access to the NLRC and that Hotel "specifically advised Ms. McKie not to reconcile the Social Member claim". Contrary to the original position of Hotel that Social Member dues were deposited into Ecoasis bank accounts, Hotel now claims amounts said to be based on an agreement that Ecoasis would pay Hotel for Social Members regardless of what was actually billed and collected.

Ruling on Damages

111. Rulings were reserved in the Partial Final Award pending verification of amounts owing in respect of invoices for Regular and Social Member access to the NLRC. Hotel did not provide the financial records necessary to support claims for monies said to have been deposited to the Ecoasis bank account.

112. In concluding Ecoasis owed $134,136.49 less an 8.6% variance for Member access to the NLRC, the McKie Report double counted monies already paid by Ecoasis for Golf and Tennis Members and included people under the Regular Member category already claimed in the Social Member category. Ms. McKie conflated the three categories of members under one heading titled Members. Ms. McKie did not reconcile the financial records and banking records to verify amounts claimed for NLRC access.

113. It does not make sense that monies paid to Hotel by hotel guests and members of the public were paid into Ecoasis accounts. The allegation that the monies were for some reason deposited to the bank account of Ecoasis is not supported on the evidence. There is no accounting backup.

114. Hotel submits there was a binding agreement to pay a flat fee of either $25 or $55 per month per Social Member for access to the NLRC for the period July 11, 2019 to March 14, 2020. The claim is not supported on the evidence and does not take into account the failure to verify amounts claimed through financial and banking records as required in the Partial Final Award.

115. Hotel submits it was not paid any funds by Social Members for access to the NLRC and that funds were paid directly to Ecoasis. Hotel was largely responsible for accounting matters in the relevant period. It was incumbent upon Hotel in the circumstances to produce financial records to show monies were credited to Ecoasis in the amounts claimed.

116. The McKie Report offers no proof. Hotel's claims lack verification in financial and banking records that were available. The expert report of Ms. McKie conflated members who had access to the NLRC and double counted significant amounts. The evidence tendered by Hotel is not supported by financial records sufficient to meet the burden of proof on Hotel. The claims for Regular Member and Social Member access to the NLRC are dismissed.

Issue #9 – Additional Outstanding Invoices

117. There are a number of issues related to monies owing and cash reconciliations for hotel

stays, food and beverage invoices, and goods and services provided to hotel guests by Ecoasis. The controversy over these issues turns largely on the scope of accounting services provided by Hotel under the Operations Agreement and the amount of backup that each party was obliged to provide along with invoices tendered.

118. Hotel issued invoices to Ecoasis for $177,443 for food and beverage charges incurred by Ecoasis members in hotel outlets.

119. Ecoasis claims $420,005.58 for unpaid invoices related to Stay and Play packages, food and beverage charges, Pro Shop charges and members lounge rentals.

Ruling on Liability in Partial Final Award

120. The amounts owed between Hotel and Ecoasis for such items as food and beverage services and hotel stays will depend upon the provision of proper backup as detailed under Issue #10 – Accounting Services.

Position of Hotel on Monies Owing

Re Hotel Claims

121. A claim is made in Hotel's written Submissions on Damages dated August 8, 2023 for $33,091.42 for hotel rooms and for food and beverage charges incurred by golf and tennis members.

122. Invoices were issued to Ecoasis on May 27, 2020 for $161,900.42 for food and beverage charges to Ecoasis members. Melinda McKie of Deloitte LLP was engaged to determine which amounts were charged to members, which were paid, and which were deposited to the Ecoasis bank account. Her analysis for food and beverage charges was based on a claim by Hotel for $177,443 that included an additional invoice dated January 20, 2020 in the amount of $15,542.00.

123. Ms. McKie confirmed the amount claimed subject to a *pro rata* variance od 8.6% that she applied across the board for monies that could not be accounted for in bank deposits from merchant account providers such as VISA. Hotel argues against the variance on the basis it is not a variance of errors such that funds that could not be reconciled were nevertheless probably received by Ecoasis.

Re Ecoasis Claims

124. Hotel says nothing is owed for Stay and Play packages, food and beverage charges, Pro Shop charges and members lounge rentals. Hotel submits Ecoasis failed to lead any evidence to show invoices were correct or that Hotel collected monies owed to Ecoasis. In the alternative, Hotel submits it is entitled to a setoff in a value that exceeds the

amount claimed by Ecoasis and says the Ecoasis claims should be dismissed.

125. Hotel says that on June 28, 2021, in compliance with the direction in the Partial Final Award to provide accounting information, it completed a reconciliation of amounts owing between the parties and concluded it was owed a balance of $434,288.77. Ecoasis disputed the 2021 reconciliation and demanded backup to prove amounts said to have been deposited to Ecoasis bank accounts.

126. Hotel argues the Ruling dated March 29, 2022 dismissing its application to have a tribunal expert appointed to reconcile amounts owing between the parties had the result of relieving it of the obligation to provide accounting information as required in the Partial Final Award and placed an onus on Ecoasis to make its case for monies owing. Hotel says the issuance of invoices alone is not sufficient to prove the amounts set out therein were appropriately charged citing *Procrane Inc. v. Intact Insurance Company*, 2018 BCSC 1477 at para. 30.

127. Hotel argues Ecoasis failed to prove the services or goods charged, and says the evidence tendered is unreliable. Hotel says Mr. Larocque and Mr. Matthews are not credible. Hotel submits there is no basis in the Operations Agreement for any of the claims by Ecoasis for monies owing. Hotel submits it was incumbent upon Ecoasis to provide documentation of a completed accounting cycle so as to show amounts collected y Hotel and deposited to Ecoasis bank accounts.

128. Mr. Clarke stated that whenever a hotel guest charged a good or service provided by Ecoasis to their room, the guest signed a receipt. He says the signed receipts were collected by Ecoasis. He says Hotel gave 50 boxes of accounting records to Ecoasis in February 2020 and Hotel does not currently have in its possession any of the guest receipts. Hotel submits an adverse inference should be drawn from the failure of Ecoasis to produce the signed tickets.

129. The Ecoasis claim for rental charges in the members lounge is based on the evidence of Mr. Matthews that Hotel used the lounge for special events. Ecoasis submits Hotel failed to provide compensation for that use. Hotel says Mr. Matthews does not assert any agreement between the parties with respect thereto. Hotel submits there is no contractual foundation for this claim in the Operations Agreement or otherwise.

130. In the alternative, Hotel says it was Ecoasis that negotiated the rate for fees for use of the members lounge for the special events before the sale of the hotel. It was Ecoasis that set the room rate at $500. Hotel submits appropriate rental fees collected by Hotel were in the amount of $4,500.00 not the $47,250.00 claimed by Ecoasis in Written Submissions.

Position of Ecoasis on Monies Owing

Re Hotel Claims

131. Ecoasis concedes the claim for $33,091.42 for hotel rooms. The Hotel claim for food and beverage consumption by Ecoasis members in the amount of $177,443.00 is disputed

132. Ecoasis objects to the opinion of Ms. McKie on the basis her calculations included charges incurred by non-members of Ecoasis such as musicians, spa guests and hotel employees.

Re Ecoasis Claims

133. In Written Submissions dated November 30, 2023, Ecoasis claims $420,005.58 for unpaid invoices for Stay and Play packages, food and beverage charges, Pro Shop charges, and members lounge rentals. Ecoasis says Hotel was required in the Partial Final Award to provide complete financial information in order to properly assess Hotel's liability for amounts owing on invoices issued by Ecoasis. No information was provided to suggest outstanding invoices for Stay and Play packages, food and beverage charges, Pro Shop charges and members lounge rentals were paid to Ecoasis. Ecoasis says Hotel did not challenge the invoices on cross-examination and did not challenge any of the evidence on the claim.

134. Hotel guests charged golf and tennis services, food and beverage services and Pro Shop purchases to their room and Hotel collected those amounts. Ecoasis then invoiced Hotel for purchases that were charged to rooms. In 2020 Ecoasis invoiced Hotel $6,976.90 for Stay and Play packages, $351,954.79 for Pro Shop charges, $13,823.89 for food and beverage charges and $47,250.00 for members lounge rentals.

135. Mr. Malak wrote on September 8, 2020 to say: "Hotel will indeed ensure that payment is made for all rounds of golf played by Hotel guests under stay and play packages". Hotel included Pro Shop charges and food and beverage charges in the general ledger that represents the reconciliation of accounts between the parties.

136. Ecoasis says Hotel is obliged to provide accounting records to show a complete accounting cycle of monies collected by Hotel and deposited to Ecoasis bank accounts for hotel guest purchases in the Pro Shop.

137. Mr. Clarke stated that whenever a hotel guest charged a good or service provided by Ecoasis, a receipt was signed. He says the signed receipts were collected by Ecoasis. Ecoasis says Mr. Clarke omits to acknowledge the signed guest receipts were handed back to Hotel. Hotel was in possession of the receipts but failed to produce them.

138. Mr. Clarke testified Hotel gave 50 boxes of accounting records to Ecoasis in February 2020 and that Hotel does not currently have any of the guest receipts in its possession. Mr. Larocque and Mr. Matthews say the signed receipts were never returned to Ecoasis. Hotel submits Mr. Clarke testified the signed guest receipts were returned with the 50 boxes. However, Ecoasis says Mr. Clarke did not give that evidence.

139. While not expressly provided for in the Operations Agreement, Ecoasis says Hotel is responsible to pay compensation for members lounge room rentals for Hotel special events. Mr. Matthews' fifth witness statement dated November 30, 2023 sets out the arrangement regarding rental of the lounge at the request of. Hotel. On November 10, 2020 Ecoasis issued an invoice for $47,250.00 for the rentals. Hotel did not dispute the invoice.

140. Ecoasis says the Hotel submission for a $4,500.00 amount for lounge rental fees based on Ecoasis precedents is flawed because the precedent amount was actually a loss leader for other revenues generated by special events when Ecoasis owned and operated the hotel.

141. Ecoasis disputes the validity or reliability of Hotel reconciliations of amounts owing between the parties. Ecoasis says an accurate and fulsome reconciliation has never been produced. Multiple versions were provided, each with different numbers.

142. Ecoasis says Mr. Malak acknowledged in cross-examination that approximately $570,000.00 was owed to Ecoasis as part of the reconciliation of accounts between the parties. In response to an email on August 25, 2020 from Ecoasis inquiring about payment for golf and tennis, food and beverage and Pro Shop purchases by hotel guests and charged to hotel rooms, Michelle Patton wrote: "These amounts haven't been paid to Ecoasis, and form part of a reconciliation of amounts due back & forth between the two companies that is now in progress."

Ruling on Monies Owing

Re Hotel Claims

143. Ecoasis concedes the claim for $33,091.42 for hotel rooms and is ordered to pay that amount.

144. Ms. McKie's opinion regarding monies owed to Hotel for food and beverage charges incurred by Ecoasis members in the amount of $162,183.00 is accepted. It was not unreasonable for Ms. McKie to have applied the 8.6% variance in the circumstances. It may not have been a variance of errors but there is no reason to assume Ecoasis received monies that could not be reconciled as opposed to Hotel holding those monies.

145. The confusion in the calculations of Ms. McKie that included charges incurred by musicians, spa guests and hotel employees was explained in testimony. She said the result would be the same with those charges included because her methodology involved reconciling amounts paid to Ecoasis that should have been credited to Hotel. Payment was actually made to Ecoasis for the charges incurred by musicians, spa guests and hotel employes.

146. Ecoasis is ordered to pay Hotel the sum of $162,183.00 under this head.

Re Ecoasis Claims

147. There is no evidence to suggest the Ecoasis invoices for hotel guest charges for golf and tennis services, food and beverage services and Pro Shop purchases were incorrect. Hotel had the burden of providing accounting records for the relevant period. Hotel offered no reason why it should keep monies paid by hotel guests to Hotel for goods such as golf clubs purchased in the Pro Shop.

148. Hotel argues the Ruling dated March 29, 2022 dismissing its application to have a tribunal expert appointed to reconcile amounts owing between the parties had the result of placing the onus on Ecoasis to make its case for monies owing and relieved Hotel of the obligation to provide accounting information and records for the relevant period. In the application by Hotel for appointment of a tribunal expert, Hotel sought to comply with the obligation set out in the Partial Final Award to provide accounting information by appointing a tribunal expert to do the job.

149. The Ruling of March 29, 2022 dismissing the Hotel application for the appointment of a tribunal expert did not relieve Hotel of the obligation to provide accounting information for the relevant period. The purpose of the Hotel application for appointment of a tribunal expert was to avoid its obligation to provide backup for monies said to be deposited to Ecoasis bank accounts. Hotel cannot now claim that the dismissal of its application then had the result of shifting the burden to Ecoasis to provide backup documentation in the possession of Hotel.

150. The accounting materials Hotel considered sufficient to comply with the terms of the Partial Final Award were delivered to Ecoasis on June 28, 2021. After a number of exchanges, Ecoasis responded on March 2, 2022 to dispute the sufficiency and correctness of Hotel's backup documents.

151. There is no evidence to support the Hotel argument that Ecoasis failed to prove the services or goods charged, or that Mr. Larocque and Mr. Matthews are not credible. The Hotel submission that there is no basis in the Operations Agreement for any of the claims by Ecoasis for monies owing ignores the fact the claim is for monies actually paid to Hotel. Hotel cannot say Ecoasis must provide the accounting backup for monies paid to Hotel and alleged to have been deposited to Ecoasis accounts.

152. Hotel argues for the validity and reliability of various reconciliations performed in respect of monies owing between the parties. The reconciliations included ever changing amounts owing and were not verified in evidence. No reliance can be placed on the various Hotel reconciliations of amounts owing between the parties.

153. Hotel submits it was incumbent upon Ecoasis to provide documentation of a completed accounting cycle so as to show amounts collected by Hotel and deposited to Ecoasis bank accounts. However, it was Hotel, not Ecoasis, that was obliged to provide the accounting backup. An adverse inference may be drawn from the failure of Hotel to provide the backup for deposits to Ecoasis accounts. The inference is that Hotel possessed the records but declined to produce them.

154. There is no evidence to show signed guest receipts for goods and services charged by Hotel guests were returned to Ecoasis as part of 50 boxes of documents delivered in February 2020. Hotel relies upon a statement by Mr. Clarke that the signed guest receipts were returned with the 50 boxes. Mr. Clarke did not say that.

155. Hotel submits an adverse inference should be drawn from the failure of Ecoasis to produce the signed tickets. However, the inference to be drawn is that Hotel is in possession of the signed tickets and chose to suppress them.

156. The transactions for the Pro Shop and food and beverage charges were included in the point of sale system shared between the parties up until January 31, 2020. Hotel alone had the means to confirm it received funds charged by hotel guests. In addition, Mr. Malak acknowledged in cross-examination that approximately $570,000.00 was owed to Ecoasis as part of the reconciliation of accounts between the parties.

157. The Ecoasis claim for rental charges in the members lounge is based on the evidence of Mr. Matthews that Hotel used the lounge for special events without payment. Ecoasis says Hotel is liable to pay compensation for use of the members lounge based on an invoice for $47,250.00. Hotel says Mr. Matthews does not assert any agreement between the parties with respect to rental charges. Hotel submits there is no contractual foundation for this claim in the Operations Agreement or otherwise.

158. In the alternative, Hotel says it was Ecoasis that negotiated the appropriate rate for use of the members lounge for special events before the sale of the hotel. It was Ecoasis that set the room rate at $500. Hotel submits rental fees collected by Hotel were $4,500.00 not $47,250.00.

159. There is no agreement proved in respect of the amount of rental costs for the members lounge. The amount actually collected by Hotel for use of the room is the amount that may be claimed by Ecoasis. The Ecoasis claim of $47,250.00 is allowed in the amount of $4,500.00.

160. The Ecoasis claim for the balance of charges for Stay and Play packages, food and beverage charges and Pro Shop purchases by hotel guests is allowed in the amounts of $6,976.90 for Stay and Play packages, $351,954.79 for Pro Shop charges and $13,823.89 for food and beverage charges. The total owing by Hotel to Ecoasis under this head, including room rental fees, is $377,255.58.

Issue #10 – Accounting Services

161. Hotel agreed in the Operations Agreement to assume responsibility for accounting services for golf operations. In the Fall of 2019 Hotel balked on the scope of services required and the amount of compensation. Ecoasis was dissatisfied with the failure of Hotel to provide reports including income statements, an up-to-date general ledger and backup for invoices issued by Hotel.

162. Hotel hired the entire accounting staff of Ecoasis at the time of the purchase. David Clarke was responsible for oversight of the staff prior to the sale and continued to be the contact person after the sale.

163. As disagreements arose between Hotel and Ecoasis regarding accounting services, it appeared to Ecoasis that Mr. Clarke was acting in a manner contrary to the best interests of Ecoasis – including alleged unauthorized agreements between Mr. Clarke and Hotel to pay Hotel for pre-sale accounting services, increased compensation for accounting services generally and ultimately, termination of accounting services.

164. Expert witnesses were called to establish the scope and cost of accounting services to be expected. Dana Adams provided an opinion regarding the range of services to be expected in an internal accounting department for an organization like Ecoasis – including 17 enumerated items related to the recording and reporting of financial activities. Christopher Polson provided an opinion that the accounting services provided by Hotel had a market value far in excess of the compensation set out in the Operations Agreement. Mr. Polson's legal opinions on the interpretation of the Operations Agreement and the scope of accounting services intended by the parties were inadmissible.

Ruling on Liability in Partial Final Award

165. Section 4.1 of the Operations Agreement required that Hotel provide accounting services to Ecoasis in the same manner and to the same level as existed prior to the sale. The accounting services to be delivered under the Operations Agreement are those enumerated in the 17 bullet points listed in the expert report of Dana Adams. Hotel was obliged to provide a full suite of services consistent with the services provided prior to the sale of the hotel and consistent with the services provided to Hotel after the sale. Services to be provided included the preparation of income

statements, balance sheets, up-to-date general ledger entries and the recording and reporting of financial data necessary for tax purposes.

166. Accounting services provided by Hotel were inadequate particularly in respect of reporting obligations to Ecoasis. Hotel breached its obligation under Section 4.1 of the Operations Agreement. The extensive failures of Hotel triggered a cascade of conflict between the parties, notably in respect of backup for invoices issued by Hotel.

167. Hotel is liable for damages caused by breach of Section 4.1 of the Operations Agreement with damages to be assessed.

Position of Ecoasis on Damages

168. Ecoasis claims damages for breach of Hotel's obligation to provide accounting services including 1) the cost for employees to perform services that should have been performed by Hotel, 2) the expense of an outside accountant, 3) GST late penalties, and 4) loss of the Homeowner Card program.

169. Three employees, Dana Rozitis, Tony Jensen and Kay Szteina, spent more than 1,100 hours performing tasks Hotel should have performed, at a cost to Ecoasis of $46,746.62. Ecoasis incurred expenses of $12,420.45 for outside accountants, DMCL Chartered Professional Accountants, to assist in the transition.

170. Ecoasis paid $20,045.41 in interest and penalties as a result of late filing GST returns. The inability to file on time is said to have been caused by the accounting failures of Hotel.

171. Ecoasis claims damages in the amount of $80,000.00 for the cost to re-launch the Homeowner Card program that was lost when Hotel discontinued accounting services and failed to transition Homeowner Card accounting information. Ecoasis attempted to obtain the necessary information but Hotel declined, first claiming the accounts were Hotel business and then claiming the accounts were Ecoasis business and that all dues had been deposited to the Ecoasis bank account. Hotel provided no backup and no access to the accounting records to verify the claims. The estimated costs to re-launch the program includes hiring a consultant plus staff time totaling $80,000.00.

172. In response to the argument of Hotel blaming Ecoasis for increased costs, Ecoasis submits Hotel is attempting to reargue the case on liability and the finding in the Partial Final Award that the breach of section 4.1 of the Operations Agreement was devastating on Ecoasis' business. In particular, Ecoasis relies upon the findings in the Partial Final Award regarding the complicity of Mr. Clarke in the failure to provide accounting services and information necessary for the transition and the refusal of Ms. Patton to provide accounting information for the transition.

173. Ecoasis says all of the staff time devoted to the transition dealt with the 17 bullet points in the expert report of Dana Adams related to accounting services that were to have been delivered by Hotel. The Hotel argument that accounting problems were compounded by the transition from the Sun Systems accounting platform is said to be hypocritical given the earlier argument by Hotel that Sun Systems was antiquated and inadequate.

174. Mr. Jensen testified GST returns could not be filed on time because he could not certify opening balances. The opinion of Mr. Brook that returns could have been filed with the information available from the point-of-sale system and bank records ignores the fact opening balances were not available and that Mr. Jensen could not certify the correctness of the financial information.

Position of Hotel on Damages

175. Hotel disputes the claims for employee wages in the amount of $46,746.62 and external accounting in the amount of $12,420.45 on the basis the losses were caused by pre-existing deficiencies in the Ecoasis accounting system and the decision by Ecoasis to migrate its point of sale and accounting systems to new platforms at the same time transition of accounting services from Hotel to Ecoasis was underway. Transitioning to a new system is a lengthy and complicated process that can impact business operations dramatically. Hotel submits the choice by Ecoasis to migrate to a new accounting system at the same time as the transition of accounting services caused significant employee time to be expended on matters for which Hotel is not accountable.

176. Problems in transition were due in large part to deficiencies in the Ecoasis accounting systems prior to July 11, 2019. Bank reconciliations were not complete, balance sheet accounts were not reconciled, accounts receivable were outstanding, accruals were not posted and profit and loss statements for May and June 2019 were not completed. Hotel says it was hamstrung by the state of accounting it took over that caused ongoing difficulties.

177. Hotel says it provided all necessary information and assistance in the transition of accounting services from Hotel to Ecoasis. Ecoasis was given everything it needed to complete the transition. In February of 2020 when Hotel carried out a separation of the systems, Mr. Clarke reached out to offer assistance. In response to a request from Mr. Isomura to Ms. Patton on March 27, 2020 for the trial balance for December 31, 2019, Mr. Clarke provided the information on March 31, 2020. Hotel says Mr. Clarke worked diligently throughout the transition to ensure Ecoasis had all the information needed to carry on its business.

178. Hotel submits the time spent by Ecoasis employees was excessive and inefficient.

Claims for employee time were not supported by activity logs. Much of the time spent by Mr. Jensen was not necessary or was unrelated to transition issues, particularly when Mr. Clarke provided explanatory notes and offered to review information provided. Time spent on GST accounts related to Ecoasis' fault in failure to file GST returns on time.

179. Hotel says much of the time spent by Ms. Rozitis on transition issues was not necessary. The information she needed for payroll and accounts payable were readily available from Ceridian and Sun Systems.

180. Hotel submits the costs for DMCL Chartered Professional Accountants related to reconciliation of Ecoasis intercompany loan and investment accounts that were outside the responsibility of Hotel.

181. Hotel says Ecoasis failed to mitigate by refusing Hotel's offers to assist in the transition and by failing to adequately prepare for the transition. In the alternative, Hotel submits damages should be reduced to reflect what Ecoasis would have paid Hotel for accounting services in any event and because some of the time claimed for internal and external accounting services was unnecessary.

182. Hotel tendered the October 21, 2022 Expert Report of Thomas Brook to provide an opinion that Ecoasis could have filed timely GST returns for the period February 2020 to December 2021. Mr. Brook was qualified as an expert in the area of income taxation, commodity taxation, corporate structuring, tax audits, GST taxation and litigation in tax court. In his opinion, Ecoasis should have had all of the financial information needed. The availability of information in the point-of-sale system and bank records should have been enough to allow the timely filing of returns.

183. Hotel filed the GST returns for Ecoasis up to January 2020. All information needed to file the returns from February 2020 to December 2021 was accessible to Ecoasis accounting staff.

184. With respect to the Homeowner Card program, Hotel says it did not cause the losses claimed. Any such losses were caused by the closing of the NLRC, access to which was the principal benefit of the program. Hotel submits it was not responsible for managing the Homeowner Card program. Its sole responsibility was to process payments due. Information related to the program was stored on the IBS/EZ Links System to which Ecoasis staff had unlimited access.

185. Hotel argues a failure by Ecoasis to mitigate in respect of damages caused by its breach of section 4.1 of the Operations Agreement. Hotel says Ecoasis refused offers to assist in transition matters and Ecoasis failed to take adequate steps to prepare for the accounting transition.

186. Hotel submits the quantum of damages relating to employee wages should be reduced to reflect what Ecoasis would have had to pay Hotel for accounting services. Ecoasis was required to make payment under section 4.1 of the Operations Agreement of $8,000.00 per month. Ecoasis would have paid Hotel $52,800.00 for the 6.6 months of employee time claimed. Hotel submits Ecoasis therefore suffered no loss.

Ruling on Damages

187. As with the contractual duty to provide Marriott Reward privileges, Hotel breached its obligation to provide accounting services. Hotel was unhappy with the deal it made in the Operations Agreement and chose instead to refuse to provide the accounting services required.

188. It is difficult to quantify the full extent of the damage caused by Hotel failing to live up to its obligations under the Operations Agreement. There was a cascade of consequences that followed from Hotel's breaches of contract. In particular, a significant break down in the relationship with Ecoasis resulted from Hotel's refusal to provide food and beverage service, refusal to provide Marriott privileges, refusal to provide accounting services and refusal to provide backup for invoices issued to Ecoasis.

189. The damages sought by Ecoasis for the breach of Hotel's obligation to provide accounting services relate to the financial cost for employees to rectify the books, the expense of an outside accountant, GST late penalties and loss of the Homeowner Card program.

190. Ecoasis incurred costs of $46,746.62 for employees to perform accounting services that should have been performed by Hotel as set out in the written submissions and evidence filed by Ecoasis. Counsel for Hotel cross-examined the employees to attempt to establish that hours claimed were inflated or unnecessary. The cross-examinations did not yield that result. None of the employee costs were shown to be unjustified. Kay Szteina refused to attend for cross-examination. The claim for her time in the amount of $2,115.20 must be dismissed.

191. Ecoasis paid $12,420.45 to DMCL Professional Accountants for time and expenses over and above what would have been charged if Hotel had provided complete and timely information. Hotel did not establish the outside accounting services were not related to transition problems created by Hotel's failure to provide required accounting services and to assist in the transition.

192. Hotel is ordered to pay Ecoasis the amounts of $44,631.42 for staff time and $12,420.45 for outside accounting services.

193. The argument that transition problems were compounded by the switch from Sun

Systems to a new platform is not supported on the evidence and is largely based on speculation.

194. The Hotel argument that the loss of the Homeowner Card program was caused by the closing of the NLRC is speculation. The evidence does not support an argument that the Homeowner Card program could have survived Hotel's failure to respond to the repeated requests by Ecoasis for necessary accounting information to keep the program going. Ecoasis submitted extensive evidence regarding the manpower required to launch a membership program. Hotel has not countered with evidence to challenge the estimate of costs of $80,000.00 to re-launch the Homeowner Card program. Hotel is ordered to pay Ecoasis $80,00.00 for the loss of the program.

195. The evidence does not support Hotel's argument that Mr. Jensen could have filed timely GST returns notwithstanding his testimony that he couldn't because he was not able to certify the opening balances. Counsel for Hotel conducted a vigorous cross-examination. Mr. Jensen's reluctance to certify the truth and correctness of returns based on incomplete data was not unreasonable. The opinion of Mr. Brooks is premised on Ecoasis having all of the financial information needed to file GST returns. This assumption is not supported on the evidence. Hotel is ordered to pay Ecoasis damages in the amount of $20,045.41 for penalties and interest for late GST returns.

Issue #12 – Disruption of Ecoasis Business Operations

196. Ecoasis alleges numerous breaches of the Operations Agreement, breach of a right of quiet enjoyment, violation of the Non-Competition and Non-Solicitation Agreement with respect to David Clarke and an improper attempt to terminate the Commercial Lease and Operations Agreement. Ecoasis claims Hotel breaches caused the loss of significant new memberships in 2020 and 2021 in both golf and tennis operations with associated lost fees and dues.

197. This is by far the largest claim by Ecoasis at $13,870,606.00. Beyond filings in the liability phase, materials filed in support of the claim for damages include Ecoasis Damages Submissions dated August 2, 2022, the Expert Report of Jeff Calderwood dated July 25, 2022, Witness Statement #4 of Dan Matthews dated August 2, 2022 and Witness Statement #3 of Rob Larocque dated August 1, 2022. Hotel responded with Submissions on Damages dated August 21, 2023, the Expert Report of Stephen Johnston dated August 2023 and Witness Statement #3 of Raoul Malak dated October 21 2022. Ecoasis replied with Written Submissions dated May 6, 2024 and Witness Statement #7 of Dan Matthews dated May 6, 2024.

198. At the hearings, a number of additional witnesses touched on issues related to the claim under this head including David Clarke, Chris Currie, the former manager of golf sales for Ecoasis, Brandon Wallraff, a golf operations consultant for Ecoasis 2015 to 2019, and J. P. Miramont, a representative of the development group for One Bear

Mountain properties. After hearings concluded, final written arguments were submitted by counsel on November 15, 2024.

Ruling on Liability in Partial Final Award

199. It is not clear that the effect of multiple breaches of contract give rise to a cumulative loss greater than the sum of the parts addressed under each individual issue. To the extent that Ecoasis seeks to prove losses on an assessment of damages there is no impediment to seeking to prove a loss associated with any particular breach of contract that is causally connected. To the extent a combination of breaches gives rise to a loss greater than the sum of losses caused by individual breaches, it is open to Ecoasis to make a causation argument on a future assessment of damages.

Position of Ecoasis on Damages

200. Ecoasis says a combination of contract breaches gives rise to a loss greater than the sum of losses caused by each individual breach. Ecoasis argues the disruption to its golf business caused a loss of profits particularly with respect to the boom in the golf industry during the Covid pandemic.

201. The Ecoasis expert witness, Jeff Calderwood, describes a significant increase in golf activities during the pandemic. He was the CEO of the National Golf Course Owners Association of Canada. In his report he noted that in 2020 and 2021 there was an increase of 33.3% in golf rounds played. Many golf courses reported their most profitable years ever. With fixed costs, incremental growth revenues generated a very high profit margin. Golf courses that offered public play enjoyed significantly higher revenues over courses that restricted play to private members. Mr. Calderwood was of the opinion Ecoasis should have experienced the same or greater growth as other golf courses in Canada.

202. Ecoasis submits it hoped to take advantage of the boom in the golf industry to increase the number of individual memberships not tied to real estate. As a result of Hotel's breaches, Ecoasis missed the once in a lifetime opportunity for growth offered in 2020 and 2021. If Ecoasis had been able to capitalize on the golf boom with a membership drive, significant profits would have been generated. The disruptive actions of Hotel blocked the ability of Ecoasis to initiate a member drive. The loss of amenities for members caused by Hotel's conduct had a devastating impact on the reputation of Ecoasis.

203. Ecoasis submits it is able to establish a loss of profits as a reasonable and probable consequence of Hotel's breaches of contract. But for those breaches, Ecoasis could have captured a unique opportunity to grow its membership and profits.

204. Ecoasis tendered a number of witness statements from members to comment on the

negative impacts of Hotel's actions including doubt as to the decision to buy a membership, loss of effective use of the members lounge, and loss generally of the social aspect of the club.

205. Because of the disruption of amenities Ecoasis had to reduce membership dues from $500 per month to $475 per month in 2020 and then to $450 per month in 2021 with a commensurate loss of profits at a time when costs were actually increasing with inflation.

206. Economic harm flowed from Hotel wrongfully terminating the Commercial Lease and from the inability to obtain a liquor licence. Ecoasis could not effectively use the members lounge for which rent was being paid. The Liquor Board would not issue a licence while a challenge to the Partial Final Award remained outstanding. Hotel launched a challenge to the Partial Final Award for bias on March 31, 2021 only to discontinue the application on the eve of the hearing.

207. Economic harm flowed from Hotel terminating the Operations Agreement including disruption of amenities and the ability of Ecoasis to plan for the future. The failure of Hotel to provide proper accounting services impacted the ability of Ecoasis to collect dues, plan events, prepare capital budgets, obtain financing for golf carts and attract new members.

208. Ecoasis submits the same rationale as applied to golf membership applied to tennis membership. Tennis membership dropped in 2021. The loss of amenities in the members lounge adversely affected the tennis experience.

209. A detailed quantification of losses related to golf memberships is explained in Exhibit "B" to the fourth witness statement of Dan Matthews dated August 2, 2022. The spreadsheet represents Ecoasis' projected membership losses in various categories as a result of Hotel's breaches. The total losses claimed for golf operations are $12,059,195.00. The total losses for tennis operations are $1,811,411.00 as shown at Exhibit "C" to the fourth witness statement of Dan Matthews dated August 2, 2022. Approximately $3.53 million of the losses were from lost initiation fees with the balance related to lost revenues over the period 2020 to 2029.

210. Ecoasis submits the Hotel expert, Stephen Johnston, was argumentative and an advocate for Hotel. Ecoasis says his lack of independence and impartiality and his combative nature as a witness should result in his evidence being given little to no weight. Ecoasis submits Mr. Johnston placed too much emphasis on the distinction between public and private golf courses. His opinion relied upon Bear Mountain being a private course when it is semi-private. Lengthy submissions alleging bias on the part of Mr. Johnston are contained in the Closing Submissions of Ecoasis dated November 15, 2024.

211. Ecoasis notes Mr. Johnston conceded Ecoasis is a unique operation and that the golf industry enjoyed hockey-stick growth after the pandemic with an increase in dues for most clubs. Mr. Johnston agreed food and beverage outlets are important, that member satisfaction drives membership sales and the more amenities are affected, the greater the impact on member experience.

212. In response to the evidence of Mr. Johnston that Ecoasis did enjoy significant growth during the period of the Hotel breaches including a 26.9% increase in total active memberships from 2020 to 2022 and a 22% increase in public and tournament play from 2019 to 2021, Ecoasis submits 25% of the growth was in the national membership category with low fees and dues. Corporate membership increases were primarily due to the addition of designees to existing memberships. Increases in GMEA members could have come from dormant members activating their memberships or new property buyers.

213. Ecoasis submits the independent witnesses called by Hotel, Chris Currie and Brandon Wallraff, corroborated the Ecoasis case in confirming there was no cap on memberships and, with two Jack Nicklaus designed courses, golfers were provided a unique and reasonably priced golfing opportunity. Mr. Miramont testified the sale of Individual Memberships would not impact the value of real estate.

214. Ecoasis submits there were significant disruptions caused by extensive renovations that failed to respect Ecoasis business operations. Ecoasis says Mr. Malak set out to create an intolerable environment for Ecoasis to operate. The real estate office was unusable for long periods because of no heat and noxious smells. The main access point to the members lounge was blocked by a large construction box where the main stairwell was removed. The men's locker room was in a constant state of disrepair. Many complaints were made to Hotel with little done to ameliorate the harm caused by the disruptions. Correspondence with Hotel's solicitor was extensive. Ecoasis was finally forced to give up the lease and vacate the premises in July 2024.

215. Ecoasis denies the dispute between Ecoasis and its business partner, Tian Kusumoto, caused relevant liquidity problems, particularly because alleged issues of funding only arose later in 2021 after the period for which Ecoasis was claiming lost memberships.

216. Ecoasis submits Mr. Malak was seeking to use the receivership proceedings involving Tian Kusumoto to escape responsibilities under the Operations Agreement and the Lease. Ecoasis says Mr. Malak was seeking to have Mr. Matthews removed and the Operations Agreement and Lease cancelled with new and less onerous terms negotiated with the Receiver, citing the affidavit filed by Mr. Malak in the receivership proceedings in June 2024.

217. Ecoasis disputes the Hotel arguments regarding a failure to mitigate by accepting an offer to use other food and beverage outlets to replace the members lounge. Ecoasis

says there was no reasonable option to replace a private meeting area for members.

Position of Hotel on Damages

218. Hotel submits Ecoasis must prove breaches of contract caused business disruptions that resulted in business losses over and above losses claimed under other heads. Hotel submits no damages, or nominal damages, should be awarded under the business disruption head. Hotel says there is no causal connection between the breaches and an inability to sell memberships or collect membership dues.

219. In the alternative, Hotel says Ecoasis failed to lead evidence to support the quantum of damages claimed. The calculations made by Mr. Matthews at Exhibit "B" of Witness Statement #4 dated August 2, 2022 were based on assumptions, market data and historical trends unsupported by admissible opinion evidence. Mr. Matthews' calculations are said to be inconsistent with the evidence and marred by errors and logical inconsistencies.

220. Hotel submits the claim for Individual Member losses is inconsistent with Ecoasis' practice and policy against offering Individual Memberships. Hotel says there was an overriding disruption of Ecoasis business resulting from an acrimonious dispute between Ecoasis and its business partner, Tian Kusumoto. In June 2021. Mr. Kusumoto refused to advance further funding for Ecoasis operations, and advised Mr. Matthews that the proceeds of land sales must now be paid to his company directly, without any funds being retained. This caused significant liquidity problems for Ecoasis.

221. Hotel tendered the Expert Report of Stephen Johnston, a leading authority on operational analysis and financial solutions for golf businesses. He was accepted as an expert in the Canadian golf industry, including with respect to commercial golf operations, business strategy, market analysis, revenue projections and industry trends and forecasts. Mr. Johnston challenged the Calderwood Report on the basis it failed to distinguish between private and semi-private golf clubs, failed to address the critical link of Ecoasis golf operations to real estate sales and failed to consider the fact the Ecoasis operation is as a resort with an associated decline in business caused by the pandemic.

222. Mr. Johnston notes Ecoasis' golf business was a real estate- membership model not compatible with the sale of individual memberships that represented the majority of the lost initiation fee revenue claimed by Ecoasis. His opinion is that the initiation fee claimed in the amount of $60,000.00 was significantly overpriced for a public golf course.

223. Mr. Johnston's opinion is that Ecoasis could not have sold any more memberships in 2020 and 2021 than it did. He discounts entirely the impact of the suspension of food and beverage service on the basis there were three superior options available at the

Masters Lounge, Jack's Place and Bella restaurants. He notes Ecoasis enjoyed significant growth during the period of the Hotel breaches including a 26.9% increase in total active memberships from 2020 to 2022 and a 22% increase in public and tournament play from 2019 to 2021. Mr. Johnston concludes Ecoasis did not suffer any damage related to lost memberships caused by Hotel's breaches.

224. The expert opinion of Mr. Johnston is that: "Based on our assessment of all available information and the nature of Ecoasis' membership program, it is our opinion that Ecoasis did not incur any level of monetary losses related to lost memberships, membership dues, or initiation fees as a result of the Hotel Operator's breaches of the Operations Agreement."

225. Hotel submits the evidence of Mr. Matthews including Witness Statements #4 dated August 2, 2022, #5 dated November 30, 2023, #7 dated May 6, 2024, and #8 dated June 17, 2024 should be given no weight. Lengthy pre-hearing submissions were made that these witness statements contained inadmissible opinion evidence based on purported assumptions, market data and historical trends as well as improper reply evidence. Hotel submits Mr. Matthews is not qualified to apply the methodology or perform the calculations in Exhibit "B" to Witness Statement #4 and highlights admissions by Mr. Matthews in cross-examination showing his calculations to be unreliable. Hotel says the calculations made by Mr. Matthews for lost revenues from increased membership failed to make adjustments for increases in costs for staff, equipment and maintenance. Hotel relies upon testimony from Mr. Matthews and Mr. Larocque that the reason to not proceed with a membership drive until 2022 was the suspension of the liquor licence.

226. In written submissions dated June 14, 2024, June 24, 2024 and August 27, 2024, Hotel objected to witness statements of Mr. Matthews and Mr. Larocque that included unsupported opinion evidence on golf industry trends and high-end club experience as well as speculative opinion evidence of projected future golf and tennis membership losses. Mr. Matthews' calculations of damages are said to include unsupported opinion evidence regarding inability to recover lost dues, hypothetical and speculative increases in membership numbers, and an assumed and hypothetical increased probability of selling memberships.

227. Hotel submits the disruptions claimed related to alleged difficulties in obtaining golf cart leases, failure to provide member discounts, renovations to leased premises and non-renewal of the lease were either so minimal as to have no substantial impact on the Ecoasis business or were caused by factors unconnected to Hotel.

228. In the alternative Hotel submits that, to the extent Ecoasis suffered any losses arising from business disruption, such losses were avoidable and arose owing to the failure of Ecoasis to take reasonable steps in mitigation. With respect to the suspension of the food and beverage services, Hotel says Ecoasis could have avoided losses by accepting

Mr. Clarke's offer of May 15, 2020 to designate a "members only" area on the Bella restaurant patio, by paying Hotel's disputed invoices, or by replacing the food and beverage services using Ecoasis facilities or a catering service. Hotel says Ecoasis could have set up alternative food and beverage service from the comfort station and the NLRC kitchen.

Ruling on Damages

229. The parties acknowledged in the Operations Agreement that the ongoing operation of the business of one was an essential element of the business of the other, and that any interruption in the operation of their respective businesses would be a detriment to the other.

230. Hotel's breaches of contract caused disruptions to operations in the Ecoasis golf and tennis businesses. The failure to provide proper accounting services, food and beverage service, and employee benefits and the improper actions to evict Ecoasis from the premises over the Easter holiday in the year 2020 had a negative impact on the reputation of Ecoasis and the level of satisfaction of its members. Amenities were limited and there was an effective loss of a clubhouse. The main issue for determination is the extent to which the disruptions caused by Hotel deprived Ecoasis of the opportunity to take advantage of a super-cycle in the golf industry during the pandemic.

231. Disruption of business operations alleged by Ecoasis to have been caused by extensive renovation work is not a factor that can be considered in calculating damages. No direct link to a contractual breach was established and no finding of liability was made under this head.

232. A loss of business opportunity is difficult to quantify. Nevertheless, damages caused by a breach of contract that results in a loss of chance must be assessed. The calculation of the loss requires assumptions as to the likelihood of future events. Those assumptions must be tempered by the risk that business operations and future plans may have been frustrated by causes other than Hotel's breaches.

233. The extent of Ecoasis' damages in the form of lost golf membership sales in 2020 and 2021 is not clear on the evidence. The implementation of an Individual Member drive was largely aspirational. Ecoasis has not met the burden on a balance of probabilities of proving the full loss of initiation fees and dues over for the period 2020 to 2029 for the claimed 50 lost Individual Memberships, 13 Spousal Memberships and 8 Corporate Memberships. There were losses of reputation and amenities that probably caused some loss of new members but not to the extent claimed by Ecoasis. Claimed losses related to GMEA Memberships are for the most part speculative.

234. Mr. Matthews attempted to quantify the Ecoasis losses in Exhibit "B" to Witness

Statement #4 dated August 2, 2022. That proof is insufficient in fact and law to support the full Ecoasis claim for damages. The reduction in member dues may have been a response to issues other than the misconduct of Hotel. The need to lower dues may have resulted from pandemic related issues, closure of the NLRC, or market conditions. The loss of amenities and disruptions caused by Hotel may have been a factor but were not the only factor in a failure to grow membership during the Covid boom.

235. The calculation of losses in the golf and tennis businesses by Mr. Matthews included expressions of opinion that diminished the weight to be given to his evidence. An application by Hotel to strike portions of his witness statements was dismissed but the matter of weight was left to be decided. The estimates made by Mr. Matthews in calculating damages as shown in Exhibit "B" and Exhibit "C" to Witness Statement #4 dated August 2, 2022 were based in part on unproven assumptions and opinion involving market data and historical trends and must be treated with appropriate caution. His estimates of golf and tennis membership losses were optimistic and to a large extent speculative. The projections in the spreadsheets in Exhibit "B" and Exhibit "C" to Witness Statement #4 go well beyond factual observations, were prepared by employees and tend toward business valuation opinion for which he has no expertise. The calculations made by Mr. Matthews are not sufficiently reliable to support the very significant claim for damages for business disruption.

236. In the uncertain times of Covid it is exceedingly difficult to estimate the degree of possible golf memberships lost owing to the misconduct of Hotel. Potential Individual members may have been reluctant to make the significant investment in the cost of a membership. Companies may not have chosen to pursue social activities for staff or clients. Families might have been leery of group activities in a pandemic.

237. The evidence of Hotel tendered in defence of the Ecoasis claims is problematic. The Ecoasis submissions alleging bias on the part of Mr. Johnston are well founded. Mr. Johnston was a combative witness who lacked objectivity. He was argumentative and an obvious advocate for Hotel. The lack of impartiality on the part of Mr. Johnston warrants significant caution in the weight to be given to his opinions. Where Mr. Calderwood and Mr. Johnston disagreed, the evidence of Mr. Calderwood is to be preferred.

238. The Hotel arguments regarding a failure to mitigate are not accepted. Mr. Clarke's offer of May 15, 2020 to designate a "members only" area on the Bella restaurant patio was not a reasonable alternative to a private members lounge. Ecoasis was not required to mitigate by paying Hotel's disputed invoices. Hotel was obliged under the Operations Agreement to provide the requested backup. Ecoasis did not act unreasonably in failing to replace food and beverage services using Ecoasis facilities or a catering service. Neither of those options was practical.

239. Ecoasis' focus on GMEA Membership for individuals and couples at the start of 2020

created an inherent limitation on the ability of Ecoasis to take advantage of the golf boom in 2020 and 2021. It would have taken significant time and effort to turn the ship around, particularly considering the initial reluctance of existing GMEA members to agree with an expansion of Individual Members who did not have to buy real estate to qualify for membership.

240. Attempts to sell non-callable Individual Memberships in 2020 and 2021 would have been inconsistent with the GMEA program. Evidence that Ecoasis staff were able to convince GMEA members that the sale of Individual Memberships was a good thing was equivocal. The "scarcity model" to create greater value in a GMEA membership was a tough sell to existing GMEA Members.

241. The dispute between Ecoasis and Tian Kusumoto presented some degree of impediment to membership growth in the year 2021. There were disruptions to Ecoasis business caused by the inability of Ecoasis to obtain financing necessary to grow the business. The dispute with Tian Kusumoto caused Ecoasis problems of uncertain impact.

242. There is no doubt the loss of the members lounge as a meeting place had a detrimental effect on the golf experience. The loss of a place for members to get together in a private space for food and a beverage caused a loss of reputation for Ecoasis. Food and beverage service is an important part of the membership experience. There was some degree of deterioration in market perception and uncertainty in the value of membership generally for which Hotel must be held accountable. Hotel should not be able to avoid responsibility for Ecoasis losses because it is difficult to calculate the impact on growth of membership and revenue from dues. Some measure of damages beyond mere nominal damages must be assessed.

243. Hotel's argument is accepted that Ecoasis was not able to prove financial loss related to difficulties in obtaining golf cart leases and being unable to provide member discounts. These disruptions were minimal or equally the result of factors unconnected to Hotel.

244. Given the deficiencies in the evidence noted above, Ecoasis has not proven the full losses claimed in the amount of $12,059,195.00. The application of contingency reductions for uncertainty also preclude the full claim. The evidence does not support a finding that the losses would have extended out to the year 2029. The extent to which Ecoasis suffered financially as a result of Hotels' breaches of contract is too speculative and too uncertain to allow the full claim. The appropriate reduction including a contingency discount under this head is 95%. The amount owing by Hotel to Ecoasis is $602,959.75.

245. The loss of amenities and the loss of reputation caused by Hotel's breaches of contract resulted in a probable loss of some tennis memberships. The of loss food and beverage

services, loss of enjoyment of the members lounge and reduced social activities undoubtedly deterred potential members. The pandemic was a factor favouring an increase in tennis activity. Tennis is one of the possible activities during the pandemic that did involve social distancing. Tennis memberships were not similarly tied to the purchase of real estate. Ecoasis did enjoy a bump in tennis membership in late 2020 but experienced a drop in 2021. Ecoasis says the drop was caused by the ongoing disruption of services.

246. The dispute with Tian Kusumoto caused some of the disruption in tennis membership sales. Hotel must, however, be held accountable for at least a modest loss of sales. A contingency reduction must be applied to the Ecoasis claim for $1,811,411.00. The unproven assumptions and opinion evidence included in the spreadsheets contained in Witness Statement #4 of Mr. Matthews are a relevant factor in reducing damages. The calculations in Exhibit "C" to Witness Statement #4 were to a large extent based on speculation. An appropriate discount for insufficient evidence, uncertainty and risk factors is 85%. The amount owing by Hotel to Ecoasis is $271,711.65.

Issue #15 – Breach of the Non-Competition and Non-Solicitation Agreement

247. The parties entered into a Non-Competition and Non-Solicitation Agreement as part of the package of agreements signed in July 2019 relating to the sale of the hotel and hiring of scheduled Ecoasis employees. Hotel was prohibited for a period of three years from employing, soliciting the employment of, or otherwise enticing any individual employed by Ecoasis without the express written consent of Ecoasis. The remedies provided for breach included an acknowledgement of irreparable harm should there be a violation.

248. Hotel entered into a consulting agreement with Mr. Clarke immediately after he left employment with Ecoasis.

Ruling on Liability in Partial Final Award

249. Hotel breached the Non-Competition and Non-Solicitation Agreement by working with Mr. Clarke behind the back of Ecoasis after July 11, 2019 and by entering into a consulting agreement with him in 2020. Mr. Clarke was the key person in the sale of the hotel and in the ongoing operation of the hotel and golf and tennis businesses. It is impossible to gauge the extent to which his duplicity contributed to the breakdown in relations between the parties.

250. Both Mr. Malak and Mr. Clarke were sophisticated businessmen who were aware of the serious breach of trust inherent in their business dealings. The duty of loyalty owed by an employee in the position of Mr. Clarke is one of the most significant obligations recognized in law. Hotel is liable for damages to be assessed or cost consequences

caused by breach of the Non-Competition and Non-Solicitation Agreement.

Position of Ecoasis

251. Ecoasis alleges the breach of the Non-Competition and Non-Solicitation Agreement contributed to the disruption of Ecoasis business operations. Ecoasis submits Hotel should be assessed the full costs of the arbitration on an indemnity basis because it would be impossible to quantify each discrete head of damage caused by the actions of Mr. Clarke.

Position of Hotel

252. Hotel claims there was no violation of the Non-Competition and Non-Solicitation Agreement and argues Ecoasis was well aware of the relationship between Mr. Clarke and Hotel. Hotel says Mr. Clarke was not a party to the Operations Agreement or the Non-Competition and Non-Solicitation Agreement. No claim for breach of contractual or fiduciary duty was brought against Mr. Clarke by Ecoasis. Hotel does not voice objection to the matter being dealt with in costs.

Ruling

253. Given the election by Ecoasis to claim breach of the Non-Competition and Non-Solicitation Agreement as an aspect of costs, the party positions on that issue will be addressed in assessing costs of the arbitration.

Supplementary Closing Submissions on the Reports of the Receiver

254. By written submissions dated February 14, 2025 and February 28, 2005, filed after the close of evidentiary hearings, Hotel seeks to buttress its defence of the Ecoasis claims for damages. Hotel says the Receiver's Reports dated October 25, 2024 (the First Report) and December 9, 2025 (the Third Report) authored by Alvarez and Marsal Canada Inc. pursuant to the order of Walker J. in proceedings involving Ecoasis Developments LLP, the parent of Ecoasis Resort and Golf LLP, undermine the Ecoasis claim that its ability to market memberships in 2020 and 2021 was reduced as a result of Hotel's breaches of the Operations Agreement.

255. Hotel submits the First and Third Reports are relevant to deciding the extent to which the commercial performance of Ecoasis in the period 2020 to 2029 is consistent with the projections of Mr. Matthews and the extent to which the commercial performance from 2020 to present is attributable to Hotel's breaches of the Operation Agreement. Hotel submits the Reports are also relevant to issues generally related to the management of the Ecoasis business. Hotel submits the Receiver's recommendations on the marketing and sale of Ecoasis Developments' real property assets are likely to have a significant impact on the commercial prospects of Ecoasis and the claim for

damages through the year 2029.

256. Hotel says the First Report noted the stability of Ecoasis' business would be impacted by decisions affecting Ecoasis Developments LLP and that the sale of the golf courses and real estate would significantly reduce revenues from initiation fees and membership dues. In addition, the First and Third Reports are said to be relevant to the assessment of the credibility of Ecoasis witnesses in the arbitration proceedings who concurrently provided information to the Receiver.

257. Hotel submits Ecoasis told the Receiver that it sold 119 GMEA memberships in 2020 and 2021, which are not included in the evidence of sales tendered at arbitration; and that it presently has 114 individual or spousal non-GMEA members, which indicates that it has sold 57 such memberships since 2020. In addition, the conclusions drawn by the Receiver are said to support the position that, in any event of the breaches, Ecoasis would not have been able to increase its membership dues by 10% per year, that the assessment of damages for the suspension of food and beverage services provided by Carrie Russell is preferable to that of Ralph Miller, that the suspension of the Marriott Rewards Program had no impact on the GT Operator's ability to recruit and retain staff and that the cause of any disruption to the Ecoasis business in 2021 was the ongoing dispute between Mr. Matthews and Mr. Kusumoto and resultant cashflow issues, rather than the breaches of the Operations Agreement.

258. Hotel says discrepancies between the information provided to the Receiver and the evidence given in the arbitration destroys the credibility of Mr. Matthews. Hotel submits the First and Third Reports show Mr. Matthews deliberately omitted critical information from evidence tendered at arbitration, including a large volume of membership sales, in an effort to heighten the claim for damages

259. Hotel argues the sale of the 119 GMEA memberships was not included in Exhibit "B" to Mr. Matthews' witness statement #4. Rather, Mr. Matthews' evidence was that Ecoasis sold no individual GMEA memberships in 2020 and 2021. Hotel says the additional sales of GMEA memberships fundamentally undermine the Ecoasis claim that it was prevented from soliciting memberships in 2020 and 2021. Hotel submits Ecoasis had the ability to generate significant membership sales in this period. The large volume of GMEA sales in 2020 and 2021 undermine the claim that Ecoasis would have pivoted to non-GMEA individual membership sales during that time

260. Likewise, Hotel submits the membership figures reported to the Receiver do not support the claim that Ecoasis experienced a limitation o n its ability to sell non-GMEA individual memberships. In Exhibit "B" to Mr. Matthews witness statement #4, he projected Ecoasis would have sold 50 individual non-GMEA memberships. Hotel says the Ecoasis claim for this category of unsold memberships represented lost revenues of $3,000,000 in initiation fees and $100,000 in annual dues from 2021 onwards. Hotel

says the First Report indicates that, in the period between 2020 and October 1, 2024, Ecoasis sold 57 individual memberships and there is therefore no basis on which to allege Ecoasis was prevented from selling the 50 individual non-GMEA memberships for which it now claims damages.

261. Ecoasis filed response submissions dated February 24, 2025. Ecoasis says the First and Third Reports add nothing to Hotel's defence of damage claims. In respect of the submission that Ecoasis did not disclose the 119 GMEA memberships sold by Ecoasis Developments LLP, Ecoasis submits the information was expressly provided to Hotel. Those GMEA memberships were described in Mr. Matthews' witness statement #7 and in his testimony and in the testimony of Mr. Clarke in the arbitration hearings. These memberships were tied to land ownership and were not part of memberships that could have been sold during the golf boom.

262. Ecoasis submits there is no credence to the Hotel argument that 57 non-GMEA memberships sold between 2020 and 2024 militate against a claim that 50 such memberships could have been sold in 2021 had it not been for Hotel's breaches. Ecoasis says none were sold in 2020 and 2021, the relevant dates. Hotel submits that even if the date of sales of individual memberships is correct, the high volume of memberships sold from 2022 to 2024 undermines the claim that Ecoasist was unable to sell them in 2020 and 2021. Hotel says a central element of the Ecoasis theory of causation is the claim that a food and beverage service is a "key component to the membership experience" without which it could not market memberships.

263. Hotel submits the claim for lost membership dues in the amount of $8,916,657.00 is meritless, in part because the proposed annual increase in membership dues is unsupportable and the projections by Mr. Matthews are unreliable. The calculation is based on the assumption Ecoasis would be able to increase membership dues by 10% every year. Appendix "G" to the First Report states that 2025 monthly golf dues will remain the same as 2024. Ecoasis has increased its membership dues each year from 2020 through 2022 and cannot claim that Hotel interfered with its ability to increase dues for 2025.

264. Hotel says membership dues cannot be increased in the linear manner claimed and are subject to periods of stasis or fluctuation due to market forces. This undermines the Ecoasis claim that any reduction in dues in March of 2020 was attributable to Hotel's breaches. Hotel says any reduction in dues was due to factors unrelated to the breaches such as COVID-19 and the closure of the North Langford Recreation Centre.

265. In respect of membership dues, Ecoasis submits it could not increase dues each year from 2020-2022. Ecoasis had to decrease dues in March 2020 and then again in 2021 due to the disruptions caused by Hotel. Dues were increased by approximately 10% in 2022, 2023 and 2024. In 2025, Ecoasis had to keep dues at the same level because of

the loss of the members lounge and other amenities.

266. Hotel submits the volume of GMEA and non-GMEA membership sales in the period from 2020 to 2022 shows that the Ecoasis claim it was unable to market memberships due to the suspension of food and beverage services is unsupportable. The reports of Ms. Russell and Mr. Miller diverge on the inclusion of a portion of Unallocated Food & Beverage Salaries and Unallocated Food & Beverage Expenses as expenses in the calculation of net revenue for the members' lounge, take-out window and Valley Course cart. In Mr. Miller's opinion, the costs associated with "such management positions as: Director of Food & Beverage" and "Executive Chef" were not expenses that would relate to the operation of the members' lounge, take-out window and Valley Course cart.

267. Hotel argues the Receiver's recommendations contradict Mr. Miller's position and provide support for Ms. Russell's approach. The Receiver observed that "the Resorts Business had not had a full-time F&B Manager to oversee the department since August 2023," thereby indicating that, up until August 2023, Ecoasis did have a full-time F&B Manager. The Receiver noted the vacant position of F&B manager is a "key" position that should be filled, and Ecoasis agreed that the position is required during the high season. Ms. Russell was of the opinion the cost associated with food and beverage management should be included when determining net profit and her evidence should be preferred over that of Mr. Miller

268. Ecoasis submit sthe Receiver did not do any analysis of the food and beverage operation. The Receiver suggested hiring an F&B manager to fill a vacant position to which Ecoasis agreed, but qualified the hire as seasonal. Mr. Miller's opinion was that unallocated costs associated with management positions such as Director of Food and Beverage, Executive Chef, Sommelier, and Conference/Banquets Manager, were not needed for Ecoasis' operation of the members lounge, take-out window or Valley cart.

269. Hotel says there is no indication in either the First or the Third Report that Ecoasis faced difficulty recruiting staff as a result of the suspension of the Marriott Reward Program. Ecoasis submits the Receiver did not analyze the loss of the Marriott Rewards Program.

270. Hotel argues that any restriction on the ability of Ecoasis to capitalize on a surge in demand in 2021 was not caused by its breaches of the Operations Agreement but rather by the dispute between Mr. Matthews and Tian Kusumoto, which precipitated a severe reduction in cashflow. As a result, Ecoasis would not have been able to pursue any significant increase of its golf and tennis membership. The Receiver noted Ecoasis had $1.6 million of outstanding accounts payables dating as far back as 2020.

271. Hotel says Mr. Matthews testified he had approximately $500,000 in critical payables but the Receiver indicated Ecoasis had $1,258,000 in critical payables Hotel submits the divergence shows a deliberate attempt to underrepresent the extent of financial

distress at the time of the arbitration. Ecoasis argues the difference between immediate accounts payable of approximately $500,000 and longer term payables was explained by Mr. Matthews in testimony.

272. The First Report is said by Hotel to undermine the claim related to the late filing of GST/HST returns for the period from February 2020 to December 2021. The failure to file in 2020 and 2021 was attributable to institutional issues rather than Hotel breaches. The First and Third Reports indicate that the likely cause of any delay in finalizing financial statements for the fiscal years ending December 31, 2020 and 2021 was the partnership dispute.

273. Ecoasis submits the Hotel position is not correct. GST returns were not filed in 2024 because the controller resigned. The ongoing dispute between Mr. Matthews and Mr. Kusumoto was not the cause of the delay in finalizing Ecoasis' financial statements for 2020 and 2021. Ecoasis submits the blame rests with Hotel's withdrawal of accounting services.

274. Hotel says the measure of any damages awarded must be subject to adjustment to account for contingencies that might reduce losses. By order of Justice Walker made September 18, 2024, Ecoasis Developments LLP – as well as all of the partnership's real property assets, including the golf courses– were placed into receivership. The Receiver has been directed to make a recommendation as to whether or not the scope of the receivership should include Ecoasis Resort and Golf LLP. This recommendation and the court's subsequent decision thereon have not yet been made.

275. Hotel submits that if the Receiver extends the scope of the receivership to include Ecoasis Resort and Golf LLP, it's income will be eliminated or substantially reduced. The potential extension of the receivership is a contingency that must be considered in reducing damages.

276. In addition, Hotel says the Receiver has been directed to make recommendations on the sale of the real property assets, which include the golf courses. Hotel says there is a real and substantial possibility that the golf courses will be sold to a third party, causing the cessation of the Ecoasis business. Hotel submits that any damages awarded for future lost revenue ought to be reduced by 75% to account for the contingency that revenues will be eliminated or substantially reduced.

277. Ecoasis submits there is nothing in the Receiver's First and Third Reports that suggest Ecoasis will be put under receivership and that the allegation that critical payables will drive receivership is incorrect. The payables noted in the First Report are not day to day operational costs, but rather are non-recurring costs that do not reflect the profitability of the business in 2025. There is no indication the Receiver will recommend sale of the golf courses.

Ruling on Supplementary Submissions

278. There is nothing in the First and Third Reports of the Receiver that impact the assessment of damages for Hotel's breaches of the Operations Agreement.

279. The 119 GMEA memberships were known in the evidentiary hearings. No adverse inference regarding the credibility of the Ecoasis witnesses is appropriate based on the unsupported allegation that there was a deliberate concealment of sales of GMEA memberships.

280. The Receiver did not analyze the need for a full time F&B Manager. The Receiver's First and Third Reports do not impact the analysis of damages related to food and beverage. Mr. Miller's statement that a manager position is not necessary is not contradicted in the Receiver's Reports.

281. The Ecoasis claim for lost revenues from golf membership sales has been discounted by a factor of 95% to account for contingencies and inability of Ecoasis to prove the full extent of losses caused by Hotel's breaches of the Operations Agreement. There is no basis upon which to increase the contingency discount by more than what has already been done in the analysis of that claim.

282. The Receiver's Reports do not impact the Ecoasis claim for loss of the Marriott Rewards Program. The ability to attract and retain employees was a subsidiary issue in assessing that claim. The critical issue was the cost of replacing the program.

SUMMARY OF SECOND PARTIAL FINAL AWARD

Issue #2 – Food and Beverage

283. Ecoasis is ordered to pay Hotel the sum of $29,453.00 for food and beverage service.

284. Hotel is ordered to pay Ecoasis $193,720.80 in damages for breach of section 4.2(a) of the Operations Agreement.

Issue #5 – Hotel Rates and Discounts

285. Hotel is ordered to pay Ecoasis the sum of $680,000.00 as compensation for loss of the Marriott Rewards Program for Ecoasis employees.

Issue #8 –Access to the North Langford Recreation Centre

286. The Hotel claim for damages for access to the NLRC by Regular Members and Social Members is dismissed.

Issue #9 – Additional Outstanding Invoices

287. Ecoasis concedes the Hotel claim for $33,091.42 for hotel rooms. The amount owing to Hotel by Ecoasis for food and beverage charges is $162,183.00.

288. The amount owing by Hotel to Ecoasis under this head for room rentals, Stay and Play packages, food and beverage charges and Pro Shop purchases is $377,255.58.

Issue #10 – Accounting Services

289. Hotel is ordered to pay Ecoasis $44,631.42 for staff time and $12,420.45 for outside accounting services.

290. Hotel is ordered to pay Ecoasis $80,00.00 for the loss of the Homeowner Card program.

291. Hotel is ordered to pay damages in the amount of $20,045.41 for causing Ecoasis to incur penalties and interest for late GST returns.

Issue #12 – Disruption of Ecoasis Business Operations

292. Hotel is ordered to pay Ecoasis $602,959.75 for losses in the golf business and $271,711.65 for losses in the tennis business caused by Hotel's breaches of contract.

SECOND PARTIAL FINAL AWARD

293. After setting off monies owing by Ecoasis, Bear Mountain Resort & Spa Ltd, BM Management Holdings Ltd. and BM Resort Assets Ltd. are ordered to pay Ecoasis Resort and Golf LLP the sum of $2,058,017.63 by April 29, 2025.

294. No claim is made for pre-award interest. Post-award interest is ordered at the Bank of Montreal prime rate plus 1%, compounded and adjusted semi-annually, from April 29, 2025.

295. The matter of costs is reserved.

MADE at the City of Vancouver, Province of British Columbia, April 15, 2025.

Murray L. Smith

Murray L. Smith K.C.,
Arbitrator

This is **Exhibit "J"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.

A Commissioner for taking Affidavits for British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20250604
Docket: CA50676

Between:

Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd., and BM Resort Assets Ltd.

Applicants/Appellants

And

Ecoasis Resort and Golf LLP

Respondent

Before: The Honourable Justice Winteringham
(In Chambers)

On appeal from: A partial award of an Arbitrator under the *Arbitration Act*, S.B.C. 2020, c. 2, dated April 15, 2025 (Ecoasis Resort and Golf LLP v. Bear Mountain Resort & Spa Ltd.).

Oral Reasons for Judgment

Counsel for the Applicants/Appellants:	M.C. Stacey D. Babcock B.P. Palaschuk
Counsel for the Respondent:	R.D. Lee S.T. Robertson
Place and Date of Hearing:	Vancouver, British Columbia May 30, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 4, 2025

WINTERINGHAM J.A.:

Background

[1] The applicants, Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd., and BM Resort Assets Ltd. (collectively, "Bear Mountain") seek leave to appeal of an arbitral award issued on April 15, 2025, pursuant to s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2. Bear Mountain also seeks a stay of execution of the award. The respondent, Ecoasis Resort and Golf LLP ("Ecoasis"), opposes both applications.

[2] Ecoasis owned the Westin Bear Mountain Golf Resort and Spa near Victoria, British Columbia (the "Resort"). The Resort mainly consisted of a hotel and two golf courses. On July 11, 2019, Ecoasis sold the hotel to 1210110 B.C. Ltd. and 2600 Viking Way Limited, who later became Bear Mountain. Ecoasis remained the owner of the golf courses.

[3] As part of the purchase, the parties entered into an agreement which provided for the integrated operation of the hotel and golf business (the "Operations Agreement"); as well as a commercial lease, pursuant to which Ecoasis leased back certain areas of the hotel for a golf store, members lounge, and real estate office. Three provisions of the Operations Agreement are especially relevant for these applications:

1) Pursuant to s. 4.2(a) of the Operations Agreement, Bear Mountain agreed to provide food and beverage service to Ecoasis, including sales to the golf course and tennis members. In exchange, Ecoasis agreed to pay food and beverage costs plus 20%.

2) Pursuant to s. 4.2(b), Bear Mountain agreed to give a 20% discount on food and beverage to golf and tennis members.

3) Pursuant to s. 5.5, the parties agreed that all Ecoasis employees "shall be entitled to current staff food and beverage discounts and to maintain privileges through the hotel franchise agreement with Marriott", including discounted rates on hotel rooms.

[4] In late 2019 and early 2020, following the hotel purchase, the parties' relationship began to deteriorate. Ecoasis did not pay invoices for food and beverages after failing to receive backup on those invoices from Bear Mountain; in response, Bear Mountain temporarily cut off food service to Ecoasis and discontinued hotel privileges to Ecoasis staff. At the same time, the parties also had an ongoing dispute about liquor licensing. Ecoasis had transferred all liquor licenses associated with the hotel restaurant and bar to Bear Mountain but took the position that the parties intended to transfer back portions of the license covering the members lounge and the golf course. Bear Mountain took the position that those portions were intended to be registered in their name.

[5] On April 14, 2020, counsel for Bear Mountain advised Ecoasis that the Operations Agreement and related lease were terminated and that Ecoasis must vacate the premises. Ecoasis launched a court proceeding to enjoin Bear Mountain from evicting Ecoasis, following which the parties agreed to resolve their disputes in arbitration.

[6] The arbitration was split into two phases, one for determining liability and one for determining the quantum of damages. The arbitrator released the liability decision on February 26, 2021, which found Bear Mountain liable for a number of breaches of contract (the "Liability Award"). Bear Mountain sought leave to appeal the Liability Award, but it was denied: *Ecoasis Resort and Golf LLP v. Bear Mountain Resort & Spa Ltd.*, 2021 BCCA 285 (Chambers). Bear Mountain now seeks leave to appeal the damages decision, issued on April 15, 2025 (the "Damages Award").

The Damages Award

[7] Bear Mountain alleges errors of law relating to the arbitrator's assessment of damages on three issues, numbered in the Damages Award as Issue #2, Issue #5,

and Issue #12. I have summarized the arbitrator's conclusions on those three issues below.

Issue #2: Food and Beverage

[8] Issue #2 related to s. 4.2(a) of the Operations Agreement; specifically, Bear Mountain's wrongful suspension of food and beverage service. Ecoasis claimed $276,774 in lost revenue resulting from those suspensions. It relied on, among other things, an expert report of Ralph R. Miller which was prepared in response to Bear Mountain's expert report. Ecoasis argued that the losses should include liquor sales, despite "acknowledg[ing] it cannot seek damages for the failure of [the] Hotel to transfer back portions of [the liquor license] as determined in the [Liability Award]": Damages Award at para. 65. Ecoasis' argument was based on Bear Mountain's attempts to block Ecoasis from obtaining a liquor license, which it said amounted to bad faith actions which cannot be relied on to reduce damages.

[9] The arbitrator found that Bear Mountain was "not responsible for all of the losses resulting from the delay in obtaining a liquor licence", but that it was "liable for the loss of opportunity for Ecoasis to earn profits from food and beverage sales caused by the breach of the Operations Agreement" including "profits from liquor sales that Ecoasis might have earned but for the breakdown in business operations caused by [the] Hotel": Damages Award at para. 73. He accepted Mr. Miller's calculation of this loss at $276,744, but discounted it by 30% "to acknowledge a risk that profits claimed may not have been realized including those from liquor sales": Damages Award at para. 74.

[10] The arbitrator also addressed Bear Mountain's supplementary written submissions which relied on two receiver's reports (the "Receiver's Reports"). The reports stemmed from a September 18, 2024 court order placing Ecoasis Developments LLP—the parent company of Ecoasis—into receivership. The receivership included all of the partnership's real property assets, including the golf courses on the Resort. At the time of the Damages Award, it was not yet determined whether the scope of the receivership included Ecoasis.

[11] Bear Mountain relied on the Receiver's Reports to argue for a reduction of damages on various bases. One of their arguments was that the Receiver's Reports contradicted Mr. Miller's expert evidence because the reports described the position of food and beverages manager at Ecoasis as a "'key' position that should be filled": Damages Award at para. 267. In contrast, Mr. Miller's opinion was that costs associated with management positions, including food and beverages manager, "were not needed for Ecoasis' operation of the members lounge, take-out window or Valley cart": Damages Award at para. 268.

[12] The arbitrator found that the Receiver's Reports contained "nothing ... that impact[s] the assessment of damages for [the] Hotel's breaches of the Operations Agreement": Damages Award at para. 278. Specific to Bear Mountain's argument about the food and beverages manager position, the arbitrator held:

> 280. The Receiver did not analyze the need for a full time F&B Manager. The Receiver's First and Third Reports do not impact the analysis of damages related to food and beverage. Mr. Miller's statement that a manager position is not necessary is not contradicted in the Receiver's Reports.

Issue #5: Hotel Rates and Discounts

[13] Issue #5 related to Bear Mountains' breach of their obligation to provide Ecoasis employees with hotel rewards and privileges pursuant to s. 5.5 of the Operations Agreement. The arbitrator made an award of $680,000 for the loss of these rewards and privileges for a five-year period. He rejected Bear Mountain's argument that Ecoasis did not take reasonable steps to mitigate damages based on Ecoasis' refusal of their offer "to provide Ecoasis employees a family and friends rate at Marriott properties": Damages Award at para. 87. The arbitrator held:

> 90. ...The damages for breach of section 5.5 of the Operations Agreement are the cost to replace the thing that was lost. It was not incumbent upon Ecoasis to accept an offer of an inferior friends and family discount. The duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost.

Issue #12: Disruption of Ecoasis Business Operations

[14] Ecoasis claimed approximately $13.8 million in damages caused by cumulative breaches of various contracts, including the Operations Agreement. It argued these breaches "caused the loss of significant new memberships in 2020 and 2021 in both golf and tennis operations with associated lost fees and dues": Damages Award at para. 196. The arbitrator agreed with Ecoasis' argument that Bear Mountain's breaches of contract "caused disruptions to operations in the Ecoasis golf and tennis businesses", and found that "[t]he main issue for determination is the extent to which the disruptions caused by [the] Hotel deprived Ecoasis of the opportunity to take advantage of a super-cycle in the golf industry during the pandemic": Damages Award at para. 230.

[15] While he observed that this loss of business opportunity was "difficult to quantify", it nevertheless "must be assessed" with regard to the likelihood of future events and the risk that business plans might be frustrated by causes other than Bear Mountain's breaches of contract: Damages Award at para. 232. Later, he reiterated that:

> 242. ...There was some degree of deterioration in market perception and uncertainty in the value of membership generally for which Hotel must be held accountable. Hotel should not be able to avoid responsibility for Ecoasis losses because it is difficult to calculate the impact on growth of membership and revenue from dues. Some measure of damages beyond mere nominal damages must be assessed.

[16] In the end, the arbitrator applied a contingency discount of 95% to the claim for losses relating to golf operations and 85% to the claim for losses relating to tennis memberships. This resulted in awards of $602,959.75 and $271,711.65, respectively.

Legal Framework

Leave to Appeal

[17] Section 59 of the *Arbitration Act* governs and requires leave to appeal an arbitral award absent the parties' consent. Three requirements must be met for

leave to appeal to be granted under s. 59 (*MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54; *Seylynn (North Shore) Phase II GP Ltd. v. Seylynn (North Shore) Properties Phase II Limited Partnership*, 2025 BCCA 36 (Chambers) at para. 24):

a) The appeal must be based on a question of law.

b) The justice must be satisfied that one of the three circumstances identified in s. 59(4) exists.

c) The justice must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave ...".

[18] The first requirement is a threshold criterion and requires there to be a question of law which "can be clearly perceived and identified": see *Grewal v. Mann*, 2022 BCCA 30 at para. 32. Care must be taken when a question of law is implicit and must be extricated from the application of law to facts. While an argument that the arbitrator altered a legal test in the course of applying it raises a question of law, an argument that the arbitrator should have come to a different outcome in applying the test only raises a question of mixed fact and law: see *Colony Construction Corporation v. Scott Steel Erectors Ltd.*, 2024 BCCA 306 at para. 14 (Chambers). Misapprehending the evidence can amount to an extricable error of law when the misapprehension is plain and obvious and "goes to the core of the outcome": see *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 43.

[19] On the second requirement, s. 59(4) of the *Arbitration Act* provides that:

> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.

[20] Relevant to all of the requirements, including the third, is the fact that this Court has emphasized the importance of taking a narrow and restrained approach to appellate intervention in commercial arbitration, in order to preserve the integrity and finality of the arbitration system: see *Desert Properties Inc. v. G&T Martini Holdings Ltd.*, 2024 BCCA 320 at para. 10 (Chambers).

Analysis

[21] Bear Mountain alleges eight extricable issues of law sufficient to ground leave to appeal the Damages Award.

Issue A: Joint and Several Liability

[22] Bear Mountain argues that the arbitrator erred in law by awarding damages for breach of the Operations Agreement against all the entities making up Bear Mountain, jointly and severally. They rely on the fact that BM Resort Assets Ltd. was not a party to that agreement. However, this issue was dealt with conclusively, in my view, in the Liability Award, which is not under appeal. Indeed, Bear Mountain's position on this leave application is inconsistent with the position taken before the arbitrator. In the Liability Award, the first term of that award states:

> Further to the advice of counsel on January 5, 2021 that Bear Mountain Resort & Spa Ltd, BM Management Holdings Ltd. and BM Resort Assets Ltd. (collectively "Hotel") are proper parties to the arbitration and have agreed to be bound by the result, each of those entities is jointly and severally liable for the matters for which [the] Hotel is held liable.

[23] Bear Mountain did not seek to resile from that position. Instead, it maintained its position that this was an error in law, regardless of what had occurred earlier. Even if holding BM Resort Assets Ltd. jointly and severally liable under these circumstances might raise a question of law, that question should have been raised on an appeal of the Liability Award and not the Damages Award.

[24] Having reviewed the transcript of the proceedings and considering the Liability Award, that has not been varied on appeal, I am not satisfied that this alleged error constitutes an extricable error of law.

Issue B: Mitigation

[25] Bear Mountain says that the arbitrator applied the wrong standard for mitigation when he determined the issue of hotel rates and discounts (Issue #5). Before the arbitrator, Bear Mountain submitted that Ecoasis did not take reasonable steps to mitigate its damages, stating the cash replacement program claimed by Ecoasis represents a significant improvement to the benefit lost and the refusal of the offer "to provide Ecoasis employees a family and friends rate at Marriott properties is evidence of a failure by Ecoasis to mitigate" (Damages Award at para. 87).

[26] Bear Mountain submits the arbitrator's error is evident when he stated: "[t]he duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost": Damages Award at para. 90. Bear Mountain says this statement is unsupported by authority and in fact runs contrary to existing legal principles regarding mitigation in commercial contract claims, including: (1) that mitigation involves taking all reasonable steps necessary to avoid losses flowing from the breach; and (2) that it is generally reasonable in commercial contracts to accept an offer from the party in default.

[27] Ecoasis says that when the arbitrator's reasons are read holistically, it is clear that he applied the general principles of mitigation. Even if the arbitrator's impugned statement was meant as a separate principle, it says that principle is supported by precedent and "consistent by analogy to the well-settled principle that an employee is not obliged to accept an inferior job in mitigation".

[28] In its written submissions to the arbitrator, Bear Mountain's mitigation section was tied to Ecoasis' argument that the lack of hotel benefits negatively impacted Ecoasis' ability to recruit and retain employees. This makes sense, as it is arguable that by failing to accept a replacement program (even a worse one) could increase losses associated with recruiting and retaining employees. However, at para. 90 of the Damages Award, the arbitrator explicitly rejects this argument: "The determination of damages under this head does not turn on whether Ecoasis will

have trouble recruiting and retaining employees or whether Ecoasis chooses to implement a replacement program ... The damages for breach of section 5.5 of the Operations Agreement are the cost to replace the thing that was lost". In this context, I do not see how the arbitrator's conclusion that mitigation did not apply can be challenged.

[29] I have been taken to other aspects of the arbitrator's award that address mitigation. I have also considered that this part of the arbitration, the quantum aspect, constituted 15 days of evidence presented to an arbitrator that was fully versed in the background of the dispute, having determined the liability issues.

[30] When read in context, I find that the arbitrator's impugned statement is clearly tied to the facts of the dispute, the submissions advanced, and is supported by the existing legal principles that Bear Mountain cites. The arbitrator's statement that "[t]he duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost" flows from the sentence immediately preceding: "[I]t was not incumbent upon Ecoasis to accept an offer of an inferior friends and family discount" from Bear Mountain: Damages Award at para. 90. In the paragraph that follows, the arbitrator set out the evidence of valuation regarding the "lost benefit". As I read the arbitrator's reasons as a whole, he is not saying the duty to mitigate *in every case* will not include a duty to accept an inferior replacement as a general legal principle. Instead, he is saying that the duty to mitigate *in this case* does not require Ecoasis to accept Bear Mountain's offer, which was an inferior version of what it was contractually obligated to provide. That finding is effectively a conclusion that the alleged failure to mitigate did not constitute a reasonable step in the circumstances of this case, which is a question of mixed fact and law. A finding about the duty to mitigate is one anchored on the evidentiary record presented in the circumstances—the arbitrator's finding on this point finds support in the evidentiary record. This issue does not raise an extricable question of law.

Issue C: Contingency Reductions

[31] Bear Mountain says that the arbitrator applied the wrong legal principles to calculate contingency reductions with respect to Issue #12, the disruption of Ecoasis' business operations. They say that the arbitrator relied on an amount of damages which was uncertain, contingent, and speculative, contrary to the principle that "when damages are uncertain, contingent and speculative, they should not be made a basis for recovery, unless the uncertainty is with respect to the extent or measure of damages and not their cause". Bear Mountain contends that there was not a foundational value for the contingency deduction used by the arbitrator and he failed to apply a "factual mathematical anchor" when calculating contingency reductions: Damages Award at para. 55. (See *Rab v. Prescott*, 2021 BCCA 345 at paras. 73–74).

[32] Ecoasis submits there is not uncertainty with the arbitrator's finding that Bear Mountain's breaches of contract disrupted Ecoasis' business operations, causing a loss of revenue. Ecoasis submits there is nothing contingent or speculative about this finding. Rather, the arbitrator found that the insufficiencies and speculative nature of Ecoasis' evidence did not support a claim for the full amount of damages or supported reducing the amount of damages—in other words, any uncertainties went to the extent of damages and not their cause.

[33] The arbitrator concludes that Ecoasis did not prove the full amount of its claim under this head of damage in the amount of $12,059,195, stating:

> 244. ... [t]he application of contingency reductions for uncertainty also preclude the full claim. The evidence does not support a finding that the losses would have extended out to the year 2029. The extent to which Ecoasis suffered financially as a result of [the] Hotels' breaches of contract is too speculative and too uncertain to allow the full claim. The appropriate reduction including a contingency discount under this head is 95%. The amount owing by [the] Hotel to Ecoasis is $602,959.75.

[34] With respect to the business disruption for the tennis membership sales, the arbitrator applied a deduction of 85% and awarded $271,711.65.

[35] Before he reached either of these figures, the arbitrator reviewed the evidentiary record. He noted flaws in the evidence tendered by both sides. His reduction was based on his findings regarding the frailties in the evidence. He outlined what evidence he accepted and what evidence he was rejecting. In my view, as I examine the paragraphs leading up to his conclusions, the arbitrator's figures used to reduce the claim were based on his evidentiary conclusions. That is, he accepted there was some loss but rejected the extent of the claim advanced by Ecoasis.

[36] As the arbitrator's reasons are consistent with the legal principles Bear Mountain outlines, I see no extricable question of law arising from his analysis.

Issues D and E: Liquor Licences

[37] Bear Mountain alleges the arbitrator erred by awarding damages under Issue #2 for two reasons. First, because he awarded damages "for the losses associated with Ecoasis' failure to obtain a liquor license for the Members Lounge in the face of his finding in the Liability Award that Bear Mountain was not liable for failure to transfer the liquor licence". Second, because he "made a new finding of liability in respect of Bear Mountain's responsibility for delaying Ecoasis from obtaining a liquor license for the Members Lounge".

[38] Ecoasis submits, and I agree, that Bear Mountain's submissions on these issues misinterpret the arbitrator's findings regarding the liquor license. The arbitrator did not award damages stemming from Bear Mountain's failure to transfer the liquor licence. To the contrary, in outlining Ecoasis' position at the arbitration hearing, the arbitrator stated that "Ecoasis acknowledges it cannot seek damages for the failure of [the] Hotel to transfer back portions of License #54 as determined in the [Liability Award]": Damages Award at para. 65. He awarded damages based on Bear Mountain's "liab[ility] for the loss of opportunity for Ecoasis to earn profits from food and beverage sales caused by the breach of the Operations Agreement as found in the [Liability Award]", including "profits from liquor sales that Ecoasis might have earned but for the breakdown in business operations caused by [the] Hotel": at

para. 73. This does not amount to a new finding of liability. In these circumstances, I see no extricable error of law.

Issues F, G, and H: Misapprehension of the Evidence

[39] First, Bear Mountain alleges that the arbitrator misapprehended the evidence regarding which entities were party to which agreements. It says this goes to the core of the outcome, as no damages should have been awarded against BM Resort Assets Ltd. For the reasons provided earlier, I have concluded that this does not raise an extricable question of law because it is contrary to the position advanced at the arbitration.

[40] Second, Bear Mountain argues that the arbitrator misapprehended the evidence of Mr. Miller regarding the calculation of damages under Issue #2. They rely on Mr. Miller's statement in cross-examination that if there was rent to be paid it "should have been factored into his calculations". Bear Mountain says in spite of this admission, the arbitrator awarded the entire amount calculated by Mr. Miller, without any adjustments to rent.

[41] While it is true that the arbitrator accepted Mr. Miller's calculations without commenting on rent, in the circumstances I do not see how this rises to the level of a plain and obvious misapprehension of the evidence. The arbitrator acknowledged Bear Mountain's argument that rent should be factored into the damages award as an expense: Damages Award at para. 52. Further, he acknowledged that "[t]here is always some degree of uncertainty" and applied a 30% discount factor to that calculation to "acknowledge a risk that profits claimed may not have been realized": Damages Award at para. 74. In addition, there was evidence before the arbitrator that Ecoasis paid its rent during the applicable time period, meaning it should not have been discounted in any event. It is my view that a misapprehension of the evidence has not been shown here.

[42] Third and finally, Bear Mountain argues that the arbitrator misapprehended the content and impact of the Receiver's Reports. It says that the arbitrator erred when he found that "the Receiver did not analyze the need for a full time F&B

Manager", that the Receiver's Reports did not contradict Mr. Miller's statement that such a position was not necessary, and that nothing in the Receiver's Reports impact the assessment of damages: Damages Award at paras. 278, 280. Bear Mountain relies on the fact that the Receiver's Reports stated that "there are employment vacancies for key roles including ... F&B manager", and that they recommended hiring someone full-time to fill that vacancy starting in April 2025. Bear Mountain also takes issue with the arbitrator's statement that "[t]here is no basis upon which to increase the contingency discount by more than what has already been done in the analysis of that claim", as there was no juristic reason why he could not reduce the award by more than 95%: Damages Award at para. 281.

[43] The Receiver's Reports are contained in the second affidavit of David Clarke. Based on Bear Mountain's submissions set out in its written and oral argument, I can see no misapprehension of the evidence here. As Ecoasis points out, it sought damages for loss of food and beverage sales from 2020 to 2022: Damages Award at para. 64. The Receiver's Reports were authored in October 2024 and December 202[4]. Bear Mountain relies on the Receiver's Reports about recommending hiring a food and beverage manager from 2025 onwards. They do not demonstrate that the arbitrator misapprehended the evidence by finding that those reports did not impact the analysis of damages related to food and beverage sales from 2020 to 2022. Finally, the arbitrator's finding that there was no basis to increase the contingency discount was a factual finding based on the evidence, not a legal conclusion that the 95% contingency could not be reduced in any circumstances.

Conclusion

[44] This was a dispute about the arbitrator's award of damages under various claims advanced by Ecoasis. The quantum portion of the arbitration lasted some 15 days. The arbitrator assessed the evidence and set out the correct legal principles applicable to the issues before him. As I consider each of the issues identified by Bear Mountain, I am of the view that the gist of Bear Mountain's submission is that the application of the legal test should have resulted in a different outcome. It is clear from the Damages Award that the arbitrator considered the relevant

provisions of the Operations Agreement and the evidence presented at the hearing. He discounted the aspects of the expert's testimony that he found to be unreliable. The arbitrator set out the relevant legal principles governing contractual interpretation and considered thoroughly the various legal issues advanced by Bear Mountain. In my view, the arbitrator's analysis does not give rise to any extricable question of law which can be clearly identified. It is apparent that Bear Mountain takes issue with the arbitrator's weighing of the evidence in the context of the factual matrix presented.

Disposition

[45] For these reasons, Bear Mountain has failed to establish that its proposed appeal raises questions of law. Given this conclusion, it is unnecessary to address the other leave criteria in s. 59(4) of the *Act*. The application for leave to appeal the award is dismissed.

[46] Accordingly, it is unnecessary to address the application for a stay of execution.

E-SIGNED by J. Winteringham J.A.,
on 2025-06-16 11:36:37 PDT

The Honourable Justice Winteringham

This is **Exhibit "K"** referred to in the 1st Affidavit of Jennifer Dunn sworn before me at Vancouver, British Columbia, on this 23rd day of June, 2025.

A Commissioner for taking Affidavits for British Columbia

Court File No. VLC-S-S-253638

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BEAR MOUNTAIN RESORT & SPA LTD.,
BM MANAGEMENT HOLDINGS LTD., and
BM RESORT ASSETS LTD.

PETITIONERS

AND:

ECOASIS RESORT AND GOLF LLP

RESPONDENT

PETITION TO THE COURT

THIS IS THE PETITION OF:

Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd., and BM Resort Assets Ltd., 1200 – 925 West Georgia Street, Vancouver, BC V6C 3L2

ON NOTICE TO:

Ecoasis Resort and Golf LLP
2700 – 1133 Melville Street
Vancouver, British Columbia V6E 4E5

Smith Barristers
Murray L. Smith, K.C.
2001 – 1228 West Hastings Street
Vancouver, British Columbia V6E 4S6

The address of the registry is:

800 Smithe Street,
Vancouver, British Columbia V7Y 1K8

The Petitioners estimate that the hearing of the Petition will take 2 days.

☐ This matter is an application for judicial review.

☒ This matter is not an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below, by the Petitioners named in the style of proceedings above.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the

time for response to petition described below, and

(b) serve on the petitioner

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner,

(a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, British Columbia
(3)	The name and office address of the petitioner's lawyer is: 1200 – 925 West Georgia Street Vancouver, British Columbia V6C 3L2 Tel: (604) 682-7474 Attention: Mark C. Stacey

CLAIMS OF THE PETITIONERS

Part 1: ORDERS SOUGHT

1. An Order pursuant to Section 58(1) of the *Arbitration Act*, S.B.C. 2020, c. 2 setting aside the Second Partial Final Award made by Murray Smith, K.C. (the "**Arbitrator**") on April 15, 2025 in the arbitration proceeding between the Petitioners and the Respondent (the "**Arbitration**").

2. A declaration the Arbitrator's appointment as arbitrator in the Arbitration is revoked.

3. The costs of this Petition proceeding.

4. Such further order or declaration as this Honourable Court deems just.

Part 2: FACTUAL BASIS

Background

1. The Petitioners, Bear Mountain Resort & Spa Ltd. (the "**Bear Mountain**"), BM Management Holdings Ltd., and BM Resort Assets Ltd. (collectively defined as the "**Petitioners**" unless otherwise specified) are British Columbia companies with an address for service in this proceeding care of 1200 – 925 West Georgia Street, Vancouver, British Columbia.

2. The Respondent, Ecoasis Resort and Golf LLP (the "**Ecoasis**") is a limited liability partnership that has its registered and records office at 2700 – 1133 Melville Street, Vancouver, British Columbia.

3. Prior to July 8, 2019, Ecoasis owned The Westin Bear Mountain Golf Resort & Spa near Victoria, British Columbia, comprising mainly the Westin hotel (the "**Hotel**"), and operated two 18-hole golf courses, the Mountain Golf Course and the Valley Golf Course (collectively, the "**Golf Courses**"). On July 8, 2019, BM Management Ltd. and Bear Mountain purchased the Hotel from Ecoasis.

4. On July 11, 2019, BM Resort Assets Ltd. and BM Management Ltd. entered into a Commercial Lease with Ecoasis (the "**Commercial Lease**"). Under the terms of the

Commercial Lease, BM Resort Assets Ltd. and BM Management Ltd. leased portions of the Hotel, including the Members Lounge to Ecoasis.

5. On July 11, 2019, Bear Mountain and BM Management Ltd. entered into an Operations Agreement with Ecoasis (the "**Operations Agreement**") for the integrated operation of the Hotel and golf businesses.

6. Shortly after July 2019, issues arose with respect to both the Operations Agreement and the Commercial Lease.

The Arbitration

7. The parties sought third-party binding resolution through arbitration, and pursuant to Terms of Reference dated September 16, 2020, Murray L. Smith, K.C. was appointed as arbitrator (the "**Arbitrator**") and 15 issues under the Commercial Lease and Operations Agreement were referred for determination (the "**Arbitration**") as documented in signed terms of reference (the "**Terms of Reference**")

Affidavit #1 of R. Malak, Exhibit "C", Terms of Reference

8. The parties do not have a written arbitration agreement.

9. A hearing on liability for the 15 issues outlined in the Terms of Reference was heard from January 5-13, 2021 (the "**Liability Hearing**").

10. On February 26, 2021, the Arbitrator issued a Partial Final Award in the Arbitration with respect to liability of the parties in the matters subject to the Arbitration (the "**Partial Final Award**").

Affidavit #1 of R. Malak, Exhibit "D", Partial Final Award

11. A hearing on the quantification of damages was heard September 23-27, and October 7-11 and 15-18, 2024 (the "**Damages Hearing**").

12. On April 15, 2025, the Arbitrator issued the Second Partial Final Award (the "**Second Partial Final Award**").

Affidavit #1 of R. Malak, Exhibit "E", Second Partial Final Award

The Receivership Proceeding

13. On May 23, 2024, Sanovest Holdings Ltd. commenced a petition in the BC Supreme Court, Vancouver Registry No. S-243389, seeking to have Alvarez & Marsal Canada Inc. (the "**Receiver**") appointed as the receiver and manager over all of the assets, undertakings, and property of various related partnerships and corporate entities, including Ecoasis.

Affidavit #2 of R. Malak, Exhibit "A", Petition to the Court filed May 23, 2024

14. On September 18, 2024, pursuant to an order of Justice Walker (the "**Receivership Order**") in the Receivership Proceeding, the Receiver was appointed as receiver and manager over all of the assets, undertakings, and property of various related partnerships and corporate entities, including any interest in the real property of Ecoasis (defined as Resorts in the Receivership Order), including all proceeds therefrom.

Affidavit #2 of R. Malak, Exhibit "B", Receivership Order

15. Section 3(k) and (l) of the Receivership Order provides the Receiver is authorized to market and sell all of the Property (defined to include the Golf Courses) of the Development Entities, as defined in the Order to include Ecoasis and Ecoasis Bear Mountain Developments Ltd. ("**EBMD**"), which manages Ecoasis through Ecoasis Developments LLP.

16. Sections 4 and 6 of the Receivership Order provide for the Receiver preparing two reports, but three reports were prepared, as follows:

    (a) The "**First Report**" or "**Resorts Report**" dated October 24, 2024 – regarding the Resorts (Ecoasis), including the inclusion of other assets, undertakings and properties of Resorts, management by EBMD of the Resorts Business (as defined in the Order) and whether EBMD ought to continue to manage the Resorts Business;

(b) The "**Second Report**" or "**Developments Report**" dated December 2, 2024 – in respect of a marketing and sale process for the Property (again, defined to include the Golf Courses); and

(c) The "**Third Report**" or "**Resorts Response Report**" dated December 20, 2024 – an interim report prepared to provide a summary of Ecoasis' response to the First Report and the Receiver's preliminary comments.

(collectively, the "**Receiver's Reports**")

17. Following the conclusion of the Damages Hearing, the Petitioners applied to the Arbitrator for production of the First Report, which was produced.

Justifiable Doubts as to the Arbitrator's Impartiality

18. The Arbitrator's conduct and decisions before and during the Damages Hearing, paired with the findings made in the Second Partial Final Award, cumulatively give rise to justifiable doubts as to the Arbitrator's impartiality. In the circumstances detailed below, the Arbitrator treated the Petitioners and their witnesses with suspicion and severity while giving favourable preferential treatment to Ecoasis. Overall, the Arbitrator's conduct and conclusions in the Second Partial Final Award amount to a reasonable apprehension of bias in Ecoasis' favour.

19. The Petitioners' application for orders under Section 58(1)(g) of the *Arbitration Act*, S.B.C. 2020, c. 2 (the "***Arbitration Act***") include:

(a) Treatment of the Petitioners' Witnesses

20. Raoul Malak, a witness for the Petitioners was the only witness in both the Liability and Damages Hearings who was provided with a specific caution against perjury prior to cross-examination by opposing counsel.

21. The Arbitrator also demonstrated different standards to the admissibility of evidence between the Petitioners and Ecoasis.

(b) Procedural Order #9 and the Case Management Conference of August 2, 2024

22. On August 6, 2024, the Arbitrator rendered Procedural Order #9, in which many orders were made against the Petitioners, despite the absence of adequate notice thereof to which the Petitioners had the opportunity to respond.

23. Procedural Order #9 was made at a case management conference on August 2, 2024, convened at the Arbitrator's own initiative after the Petitioners had informed the Arbitrator that they considered him to have withdrawn as of July 14, 2024.

(c) Adverse Inference With Respect to Guest Receipts

24. In the Second Partial Final Award, the Arbitrator drew an adverse inference against the Petitioners and concluded the Petitioners actively "chose to suppress" evidence of guest receipts despite receiving no evidence that would support that finding.

(d) The Rent Deduction in Ralph Miller's Report

25. Despite Ecoasis' expert, Ralph Miller, admitting that his calculations were incorrect in that he did not deduct rent owed from Ecoasis for the Members Lounge, the Arbitrator accepted Mr. Miller's calculations wholesale, without any adjustments for rent owed.

(e) Hotel Rates and Discounts

26. The Arbitrator rejected Bear Mountain's argument that Ecoasis could have mitigated the $680,000 it was awarded on the basis that "[t]he duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost." The Arbitrator cited no legal principle for that conclusion.

(f) New Finding of Liability in Bifurcated Proceeding

27. The Arbitrator made a new finding of liability in respect of the Petitioners' responsibility for delaying Ecoasis from obtaining a liquor license for the Members Lounge. This was not addressed in the Partial Final Award and the Arbitrator assessed damages in the Second Partial Final Award using this new finding of liability for an issue where liability was already decided in the Petitioners' favour.

(g) The Arbitrator's Conclusion on Business Disruption Damages

28. The Arbitrator's methodology in awarding $602,959.75 in damages for disruption to Ecoasis' golf business and $271,711.65 for disruption to Ecoasis' tennis business is fundamentally flawed.

29. After concluding the evidence put forward by Ecoasis to support its combined $13,870,606 damage claim for business disruption was not sufficiently reliable, the Arbitrator nevertheless used that evidence as the basis for making his damage award.

(h) The Arbitrator's Conclusions on the Receiver's Reports

30. The Arbitrator made two unsupportable conclusions when considering further submissions on the production and significance of the Receivers Reports.

31. First, the Arbitrator did not order production of the Second Report despite the Petitioners establishing relevance on the basis the Second Report was likely to reveal that the Golf Courses or other assets of importance to Ecoasis' business may be sold in the foreseeable future. The Arbitrator then explicitly relied on the absence of evidence of the Golf Courses being sold when declining to factor that contingency into his damage award.

32. Second, the Arbitrator unreasonably rejected the Petitioners' argument regarding how the First and Third Reports demonstrated that Ecoasis would need a food and beverage manager whose salary should be deducted from the award the Arbitrator made in Ecoasis' favour.

(i) Second Partial Final Award Payment Terms

33. In the Partial Final Award, the Arbitrator made an order that Ecoasis pay the Petitioners $54,091.26 without providing a specific timeline for payment of the amount owing whereas in the Second Partial Final Award, the Arbitrator made an order that the Petitioners pay Ecoasis $2,058,017.63 within 14 days of the date of the decision.

34. The Arbitrator also found the Petitioners were jointly and severally liable despite the fact that all of the breaches of contract he found were with respect to the Operations Agreement, to which BM Resort Assets Ltd. was not a party.

(j) Failure to Consider Significance of Business Plan

35. In Mr. Matthews's Statement #4, para. 71(c), he claimed that the cessation of Bear Mountain's accounting services rendered Ecoasis unable to properly prepare a capital budget in 2020 when in fact Ecoasis had prepared a business plan with a capital budget for 2020.

(a) Treatment of the Petitioners' Witnesses

36. During the Liability Hearing leading up the Partial Final Award, the Petitioners submitted three witness statements:

(a) Witness Statement #1 of Raoul Malak, the sole director of BM Resort & Spa, dated December 16, 2020;

(b) Witness Statement #1 of David Clarke, former Chief Financial Officer of Ecoasis, dated December 16, 2020; and

(c) Witness Statement #2 of Raoul Malak dated December 23, 2020.

37. On January 12, 2021, the first day of Mr. Malak's testimony, the court reporter administered Mr. Malak's affirmation to tell the truth. The Arbitrator did not make any comments to Mr. Malak about his affirmation or otherwise before he began his testimony.

Affidavit #1 of S. Evans (S-213239), Exhibit "F", Transcript Jan. 13, 2021, pg. 96

38. On January 13, 2021, the second day of Mr. Malak's testimony, the Arbitrator reminded Mr. Malak of his affirmation to tell the truth prior to cross-examination by opposing counsel, as outlined below:

> THE ARBITRATOR: Mr. Malak, welcome back. Thank you. I'll remind you that you're still under the compulsion of the affirmation to tell the truth, nothing but the truth, and that that will weigh not only on your conscience but also could lead to serious consequences. So that's the warning for this morning. Thanks.
>
> Go ahead, Mr. Lee

Affidavit #1 of S. Evans (S-213239), Exhibit "G", Transcript Jan. 13, 2021, pg. 98

39. At the close of the sixth day of proceedings, counsel for the Petitioners raised concerns with the Arbitrator, off the record, regarding the Arbitrator's warning to Mr. Malak. The Arbitrator's response was that the warning he gave was "standard."

40. In contrast, the Arbitrator responded positively to Ecoasis' witnesses. For example, after Mr. Matthews finished testifying, the Arbitrator said:

> THE ARBITRATOR: All right. Thank you very much. Mr. Matthews, I would like to thank you for your patience and your willingness to attend and your clear and very helpful testimony. So thank you very much for your service in the arbitration. [emphasis added]

Affidavit #1 of S. Evans (S-213239), Exhibit "C", Transcript Jan. 6, 2021, pg. 85

41. After Mr. Malak finished testifying, the Arbitrator did not make any positive comments about the nature of Mr. Malak's evidence.

Affidavit #1 of S. Evans (S-213239), Exhibit "G", Transcript Jan. 13, 2021, pg. 99

42. The Arbitrator also demonstrated different standards to the admissibility of evidence between the Petitioners and Ecoasis.

43. On October 8, 2024, the Arbitrator allowed Ecoasis' counsel to cross-examine Mr. Clarke on a document that it had in its possession for over a year, but was not in either party's evidence submitted for the Damages Hearing.

Affidavit #1 of R. Malak, Exhibit "F", Transcript Oct. 8, 2024

44. On October 9, 2024, the Arbitrator allowed counsel for Ecoasis to ask questions to Mr. Malak about a document that had just been produced by Ecoasis the day before. The Arbitrator stated to Mr. Malak that "[y]ou can be shown any document the lawyer wants to show you."

Affidavit #1 of R. Malak, Exhibit "G", Transcript Oct. 9, 2024, pg. 242

45. On October 18, 2024, when a similar issue arose about counsel for the Petitioners showing a document to a witness for Ecoasis, the Arbitrator did not demonstrate the same leniency to the use of documents that had not previously been in evidence.

Affidavit #1 of R. Malak, Exhibit "I", Transcript Oct. 18, 2024

(b) Procedural Order #9 and the Case Management Conference of August 2, 2024

46. In July of 2024, after the Arbitrator made a request for a $75,000 retainer from each party, the Petitioners took the position that the Arbitrator had withdrawn and was *functus*.

Affidavit #1 of S. Evans (S-245287), Exhibit "E", pgs. 127-131

47. On July 22, 2024, counsel for the Petitioners reiterated their position to the Arbitrator that he had withdrawn and paid half of the Arbitrator's current outstanding fees.

48. In response to the Petitioners' position, on August 1, 2024, the Arbitrator sent an email to counsel for each of the parties seeking to schedule a case management conference for August 2, 2024 even though neither party had requested one.

Affidavit #1 of S. Evans (S-245287), Exhibit "E", pgs. 122-123

49. Counsel for the Petitioners stated that he was unavailable on August 2, 2024, and informed the Arbitrator that the Petitioners would be bringing an application to the BC Supreme Court to confirm the Arbitrator had withdrawn. The Arbitrator proceeded to schedule a case management conference without counsel for the Petitioners being available.

50. Despite counsel for the Petitioners providing alternative dates on August 6, 7, and 8, the Arbitrator declined to consider those dates.

51. Despite conflicting schedules, counsel for the Petitioners made special arrangements in order to attend the case management conference. Due to their position on the Arbitrator's withdrawal and concerns about mandate, the Petitioners could not substantively participate. The Arbitrator nevertheless proceeded to conduct a substantive hearing on issues with significant negative impact on the Petitioners' ability to present their case and answer Ecoasis' case, including its outstanding procedural application.

52. At the case management conference on August 2, 2024, the Arbitrator made Procedural Order #9, which provides, amongst others, as follows:

(a) four outstanding procedural applications filed by the Petitioners were dismissed as abandoned;

(b) Procedural Order #8, rendered at the conclusion of a successful application brought by the Petitioners, was vacated or varied so as to deprive the Petitioners of the relief previously obtained; and

(c) the Petitioners were given a demand whereby the Arbitrator would terminate all proceedings in relation to its claims and preclude it from taking further steps unless it provided security for arbitration fees by August 16, 2024.

Affidavit #2 of S. Evans (S-245287), Exhibits "A and "B"

53. On August 6, 2024, the Petitioners filed a Petition to the Court in the BC Supreme Court, Vancouver Registry under Court File No. S-24587 seeking a declaration that the mandate of the Arbitrator was terminated, amongst other relief (the "**Withdrawal Petition**").

Affidavit #1 of R. Malak, Exhibit "P", Withdrawal Petition

54. On August 15, 2024, the Petitioners gave notice to the Arbitrator of a challenge pursuant to Section 17(1)(b) of the *Arbitration Act*, alleging Procedural Order #9 was made out of bias against the Petitioners.

Affidavit #1 of R. Malak, Exhibit "L", August 15, 2024 Notice

55. On August 22, 2024, the Withdrawal Petition was dismissed by order of Justice Lamb.

Affidavit #1 of R. Malak, Exhibit "Q", Order Made After Application entered October 1, 2024

56. On September 13, 2024, the Petitioners made an application in the Arbitration seeking the recusal and withdrawal of the Arbitrator pursuant to Section 18(3) of the *Arbitration Act*, having made a challenge under Section 17(1)(b).

Affidavit #1 of R. Malak, Exhibit "M", September 13, 2024 Application

57. On September 23, 2024, the Arbitrator dismissed the Petitioners' application under Section 18(3) of the *Arbitration Act*.

Affidavit #1 of R. Malak, Exhibit "O", Arbitrator's September 17, 2024 Ruling

(c) Adverse Inference With Respect to Guest Receipts

58. In the Partial Final Award of February 26, 2021, the Arbitrator found that the "Hotel must provide Ecoasis with complete financial information as broadly defined in the letter from Mr. Lee dated August 4, 2020."

59. In order to assist the Arbitrator and the parties in reconciling the accounting information, the Petitioners sought to have a tribunal expert appointed who would conduct an investigation and make a joint finding on the reconciliation of the amounts owing between the parties. The Arbitrator dismissed the Petitioners' application in a ruling dated March 29, 2022.

Affidavit #1 of D. Clarke, Exhibit "D", Petitioners' Application for Joint Expert
Affidavit #1 of D. Clarke, Exhibit "E", March 29, 2022 Ruling of Arbitrator

60. In Mr. Clarke's Witness Statement #4 dated April 15, 2024, he provided evidence that Bear Mountain returned 50 boxes of accounting records and backup information to Ecoasis, and confirmed Bear Mountain does not have any signed guest tickets in its possession. Mr. Clarke was not cross-examined on that evidence.

Affidavit #1 of D. Clarke, Exhibit "C", Witness Statement #4 of D. Clarke, paras. 9-11
Affidavit #1 of D. Clarke, at para. 7

61. In the Second Partial Final Award, after considering Mr. Clarke's evidence, the Arbitrator found there "is no evidence to show signed guest receipts for goods and services charged by Hotel guests were returned to Ecoasis as part of the 50 boxes of documents delivered in February 2020."

62. The Arbitrator determined an adverse inference should be drawn "that Hotel is in possession of the signed tickets and chose to suppress them." No evidence was led or sought by Ecoasis that the Petitioners intentionally destroyed or suppressed that evidence.

(d) The Rent Deduction in Ralph Miller's Report

63. Under the terms of the Commercial Lease, Bear Mountain and BM Management Holdings Ltd. leased portions of the Hotel, including the Members Lounge at an annual rate of rent of $40,285.

Affidavit #1 of D. Clarke, Exhibit "B", Witness Statement #3 of D. Clarke, para. 8

64. On October 10, 2024, during the Petitioners' cross-examination of Ecoasis' expert, Mr. Miller, was asked about his calculations, including whether he factored in rent for the Members Lounge payable under the Commercial Lease, and if such rent would impact his calculations.

65. Mr. Miller responded that he did not factor in rent, but that if there was rent to be paid it "would be an expense that should have been factored in."

Affidavit #1 of R. Malak, Exhibit "H", Transcript, October 10, 2024, pgs. 104-108

66. During closing argument, counsel for the Petitioners made a submission to the Arbitrator that Mr. Miller admitted that rent would be an expense that should have been factored in.

Affidavit #1 of R. Malak, Exhibit "K", Transcript, November 18, 2024, pgs. 65-67

67. However, in the Second Partial Final Award, at para. 273, the Arbitrator accepted Mr. Miller's calculations wholesale, without any adjustments for rent, despite Mr. Miller's admission that rent should be factored in.

(e) Hotel Rates and Discounts

68. In the Partial Final Award, the Arbitrator found Bear Mountain was liable under the Operations Agreement for not providing Ecoasis' employees the benefit of reduced room rates through the Marriott Rewards Program.

69. At paragraph 98 of the Second Partial Final Award, the Arbitrator awarded $680,000 to Ecoasis to compensate it for loss of the Marriotts Reward Program on the basis of a cash benefit to employees to replace the use of the program.

70. During the Damages Hearing, the Petitioners led evidence that they had offered a "friends-and-family" discount for Marriott properties as a reasonable alternative to the Marriott Rewards Program.

Affidavit #1 of R. Malak, Exhibit "T", Petitioners' Closing Submission on Damages, paras. 263-267
Affidavit #1 of D. Clarke, Exhibit "A", Witness Statement #2 of D. Clarke, paras. 96-98

71. At paragraph 90 of the Second Partial Final Award, the Arbitrator dismissed the Petitioners' mitigation argument, as follows:

> 90. [...] The damages for breach of section 5.5 of the Operations Agreement are the cost to replace the thing that was lost. It was not incumbent upon Ecoasis to accept an offer of an inferior friends and family discount. The duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost.

72. The Arbitrator cited no legal principle for the statement above. Given the Arbitrator made his award on the basis of a cash incentive to replace the Marriott Rewards Program, such cash incentive would only have been necessary to top up the difference between the "friends-and-family" discount and the Marriot Rewards Program.

(f) New Finding of Liability in Bifurcated Proceeding

73. In the Second Partial Final Award, the Arbitrator made a new finding of liability in respect of the Petitioners' responsibility for delaying Ecoasis from obtaining a liquor license for the Members Lounge.

74. The Petitioners explicitly argued the Arbitrator did not have jurisdiction to make a damage award for suspension of the liquor licence in its closing submissions on damages at paras. 132-135. Paras. 132 and 135 of the Petitioners' closing submissions are outlined below:

> 132. The GT Operator alleges in its Damages Submissions that the Hotel Operator has interfered with its ability to obtain a liquor license for the members lounge, the take-out window and the Valley Course cart. However, these allegations were either raised and disposed of at the previous arbitration hearing or have arisen subsequent thereto and therefore have not been ruled upon. In either case, there is no order that would entitle the GT Operator to damages arising from the alleged conduct.
>
> ...
>
> 135. The balance of the GT Operator's allegations -- advanced in paragraphs 91(l)-(v) and 92-93 of Matthews #4 – either relate to the PFA or to the Hotel Operator's lawful exercise of its right to appeal the same in accordance with the dispute resolution provisions in the

> Operations Agreement. The conduct complained of is said to have occurred subsequent to the issuance of the PFA. As such, these allegations could not and were not brought before the arbitrator at the previous arbitration hearing and have not been properly tested or ruled upon. The Hotel Operator has not been found in breach of contract on the basis of these allegations and no order has been made entitling the GT Operator to damages for the same.
>
> *Affidavit #1 of R. Malak*, Exhibit "T", Petitioners' Closing Submissions on Damages

75. As outlined above, the alleged conduct complained of by Mr. Matthews regarding the Petitioners' responsibility for Ecoasis' delay in obtaining a liquor licence was either raised and disposed of in the Partial Final Award, or relates to delays from the Petitioners' challenge to the Partial Final Award or the Petitioners' appeal of the same.

76. The Arbitrator referred to the Petitioners' argument about the Arbitrator not having jurisdiction to make a new finding of liability at paras. 54-55 of the Second Partial Final Award. However, the Arbitrator did not comment on the argument when making his final determination on the liability for damages, as outlined below:

> 73. Hotel is not responsible for all of the losses resulting from the delay in obtaining a liquor licence for the members lounge and take out window. Hotel is, however, liable for the loss of opportunity for Ecoasis to earn profits from food and beverage sales caused by the breach of the Operations Agreement as found in the Partial Final Award. Such losses included profits from liquor sales that Ecoasis might have earned but for the breakdown in business operations caused by Hotel. It is impossible to calculate the exact quantity of liquor sales if business had continued as usual with the cooperation and goodwill of Hotel. The Ecoasis claim for damages must be discounted to reflect the difficulty in obtaining a liquor licence and the uncertainty in estimating how long it would have taken to obtain a new licence with the required cooperation of Hotel. [emphasis added]

77. Without a finding on liability for the cause of the delay in Ecoasis obtaining a liquor licence, the Arbitrator should not have found that further damages should be awarded to Ecoasis for not having a liquor licence. If Ecoasis would not have had a liquor licence in any event, causation for such damages could not be proven.

(g) The Arbitrator's Conclusion on Business Disruption Damages

78. During the Damages Hearing, Ecoasis claimed $13,870.606 ($12,059,195 for disruption to the golf business and $1,811,411 for disruption to the tennis business) in damages for business disruption when it had initially only sought $1,799,699 in business losses and $548,921 in lost revenue during the Liability Hearing.

79. At paragraph 199 of the Second Partial Final Award, the Arbitrator explained that his task in assessing damages for business disruption required Ecoasis to prove that the effect of multiple breaches of contract give rise to a cumulative loss greater than the sum of the parts addressed under each individual issue.

80. The Arbitrator's conclusion on the combined effect of the breaches of contract with respect to damages for the golf business is outlined at paragraph 230 of the Second Partial Final Award:

> Hotel's breaches of contract caused disruptions to operations in the Ecoasis golf and tennis businesses. The failure to provide proper accounting services, food and beverage service, and employee benefits and the improper actions to evict Ecoasis from the premises over the Easter holiday in the year 2020 had a negative impact on the reputation of Ecoasis and the level of satisfaction of its members. Amenities were limited and there was an effective loss of a clubhouse. The main issue for determination is the extent to which the disruptions caused by Hotel deprived Ecoasis of the opportunity to take advantage of a super-cycle in the golf industry during the pandemic.

81. As outlined above, the Arbitrator concluded the breaches caused disruptions and a loss of reputation, but that alone did not establish damages.

82. To support its claim for business disruption damages, Ecoasis relied on two one page Microsoft Excel Spreadsheets prepared by Mr. Matthews attached as Exhibits B and C to his fourth witness statement.

Affidavit #1 of R. Malak, Exhibit "V", Witness Statement #4 of Dan Matthews

83. At paragraph 234 of the Second Partial Final Award, the Arbitrator concluded that Mr. Matthews's spreadsheets were insufficient to support Ecoasis' claim for damages:

> 234. [....] Mr. Matthews attempted to quantify the Ecoasis losses in Exhibit "B" to Witness Statement #4 dated August 2, 2022. That proof is insufficient in fact and law to support the full Ecoasis claim for damages.

84. At paragraph 235, the Arbitrator also agreed the estimates made by Mr. Matthews in calculating damages were speculative, based in part on unproven assumptions, and opinion involving market data and historical trends.

85. At paragraph 236, the Arbitrator acknowledged the spreadsheets attached as Exhibits B and C were prepared by Ecoasis' employees and tend towards business valuation opinion for which Mr. Matthews has no expertise. The Arbitrator concluded the "calculations made by Mr. Matthews are not sufficiently reliable to support the very significant claim for damages for business disruption."

86. At paragraph 242, the Arbitrator found there was a loss, but could not identify a means for calculating the loss:

> There is no doubt the loss of the members lounge as a meeting place had a detrimental effect on the golf experience. The loss of a place for members to get together in a private space for food and a beverage caused a loss of reputation for Ecoasis. Food and beverage service is an important part of the membership experience. There was some degree of deterioration in market perception and uncertainty in the value of membership generally for which Hotel must be held accountable. Hotel should not be able to avoid responsibility for Ecoasis losses because it is difficult to calculate the impact on growth of membership and revenue from dues. Some measure of damages beyond mere nominal damages must be assessed.

87. In the Petitioners' damages submissions, they provided legal authority to the Arbitrator that where a loss has been established for breach of contract, that does not relieve the party claiming the loss from the onus of providing a realistic base for pecuniary compensation.

Affidavit #1 of R. Malak, Exhibit "T", Petitioners' Closing Submissions on Damages, para. 279

88. After concluding Ecoasis had not provided a realistic base for its business disruption claim, the Arbitrator provided a 95% contingency reduction to Mr. Matthews's $12,059,195 claim for business disruption to the golf business, resulting in a damage award of $602,959.75.

89. The Arbitrator used as similar methodology to provide an 85% contingency reduction to Mr. Matthews's $1,811,411 claim for business disruption to the tennis business, resulting in a damage award of $271,711.65.

90. In the Second Partial Final Award, the Arbitrator did not accept the expert opinion of Stephen Johnston dated August 2023 because he found Mr. Johnston was biased. Mr. Johnston concluded that Ecoasis had not suffered any loss because it could not have sold any further memberships during the relevant period.

91. Instead, the Arbitrator accepted, at least in part, the calculations of Mr. Matthews, a lay witness with no expertise to comment on business losses, was guaranteed to be biased on account of his role as principal of Ecoasis, and whose self-serving evidence the Arbitrator found was insufficiently reliable.

92. The Arbitrator's acceptance of Mr. Matthews's unreliable evidence was evident in the Liability Hearing as well. For instance, in the Liability Hearing, Mr. Matthews:

(a) stated there was no reason to doubt the ability of Bear Mountain to offer Marriott privileges to Ecoasis' employees (Partial Final Award, para. 138), which the Arbitrator acknowledged as hearsay but nevertheless accepted, when in fact:

(i) Mr. Matthews admitted on cross-examination that when he reached out to Marriott to obtain Marriott rewards for Ecoasis' staff, Marriott was unable to provide these benefits; and

Affidavit #1 of S. Evans, Exhibit "C", Transcript Jan 6, 2021, pgs. 81-83

(ii) Bear Mountain submitted the hotel Employee Handbook and the Marriott Explore Program Rules, which clearly state discounts were only available for hotel employees, owners, franchisees and licensees.

Affidavit #1 of S. Evans, Exhibit "H",, Marriott Explore Program Rules, pg. 100
Affidavit #1 of S. Evans, Exhibit "I",, Marriott Employee Handbook, pg. 109

(h) The Arbitrator's Conclusions on the Receiver's Reports

(i) *Relevance of the Receiver's Second Report*

93. On January 22, 2025, the Petitioners applied to the Arbitrator for an order to produce both the Second and Third Reports. The Petitioners' arguments for production of the Second Report on the basis of relevance were that:

(a) it was reasonable to expect the Second Report would address whether the commercial performance of Ecoasis in the period from 2020 to 2029 was likely to be consistent with the projections of Mr. Matthews and the extent to which the

commercial performance of Ecoasis is attributable to Bear Mountain's breaches of the Operations Agreement; and

(b) the Receiver's recommendations regarding the marketing and sales of EBMD's real property assets were likely to have a significant impact on Ecoasis' commercial prospects since it does not own the Golf Courses and if the Golf Courses are sold, Ecoasis' business may cease entirely.

Affidavit #2 of R. Malak, Exhibit "E", Hotel Operator's Application dated January 22, 2025

94. In Ecoasis' responding submissions on production of the Second Report, Ecoasis did not oppose production of the Second Report on the basis of relevance or materiality.

Affidavit #2 of R. Malak, Exhibit "F", Ecoasis' Response dated January 31, 2025

95. Rather, Peter Rubin, counsel for the Receiver, alluded to the materiality of the Second Report, especially as it concerned the sale of EBMD's real property, which included the Golf Courses, as outlined below:

> 9. The Receiver objects to the production of the Developments Report in the arbitration for the same reasons. It was noted in the hearing that the Hotel Operator or companies affiliated with the Hotel Operator may be making a bid in the upcoming sales process and production of the Developments Report would give them access to information that other bidders would not have.
>
> 10. There is a real and substantial concern that disclosing the Developments Report would affect the proper sale of Ecoasis Developments' properties.

96. Ecoasis' submissions concluded by stating "Mr. Rubin advised that if the arbitrator wished a submission on this point directly from him, he would be able to provide them by the end of day Tuesday, February 4, 2025", but the Arbitrator did not seek further submissions from Mr. Rubin.

Affidavit #2 of R. Malak, Exhibit "F", Ecoasis' Response dated January 31, 2025

97. In the Petitioners' reply submissions dated February 3, 2025, they additionally submitted the argument that Ecoasis does not own the real estate on which the properties designated GMEA are located. Therefore, even if the Golf Courses were not sold, if the GMEA

property was sold to a third-party, Ecoasis strategy of selling memberships associated with GMEA property may become impossible to maintain.

Affidavit #2 of R. Malak, Exhibit "G", Petitioners Reply Submissions dated February 3, 2025

98. It was further confirmed in the First Report that Ecoasis does not have a lease or rental agreement in place for the use of the Golf Courses.

Affidavit #2 of R. Malak, Exhibit "C", The First Report, pg. 33, para. 8.97.i)

99. One of the issues raised by Ecoasis during its closing submissions on November 18, 2024 was that Mr. Malak was seeking to purchase the Golf Courses, as outlined below from the closing submissions of counsel for Ecoasis:

> Mr. Malak and the Hotel Operator had their eye on a larger prize: Purchasing the land in which the golf courses are situated. Mr. Malak obviously has a right of first refusal, and this is not something that has not come to light before. Mr. Malak, as early as October of 2019, made an offer to both Mr. Kusumoto and Mr. Matthews to buy the golf courses.

Affidavit #1 of R. Malak, Exhibit "J", Transcript, Nov 11. 2018, pg. 6

100. In his February 5, 2025 ruling denying production of the Second Report, the Arbitrator concluded:

> 9. Hotel submits the Second Report contains relevant and material information and says Ecoasis has not led any evidence it contains confidential information or that an averse effect would arise from its disclosure. Neither has Hotel led any evidence that the Second Report contains information material to issues arising in the arbitration proceedings.

Affidavit #2 of R. Malak, Exhibit "H", Arbitrator's Ruling on the Second Report

101. The Arbitrator's conclusion on the Petitioners' requirement to lead evidence of materiality required the Petitioners to already be in possession of the Second Report. The same was not true for Ecoasis' submissions on confidentiality on account of Mr. Rubin offer to make himself available.

102. Overall, given the evidence the Arbitrator already had about Mr. Malak potentially purchasing the Golf Courses, and Mr. Rubin's concern about Mr. Malak seeking to make a bid in the upcoming sales process for the Property (which includes the Golf Courses), it is difficult to see how the Arbitrator could have found the Second Report was not material

to the issue of whether the Golf Courses or GMEA property may be sold, unless motivated by bias against the Petitioners.

103. In the Second Partial Final Award, the Arbitrator concluded at para. 277 that there "is no indication the Receiver will recommend sale of the golf courses" when denying the Petitioners' submission that the sale of the Golf Courses should be accounted for as a further contingency in reducing Ecoasis' damage award. Given Ecoasis was claiming damages for business disruption up to 2029, any indication the Golf Courses or GMEA property may be sold from 2024-2029 ought to have factored into his contingency reduction.

(ii) Food and Beverage Manager Analysis

104. During the Damage Hearing, the Petitioners' expert, Ms. Russell and Ecoasis' expert, Mr. Miller, disagreed on whether the costs of salaried positions should be included as expenses in the calculation of net revenues for the Members Lounge, take-out window, and Valley Course – the food and beverage services operated by Ecoasis.

105. At para. 110 of Mr. Miller's report dated April 26, 2024, with respect to whether salaried expenses for positions such as the Director of Food & Beverage and Banquets Manager should be included as expenses, he concluded:

> In my Opinion, none of these positions relate specifically to the operation of the Member's Lounge, Take-out Window, or Valley Cart and are overhead costs for the Hotel's Food & Beverage Department, and no expense allocation should be made. [Emphasis Added]
>
> *Affidavit #1 of R. Malak,* Exhibit "R", R. Miller report dated April 26, 2024

106. Mr. Miller's conclusion is that expenses for those positions will be born by the Hotel. That is, since Ecoasis does not require a food and beverage manager, such expenses should not be accounted for in the calculation of net revenues.

107. Contrary to Mr. Miller's assertion, in the First Report, the Receiver recommended that Ecoasis hire a qualified food and beverage manager and provided Ecoasis with 45 days to commence immediate implementation of corrective measures to address the Receiver's recommendations. Given the First Report was dated October 25, 2024, the Receiver

concluded a qualified food and beverage manager should be hired by no later than the start of December.

Affidavit #2 of R. Malak, Exhibit "C", The First Report, pg. 34, para. 9.2 a)

108. In the Third Report, Ecoasis responded to the Receiver's recommendation about the food and beverage manager by suggesting that it was of the view the food and beverage position was only required during the high season.

Affidavit #2 of R. Malak, Exhibit "D", The Third Report, pg. 3, para. 5.2 b)

109. The Receiver made no comments on whether it agreed with Ecoasis' response on the food and beverage manager recommendation, and only provided a general comment that Ecoasis did not provide sufficient information for the Receiver to make a final recommendation. Either way, Ecoasis agreed that a food and beverage manager should at least be hired for the high season.

110. At para. 280 of the Second Partial Final Award, the Arbitrator then concluded:

> 280. The Receiver did not analyze the need for a full time F&B Manager. The Receiver's First and Third Reports do not impact the analysis of damages related to food and beverage. Mr. Miller's statement that a manager position is not necessary is not contradicted in the Receiver's Reports.

111. The Petitioners respectfully submit the Arbitrator:

(a) had all of the evidence necessary to conclude the Receiver analyzed the need for a full-time food and beverage manager; and

(b) Ecoasis agreed it needed a food and beverage manager for the high season such that Mr. Miller's statement about a food and beverage manger position not being necessary was contradicted by the First and Third Report.

(i) Second Partial Final Award Payment Terms

112. In the Partial Final Award, the Arbitrator made an order that Ecoasis pay the Petitioners $54,091.26 without providing a specific timeline for payment of the amount owing.

113. In the Second Partial Final Award, the Arbitrator made an order that the Petitioners pay Ecoasis $2,058,017.63 within 14 days of the date of the decision with interest accruing from that date. No reasoning was provided for the discrepancy in the timeline for payment terms between the two awards.

114. Further, the Arbitrator found the Petitioners were jointly and severally liable to pay the sum of $2,058,017.63 to Ecoasis despite the fact that all of the breaches of contract for which damages were awarded to Ecoasis were with respect to the Operations Agreement, to which BM Resort Assets Ltd. was not a party.

(j) Failure to Consider Significance of Business Plan

115. In Mr. Matthews's Statement #4, he claimed that the cessation of Bear Mountain's accounting services rendered Ecoasis unable to properly prepare a capital budget in 2020. However, in the course of the Arbitration proceedings, Ecoasis was ordered to produce its business plan for the year 2020, which included a budget for the year.

Affidavit #1 of R. Malak, Exhibit "V", Witness Statement #4 of Dan Matthews, para. 71(c)

116. In the Second Partial Final Award, the Arbitrator did not comment on the Petitioners' submission that Mr. Matthews's evidence should not be accepted for having failed to mention Ecoasis actually had business plan and a 2020 capital budget.

Breaches of Natural Justice and Procedural Fairness

117. The Petitioners rely on the facts outlined above with respect to the Arbitrator's conclusion on the Receiver's reports, Procedural Order #9, the adverse inference for the guest receipts, and the new finding on liability in the bifurcated proceeding to also argue the Arbitrator breached s. 58(1)(h) of the *Arbitration Act* by not treating both parties fairly.

Part 3: LEGAL BASIS

Section 58(1)(g) of the Arbitration Act

118. Section 58(1)(g) of the *Arbitration Act* provides as follows:

> 58(1) A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds:
>
> ...
>
> (g) there are justifiable doubts as to the arbitrator's independence or impartiality;

119. An arbitrator must be independent of the parties, unless otherwise agreed, and must be impartial and act impartially.

Arbitration Act, ss. 16(1)-(2) and 58(1)(g)

120. The court in *Atlantic Industries Limited v SNC-Lavalin Constructors (Pacific) Inc.*, 2017 BCSC 1263 observed as follows at para. 18:

> Arbitrators owe a duty of fairness to the parties to an arbitration. Avoiding both a biased state of mind and the appearance of bias is part of that duty: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at 636. In *Szilard v. Szasz*, 1954 CanLII 4 (SCC), [1955] S.C.R. 3 at 7, Rand J. explained, "[e]ach party, acting reasonably, is entitled to sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs."

121. Justifiable doubts as to the arbitrator's independence or impartiality means "a real danger of bias on the part of the arbitrator in conducting the arbitration".

Arbitration Act, ss. 58(g)

122. There is no distinction between the terms "a reasonable apprehension of bias", "justifiable doubts as the arbitrator's impartiality", or "a real danger of bias". As the Supreme Court of Canada observed in *R. v. Burke*, 2002 SCC 55 ("***Burke***"):

> [...] the precise phrasing of the test is not crucial, if the substance is plain. It is interchangeably expressed as a "reasonable apprehension", "real likelihood" or "real danger" of bias, a "reasonable suspicion" of prejudice or taint, and so forth. Whatever the exact formulation of the test, the essence of the inquiry is the same; namely, the test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude" [...]

Burke at para. 61

123. The court in *Johnston v. Octaform Inc.*, 2024 BCSC 537, considered the comparable challenge procedure set out in the *International Commercial Arbitration Act*, RSBC 1996, c. 233. Applying *Burke*, the court finds that there is no distinction between the terms "a

reasonable apprehension of bias", "justifiable doubts as the arbitrator's independence impartiality", or "a real danger of bias".

Johnston v. Octaform Inc., 2024 BCSC 537, at paras. 37 and 47

124. The court in *Tepei v. ICBC*, 2007 BCSC 1694 observed at para. 83 that "the apprehension of bias must be a reasonable one, held by responsible and right minded persons, applying themselves to the question and obtaining thereon the required information." In other words, "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude."

125. The courts have also repeatedly endorsed two modes to challenge an arbitrator for bias: 1) attacking a specific decision of the arbitrator; and 2) challenging the arbitrator for bias based on the cumulative effect of their decisions when looking at the totality of the record.

New World Expedition Yachts LLC v. P.R. Yacht Builders Ltd., 2010 BCSC 1496, at para. 51
McEwan v. Canadian Hockey League, 2025 BCSC 455, at para. 63
Dufferin v. Morrison Hershfield, 2022 ONSC 3485, at para. 90
Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General), 2015 SCC 25, at paras. 37-38
Johnston v. Octaform Inc., 2024 BCSC 537, at para. 56

126. In the present case, the Petitioners submit the cumulative effect of the various circumstances raised in this Petition give rise to a reasonable apprehension of bias on the part of the Arbitrator.

(a) Treatment of the Petitioners' Witnesses

127. Even if the Arbitrator's treatment of Mr. Malak may not support a reasonable apprehension of bias on its own, it is part of a pattern that continued throughout the Arbitration.

128. It should stand out to any reasonable observer that it is odd for the Arbitrator to warn only one witness throughout the course of the Liability and Damages Hearing that "you're still under the compulsion of the affirmation to tell the truth, nothing but the truth, and that that will weigh not only on your conscience but also could lead to serious consequences." The Arbitrator's treatment of Mr. Malak is even more concerning when compared to his much more friendly treatment of Mr. Matthews at the conclusion of his evidence.

(b) Procedural Order #9 and the Case Management Conference of August 2, 2024

129. The timing of Procedural Order #9 at the case management conference on August 2, 2024 amidst the Petitioners taking the position the Arbitrator had withdrawn makes it appear as though he was seeking to punish the Petitioners for their position.

130. There had been considerable delays in the proceedings prior to July 2024 and the Arbitrator suddenly demonstrated urgency only after the Petitioners had expressed their position on his withdrawal.

131. On August 1, 2024, the Arbitrator then proceeded to schedule a case management conference for the following day even though counsel for the Petitioners was not available and provided alternative dates, which the Arbitrator declined to consider.

132. When it became apparent to counsel for the Petitioners that the case management conference would proceed in his absence, he changed his schedule to make sure he could attend. However, given the Petitioners' position on the Arbitrator's lack of jurisdiction, he was unable to substantively participate.

133. At the case management conference on August 2, 2024, the Arbitrator made Procedural Order #9, which dismissed four of the Petitioners' applications that they had been trying to have scheduled, varied a previous order that deprived the Petitioners of the relief they previously obtained, and the Petitioners were given a demand to pay the Arbitrator's deposit for security for fees or the Arbitrator would terminate all proceedings in relation to their claims and preclude them from taking further steps. This order was notwithstanding the Petitioners' position that the Arbitrator no longer had jurisdiction.

(c) Adverse Inference With Respect to Guest Receipts

134. In the Second Partial Final Award, the Arbitrator made a series of unsupported findings, which the Petitioners submit can only be explained by bias towards the Petitioners.

135. The first was the adverse inference the Arbitrator drew with respect to whether the Petitioners had the signed guest receipts in their possession. Mr. Clarke provided evidence that the Petitioners were not in possession of the signed guest receipts and gave evidence

that they were likely in the 50 boxes that were provided to Ecoasis by the Petitioners in February of 2020.

136. Generally, before such an adverse inference can be found, caselaw requires a finding that a party has intentionally destroyed or suppressed documents relevant to ongoing or contemplated litigation such that a reasonable inference can be drawn that the evidence was destroyed to affect the litigation (*Rostas v. The Corporation of the City of Port Coquitlam*, 2019 BCSC 1804, at para. 55).

137. As Mr. Clarke was not cross-examined on his evidence, the Arbitrator's conclusion that the Petitioners were in "possession of the signed tickets and chose to suppress them" is outside the range of reasonable conclusions that could be supported by the evidence, and can only be explained by bias towards the Petitioners.

(d) The Rent Deduction in Ralph Miller's Report

138. Even though Ecoasis' own expert, Mr. Miller, agreed that rent payable under the Commercial Lease for the Members Lounge should be factored into his calculations for expenses, in the Second Partial Final Award, the Arbitrator accepted Mr. Miller's calculations wholesale, without any adjustments for rent.

139. The Petitioners submit that such a failure to account for uncontroverted evidence can only be explained by bias towards them.

(e) Hotel Rates and Discounts

140. In the Partial Final Award, the Arbitrator found Bear Mountain was liable under the Operations Agreement for not providing Ecoasis' employees the benefit of reduced room rates through the Marriott Rewards Program.

141. In dismissing the Petitioners' argument in the Damages Hearing that they offered a similar, albeit slightly inferior "friends-and-family" discount to Ecoasis as a replacement, the Arbitrator stated, without citing any legal principle, that "[t]he duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost."

142. That statement by the Arbitrator on the duty to mitigate is contrary to existing principles of mitigation in commercial contract claims, that:

(a) a party who has suffered from a breach of contract [must] take all reasonable steps to avoid losses flowing from the breach (*Hargreaves v Brar,* 2010 BCCA 489, at para. 2.); and

(b) it is generally reasonable in commercial contracts to accept an offer from the party in default (*Real Organics & Naturals House Ltd. v Canadian Phytopharmaceuticals Corporation,* 2024 BCSC 1303 at paras 277-278.).

143. If Ecoasis had accepted the "friends-and-family" discount, it would have needed much less in cash incentives to top up the difference between the "friends-and-family" discount and the Marriot Rewards Program, and its damages would have been significantly reduced.

144. The Petitioners submit that the Arbitrator's unsupported statement of law, which was unsupported by any analysis, can only be explained by bias towards the Petitioners.

(f) New Finding of Liability in Bifurcated Proceeding

145. In the Second Partial Final Award, the Arbitrator made a new finding of liability in respect of the Petitioners' responsibility for delaying Ecoasis from obtaining a liquor license for the Members Lounge.

146. Despite the Petitioners making extensive arguments in their closing submissions about the Arbitrator not having jurisdiction to award damages on a new liability finding, the Arbitrator seemingly awarded damages on a breach of the duty of good faith and honest performance. Para. 73 of the Second Partial Final Award states:

> 73. [...] Such losses included profits from liquor sales that Ecoasis might have earned but for the breakdown in business operations caused by Hotel. It is impossible to calculate the exact quantity of liquor sales if business had continued as usual with the cooperation and goodwill of Hotel. The Ecoasis claim for damages must be discounted to reflect the difficulty in obtaining a liquor licence and the uncertainty in estimating how long it would have taken to obtain a new licence with the required cooperation of Hotel.

147. Not only was no such finding made in the Partial Final Award, no such allegation was contained in the Terms of Reference. With respect to liability for the food and beverage

services, the Terms of Reference only asked if Section 4.2(a) of the Operations Agreement was breached, and if so, what damages were suffered. There is no mention of "cooperation and goodwill" in Section 4.2(a) or anywhere else in the Operations Agreement.

148. The Arbitrator came to his conclusion on the apparent lack of "cooperation and goodwill" of the Petitioners to award additional damages against them, which the Petitioners submit can only be explained by bias towards them.

(g) The Arbitrator's Conclusion on Business Disruption Damages

149. The Arbitrator's methodology in awarding $602,959.75 in damages for disruption to Ecoasis' golf business and $271,711.65 for disruption to Ecoasis' tennis business is fundamentally flawed.

150. After concluding the evidence put forward by Ecoasis to support its combined $13,870,606 damage claim for business disruption was not sufficiently reliable, he nevertheless used that evidence as the basis for making his damage award.

151. The Arbitrator concluded the "calculations made by Mr. Matthews are not sufficiently reliable to support the very significant claim for damages for business disruption." The conclusion that should have followed from that statement is that Mr. Matthews calculations were not sufficiently reliable to support any claim for damages for business disruption because the flaws in Mr. Matthews's calculations were permeated throughout his analysis.

152. If Ecoasis could not provide any sufficiently reliable base to ground the damage award, the Arbitrator ought to have awarded only nominal damages. In their closing submissions on damages, the Petitioners cited *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 where the Court found that establishing a loss without satisfying the onus to provide a realistic base for monetary compensation results in nominal damages.

153. The courts have also found that a foundational value for a contingency deduction should have a rational or principled basis. In *Rab v. Prescott,* 2021 BCCA 345 (***"Rab"***) when considering a trial judge's award for future loss of income in a personal injury action, the

BC Court of Appeal concluded that the trial judge using an unreliable "factual mathematical anchor" prior to assessing contingency reductions was an error in principle. At para. 74, the Court stated "I cannot agree that the judge's foundational reference to the income level of $300,000 provided a rational or principled basis for valuing the loss, even though he applied a contingency deduction."

154. *Rab* was a personal injury action and the Arbitrator was assessing a loss of profits claim in breach of contract. However, as stated by the Court in *Howeling Nurseries Ltd. v. Fisons Western Corp.* 1988 CanLII 186 (BCCA) at para. 15, "[a]ssessment of the damages for lost profits caused by breach of contract is, in this respect, analogous to assessment of damages for personal injury resulting from a tortious act." The Petitioners have not been able to locate any examples of where, in a breach of contract claim, an adjudicator determined a mathematical factual anchor was unreliable, but nevertheless used it as a foundational reference in assessing damages with contingency reductions.

155. This Petition is not seeking to have the Second Partial Final Award set aside for errors of law. However, the Arbitrator calculating Ecoasis' damages in such a manner indicates bias in that he appears to have been searching for any means to support Ecoasis' damage claim, even if the methodology he used was not rationally supported at law.

156. Another way of viewing the Arbitrator's errors such that the Arbitrator was motivated by bias is that he accepted some aspects of Mr. Matthews's unreliable damage calculation over the opinion of Mr. Johnston because he found Bear Mountain was at fault. In *Gill v. Lai,* 2019 BCCA 103, the Court stated:

> 47 The last factor the trial judge relied on is particularly troublesome. It was open to him to prefer the evidence of one expert over another. It was also open to him to accept there is a range of future possible outcomes. It is not correct to say, where there is real and concerning doubt, it should be resolved in favour of the respondent because the appellants were at fault. The decision of how to weigh expert evidence or the quantum of damages does not hinge upon which party is blameworthy. In my view, the trial judge clearly erred in principle in the manner in which he addressed the competing expert opinions.

157. The Arbitrator found that both Mr. Matthews's and Mr. Johnston's evidence was unreliable, and both witnesses were biased. In that context, the Arbitrator's acceptance of Mr. Matthews's evidence could only have been founded out of motivation to award

damages against the "blameworthy" party, as the Arbitrator appeared to have viewed his damage assessment.

(h) Second Partial Final Award Payment Terms

158. The timeline for payment of the Second Partial Final Award and the fact he did not attempt to distinguish between the Petitioners in the damage claim indicates bias in that the payment terms were more onerous than the Partial Final Award and he demonstrated a disregard for the individual interests of the Petitioners.

(i) The Arbitrator's Conclusions on the Receiver's Reports

159. In order to be material, the Second Report only needed to have reasonably contained evidence indicating the GMEA properties or the Golf Courses would be sold sometime between 2024 and 2029 considering Ecoasis' business disruption claim calculation accounted for losses up to 2029.

160. The Petitioners provided all of the evidence they reasonably could have in the circumstances to establish materiality and Ecoasis did not oppose production on that basis.

161. The Arbitrator did not consider whether redactions could alleviate Mr. Rubin's concerns about confidentiality in the Second Report nor did he consider the significant protections against disclosing confidential evidence in Section 63 of the *Arbitration Act*.

162. Overall, given the significant effect the potential sale of the Golf Courses or GMEA property would have had on Ecoasis' damage claim, there is no justifiable explanation for the Arbitrator's ruling and failure to seek further submissions from Mr. Rubin, absent bias.

163. The Arbitrator also unreasonably rejected the Petitioners' argument regarding how the First and Third Report demonstrated that Ecoasis would need a food and beverage manager whose salary should be deducted from the award the Arbitrator made in Ecoasis' favour.

(j) Failure to Consider Significance of Business Plan

164. In the Second Partial Final Award, the Arbitrator did not comment on the Petitioners' submission that Mr. Matthews's evidence should not be accepted for having failed to

mention the 2020 capital budget in the business plan even though it should have been a significant factor in Mr. Matthews's credibility as a witness.

(k) Summary of Indicators of Bias and Effect on Overall Award

165. Overall, of the $2,058,017.63 awarded to Ecoasis, the Petitioners' cumulative allegations of bias call into question the majority of the Second Partial Final Award, as summarized in the table below:

Head of Damage	**Reason for Bias**	**Damage Amount**
Business Disruption Losses to golf business	1. The Arbitrator's assessment of damages using a 95% contingency reduction was wrong in law and based on the unreliable and unrealist base of Mr. Matthews's calculations. 2. The Arbitrator unreasonably did not order production of the Second Report, which could have demonstrated the sale of the Golf Courses or GMEA property would occur in the foreseeable future. The Arbitrator also relied on the absence of evidence of that occurring when denying the Petitioners' argument for a contingency reduction to account for that possibility.	$602,959.75
Business Disruption Losses to tennis business	1. The Arbitrator's assessment of damages using a 95% contingency reduction was wrong in law and based on the unreliable and unrealistic base of Mr. Matthews's calculations.	$271,711.65
Hotel Rates and Discounts	1. Arbitrator dismissed Petitioners' mitigation argument without citing legal principles or a considered analysis.	$680,000
Food and Beverage	1. did not take into account the rent owed for the Members Lounge; 2. made a new liability finding that was not made in the Partial Final Award; and 3. did not account for the effect of the First and Third Report on the expenses.	$193,720.80

Additional Outstanding Invoices	1. The adverse inference drawn against the Petitioners for the guest receipts was relevant to the Arbitrator's assessment of the Stay and Pay packages claim under this head of damage.	$377,255.58
Total		$2,125,647.78

166. Notwithstanding the significant effect the instances of bias have on the individual awards, if there is a reasonable apprehension of bias from looking at the cumulative effects, the Second Partial Final Award ought to be set aside in its entirety.

Section 58(1)(h) of the Arbitration Act

167. Section 58(1)(h) of the *Arbitration Act* provides as follows:

> **58** (1)A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds:
>
> ...
>
> (h)the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it;

168. In *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440, the BC Court of Appeal referred to s. 58(1)(h) as the provision that protects the parties' right to natural justice and procedural fairness.

169. Section 21 of the *Arbitration Act* requires that the Arbitrator treat each party fairly, and provide each party a reasonable opportunity to present its case and to answer the case presented against it.

170. The Petitioners take the position that any evidentiary rulings challenged under s. 58(1)(h) are properly brought after the final award on damages is issued by the Arbitrator.

Cambie Surgeries Corporation v. British Columbia (Attorney General), 2017 BCCA 287, at para. 65

171. The Petitioners rely on the Arbitrator's conclusion on the Second Report, Procedural Order #9, the adverse inference for the guest receipts, and the new finding on liability in the bifurcated proceeding to also support their claim under Section 58(1)(h).

172. The cumulative effect of the circumstances described above support the conclusion that the Arbitrator did not treat each party fairly, and the Petitioners were not provided a reasonably opportunity to answer the case presented against them.

Section 58(1)(c) of the *Arbitration Act*

173. Section 58(1)(c) of the *Arbitration Act* provides as follows:

> 58(1) A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds:
>
> ...
>
> (c)the arbitral award deals with a dispute not falling within the terms of the arbitration agreement or contains a decision on a matter that is beyond the scope of the arbitration agreement;

174. As outlined above, the parties to the arbitration do not have a written arbitration agreement and only proceeded on the basis of the Terms of Reference.

175. At para. 54 of the Second Partial Final Award, the Arbitrator acknowledged that:

> 54. [...] Hotel further submits no remedy may be provided for conduct related to interference with Ecoasis attempts to obtain a liquor licence for the members lounge and take out window because those events occurred after the date the jurisdiction of the arbitrator was established in Terms of Refence dated September 16, 2020.

176. The Petitioners rely on their argument under the new finding on liability in the bifurcated proceeding to also support their claim that the Second Partial final Award went beyond the scope of the Terms of Reference.

Costs

177. The Petitioners seeks their costs of this Petition proceeding.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Raoul Malak (S-213239), filed March 31, 2021;

2. Affidavit #1 of S. Evans (S-213239), filed April 1, 2021;

3. Affidavit #1 of S. Evans (S-245287) filed August 6, 2024;

4. Affidavit #2 of S. Evans (S-245287), filed August 7, 2024;

5. Affidavit #1 of Raoul Malak sworn May 12, 2025;

6. Affidavit #2 of Raoul Malak sworn May 12, 2025;

7. Affidavit #1 of David Clarke sworn May 12, 2025; and

8. Such further material as counsel will advise.

Date: May 13, 2025

Signature of Mark C. Stacey, lawyer for the Petitioners

To be completed by the court only: Order made [ ] in the terms requested in paragraphs ..... of Part 1 of this petition [ ] with the following variations and additional terms: ....

Date:	..... Signature of [ ] Judge [ ] Associate Judge

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ECOASIS RESORT AND
GOLF LLP

PETITIONER

AND:

BEAR MOUNTAIN RESORT & SPA LTD.,
BM MANAGEMENT HOLDINGS LTD. and
BM RESORT ASSETS LTD.

RESPONDENTS

AFFIDAVIT

DLA Piper (Canada) LLP
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File No.: 104687-00001 NB

This is Exhibit "**H**" referred to in the affidavit of Daniel Matthews affirmed before me at Vancouver this 2nd day of July 2025.

A Commissioner for taking Affidavits within British Columbia

From: "tom kusumoto " <->
Subject: Re: Thanks
Date: July 16, 2021 at 2:55:58 PM PDT
To: "David Clarke <david.clarke@westinbearmountain.com>"
<david.clarke@westinbearmountain.com>
Reply-To: <tomkusumoto@hotmail.com>

Hi David:

Thank you for keeping me in the loop.
Everything that you noted makes sense. 100%. Why would anyone dispute this proposal but you know someone will.

Thanks
Tom

From: David Clarke <david.clarke@westinbearmountain.com>
Sent: July 16, 2021 2:39 PM
To: Tom Kusumoto <tomkusumoto@hotmail.com>
Subject: FW: Thanks

Hi Tom

FYI I just sent this email to Tian. Just wanted to keep you in the loop.

Thanks

David Clarke
Bear Mountain Resort and Spa Ltd.
250-391-3702 - o
250-213-3356 - m

From: David Clarke
Sent: July 16, 2021 2:37 PM
To: TRK <TRK@SANOVEST.COM>
Subject: Thanks

Hi Tian,

Thanks very much for the chance to meet on Wednesday. I really do appreciate your time and the opportunity to clear some things up.

Just to recap and confirm a few things after have a good chat with Raoul yesterday.

- Resort amenities

Raoul is ready and willing at anytime to purchase the golf and tennis, rec centre and take over the business operations of Ecoasis Resort. Having all the resort amenities under one umbrella would be easier for all involved and could improve the overall offering to the guests of the resort. In addition it would allow the developments side to focus on land sales and development without the headaches of staffing and managing an operating business with a lot of employees and variables.
I have given more though to some ideas on the structure of Mountain/Valley courses and the future Highlands development land and how to ensure that future upside is accounted for in the Highlands.

- Gates Land

Please let me know if you are interested in selling lot 29 in Pebble Place. Given the dynamics, we are able to put forth a nominee purchaser that may make is easier for you to convince other individuals to sell.

- Food and Beverage Operations

As mentioned, Raoul has absolutely no issue with assisting the golf and tennis operations with F&B in the members lounge until such a time as we may come up with a larger deal or partnership. He is more than willing to institute the same deal that he discussed with Tom and Dan in late 2019 where the Hotel provides F&B and simply pays Ecoasis a commission each month on total sales. This would be contingent on the pricing being the same in all the resort outlets and of course the members would still be entitled to their 20% discount no matter where they ate.

- Events

We also would like to work cooperatively on events. There is huge value for both sides in having golf tournaments, corporate events, retreats, stay and play packages etc

It would be great for some discussions to be had between our new GM Noel DCouto and someone from Ecoasis to discuss how we can accomplish this.

I know that there are timing issues to be worked out, but there is no doubt that if we can find a way to work together it will be best for everyone. Raoul again wanted me to re-iterate that he has no issue at all with you or Tom and that he is always willing to work with you guys.

Please feel free to reach out to me anytime.

Thanks

David Clarke
Bear Mountain Resort and Spa Ltd.
250-213-3356 - m