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Massachusetts Land Court,
Department of the Trial Court, Norfolk County.

CBK BROOK House I LIMITED PARTNERSHIP, Plaintiff, Defendant-in-counterclaim,

v.

Ellen BERLIN, Jeffrey Hirsch, Donald Martin, Wells Shambaugh, Lawrence Shubow, George Garfinkle and Denise Karlin, as they are the Trustees of Brook House Condominium Trust, Defendants, Plaintiffs-in-counterclaim.

No. 243966.
|
April 23, 2004.

DECISION

LEON J. LOMBARDI, Justice.

***1** On December 4, 1997, plaintiff CBK Brook House I Limited Partnership (CBK I) filed a complaint against defendants Michael Weintraub (Weintraub), Stuart Sojcher (Sojcher), Ellen Berlin (Berlin), Jeffrey Hirsch (Hirsch), Donald Martin (Martin), Wells Shambaugh (Shambaugh), and Lawrence Shubow (Shubow), as the trustees (trustees) of the Brook House Condominium Trust (trust), pursuant to G.L. c. 185, § 1(k), and c. 231A, §§ 1, *et seq.* The complaint seeks a declaratory judgment that the trust is obligated to provide, at its own expense, an employee whose duties include the collection of revenue from a parking lot located within the Brook House Condominium (Condominium) and that such revenue collected must be remitted to CBK I.[1] Upon receipt of those revenues, CBK I contends the trust is entitled to a refund of ten percent. By an amended complaint filed on December 8, 1997, CBK I substituted George Garfinkle (Garfinkle) and Denise Karlin (Karlin) for Weintraub and Sojcher.

[1] Throughout the record, the parties have utilized a variety of terms to describe this employee, e.g., parking attendant/security guard, booth officer, cashier, or gatehouse attendant. The parties' disagreement as to the proper title, job description, function, and duties of this individual relates to one of the principal issues in this litigation. Unless the context requires a more specific description, this decision will refer to the person working in the gatehouse as the "gatehouse employee."

The trustees filed their answer on December 31, 1997, which set forth two affirmative defenses and a counterclaim containing five counts: (1) declaratory relief; (2) equitable reformation; (3) breach of agreement; (4) unjust enrichment; and (5) money had and received. CBK I replied to the counterclaim on January 26, 1998, and filed an amended reply on February 11, 1998, asserting seven affirmative defenses.[2]

[2] On April 21, 1998, the trustees filed Motion for Leave to File First Amended Counterclaim (counterclaim motion). The trustees maintained that the proposed amendment to the counterclaim only added paragraph 15E to Counterclaim Count I (paragraph 15E). After argument, the court (Kilborn, C.J.) allowed the counterclaim motion on April 30, 1998. The reply submitted by CBK I to the First Amended Counterclaim on April 2, 2002, asserted two additional affirmative defenses responsive to paragraph 15E. During the fourth day of trial, I dismissed paragraph 15E without prejudice.

On April 3, 1998, CBK I filed Motion of Plaintiff CBK Brook House I Limited Partnership for Summary Judgment. The trustees filed on July 7, 1998, a cross-motion for partial summary judgment. Following a hearing held on July 14, 1998, I issued an order on August 9, 1999 (1999 order), finding neither party was entitled to summary judgment. The 1999 order also established certain facts for purposes of any further proceedings. With minor revisions, those facts appear in the first twenty-nine paragraphs of the stipulated facts (stipulation) submitted by the parties as trial exhibit 29.[3]

[3] On September 15, 1999, the trustees filed a motion to clarify the 1999 order. At the conclusion of a hearing on October 7, 1999, I denied the motion.

A trial was held in Boston on November 18, 19, 20, and 21, 2002. A stenographer recorded and transcribed the proceedings of each day. The following witnesses testified: Weintraub, the former property manager at the Condominium; Richard D. Cohen (Cohen), one of the partners of CBK I in 1984; Carl E. Axelrod (Axelrod), an

attorney who represented CBK I in and around 1984; Martin; and Patricia Brawley (Brawley), the general manager of the Condominium. The parties introduced into evidence forty exhibits, some with multiple parts. In addition, I now admit into evidence exhibits 41 and 42, which had been taken de bene.[4] I hereby incorporate into this decision all exhibits for the purpose of appeal.

4 Exhibit 37, taken in part de bene, is also made part of the record in its entirety.

On March 21, 2003, the parties filed their post-trial submissions. CBK I filed a request for findings of fact (CBK I findings), a request for rulings of law, and a post-trial memorandum (CBK I memorandum). The trustees' submitted a comprehensive, combined request for findings of fact and rulings of law. At the parties' request, I heard the parties' closing arguments on April 18, 2003.[5]

5 A stenographer transcribed the parties' closing arguments. A copy of the transcript of the April 18, 2003 hearing is also made part of the record.

***2** I find the following facts:

1. CBK I is a Massachusetts limited partnership and maintains a principal place of business in Boston. Since 1992, RDC Development Corporation has been the general partner of CBK I (exhibit 29, ¶ 1).

2. At the time of the trial, the trustees were Berlin, Martin, Oswald Stewart, Garfinkle, Carol Holt, Dheeresh Patel, and Karlin. Each of the trustees is an owner of one or more units in the Condominium (exhibit 29, ¶ 2).[6]

6 The record reveals no motion was ever presented to substitute Oswald Stewart, Carol Holt, and Dheeresh Patel for Hirsch, Shambaugh, and Shubow. The parties, however, have stipulated as to the identities of the trustees as of the time of trial. Accordingly, this decision treats those trustees as the real parties in interest. *See* Mass. R. Civ. P. 17(a).

3. The Condominium is a mixed-use commercial and residential facility consisting of five buildings situated at 44 and 55 Washington Street, and 33, 77, and 99 Pond Street in Brookline (locus). The Condominium contains 763 residential units and twenty-three commercial units. There are 869 parking spaces within the Condominium (exhibit 29, ¶ 3).

4. Vehicles gain access to the Condominium through two separate entrances. The main entrance on Washington Street (Route 9) is available to all vehicles, while access to a second entrance on Pond Street is restricted. Unit owners enter through a gate at either location that is operated by a card key issued to unit owners. Visitors access the Condominium from Route 9 by obtaining a ticket ejected from a "ticket spitter" that opens the gate automatically. Egress for visitors' vehicles is by means of a gate controlled by an employee situated in a gatehouse (gatehouse employee), who lifts the gate after payment of a parking fee.

5. Pedestrians may access the Condominium freely utilizing various pathways located throughout locus.

6. The Condominium was originally constructed in the mid-1960's as an apartment and commercial development (Brook House) pursuant to a decision of the Brookline Board of Appeals (appeals board) filed with the Brookline town clerk (town clerk) on October 15, 1965, as Decision # 1375 (1965 decision). In the 1965 decision, the appeals board granted certain variances from, and special permits under, the Brookline Zoning By-Law (zoning by-law). One aspect of the 1965 decision permitted the construction of parking spaces that were not in accordance with the requirements of zoning by-law section 6.13(b), which regulates the minimum dimension of stalls and aisles. A second aspect, the special permit pursuant to zoning by-law section 6.13, permitted tandem parking for 238 cars (tandem spaces), otherwise prohibited by section 6.13(c).[7] In granting this special permit, the appeals board included a condition that "a full-time attendant [(original attendant)] shall be on duty 24 hours every day of the week." The original attendant was required pursuant to zoning by-law section 6.13(c) which provides:

7 At trial, Weintraub described tandem parking as when one vehicle parks behind another and the vehicle in the rear space blocks ingress and egress to the front space.

> "Parking facilities shall be designed so that each motor vehicle may proceed to and from the parking space provided for it without requiring the moving of any other motor vehicle. The [appeals board], however, may by special permit modify this requirement, and the dimensional requirements of paragraph (b) of this Section where a parking facility is under full-time attendant supervision."

***3** The 1965 decision also conditioned the special permit granted under zoning by-law section 4.30 by

requiring "all commercial and office tenants ... to park underground, thus allowing clients to park on grade under the platform." (exhibits 23; 24; 29, ¶¶ 4, 39).

7. The tandem spaces are located on the lower levels of the parking garage. None of the tandem spaces are thus situated in what is hereinafter described as the transient garage. 8. In May 1980, Weintraub began working at Brook House as the director of security and continued to serve in that capacity until 1984.

9. Pursuant to G.L. c. 183A (condominium statute or c. 183A), Brook House Associates (declarant), a Massachusetts limited partnership, converted Brook House into the Condominium by recording a master deed dated May 28, 1981 (master deed), in the Norfolk County Registry of Deeds in book 5875, at page 543 (exhibits 1; 29, ¶ 5).[8]

8 All recording references are to this particular Registry of Deeds.

10. A declaration of trust dated May 28, 1981 (trust declaration), and recorded in book 5875, at page 605, named Jeffrey A. Kosow, Lawrence M. Gelb, and Wendy A. Roy as the original trustees (exhibits 5; 29, ¶ 6).

11. Under master deed Section 5.(c), the Condominium common areas and facilities (common area) included all surface and underground parking areas. Floor plans consisting of fifty sheets were recorded with the master deed (plans). Sheet 3 of the plans depicted sixty-seven parking spaces, on grade, within the first floor level of the parking garage (transient spaces or transient garage). Sheets 1, 2, and 4 showed the location of other parking spaces (exhibits 1; 29, ¶ 7).

12. Section 5.1 of the master deed stated, in its entirety, as follows: "The [d]eclarant reserves to themselves, their successors and assigns the right to grant to unit purchasers exclusive and fully transferrable rights to exclusive use of the parking areas within the [c]ondominium for purposes for which parking areas are normally used." (exhibits 1; 29, ¶ 8).

13. The relevant portion of master deed Section 8.(iii) provided that

"[n]o instrument of amendment which alters the percentage of the undivided interest to which any Unit is entitled in the common areas and facilities shall be of any force or effect unless the same has been signed by all Unit Owners ... and said instrument is recorded as an Amended Master Deed."

(exhibits 1; 29, ¶ 9).

14. According to Section 12 of the master deed, "[t]he provision[s] of this [m]aster [d]eed shall be waived only in writing by the party charged therewith, and not by conduct, no matter how often repeated." (exhibits 1; 29, ¶ 10).

15. Section 5.3.2 of the trust declaration, entitled "*Maintenance of Parking Area,*" provided:

"The [t]rustees shall maintain and repair the parking areas and driveways within the [c]ondominium, accounting all ordinary maintenance costs thereof separately from [c]ondominium expenses, and shall bill such ordinary maintenance costs, in the same manner as common expenses but separately therefrom, in equal shares to the Unit Owners owning the easement to park in said areas and to all Unit Owners in common as to parking spaces within the control of the [trust] one share per parking space. All capital costs shall be borne solely by the [c]ondominium as common expenses."

***4** (exhibits 5; 29, ¶ 11).

16. Prior to the condominium conversion, the gatehouse employee for Brook House collected parking fees from persons parking in the transient garage (exhibit 29, ¶ 30).[9]

9 I infer that until the condominium conversion, the prior owner of Brook House paid for the costs of collecting such parking fees and retained all the income.

17. Since at least as early as 1980, the gatehouse employee has not performed the functions of the original attendant.

18. Following the creation of the Condominium, the trust collected the parking fees and continued without change the prior practice of using the gatehouse employee to do so. Subject to a termination letter discussed below, such practice has continued to the time of trial (exhibit 29, ¶¶ 31, 40).

19. CBK I became the successor in interest to the declarant by deed dated January 16, 1984, and recorded in book 6324, at page 7. As of that date, the general partners of CBK I were Cohen and Harold Brown (exhibit 29, ¶ 12). CBK I acquired the Condominium with the intention of marketing the condominium units.

20. CBK Brook House II Limited Partnership, not a party to this action, is an affiliate of CBK I (affiliate) (exhibit 29, ¶ 13).

21. CBK I is the "owner of the easements" with respect to the transient garage within the meaning of Section 5.3.2 of the trust declaration (exhibit 29, ¶ 40).

22. The parking procedures implemented by CBK I when it acquired its interest in the Condominium were the same procedures that were in place from the mid-1960's.

23. At the time CBK I acquired its interest in the Condominium, a group of Brook House tenants had formed an organization known as the Brook House Association (tenants association).

24. In early March 1984, Hale & Dorr, attorneys for the tenants association, began negotiations with attorneys for CBK I and the affiliate relating to the then proposed amendments to the master deed and trust declaration as well as the purchase of condominium units (exhibits 30A; 30B).

25. The negotiations also included other tenants represented by private counsel who were informed of the negotiations with Hale & Dorr.[10]

10 Some tenants were not represented by counsel. I infer from the record that in 1984 unrepresented tenants had minimal involvement with these negotiations.

26. On March 5, 1984, a representative of CBK I met with Hale & Dorr and the chairperson of the tenants association and reached agreement on several issues, including (a) CBK I would fund certain tenants association's costs for engineering, legal, accounting, and appraisal services; (b) CBK I would set aside office space for use by the tenants association; (c) anyone signing a purchase and sale agreement could terminate it if dissatisfied with the engineering report or the condominium documents; and (d) all resident buyers would receive the benefit of subsequently made concessions by CBK I to the tenants association.

27. Parking revenues that would be allocated to the trust and the costs of operation of the transient garage were discussed and negotiated at meetings with CBK I and the tenants association as well as between counsel for both CBK I and the tenants association.

28. The financial information relating to the transient garage was available to anyone who wanted to see it, including the tenants association's accountants, to permit tenants to make informed decisions as to whether they wanted to buy the units. The accountants were given free access to all of the books and the records in order to properly advise the tenants association.

***5** 29. The negotiations addressed the trustees paying the operating expenses for the transient garage and CBK I receiving ninety percent of the revenue from users of the transient spaces. The participants also discussed that a major portion of the operational cost was the "parking attendant/ security guard." Although counsel for the tenants association argued for an increase of the ten percent to be paid to the trust, CBK I refused to alter the ninety-ten split of revenues.

30. The agreements reached with Hale & Dorr, as well as CBK I's solicitation of comments, questions, and objections to the proposed condominium documents, were memorialized in a letter from Axelrod to Hale & Dorr dated March 8, 1984 (exhibit 30B).

31. Cohen, on behalf of CBK I, also sent a letter to all tenants on March 15, 1984, enclosing a copy of the March 8, 1984 letter to Hale & Dorr and highlighting a number of concessions made by CBK I (tenant letter). In particular, the tenant letter stated that "[i]f you or your attorneys are not satisfied with the condominium documents, you may terminate your P & S Agreement and get your full deposit back if you notify us before *April 6th.*" (emphasis in original). The tenant letter also stated a policy adopted by CBK I concerning the ability of tenants to benefit from ongoing or future negotiations with the tenants association. The policy was as follows:

> "If prior to or after the execution of the Purchase and Sale Agreement by a Resident Buyer, CBK [I] agrees with the Brook House Association to provide generally to existing tenants in the Brook House further or additional rights, then CBK [I] agrees to provide such further or additional rights to all resident buyers whether they are a paying member of the Brook House Association or not."

The tenant letter reiterated the intention of CBK I to "continue to meet with *both* the [a]ssociation and individual residents in addressing their concerns." (emphasis in original) (exhibit 30A).

32. On March 20, 1984, CBK I, the affiliate, and the tenants association entered into a written agreement whereby CBK I increased the amount it had previously agreed to pay for the engineering, accounting, legal and appraisal expenses that the tenants association would incur through its due diligence (exhibits 31; 34).

33. After negotiating all outstanding issues, the compromises reached by the participants were all incorporated into the First Amendment to Master Deed (first master deed amendment) and the First Amendment to Declaration of Trust (first trust amendment).

34. On May 17, 1984, CBK I and the affiliate, as the owners of all units in the Condominium, together with the then-trustees, executed the first master deed amendment and recorded the instrument in book 6408, at page 487 (exhibits 2; 29, ¶ 14).[11]

11 The fourth paragraph of that amendment recited that CBK I and the affiliate "are together the owner of all of the Units in the Condominium and 100% of the undivided interest in the common areas and facilities ..., and together are the holders of all the beneficial interest in the [t]rust."

35. Paragraph B. of the first master deed amendment struck the second paragraph of master deed Section 3 and inserted in place thereof a new paragraph. It read, in pertinent part, "[t]he Condominium common areas and facilities include ... parking areas.... However, the use of the parking areas are subject to the provisions of Section 5.1 of this [m]aster [d]eed and Sections 5 .3.2 and 5.4.6 of the ... [t]rust ...." (exhibits 2; 29, ¶ 15).[12]

12 Section 5.4.6 of the trust declaration is not at issue before me.

***6** 36. Paragraph D. of the first master deed amendment deleted master deed Section 5.1 and added a new paragraph, which stated, in relevant part:

> "[CBK I] reserves for itself, its successors and assigns the right and power to grant to individual Unit owners the right and easement to the exclusive use of the parking spaces located on the common area of the Condominium and shown on the [p]lans, for parking purposes during the existence of the [c]ondominium, but all such rights to use parking spaces shall end upon the permanent withdrawal of the Condominum premises from [c]ondominium status. [ ] Notwithstanding the foregoing, [CBK I] and the [a]ffiliate, and their successors and assigns, shall have the right to use any parking spaces retained by either of them for so long as the same are retained by either of them, for parking purposes, which right to use shall include, without limitation, the right to rent or lease upon a short or long term basis said parking spaces (including, without limiting the generality of the foregoing, the right to rent on an hourly or daily basis the parking spaces located on Sheet 3 of the Plans entitled 'Parking Garage-First Floor Level') to Unit Owners and non-Unit Owners, insofar as permitted under the zoning by-law...."

(exhibits 2; 29, ¶ 16).

37. Paragraph I. of the first master deed amendment inserted Section 4.2. In subsection (d), CBK I reserved for "itself, its successors and assigns, the right and power, without the consent of any Unit Owner, to amend" the master deed for the purpose of "[a]dd[ing] new parking spaces, to be subject to the provisions of Section 5.1...." The second sentence of the penultimate paragraph of Section 4.2 read:

> "For the purposes of this Section 4.2, each Unit Owner, by acceptance of a Deed to a Unit in the Condominium, constitutes and appoints [CBK I], its successors and assigns, attorneys-in-fact for each such Unit Owner, which power of attorney is coupled with an interest, shall be irrevocable and shall run with the land and be binding upon such Unit Owner's heirs, executors, successors and assigns."

(exhibits 2; 29, ¶ 17).

38. A new Section 8.1 was inserted into the master deed by paragraph O. of the first master deed amendment. In relevant part, it stated "no instrument of amendment which alters or impairs any of the rights, powers or prerogatives reserved to or retained by [CBK I] or the [a]ffiliate ... shall be of any force or effect until the same has been signed by [CBK I] and/or the [a]ffiliate, as the case may be." (exhibits 2; 29, ¶ 18).

39. On May 17, 1984, the then-trustees, CBK I, and the affiliate also executed the first trust amendment, which was recorded in book 6408, at page 560 (exhibits 6; 29, ¶ 19).[13]

13 The second paragraph of that amendment stated that CBK I and the affiliate "are the owners of 100% of the beneficial interest" in the trust.

40. Paragraph D. of the first trust amendment deleted the entirety of Section 5.3.2 of the trust declaration and replaced it with a new section containing two paragraphs. The first two sentences of first paragraph read:

***7** "The [t]rustees shall maintain, operate and repair the parking areas and driveways within the Condominium, accounting for all maintenance, repair and operating costs thereof separately from Condominium common expenses, and shall bill such costs (the 'Parking Surcharge')

concurrently with common expenses but separately therefrom, pro rata (with equal shares, one share for each parking space) to each Unit Owner (including [CBK I] and the [a]ffiliate) owning an easement to park in said areas pursuant to Section 5.1 of the [m]aster [d]eed, one share per each parking space owned. All such costs allocable pro rata to parking spaces owned by the [trust], if any, and all capital costs, shall be borne by the [trust] as common expenses."

The first three sentences of the second paragraph provided:

"The parking spaces shown on Sheet 3 of the [p]lans recorded with the [m]aster [d]eed, as amended, together with any additional spaces which may be lawfully created or added in the parking area shown on said Sheet 3 of the [p]lans or any amendment thereof pursuant to Section 4.2 of the [m]aster [d]eed, are hereinafter referred to as the 'Commercial Parking Area.'[14] For the purposes of this Section 5.3.2, 'operating costs' shall include, without limitation, the expense of a parking attendant/security guard provided, however, that ten (10%) percent of the gross revenues collected for the preceeding [*sic*] calendar month (excluding revenues collected from handicapped tenants who have assigned spaces in the Commercial Parking Area), by the owners of easements to use the spaces in the Commercial Parking Area shall be paid over to the [trust] within fourteen (14) days following the end of each such calendar month, which obligation shall be in addition to and not in reduction of the obligation of such owners to pay their pro rata share of the Parking Surcharge. 'Gross revenues,' as used in the preceding sentence, shall not include any allocation of rental payments from commercial and professional offices leases which are in effect on the date of this amendment provided such leases allow parking in the Commercial Parking Area at no additional charge."

14 At the time of the first trust amendment, the Commercial Parking Area consisted solely of the transient spaces.

(exhibits 6; 29, ¶ 20).

41. The first trust amendment added, inter alia, the words "operate" and "operating costs" to the first sentence of the first paragraph of Section 5.3.2 of the trust declaration. In the second sentence of the newly added second paragraph of Section 5.3.2 of the trust declaration, CBK I specified that " 'operating costs' shall include, without limitation, the expense of a parking attendant/security guard...."

42. At the time of the first trust amendment, the function of the "parking attendant/security guard" differed from the original attendant.[15] By insertion of the term "operate" in Section 5.3.2 of the trust declaration, CBK I intended to clarify the responsibilities of the trustees and to memorialize the procedures that were in place at the Condominium with regard to the collection of revenue from the transient garage since the time of the creation of Brook House.[16]

15 In his testimony, Cohen acknowledged that the gatehouse employee was someone different from the "roving guard" and was not a parking attendant. Cohen testified that CBK I agreed to remit ten percent of the parking receipts for a guard who sits in a booth. In Cohen's view, it is not uncommon to have gated communities, and such an amenity adds value to a project. Transcript, Vol. II, page 65, lines 3-10, 15.

16 I infer from the record that, after it became the successor to the declarant and until the sale of individual units, CBK I bore all the costs to collect the parking fees.

***8** 43. The first master deed amendment and the first trust amendment (collectively, 1984 amendments) were recorded prior to any sales of units.

44. At the time of the execution of the 1984 amendments, CBK I agreed in a side letter that future leases for commercial or professional office use would allocate parking costs separate from the rental costs, so that the trustees could receive ten percent of that revenue flow, which the trustees would not otherwise receive (exhibit 32).

45. Prior to the sale of units to third parties and as owners of all units, CBK I and the affiliate were responsible for paying the entirety of the costs incurred by the trust in the administration and management of the Condominium.

46. Subsequent to the recording of the 1984 amendments, CBK I's managing agent, Cohen Properties, Inc. (Cohen Properties), established the procedures concerning how costs and expenses associated with the collection of parking revenue were to be handled.

47. Under the procedures established by Cohen Properties, the trust provided a gatehouse employee and collected revenue from the users of the transient spaces. CBK I received such revenue from the trust and remitted ten percent back to the trust. This system of collection and remittance was in effect from 1984 until November 1997 (exhibit 29, ¶ 24).

48. The first unit conveyance occurred on or after May 17, 1984. Each prospective buyer received a copy of the condominium documents, including the 1984 amendments, prior to purchasing a unit .[17] Thus, the unit purchasers had at least constructive notice of the parking scheme as set out in the 1984 amendments. In the case of Brook House tenants purchasing units, those individuals had actual notice of the negotiations resulting in the 1984 amendments.

17 As used in this decision, "condominium documents" means, collectively, the master deed, trust declaration, and all amendments thereto.

49. Weintraub purchased a unit from CBK I during 1984.

50. In or about 1984, Weintraub became the property manager at the Condominium and headed the management office from 1984 through 2000.

51. When he first became the property manager, Weintraub received assistance with the preparation of the budget from Cohen Properties.

52. The master deed was amended again on May 24, 1985 (second master deed amendment), by instrument recorded in book 6686, at page 644 (exhibits 3; 29, ¶ 21).

53. By a decision filed with the town clerk on March 4, 1986 (1986 decision), the appeals board granted a special permit under zoning by-law section 6.11(a)(3) allowing CBK I, inter alia, to create thirty-one additional parking spaces (additional spaces) within the Condominium in connection with proposed conversion of uses at the Condominium. The appeals board found that at that time there was an underground parking garage (garage) containing 773 spaces, and sixty-five spaces within an above-ground covered parking area (above-ground spaces) designated for short-term visitor parking .[18] Fourteen spaces in the garage were then devoted for commercial use (fourteen spaces). For CBK I to satisfy the parking requirements relative to the proposed conversion of uses, the appeals board (a) permitted CBK I to continue to use the above-ground spaces for residential and commercial visitors and (b) authorized the fourteen spaces and the additional spaces to be used on a dual-use basis (dual-use spaces) for commercial tenants and their employees. The dual-use spaces were "to be devoted to commercial use during normal business hours and [could] be devoted to residential use during evenings, weekends and holidays." In order to allow additional parking along the service drive and to permit commercial tenants to park in reserved outdoor spaces in addition to those in the garage, the appeals board modified three of its prior decisions. Moreover, the appeals board required CBK I to establish a system for validated parking and prohibited all doctors occupying office space at the Condominium from parking in the above-ground spaces (exhibits 26; 29, ¶ 22).

18 These sixty-five spaces referenced by the appeals board appear to be the transient spaces, except that the appeals board referred to two fewer spaces. There is no explanation why the appeals board used the lesser number in the 1986 decision, other than scrivener error.

***9** 54. CBK I, the affiliate, and the then-trustees[19] further amended the master deed on March 24, 1986 (third master deed amendment) by an instrument recorded in book 7009, at page 405.[20] Paragraph 1. of the third master deed amendment struck Sheets 3 and 4 of the plans recorded with the master deed and "in lieu thereof, insert[ed] the new sheets bearing the corresponding Sheet 3, Sheet 3A and Sheet 4, thereby adding [the] additional parking spaces ... subject to the provisions of the [m]aster [d]eed as amended, including without limitation, Section 5.1 ...." (exhibits 4; 29, ¶ 23).

19 Those trustees were Lawrence Silverstein, William Apostolica, Martin, and Andrew J. Cetlin.

20 The third master deed amendment recited that either CBK I or the affiliate was the then-owner of record of eight units.

55. CBK I has received all revenue derived from the additional spaces since they were added to the Condominium. The trust has never collected revenue from the additional spaces, and CBK I has not paid the trust ten percent of the revenue derived from the additional spaces (exhibit 29, ¶ 29).[21]

21 Although this finding comes from the parties' stipulation, CBK I contends in the CBK I memorandum that it granted ten of these additional spaces to unrelated third parties in 1988 and consequently has no obligation to the trustees regarding those ten easements.

56. In 1986, CBK I relinquished control of the trust (exhibit 29, ¶ 25). Thereafter, the trustees and Weintraub continued, without change, the procedures first implemented by CBK I relating to the operation and allocation of the costs of the transient garage.

57. Contrary to the terms of the amended Section 5.3.2 of the trust declaration, the full cost of the gatehouse employee has not been allocated to the Parking Surcharge. From at least 1988 until the commencement of litigation, the trust has allocated to the Parking Surcharge twenty-five percent of the cost of all employees in the security department, including the expenses for salaries, benefits, uniforms, and training.[22] Those employees included a security director, assistant security director, supervisors/control officers and security officers who worked in and outside of the gatehouse. The remaining seventy-five percent of this cost has been charged to all unit owners as part of common expenses. Comparing the square footage of the garage against the total square footage of the Condominium, the trust arrived at these percentages.[23] The trust did not factor into its calculations the time spent by security department employees performing particular functions.

22 Weintraub testified that in 1997 the percentage allocated to the Parking Surcharge was reduced to ten percent "after subtracting out the cost of the cashier."

23 According to Weintraub, the square footage of all levels of the garage is in excess of 300,000 square feet and the "square footage of the building ... is approximately a million square feet." Transcript, Vol. I, page 62, lines 11-13; page 96, line 6. Although the resulting percentage would be thirty percent based on those square footages, Weintraub testified that "we took somewhat less than a third or 25 percent to assign to the [P]arking [S]urcharge." Transcript, Vol. I, page 62, lines 14-15. In the CBK I memorandum, CBK I contends that the transient garage accounts for less than eight percent of the total capacity of the garage, i.e., sixty-seven transient spaces out of 869 total spaces. The transient spaces plus the additional spaces (67 + 31), however, equals approximately eleven percent of the total garage capacity.

58. A full-time staff employed by the trust provides security to the Condominium, its unit owners, tenants, and visitors. At least one security officer is assigned as a "rover" at all times to maintain a security presence throughout the Condominium, including the transient spaces and other parking areas. The number of security officers on duty is dependent upon a number of factors, including the time of day.

59. Gatehouse employees are hired by the trustees as security officers and are trained as security officers. In addition, gatehouse employees are trained as cashiers to collect tickets and parking fees from visitors as they exit the transient garage. The individual working in the gatehouse one day may be performing other security functions the next day. While stationed in the gatehouse, gatehouse employees also serve a security function relating to activities around the main entry to the Condominium. Gatehouse employees are on duty twenty-four hours per day, seven days a week.

***10** 60. Nothing in the 1965 decision or in the condominium documents requires the Condominium to be a gated community. The first master deed amendment, however, amended Section 5.1 and gave CBK I and the affiliate the right to rent or lease the retained parking spaces, including the transient spaces.

61. Martin, in his capacity as chairman of the trust, sent a letter to Cohen Properties dated January 18, 1988 (Martin letter), relating to the costs of collection. In the Martin letter, Martin observed that the "Parking Fee Administration" was estimated at $17,000, with the trust receiving offsetting revenue of $10,000. In order to accomplish this administrative function, Martin stated that Condominium security and other personnel spent time on "a) collection of parking fees[,] b) security of the parking garage and enforcement of illegal parking[, and] c) deposit of monies, documentation of receipts and transmittal to Cohen Properties." The Martin letter attributed the estimated $17,000 to hours

> "that could be directly associated with this activity, not including the time of the security guard who collects parking fees on a 24 hour per day basis. Of course[,] we need the Guard for our security, so we have no out-of-pocket cost to Brook House for this activity. We also do not see it as a problem to use Brook House personnel for this purpose."

(exhibits 7; 29, ¶ 32).

62. No changes in the procedure for collecting and remitting funds pertaining to the transient garage occurred as a result of the Martin letter.

63. Following the Martin letter, Cohen Properties continued to manage the Condominium until later in 1988, when the trustees selected the Finch Group as a replacement. At that time, Weintraub ceased to be an employee of Cohen Properties and became an employee of the trust.

64. During the early 1990's, the trust established a Transient Garage Subcommittee (garage subcommittee) to consider the practice of collecting revenues from patrons of the transient

garage. Among other things, the garage subcommittee sought advice from its counsel (exhibit 29, ¶ 33).

65. On March 20, 1991, members of the garage subcommittee, including Weintraub and Martin, met with representatives of CBK I, including Cohen, to discuss the trustees' concerns regarding the operation of the transient garage (March 1991 meeting). Both sides were represented at the meeting by counsel (exhibit 29, ¶ 34).

66. As of March 19, 1991, the trust estimated the expenses for transient garage collections to be $42,545, plus an additional $95,550 for the gatehouse employee (exhibit 9).

67. Following the March 1991 meeting, the trust sent a letter dated April 24, 1991, to Capital Partners, an agent for CBK I, which stated that the trust wished to resolve the issue of the administrative costs associated with the collection of revenue from users of the transient garage. Accordingly, the trust stated that, after May 14, 1991, CBK I would be billed for "all actual printing and equipment costs.... Labor costs (not including the booth officer) will be billed at the rates indicated." (April 1991 letter) (exhibits 11; 29, ¶ 35).

***11** 68. On May 29, 1991, CBK I responded to the April 1991 letter and advised the trust, among other things, that there was no legal basis for the positions asserted in the April 1991 letter (exhibit 29, ¶ 36). In particular, CBK I wrote that it relied upon Section 5.3.2 of the first trust amendment and a course of conduct for over seven years as support for "our position that [CBK I] is not responsible for the administrative costs associated with the operation of the transient garage." (exhibit 12).

69. Despite this exchange of communications in 1991, the then existing practice regarding transient garage collections did not change (exhibit 29, ¶ 37).

70. Counsel for the trustees informed CBK I by letter dated October 10, 1997 (termination letter), that the trust "has no obligation to incur and pay for any of the costs related to your enjoyment of the exclusive use granted to you with respect to the [transient] [g]arage. In particular, there is no legal requirement that the [trust] collect parking receipts for your benefit." The termination letter advised CBK I that it had two choices. First, CBK I could collect parking receipts with its own personnel and remit ten percent of gross monthly receipts to the trust. Second, the trust would continue to collect the revenue but would deduct therefrom its costs and ten percent of the gross monthly sum and remit the remainder, if any, to CBK I. In the event of a deficiency under the second alternative, CBK I would be obligated to reimburse the trust. Finally, the termination letter demanded from CBK I an accounting and ten percent of the gross receipts collected from the additional spaces since their addition to the Condominium (exhibits 17; 29, ¶ 26).

71. CBK I objected to the termination letter in a written response dated October 23, 1997, claiming "it is clear under the operative documents concerning [t]he ... Condominium as well as from the course of dealings between the parties ... [the trust] is obligated to provide a parking attendant/security guard for the garage in order, among other things, to collect revenue from the commercial parking area." (exhibits 18; 29, ¶ 27).

72. Since November 1, 1997, the trust has continued to collect revenue from users of the transient spaces and has deposited the proceeds therefrom in a segregated account. The costs of operating the transient garage have been included in the operating costs and billed to all unit owners as a common area expense (exhibit 29, ¶ 28).

73. Since November 1, 1997, and subject to the termination letter, the trust has collected the parking receipts and deposited them in an interest bearing escrow account(s). With respect to these collections, the trust has deducted only ten percent of the revenues collected (exhibit 29, ¶ 38).

74. CBK I has retained ownership of most of the commercial units at the Condominium. Accordingly, CBK I considers the retention of exclusive rights over the use of the transient spaces to be a critical business matter so as to ensure its tenants and guests will be able to park in the transient garage and would have easy access to the Condominium.[24] Without the ability to control the use of the transient spaces, CBK I fears that the trustees could set their own rules and parking rates and could make CBK I uncompetitive in the marketplace and negatively impact the commercial units.

24 The CBK I memorandum states that the retention of the "exclusive rights" over the parking areas was critical as a business matter for CBK I (page 17) but later states that CBK I and the affiliate do not have the "exclusive right to control who uses the transient parking spaces" because the 1965 decision and the 1986 decision limit the use of the transient garage (page 21).

***12** 75. Prior to the commencement of the case at bar, the trustees did not segregate the costs associated with the collection of revenue from the transient garage in its financial statements, budgets or reports, nor did they set forth or keep records of the amount of time that was spent on garage activities by any trust employee.

76. Prior to this litigation, the trustees have never required their employees to fill out any record that sets forth the number of hours a week any employee spent on garage activities. Weintraub based the information contained in the monthly recapitulations (recaps) predominately on interviews with people who "[were] performing those tasks ... at the time [he] made [the] estimates" in the recaps.

77. The recaps indicate that: (1) regardless of the amount of annual revenues that were collected, which ranged from $81,850.19 to $139,703.00, the trust expended the exact same amount of time, each and every year, to count and audit the revenues; (2) between July 1984 and December 1988, the trust spent 1,525.96 hours for training gatehouse employees (primarily newly hired employees) in the collection of revenues, and, since 1999, gatehouse employees received three hours of training each and every month; and (3) between January 1995 and December 1999, the trust expended exactly fifty-two hours each year addressing complaints and communications relating to the collections of revenues (exhibits 37; 41).

78. For the year 2000, both Weintraub and Brawley created monthly recaps. Brawley, who was not employed by the trustees in the year 2000, increased the employees' salaries (excluding the security officers), increased the employees' taxes and benefits, tripled the hours for complaints and communications, and increased the expenditures for equipment repairs and in-house maintenance (exhibits 37; 41).

"General Laws c. 183A is essentially an enabling statute, setting out a framework for the development of condominiums in the Commonwealth, while providing developers and unit owners with planning flexibility." *Queler v. Skowron,* 438 Mass. 304, 312, 780 N.E.2d 71 (2002). *See Tosney v. Chelmsford Village Condominium Ass'n,* 397 Mass. 683, 686, 493 N.E.2d 488 (1986); *Barclay v. DeVeau,* 384 Mass. 676, 682, 429 N.E.2d 323 (1981). "While G.L. c. 183A mandates that certain minimum requirements for establishing condominiums be met, those matters that are not specifically addressed in the statute are to be worked out by the involved parties." *Queler,* 438 Mass. at 312-313, 780 N.E.2d 71. The resolution of such matters is "essentially contractual in nature." *Belson v. Thayer & Assocs.,* 32 Mass.App.Ct. 256, 259, 588 N.E.2d 695 (1992). *See Tosney,* 397 Mass. at 687-688, 493 N.E.2d 488.

"[U]nder common law, a property owner has the right to impose limitations or conditions on an estate that is conveyed to another, such that the conveyance is not one of fee simple absolute." *Queler,* 438 Mass. at 310, 780 N.E.2d 71.

> "We think it is clear that, by enacting G.L. c. 183A and providing that land can be placed into the condominium form of ownership, the Legislature did not intend to preclude the existence of nonownership interests in the condominium land.
>
> ***13** The law of real property has long recognized the coexistence of possessory interests in land with limited nonownership interests in the same land. Nothing in c. 183A expressly precludes such nonownership interests."

Commercial Wharf E. Condominium Ass'n. v. Waterfront Parking Corp., 407 Mass. 123, 128-129, 552 N.E.2d 66 (1990).

"General Laws c. 183A, § 5 (*c*), is free from ambiguity.... It provides, in pertinent part: 'The common areas and facilities shall remain undivided and no unit owner or any other person shall bring any action for partition or division of any part thereof.... Any covenant or provision to the contrary shall be null and void.' G.L. c. 183A, § 5 (*c*)." *Queler,* 438 Mass. at 313, 780 N.E.2d 71.

Although c. 183A, § 10(b)(1), vests the trust with the right and power "[t]o lease, manage, and otherwise deal with such community and commercial facilities as may be provided for in the master deed as being common areas and facilities," the *Commercial Wharf* Court stated "nothing prevents the simultaneous existence of a nonownership interest in the same land. As a practical matter, the existence of such an interest may interfere with the uses which the fee owner might otherwise make of his land." *Commercial Wharf,* 407 Mass. at 129, 552 N.E.2d 66. Nevertheless, the Court saw "nothing improper in the master deed's being subject to a prior, recorded interest in the condominium land. The [trust] still has the powers guaranteed to it by § 10(b)(1), but it simply cannot utilize these powers in such a way as to interfere with the interests retained by the developer." *Id.* "Nothing in § 5 (*c*) purports to prevent the existence of nonownership interests in the common areas. The fee interest remains undivided and

in common ownership. That the master deed makes the fee interest subject to a prior interest is not violative of § 5 (*c*)." *Id.* at 130, 552 N.E.2d 66.

In the 1999 order, I ruled that "[t]he right to use retained parking spaces by [CBK I] and the affiliate under Section 5.1 of the amended master deed does not ... divide the fee ownership of the common area and is not otherwise prohibited by the condominium statute.... Such a right is a nonownership interest in a portion of the common area devoted to parking where easements have not been granted to unit owners." I also found that "Section 4.2 of the amended master deed gave [CBK I] the right to amend the master deed to add the additional spaces to the Commercial Parking Area, [also known as the transient garage or transient spaces] subject to Section 5.1 of the amended master deed ... [and] subject to the provisions of Section 5.3.2 of the amended trust declaration."

The 1999 order stated that I considered the provisions of the 1984 amendments "to be on the same legal footing as if they were part of the documents as originally drafted. [CBK I] and the affiliate were the owners of all units at the time the [1984] amendments were made." Although interests created prior to a master deed are indisputably valid, *Queler* now makes clear that "nothing in § 5 (*c*) ... prohibits the declarant ... from retaining [an] interest by operation of the master deed itself." *Queler,* 438 Mass. at 313, 780 N.E.2d 71.[25]

25 In *Commercial Wharf* and *Queler,* the Courts found the retained interests were not part of the common area. Here, the transient garage is part of the common area of the Condominium but subject to the retained rights of CBK I.

***14** In its post-trial submission, the trust suggests that the 1999 order "placed too much emphasis on the fact that none of the units had been sold in the intervening three-year period" between the time CBK I acquired its interest in the Condominium and the 1984 amendments. Having considered this argument of the trust, I do not find such emphasis to be in error.

The fact that no third party acquired a unit during that three-year time frame is of critical significance. Until it sold its first unit, CBK I and the affiliate owned all the condominium units. As the sole owners of the units, CBK I and the affiliate provided the unanimous consent necessary to amend the condominium documents as they desired. The rights of third party unit owners would vest only at such time as conveyances were made pursuant to the amended condominium documents. Nevertheless, the facts here establish that CBK I was willing to and did negotiate the terms of the 1984 amendments prior to execution.

Under Section 5.1 of the master deed, the declarant reserved the "right to grant" to unit owners an exclusive parking easement. As modified by the first master deed amendment, the right reserved by CBK I and the affiliate was to "use any parking spaces retained by either of them for so long as the same are retained by them, for parking purposes...." Accordingly, CBK I and the affiliate possessed an exclusive right to use those parking spaces not otherwise the subject of a prior easement grant. Such right included the right to rent or lease as permitted in that section of the master deed.

The parties have stipulated that CBK I is the "owner of the easements" with respect to the transient garage. The fact that CBK I holds those easements by way of retained rights in the 1984 amendments does not violate or conflict with the condominium statute. *Cf. Strauss v. Oyster River Condominium Trust,* 417 Mass. 442, 446, 631 N.E.2d 979 (1994); *Beaconsfield Towne House Condominium Trust v. Zussman,* 416 Mass. 505, 507-508, 623 N.E.2d 1115 (1993). The rights held by CBK I are in the nature of an affirmative easement, which allows the holder to use the servient estate as set forth in the condominium documents. *See Labounty v. Vickers,* 352 Mass. 337, 347-348, 225 N.E.2d 333 (1967). For as long as the Condominium exists, such a vested right is perpetual, unless and until lawfully extinguished.

Prior to the sale of any units, CBK I gave the Brook House tenants, as potential unit owners, the opportunity to raise their issues and concerns as to the content of the 1984 amendments. Such a fact contrasts with many, if not most, instances where condominium documents are executed and recorded long before any potential unit buyers can read them. Here, a number of Brook House tenants formed the tenants association and retained a law firm, Hale & Dorr, to represent their interests. Hale & Dorr had full access to the financial records of the Condominium and negotiated with CBK I as to the form of the 1984 amendments.[26]

26 CBK I also negotiated the 1984 amendments to some degree with other tenants who were represented by private counsel.

***15** While I find that the topic of the transient garage was discussed between CBK I and Hale & Dorr, I do not necessarily accept CBK I's characterization that the negotiations were "heavy" or "intense." Rather, I find

significant the fact that the topic of the transient garage was actually discussed and that tenants had the opportunity through their attorneys and accountants to pursue the issue in more depth if they believed further discussions were warranted. "Unless expressly prohibited by clear legislative mandate, unit owners and developers may validly contract as to the details of management." *Barclay,* 384 Mass. at 682, 429 N.E.2d 323.

The principle is well-established that "a contract is to be construed to give a reasonable effect to each of its provisions if possible." *McMahon v. Monarch Life Ins. Co.,* 345 Mass. 261, 264, 186 N.E.2d 827 (1962).

> "[E]very phrase and clause must be presumed to have been designedly employed, and must be given meaning and effect, whenever practicable, when construed with all the other phraseology contained in the instrument, which must be considered as a workable and harmonious means for carrying out and effectuating the intent of the parties."

Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 501, 19 N.E.2d 800 (1939). *Accord J.A. Sullivan Corp. v. Commonwealth,* 397 Mass. 789, 795, 494 N.E.2d 374 (1986).

Following the conclusion of negotiations between the Brook House tenants and CBK I, the 1984 amendments were recorded. Thus, each unit owner, with or without a parking easement, obtained title to his or her unit with actual or constructive notice of the terms of the 1984 amendments. In accepting title to a condominium unit, the title holder was bound by the terms of the recorded condominium documents as of the time of the purchase.

Similar to the facts of *Commercial Wharf,* the organizational design of the Condominium in the instant action was not concealed from the unit owners at the time of the conveyances. *See Commercial Wharf,* 407 Mass. at 136-137, 552 N.E.2d 66 (finding the parking arrangement falling short of overreaching and considering it to be fair and reasonable). *See also Belson v. Thayer & Assocs., Inc.,* 32 Mass.App.Ct. 256, 260, 588 N.E.2d 695 (1992) (stating that an arrangement in the by-laws for apportionment of upkeep costs was recorded with the master deed and was made known to a unit purchaser). Because all potential purchasers were on notice as to the provisions of the condominium documents (including the 1984 amendments), each individual knew or should have known about the the transient garage and how it operated prior to deciding to complete the transaction.[27]

[27] The record does not disclose whether any or all buyers had a contingency concerning satisfactory condominium document review as part of the purchase contract. Even without such a contingency, a prudent buyer or a buyer's attorney should read the condominium documents prior to signing any contract to purchase a unit.

As part of the information made known to prospective buyers, the first trust amendment provided that the trustees had the obligation to not only maintain and repair the parking areas and driveways but also to "operate" such areas. Explicitly, the second paragraph of the first trust amendment stated that "operating costs" included "the expense of a parking attendant/security guard." The first trust amendment also instructed the trustees to account for all maintenance, repair, and operating costs for those parking areas separately from the common expenses. The costs for maintenance, repair, and operating the parking areas and driveways were to be billed as a "Parking Surcharge" separately from but concurrently with common expenses on a pro rata basis to each of the party or parties owning an easement to park in those areas.

***16** The first trust amendment also established the methodology as to how the monies collected from users of the transient garage were to be handled. Accordingly, ten percent of the gross revenues collected for the preceding calendar month (excluding revenues collected from handicapped tenants using spaces in the transient garage) by the owners of easements for the use of the spaces in the transient garage were to be paid over to the trust within fourteen days following the end of each such calendar month. The obligation to pay ten percent of the gross revenues was in addition to the obligation of those owners to pay their pro rata share of the Parking Surcharge.

Much of the disagreement between the parties centers on the meaning of the word "collected" in the context of Section 5.3.2 of the trust declaration following the first trust amendment. The trustees read that section to mean that CBK I is responsible to incur the expenses to employ such person or persons to collect the money from the users of the transient garage. CBK I contends that the section states clearly that the obligation to operate the parking areas and driveways falls upon the trust, which includes the transient garage.

The parties disagree as to the meaning of "operate" and "collect" in the condominium documents. Those words are susceptible of having more than one meaning. "When the written agreement, as applied to the subject matter, is in any respect uncertain or equivocal in meaning, all the

circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not of contradicting or changing its terms." *Robert Industries, Inc. v. Spence,* 362 Mass. 751, 753-754, 291 N.E.2d 407 (1973). "[W]here the language of an instrument is doubtful, evidence of the practical construction by the parties is admissible to explain and remove the doubt." *Oldfield v. Smith,* 304 Mass. 590, 600, 24 N.E.2d 544 (1939).

Relying upon *Oldfield,* the Court considered the conduct of the parties in *Commercial Wharf.* 407 Mass. at 132, 552 N.E.2d 66. It noted that between 1978 and 1985 neither the Association nor any of the unit owners objected to the developer controlling all parking activities. *Id.* The Court found that "[t]his practical construction of the terms in the Declaration [was] in accord with [its] interpretation of that provision." *Id.*

Here, the course of conduct by the parties is similarly illuminating. From 1984 until CBK I relinquished control of the trust in 1986, there is no evidence that any unit owner objected to the retained rights of CBK I in the transient garage. It was not until 1988 that Cohen Properties received the Martin letter. On behalf of the trust, Martin wrote that the trust needed a guard for security purposes and that the trust had no out-of-pocket cost arising from the task of collecting parking fees on a twenty-four hour per day basis. No change in conduct on the part of the parties occurred following the Martin letter.

***17** Three years then passed until meeting of the garage subcommittee and representatives of CBK I on March 20, 1991. Again, no change in conduct or practices occurred following that meeting. Following another six years, the trustees changed their conduct in November 1997, eleven years after CBK I had turned over control of the trust to unit owners.

Having read the contested provisions in the context of the condominium documents as a whole, I find that the conduct of the parties is in accord with my interpretation of the 1984 amendments. I conclude that the trust has the obligation to employ such personnel as is reasonably required to operate the transient garage, including staffing the gatehouse to collect money from the users of the transient spaces. In order to provide a harmonious and rational meaning of the word "collect" as found in the second sentence of the second paragraph of the Section 5.3.2 of the first trust amendment, I adopt one of the common usages of "collect" as "to receive money." The Oxford English Dictionary 476 (2nd ed.1989). Another definition of "collect" is "to receive or compel payment of." The Random House Dictionary of the English Language 403 (2nd ed.1987). While CBK I ultimately collects or receives the funds garnered from the transient garage, it is the trust that collects in the sense of compelling payment. Under this scenario, CBK I must pay the trust ten percent of the sums "collected."

The trust insists that the parking attendant/security guard is the original attendant, not the gatehouse employee. Even accepting that argument, I do not find that CBK I is responsible to hire the gatehouse employee. The obligation of the trust to hire personnel for the operation of the garage was not limited to the original attendant under the first trust amendment. Operating costs, as defined in the first trust amendment included, "without limitation, the expense of a parking attendant/security guard." The original attendant was an employee mandated in the 1965 decision. Thus, the reference to the parking attendant/security guard included in the first trust amendment suggests it pertained to someone other than the original attendant. Rather than focusing on titles, I am placing greater weight on the functions performed by the employees at issue.

The intention of CBK I to be incorporated into the first trust amendment was that: (1) the revenues received from the transient garage belonged to CBK I, as the owner of easements to use the spaces in the transient garage; (2) all operational costs with respect to the entire garage, including the parking attendant/security guard, equipment maintenance, tickets, administration and security were costs that would be paid by the trustees; (3) the employee who was on duty at the gatehouse would physically collect the revenues for the trustees; (4) the trustees would receive ten percent of the revenue that was generated from the transient garage; (5) the trustees would receive from the easement holders of all of the parking spaces in the Condominium, including the transient garage, all the operational costs as the Parking Surcharge; and (6) the trustees would remit the revenues in their entirety to CBK I, and CBK I would remit to or pay the trustees ten percent of those revenues. I find and rule that the first trust amendment did, in fact, incorporate that intention within the language of amended language of Section 5.3.2 of the trust declaration. I find that such an arrangement is not unfair or unreasonable.

***18** Although financial information was available from the declarant that would have shown the actual costs incurred

in operating the transient garage, the evidence indicates that counsel for CBK I did not review such information when the first trust amendment was drafted proposing a reimbursement of ten percent. Based upon the testimony of Cohen that the ten percent fee was a "bonus," I infer from the evidence that the reimbursement percentage was selected somewhat arbitrarily without an analysis as to how that percentage related to the costs of collection. Nevertheless, I do not find that the percentage adopted by CBK I was so unreasonable as to constitute overreaching.

From the 1965 decision until the 1984 amendments, those persons in control of Brook House (either as an apartment complex or the Condominium) had the obligation to employ the original attendant. Thus, the cost of the original attendant was an expense separate from and in addition to any employees charged with the responsibility to collect parking fees. As a consequence of the first trust amendment, CBK I indicated its intent that the cost for the gatehouse employee should be passed on to those owning easements to park and the trust would also receive ten percent of the revenue.

The trust contends that there was a material change after the adoption of the 1984 amendments in that the costs of operations were absorbed entirely by the trustees, less ten percent. I disagree that the change that occurred has the negative impact as suggested by the trust.

Prior to the 1984 amendments, the trust had the obligation to budget whatever sums were necessary to run the Condominium and manage the common areas. The condominium documents at that time had no provision that would have permitted anything less than 100% of those costs being paid, in the first instance, by the trust, and then passed onto the unit owners through the common area charges, i.e., CBK I and the affiliate. As a consequence of the first trust amendment and receiving the ten percent payment from CBK I, the trust is not adversely affected by employing the gatehouse employee, provided those costs are included in the Parking Surcharge.

As stated in finding 72, the costs of operating the transient garage have been included in the operating costs and billed to all unit owners as a common area expense. Such a procedure conflicts with the procedures set forth in Section 5.3.2 of the first trust amendment. I find the full cost of the gatehouse employee is fairly included in the "cost of collection."

I find that the arrangement set forth in the 1984 amendments is legitimately related to a business reason of CBK I, reasonably allocates the benefits and burdens, and is manifestly sound. I accept CBK I's contention that the retention of the exclusive rights over the transient spaces was an important aspect of its continuing to own the commercial areas of the Condominium. In exchange for such right, the condominium documents provide that CBK I, as the owner of parking easements, will bear the pro rata share of the costs of maintenance, operation, and repair of the parking facilities, including the cost of collection of the revenues, and will pay a separate Parking Surcharge in addition to the monthly common area expense. As admitted by CBK I, "[i]t is the owners of the parking easements, and not the [t]rustees, that are responsible for the expenses of the parking garage."[28]

28 *See generally,* section IV. B. of the CBK I memorandum.

***19** What CBK I does not admit, however, is which party has the responsibility to pay the costs of the gatehouse employee. CBK I considers the gatehouse employee to be a security guard who is situated at that location to perform primarily a security function and to "spend the 30 seconds or so that it takes to collect the parking fee from a visitor." According to CBK I, "it would make no commercial sense whatsoever to post an additional person in that guardhouse for the sole purpose of collecting the revenues from the visitors...."

I agree with the trustees that the primary purpose of the gatehouse is to collect parking fees from the users of the transient spaces. It is true that employees are cross-trained as security officers as well as cashiers in the gatehouse. I find, however, that on the days that an individual is assigned to work in the gatehouse, that employee is primarily working as a cashier and only incidentally as a security officer. During the hours the gatehouse employee is on duty, that person does not abandon his or her post to perform security functions. The trust still employs other individuals to perform "roving" security functions throughout the entire garage as well as other areas of the Condominium. If the need arises, the gatehouse employee would call for assistance from other security personnel. Contrary to the view of CBK I, the incidental function performed by the gatehouse employee is security, not collection.

As found above, nothing within the condominium documents requires the Condominium to be a "gated community." The first master deed amendment, however, gave CBK I and the affiliate the right to rent the transient spaces, and the first trust

amendment placed the obligation to collect parking fees on the trust. If it had no such responsibility to collect parking fees, the trust could make the business decision whether to maintain the gatehouse. Security could be, and is being, provided to the unit owners, their guests, and invitees by other employees of the security department.

The trust claims the arrangement concerning the transient garage constitutes overreaching and is unconscionable. According to the trust, it is an oppressive procedure that requires the trustees to absorb all the costs associated with collecting the parking revenues but receiving only ten percent of those monies. The trust states that it cannot pass those costs on to unit owners in the form of a common area charge.

What the trust fails to acknowledge is that the language of the condominium documents provides the trustees a basis to be made whole financially. Section 5.3.2 as set forth in the first trust amendment directs the trustees to account for "all maintenance, repair and operating costs [for the parking areas and driveways], separately from Condominium common expenses, and shall bill such costs (the 'Parking Surcharge') concurrently with common expenses ... pro rata ... to each Unit Owner (including [CBK I] and the [a]ffiliate) owning an easement to park in said areas...." Thus, CBK I and any other unit owners owning an easement to park are liable for the full costs of those expenses.[29] In addition to receiving payment from the holders of the parking easement for the Parking Surcharge, the trust should also receive the ten percent remittance.[30]

29 CBK I does not dispute the fact that the trustees are entitled to receive from the easement holders of all of the parking spaces in the Condominium, including the transient garage, all the operational costs as the Parking Surcharge. *See* ¶ 31 of CBK I findings.

30 The question whether CBK I and the affiliate should be solely responsible for the expenses related to the transient garage as opposed to all unit owners owning parking easements is not an issue before me in this action.

***20** The effect of the third master deed amendment was to delete Sheet 3 of the plans depicting the transient spaces and replacing it with the new sheets. As a result, all of the additional spaces shown on the new sheets became part of the Commercial Parking Area and were subject to the provisions of Section 5.3.2 of the amended trust declaration. The obligation to pay ten percent of the gross revenue thus was not limited to the transient spaces. Rather, the percentage payment was to be made on the gross revenue from all the spaces within the Commercial Parking Area.

Because the additional spaces are now part of the Commercial Parking Area, the trust has the right to bill CBK I or the affiliate, pro rata, the Parking Surcharge for the additional spaces controlled by either entity. Additionally, the trust may bill any successors in interest to CBK I or the affiliate for the ten spaces granted to third parties in 1988. Each entity or party controlling the additional spaces must remit to the trust ten percent of the gross revenue received from the users of the additional spaces, if any, fourteen days following the end of the month it was received.[31]

31 I do not accept the trust's argument that it is entitled to ten percent of the gross funds received by CBK I on the transfer of those ten spaces to third parties in 1988.

Among its defenses against the trust's counterclaims, CBK I asserts waiver, estoppel, laches, and statute of limitations. I shall address each argument in turn.

CBK I identifies six examples to support its claim that the acts of the trustees constitute waiver. *See* CBK I memorandum, pp. 34-35. I find and rule that Section 12 of the master deed disposes of the waiver argument: "The provision[s] of this [m]aster [d]eed shall be waived only in writing by the party charged therewith, and not by conduct, no matter how often repeated."

The trustees insist that each of the several Counts of the Counterclaim concerns a right, title, or interest in real property and thus is governed by the twenty year statute of limitations period of G.L. c. 260, § 21. While recognizing that the use of a condominium's common area is an interest in land, I do not find G.L. c. 260, § 21, applies here. The purpose of that statute is to limit actions to recover land to be brought within twenty years. The nature of the trustees' claims is not for recovery of land. The disputes between the parties here concerning the administration of the Condominium and its common areas are matters that are "essentially contractual in nature." *Belson,* 32 Mass.App.Ct. at 259, 588 N.E.2d 695. *See Queler,* 438 Mass. at 312-313, 780 N.E.2d 71.

CBK I relinquished control of the trust in 1986. On or about January 18, 1988, the trust sent the Martin letter to Cohen Properties concerning the operation of the transient garage. The meeting of the garage subcommittee took place on March 20, 1991, for the purpose of discussing the trustees' concerns regarding the operation of the transient garage. Accordingly,

the trust knew or should have know of its claims against CBK I at least as early as 1986 and no later than March 20, 1991.

The trustees' claim under Counterclaim Count II for equitable reformation is thus barred by the six year statute of limitations. G.L. c. 260, § 2. Such limitations period operates in equity as well as at law. *See David v. Zilah,* 325 Mass. 252, 255, 90 N.E.2d 343 (1950). The six year statute of limitations begins to run against an equitable cause of action for the reformation of an instrument when the mistake has been or ought to have been discovered. *See Stoneham Five Cents Sav. Bank v. Johnson,* 295 Mass. 390, 395-396, 3 N.E.2d 730 (1936).

***21** Similarly, the statute of limitations bars the trustees' recovery under Counterclaim Count III for breach of agreement, under Counterclaim Count IV for unjust enrichment, and under Counterclaim Count V for money had and received for claims they have prior to the six years preceding bringing the counterclaims, i.e., December 31, 1991. G.L. c. 260, § 2. *See State Nat'l. Bank of Lynn v. Beacon Trust Co.,* 267 Mass. 355, 360, 166 N.E. 837 (1929); *Sturgis v. Preston,* 134 Mass. 372, 373 (1883).

CBK I argues its further defenses of unclean hands, estoppel, and laches. In an action seeking a declaratory judgment under G.L. c. 231A, a court must declare the rights of the parties. Accordingly, those defenses should not bar me from entering a declaration concerning the rights of the parties under the condominium documents, particularly where it was CBK I that commenced the case at bar.

No judgment shall issue at this time. On or before May 28, 2004, the parties shall submit their proposed forms of judgment. I shall enter judgment following the review of the parties' submissions. To the extent that judgment will include an award of monetary damages, I find that the instant action is a proper case in which to do so. *See Essex Co. v. Goldman,* 357 Mass. 427, 434, 258 N.E.2d 526 (1970).

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