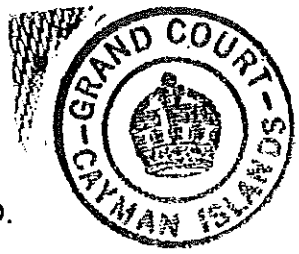
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD: 58 OF 2012 (PCJ)

The Honourable Sir Peter Cresswell
In Open Court, 9th and 10th August 2012



BETWEEN:
(1) CESAR HOTELCO (CAYMAN) LTD.
(2) CESAR PROPERTIES LTD.
(3) CONDOCO GRAND CAYMAN RESORT LTD.
(4) CONDOCO PROPERTIES LTD.
(5) ENDLESS SERVICE LTD.

PLAINTIFFS

AND
(1) MICHAEL RYAN
(2) ORION DEVELOPERS LTD.
(3) DECKHOUSES CONSTRUCTION COMPANY LTD.
(4) I.R.R. LIMITED
(5) ENDLESS SERVICE MANAGEMENT LTD.
(6) BLUETIP WATERSPORTS LTD.

DEFENDANTS

APPEARANCES: Mr. Hector Robinson of Mourant Ozannes for the Plaintiffs

Mr. Ian Huskisson of Thorp Alberga for the Defendants

RULING

This Ruling relates to applications by the Defendants for security for costs, alternatively an indemnity.

INTRODUCTION

The claim relates to the Ritz-Carlton Grand Cayman Resort ("the Resort"). The Plaintiffs were property owners and the Defendants provided a full range of services with a view to developing and then operating a world class luxury resort.

All of the Plaintiff and Defendant companies are ultimately over 90 percent owned by Michael Ryan ("Mr. Ryan"). Accordingly, their accounts were managed on a

consolidated basis. Until 2010, the accounts were audited on an annual basis by Ernst & Young.

As to the Resort, the hotel is owned by Cesar Properties Ltd. ("Cesar Properties"). The unsold condominiums are owned by Condoco Properties Ltd., ("Condoco Properties"), Cesar Properties, Cesar Hotelco (Cayman) Ltd ("Hotelco") and Condoco Grand Resort Ltd ("CGCR"). Cesar Properties also owns the 14 unsold lots on which deckhouses are intended to be constructed. The golf course, the condominiums and deckhouses are part of a total of 7 strata plans within the Resort, registered under the Strata Titles (Registration) Law (2005 Revision).

The hotel, golf course and 24 of the condominiums are currently managed and operated by the Ritz-Carlton Hotel Company of the Cayman Islands, Ltd. through various service agreements with one or more of the First to Fourth Plaintiffs ("the Receivership Companies") and, variously, the strata corporations in which the different properties fall. The present proceedings do not directly concern those properties being managed and operated by the Ritz-Carlton Hotel Company of the Cayman Islands Ltd.

The Resort was developed by Mr. Ryan through companies controlled by him and directly or indirectly owned by the Fourth Defendant, I.R.R. Limited ("I.R.R.") which, subject to security granted over the Receivership Companies, the First to Fourth Plaintiffs, was the ultimate holding company of the group. I.R.R. is owned by entities controlled by Mr. Ryan and by The King's Foundation – Investment Cayman Ltd.

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The Plaintiffs are all Cayman Islands registered companies. I.R.R. is the ultimate parent of all the Receivership Companies (the First to Fourth Plaintiffs). Endless Service Ltd. ("ESL") is a wholly owned subsidiary of CGCR, the Third Plaintiff.

Mr. Ryan was a director of each of the Receivership Companies and ESL for several years until 12 March 2012, the date of the Receivers' appointment, when he resigned his appointment in each of them.

The Defendant companies, Orion Developers Ltd. (the Second Defendant), Deckhouses Construction Company Ltd. (the Third Defendant), Endless Service Management Ltd. (the Fifth Defendant), and Bluetip Watersports Ltd. (the Sixth Defendant), are owned and controlled by Mr. Ryan outside the I.R.R. umbrella. They are all Cayman Islands registered companies.

The Second Defendant Orion Developers Ltd ("Orion") performed and managed the operations and day-to-day activities of the Receivership Companies.

RC Cayman Holdings LLC (the "Lender") is the assignee of a loan in the original principal amount of US$250,000,000 (the "Loan") made by Column Financial Inc. to the Receivership Companies. The Loan was advanced pursuant to the Loan Agreement dated 16 April 2007.

The Loan is secured by (among other securities) (a) an Amended and Restated Debenture dated 10 January 2008 granting a fixed and floating charge over the assets and undertaking of the First Plaintiff, Cesar Hotelco (Cayman) Ltd. (the "Debenture"), and (b) an Amended and Restated Collateral Debenture over the assets and undertakings of CGCR, Condoco Properties and Cesar Properties (the "Collateral Debenture"). The Debenture and the Collateral Debenture were assigned to the Lender by an Assignment of Amended and Restated Debenture and an Assignment of Amended and Restated Collateral Debenture respectively, both dated 30 June 2011.

The Lender appointed the Receivers over the Receivership Companies by two deeds of appointment dated 12 March 2012, one under the Debenture in respect of Hotelco and the other under the Collateral Debenture in respect of CGCR, Cesar Properties and Condoco Properties.

The Defendants deny that the Receivers' contractual appointments applied with respect to assets of the Receivership Companies insofar as the assets were comprised of registered land or leases of registered land, or the rents or profits therefrom, because it is said the Lender had (and still has) not served the notices required by the Registered Land Law;

such that the Receivers had no power or authority with respect to land owned by the Receivership Companies or the rents or profits derived therefrom.

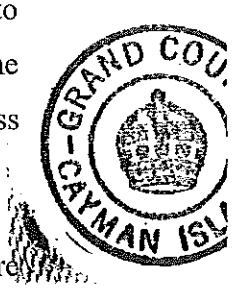
The intercompany relationships are shown in two charts — Appendix 1 and Appendix 2 to this ruling. The first chart is the Structure Chart set out in the case memorandum. The second chart is the Project Corporate Structure Post Buyout of Minority Interests, Exhibit 1 to Mr. Blake's First Affidavit.

It is alleged in the Amended Statement of Claim that the Defendants are liable to the Plaintiffs in five respects.

Firstly, it is alleged that assets belonging to the Plaintiffs have been sold in a transaction with no or illusory consideration. In response to this, the Defendants say that the market price was paid and that the consideration was then spent on the Resort's day-to-day operations in accordance with the contractual arrangements in place.

Secondly, it is alleged that the Defendants hold rental deposits received from tenants of condo properties at the Resort on trust for the Plaintiffs. The Defendants deny the deposits were held on trust for the Plaintiffs (or the relevant tenants) and say that when Orion was managing the rental programme, it would utilise the deposits to meet the expenses of the Resort. The Defendants claim that when the deposits were due to be repaid, the repayments were funded out of the current cash-flow. It is further claimed that this system only stopped when the Receivers cancelled Orion's authority to continue managing the rental programme.

Thirdly, it is alleged that the Defendants owe the Plaintiffs commission in relation to condo rentals. The Defendants deny this. The Defendants say the commissions due to the relevant Plaintiffs have been accounted for and utilised to meet legitimate business expenses.



Fourthly, the Plaintiffs claim that a number of payments made by the Defendants were unexplained, or paid to affiliates of Mr. Ryan improperly. The Defendants say they have explained each transaction and contend that the expenses were legitimate business

expenses of the Plaintiffs in respect of which payment was permitted pursuant to the agreements in place between the Plaintiffs, Mr. Ryan and Orion.

Fifthly, the Plaintiffs claim that they are entitled to exercise a set-off between sums due on the Defendants' counterclaims and sums they claim Mr. Ryan and Orion are liable to account for in respect of payments made to them out of the bank accounts of the Plaintiffs between 2005 and 2012 (for Mr. Ryan) and 2007 and 2012 (for Orion).

The First, Second and Sixth Defendants counterclaim for unpaid fees and expenses along with damages for the claimed wrongful termination of the development and operational agreements that were entered into.

LIST OF ISSUES

The list of issues in the case memorandum originally extended to 20 issues. Some of these issues no longer remain as a result of concessions, but I will retain the original numbering.

The Plaintiffs say that all of the following issues of fact and law fall for determination in this action.

The Defendants object to issues 7 to 12 on the grounds that it is alleged they are not properly pleaded.

1. Do the Receivers have authority with respect to land owned by the Receivership Companies or the rents and profits derived therefrom?

2. Even if the Receivers have no authority with respect to land owned by the Receivership Companies, are the actions of the Receivers invalid on this basis?

3. Do the Defendants, or any of them, have standing to challenge the Receivers' powers or authority?

4. If the Defendants, or any of them, have standing to challenge the Receivers' powers or authority, are they estopped from making such a challenge as a result of acquiescence with the Receivers' appointment, recognition of the Receivers' authority and cooperation with the Receivers?

5. What is the extent of the duties of Mr. Ryan and Orion to account to the Plaintiffs? To what extent have those duties been sufficiently discharged?

6. No longer arises.

7. Were the payments made from the proceeds of the sale under the Asset Purchase Agreement used to satisfy legitimate and proper expenses, liabilities or obligations of the relevant Plaintiffs from which the relevant Plaintiffs derived a commercial benefit?

8. Were the "Rental Management Arrangements" valid and enforceable against the Plaintiffs in all respects? What are the terms of these arrangements?

9. Were the payments made by the Defendants out of the proceeds of the non-PIP rental programme in all respects proper and legitimate expenses of the relevant Plaintiffs from which the relevant Plaintiffs derived a commercial benefit?

10. Is the Development Management Agreement in all respects valid and enforceable against the relevant Plaintiffs?

11. If the Development Management Agreement is valid and enforceable, to what extent do the expenses discharged by the Defendants using the Plaintiffs' assets, properly constitute expenses, liabilities and obligations created under the Development Management Agreement?

12. To what extent were the payments made out of the bank accounts of the Plaintiffs used to satisfy legitimate and proper expenses, liabilities and obligations of the Plaintiffs from which the Plaintiffs derived a commercial benefit?

13. Is Mr. Ryan entitled to a release or indemnity under the Articles of the Plaintiffs?

14. Is Mr. Ryan entitled to recover the amounts claimed for loss of salary?

15. Is Mr. Ryan entitled to recover the amounts claimed as loans made to the Plaintiffs?

16. Is Mr. Ryan liable to account for the payments made to him out of the accounts of the Plaintiffs between 2005 and 2012 and to what extent is Mr. Ryan liable to the Plaintiffs after such an account?

17. Is Orion entitled to recover the amounts claimed as Development Management Expenses, Development Expenses and Development Management Fees under the Development Management Agreement?

18. No longer arises.

19. Was a valid licence for the use of the Docks and waterway granted to Bluetip Watersports Ltd. ("Bluetip")?

20. Are any of the Plaintiffs liable to Bluetip for wrongful termination of the licence to use the Docks and waterways and if so, what is the extent of such liability?

APPLICATION FOR LEAVE TO RE-AMEND

The Plaintiffs have indicated that they propose to apply for leave to re-amend the Statement of Claim to add additional claims. I have directed that a draft Re-Amended Statement of Claim be served by 28 August. Application for leave to re-amend (if necessary) is to be heard as soon as practicable, if necessary by video link, after 28 August.

The Plaintiffs have informed the court through counsel that, among other matters, they intend to seek leave to re-amend the Statement of Claim having regard to the following allegations in Mr. Alexander William Lawson's First Affidavit.

Mr. Alexander William Lawson ("Mr. Lawson") of KPMG is a Senior Manager, Advisory with KPMG, Cayman Islands. He was authorised by the Receivers to make his First Affidavit on their joint behalf. His First Affidavit was based on the investigations and enquiries carried out by the Receivers and their supporting team at KPMG (the "KPMG Team"); from reviews of documents carried out by the KPMG Team; and from

Paragraph 8 of Mr. Lawson's First Affidavit reads:

> *"Since [13 April] ... the investigations into the affairs of the Receivership Companies have continued. For example, the KPMG Team has carried out an analysis of the Hotelco bank statements for the period 1 June 2004 to 9 March 2012, the CGCR bank statements for the period 17 May 2006 to 9 March 2012 and the Cesar Properties bank statements for the period 4 May 2010 to 9 March 2012. That analysis suggests that during the period 2005 to 2012, transfers with the payment description "Michael Ryan" were made to Mr. Ryan from the Hotelco and CGCR bank accounts totalling $19,094,777. Whilst there have also been receipts into the accounts with the description "Michael Ryan", and it is claimed in the Counterclaim that some of those transfers related to loans, there appears to be a net outflow of funds to Mr. Ryan during the period 2005 to 2012 totalling $10,307,964. This outflow remains unexplained (see schedule of payments at tab 1). In addition, for the period 2007 to 2012, it suggests that payments with the description "Orion Developers" were made to the Second Defendant, Orion Developers Ltd, in the amount of $55,745,949 from the Hotelco, CGCR and Cesar Properties bank accounts. During the period 2007 to 2012 receipts to the Hotelco, CGCR and Cesar Properties bank accounts with the description "Orion Developers" totalled $21,614,323. This indicates a net cash outflow to Orion Developers of $34,131,626 during the period. Again, to date a sufficient explanation for these transfers and the use of the funds by the Second Defendant has not been forthcoming (see the schedule at tab 2)."*

SUMMARY OF THE PLEADINGS

A summary of the pleadings to date is set out in the case memorandum. I do not propose to repeat that summary here, but I refer to it for its full terms and effect.

SUMMONS BEFORE THE COURT

There is before the court a summons dated 1 August issued by Thorp Alberga for the Defendants seeking the following orders:

1. *"(Security for Costs). That unless the Plaintiffs, jointly and severally, pay the sum of $1,206,760.75 into court by 4pm on 24 August 2012, this action shall be stayed until further order.*

2. *(Indemnity). Alternatively, that unless the First, Second and Third Plaintiffs (whose obligation shall be joint and several) pay the First Defendant the sum of $126,152.00 by way of indemnity pursuant to their Articles of Association by 24 August 2012 and after that all further legal costs incurred by the First Defendant within two working days of transmitting an invoice, this action shall be stayed until further order ...."*

THE EVIDENCE

The evidence before the court consists of the following: The First Affidavit of Mr. Keith David Blake (Plaintiffs); the First Affidavit of Cathy Canada (Defendants); the First Affidavit of Mr. Timothy Derksen (Defendants); the First, Second, Third and Fourth Affidavits of Mr. Michael Ryan (Defendants); the First Affidavit of Mr. Lawson (Plaintiffs).

THE DEFENDANTS' SUBMISSIONS

The principal submissions of Mr. Ian Huskisson for the Defendants include the following:

As to security for costs, the Defendants' application for security for costs is made pursuant to Section 74 of the Companies Law (2011 Revision) which provides that:-

> *"Where a company is a plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given".*

In *Eagle Ltd v Falcon Ltd* [2012] EWHC 2261 Coulson J summarised the approach of the English Courts to similarly worded legislation in the United Kingdom. A two-stage test is to be applied. First, it must be shown there is reason to believe a Plaintiff will be unable to pay the Defendant's costs if ordered to do so. Secondly, if this is made out, the Court must be satisfied in its discretion that it is just in all the circumstances to order security.

As to the first stage of the test, Coulson J in *Eagle* (supra) found that this should be assessed on a balance sheet, not a cash flow or *"inability to pay its debts"* basis as if it were a hearing of a winding up petition.

Unaudited balance sheets for all the Plaintiff companies as of December 2011 and as of March 2012 have been prepared and disclosed to the Plaintiffs. The Receivers would not pay Ernst & Young's costs of completing the audit. The content of the March 2012 balances is summarised in a letter from a partner in Deloitte (see below).

On a balance sheet basis, the Plaintiff companies are insolvent to the tune of $340,640,000. They have combined assets of $260,518,000 and liabilities of $601,158,000. To compound this, most of their assets are charged and the Secured Lender is taking steps to enforce its security.

If the Plaintiffs' assets are sold by the Secured Lender for their book value there would be a relatively modest surplus over the secured debt. Ignoring the costs of Receivership, unsecured creditors could at best hope to receive a dividend of 2.5 cents on the dollar following the inevitable liquidation once the surplus was divided amongst creditors. On this basis, the first stage of the test is made out.

This is confirmed by the Receivers' stated position in Mourant Ozannes' letter of 30 March 2012 (see below).

As to the second stage, in *Eagle* (supra) Coulson J summarised the position as follows:

> *"As to the second stage, it is very difficult (if not impossible) in a complex commercial dispute such as this for the court to form a view as to the respective merits of the claim and defence. An application for security for costs should not be sidetracked into an investigation into the merits of the case, unless it can be clearly demonstrated that there is a high degree of success or failure ... the general position is that success or failure at trial is not a relevant factor"* (see paragraph 23 of the judgment).

The defences in this claim have a high degree of potential success. All of the allegations levelled at the Defendants in the Amended Statement of Claim and Mr. Blake's First

Affidavit have been comprehensively answered not only by the Defendants and their accounting staff, but also by independent accountants from Deloitte.

A further factor is the existence of very substantial claims going the other way that would extinguish the claim altogether even if it had merit. No positive case is advanced by the Plaintiffs on the counterclaims. They merely put the Defendants to proof on various matters.

A further important factor in the exercise of the Court's discretion is the involvement of Receivers. Security for costs will usually be awarded against a claimant company in receivership (Bailey & Groves on Corporate Insolvency, paragraph 5.19).

The issue was addressed by the English Court of Appeal in *Peter Mills v Robert William Birchall* [2008] EWCA Civ 385 in the context of potential third party orders against receivers or funders (See Collins LJ at paragraph 85).

It is necessary to distinguish between the role of receivers and liquidators. Receivers are appointed by a secured lender; they are agents of the company but they owe their duties principally to the lender. They have no role in looking after the interests of ordinary unsecured creditors nor do they have any obligation to call in the assets of the company beyond what is necessary to satisfy their lender client's claim and their own expenses.

This means that if there was in fact a surplus following a sale of the Plaintiffs' assets then the Receiver would vacate office and the companies will almost certainly go into liquidation. They may even be placed in liquidation sooner if a creditor takes action.

At this point a liquidator would need to decide whether or not to pursue this litigation. He would need to consult with a creditors' committee, who would assess the merits of the claims against the likelihood of making a recovery. This is an important exercise that should take place when any insolvent company embarks on litigation, the key issue being what is in the interests of creditors. This has not happened in the present case.

In the event that there was a surplus and the Receivers vacated office, there must be a real prospect that creditors would have no appetite for litigation. If this happens then the claim would be abandoned and the Defendants left to prove in the liquidation.

Security has been requested since the outset of the case, and declined. The Plaintiffs' initial response relied on two grounds. The first was that the Defendants had not shown the Plaintiffs would not be able to pay a costs order. As to this, the Defendants need do no more than point to the $340,640,000 deficit on the Plaintiffs' balance sheet. They are unarguably insolvent on this basis. The Plaintiffs' evidence does not dispute this.

The second ground was that the Defendants' conduct had brought about the Plaintiffs' want of means. Even if the Plaintiffs were to succeed on every aspect of their pleaded claims and the Defendants had no rights of set off, then it is impossible to say that the Plaintiffs' balance sheet would be restored to solvency. At present the Plaintiffs' balance sheet is $340,640,000 in deficit. The Plaintiffs' pleaded claims are barely in seven figures, at their highest, and ignoring the Defendants' very substantial counterclaims. The Amended Statement of Claim and the Receivers' own evidence confirms that US$900,000 was paid to the Receivership Companies by Mr. Ryan under the Asset Purchase Agreement. Furthermore, there is no real dispute that Mr. Ryan also contributed US$555,000 by way of loans in 2011 and 2012. The Counterclaims against the Plaintiffs have a higher monetary value than the claims against the Defendants.

The Receivers' evidence in response does not give any indication as to the Plaintiffs' cash flow situation or their ability to pay security. The thrust of the affidavit places heavy reliance on a statement which appeared recently in the Plaintiffs' Reply and Defence to Counterclaim. The Plaintiffs complain that this issue has not been addressed by the Defendants. This is hardly surprising given it was only raised recently.

The Plaintiffs' latest pleading alleges that the Plaintiffs have a defence of set off to the counterclaims because there is evidence of significant sums being paid to Mr. Ryan and Orion. If the Plaintiffs are intending to plead some type of equitable set-off, they need to meet the tests for doing so. The explanation of the allegations is sparse. The new

allegations merely state that the payments were "received" by Mr. Ryan and his affiliated companies. A payment in settlement of a liability or obligation is no basis for an allegation of impropriety.

Having regard to the fact that the financial statements of the Receivership Companies were audited up until 2010, it is wrong for the Plaintiffs to ask the Court to draw an inference that "payments" made to Mr. Ryan and his associates must have been improper, instead of a legitimate payment of some liability or obligation.

This litigation appears to be funded by a Secured Lender who claims to have $2 billion of assets under management.

As to the alternative claim for an indemnity, if the Court is not persuaded that the Plaintiffs would be unable to meet a costs order, then it is submitted by Mr. Huskisson that the first three Plaintiffs should be required to fulfil the obligation to indemnify Mr. Ryan in respect of legal fees incurred defending proceedings in the light of their respective Articles of Association.

The terms of the indemnity are straightforward and appear in most modern companies' Articles. They also reflect the modern practice in the United Kingdom (see Sections 232-4 of the English Companies Act 2006). Mr. Ryan has given the necessary undertaking to repay.

There is no reason in principle why Mr. Ryan should not be entitled to rely on the indemnity provisions in these circumstances. The claims brought against him are framed as breaches of fiduciary duty and conflict of interest claims. There is no overtly pleaded case of wilful default or dishonesty.

As the provisions of the indemnity clauses provide for repayment in the event the Receivers can prove wilful default, the companies are fully protected in the event of a finding against Mr. Ryan at trial or a finding that the relevant indemnity was not enforceable. By contrast, Mr. Ryan and the other Defendants are exposed in the event that the case collapses for whatever reason, or the Court finds in their favour.

THE PLAINTIFFS' SUBMISSIONS

The principal submissions of Mr. Hector Robinson ("Mr. Robinson") for the Plaintiffs included the following:

As to the application for security for costs the Receivers are in the process of gathering the assets of the Receivership Companies, and it is not yet possible for the Receivers to say whether, or to what degree, there will be any surplus available to pay an order for costs at the conclusion of the action. The provision of a comprehensive account by the Defendants is essential to the process of ascertaining the precise degree of solvency of the Receivership Companies. There is a very substantial liability due to the Secured Lender.

The Court's power to award security for costs, pursuant to Section 74 of the Companies Law is discretionary. The Cayman Islands Court, in exercising its discretion on this issue, has consistently applied the approach taken by the English Court of Appeal in *Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd* [1973] QB 609.

The Court will consider all the circumstances of the case, including the plaintiff's prospects of success, any admissions by the defendant, and the justice of the case: 1999 Supreme Court Practice 23/3/3; *Banco Economico v Allied Leasing* [1998 CILR 102]. The Court may refuse to order security in certain circumstances where it can clearly be shown that the plaintiff company's impecuniosity has been caused by the defendant's conduct: *Grand Cay Development Ltd v Griesel* [2004-05 CILR, Note 18] Grand Court, [2004-05 CILR, Note 51], CICA.

Mr. Ryan has made admissions sufficient for the Court to conclude that the Defendants are liable to provide an account to the Plaintiffs. The evidence shows clearly that Mr. Ryan and Orion have failed to make available to the Plaintiffs a proper account of their management of the Plaintiffs' affairs.

The Court should refuse to order the Plaintiffs to post security for costs before Mr. Ryan and Orion have discharged their obligation to account fully to the Plaintiffs. Upon provision of such an account, the Court will be better able to assess the true financial

condition of the Plaintiffs, and whether it would be just in the circumstances to order the Plaintiffs to provide security for costs. An order for security would not be just if the account shows that there is a significant balance due from the Defendants to the Plaintiffs. It would also not be just if the account shows that the Plaintiffs' financial condition was caused by the actions or failures of the Defendants.

In any event, the Court has a discretion under Section 74 whether to order security for costs having regard to all the circumstances of the case. In the particular circumstances of the present case, the Court should decline to order security.

In all the circumstances, the Defendants' application for security for costs should be refused.

As to the application for an advance payment on the alleged indemnity, Mr. Ryan seeks payment of US$126,152 as an advance payment towards his legal costs pursuant to a claimed indemnity under the Articles of Hotelco, Cesar Properties and CGCR. At paragraph 14 of his Fourth Affidavit, Mr. Ryan states that his claim for indemnity will only be made in the event the Court is not minded to order security for costs.

There is no claim in the pleadings for an advance payment on the indemnity. Mr. Ryan raises the claim for indemnity at paragraphs 85 to 90 of the Defence as a shield only. He does not raise it as a sword, whether in his claim to the right of set-off at paragraphs 91-92 of the Defence, or in his Counterclaim. As such, it is not open to him on the pleadings to make this application.

Further, the Articles of Association constitute a contract between the company and its members. Mr. Ryan, as a director (as he then was) was not a party to these agreements and therefore is not entitled to the benefit of the terms of the Articles, unless the terms of the Articles were expressly or by necessary implication incorporated in the terms of his engagement: see *Globalink Telecommunications Ltd v Wilmbury Ltd et al* [2002] EWHC 1988 (QB).

The onus is on Mr. Ryan to show that he is entitled to the benefit of the indemnity contained in the Articles. The only evidence Mr. Ryan has adduced in support of his position is at paragraph 8 of his Third Affidavit where he states:

> *"I was aware of the Indemnity Provisions at the time of my appointment and regarded the protection they offered as an important part of the overall consideration being offered to me by the Respondents in return for my directorship, management and CEO services. The sections of the Indemnity Provisions covering costs incurred by me in defending claims brought against me in the capacity as a director/officer were of particular importance to me because defence costs can be significant. I believed, at the time of my appointment, and still believe, that the relevant Indemnity Provisions formed part of the terms of my engagement with each of the Respondents."*

Mr. Ryan has produced no evidence of the terms of his contract. The contract was not in writing. In response to a request for further and better particulars of his employment contract, Mr. Ryan states at paragraphs 2 to 9 of his response that the contract was agreed between himself and the shareholders and directors of the Receivership Companies, and was the subject of discussion at various board meetings, shareholder meetings and other ad hoc meetings. He fails to provide in support of his application, any evidence of any precise discussion or minutes of any meeting, on the basis of which the Court may safely conclude that the shareholders and directors, other than himself, ever agreed that he should be entitled to benefit from the indemnity in the Articles. See e.g. the approach taken in *Globalink* (supra) at paragraph 31.

Paragraph 146 of the Articles of Hotelco expressly subordinates the right of an indemnity to the debt owed to the Lender, which means that so long as the debt remains unpaid the right to an indemnity cannot arise.

All the indemnity provisions expressly exclude the entitlement to an indemnity in cases of wilful neglect or default. In this case, the Plaintiffs have made allegations of breaches of fiduciary duties against Mr. Ryan. If proved, Mr. Ryan would not be entitled under the Articles to an indemnity. The indemnity provisions were clearly intended for cases of mere negligence, which this case is not.

In any event, if there is any doubt on the matter, the fiduciary duties which Mr. Ryan is alleged to have breached, form part of the *"irreducible core of obligations"* that a director owes to a company, and it would not be within the power of the Plaintiff Companies, in their Articles, to grant an indemnity to their directors for breaches of such duties: *In re Bristol Fund* [2008 CILR 317] per Smellie CJ at page 342; *Renova Resources Private Equity Ltd v Gilbertson* [2009 CILR 268] per Foster J at page 292.

Mr. Ryan's claim for an advance payment on the indemnities contained in the Articles should be refused.

SECURITY FOR COSTS - ANALYSIS AND CONCLUSIONS

Section 74

Section 74 of the Companies Law (2011 Revision) provides:

> *"Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given."*

For the comparable provision in England and Wales, see CPR 25.13(1) and (2)(c) ("Conditions to be satisfied 25.13" "(1) The court may make an order for security for costs under rule 25.12 if (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (b)(i) one or more of the conditions in paragraph (2) applies, or (ii) an enactment permits the court to require security for costs. (2) The conditions are — … (c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.") See also page 695 and following of the 2012 edition of the White Book.

Consideration of an application under section 74 for security for costs in an action brought by a limited company involves a two-stage approach.

First, it is necessary for the Court to consider whether it is satisfied that there is reason to believe that if the defendant is successful in the defence, the assets of the company will be insufficient to pay the defendant's costs?

Second, if the Judge is so satisfied, the Court has a discretion under section 74 whether to order security for costs having regard to all the circumstances of the case (*Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* (supra) [1973] QB 609). Lord Denning said in *Lindsay Parkinson* at 626(c) and following:

> *"The important word is "may". That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case. ...*
>
> *If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case ...."*

It is convenient to adopt the summary of the seven circumstances referred to by Lord Denning from the Supreme Court Practice 1999 at 23/1 - 3/14.

> *"Among the circumstances which the Court might take into account are the following: (1) whether the plaintiff's claim is bona fide and not a sham; (2) whether the plaintiff has a reasonably good prospect of success; (3) whether there is an admission by the defendants on the pleadings or elsewhere that money is due; (4) whether there is a substantial payment into Court or an 'open offer' of a substantial amount; (5) whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim; (6) whether the plaintiff's want of means has been brought about by any conduct by the defendants, such as delay in payment or in doing their part of the work; (7) whether the application for security is made at a late stage of the proceedings."*

In my opinion, Lord Denning at 626F and following was not setting out an exhaustive list of circumstances. This is clear from his use of his words *"might take into account"* at 626F.

It is appropriate to consider the seven *Lindsay Parkinson* (supra) circumstances, but the court has a discretion which it will exercise in all the circumstances of the case.

As Malone CJ said in *JM Bodden and Son International Limited v Dettling and Sparks* 1990-91 CILR 220 at 224:

> *"... it must be noted that the circumstances listed [in an earlier edition of the Supreme Court Practice] are (a) not exhaustive of the circumstances of which account may be taken; but are (b) circumstances that were suggested in Parkinson's case by counsel for the defendant Triplan Ltd in that case."*

As to other Cayman authorities, the note at [2004-05 CILR Note 51] of *C. Griesel, P. Griesel and Grand Cay Investments Limited v Grand Cay Developments Limited* (in liquidation) reads:

> *"That an action against directors of a company in respect of their alleged breaches of fiduciary duty and misappropriation is brought at the instance of liquidators performing statutory duties is not in itself sufficient to justify a refusal to order that security for costs be given by the liquidators. Such an order may, however, be properly denied on the basis that the lack of available assets has been brought about by the directors' failure to manage the company properly (Sir Lindsay Parkinson & Co Ltd v Triplan Ltd., [1973] Q.B. 609, applied)."*

In *Griesel* security for costs was sought against a company in liquidation, not a company in receivership. The appellants a husband and wife and their investment company, sought security for costs as defendants in an action brought by another of their companies which had fallen into insolvency and was being managed by liquidators. The plaintiff, Grand Cay Developments Ltd, had been used by the family to engage contractors to work on the improvement of commercial and residential property held in the name of the defendant, Grand Cay Investments Limited, a company created and used by the Griesels to acquire and hold title to land. The result of these corporate arrangements was that the contractors creating improvements to enhance property held in the name of the defendant company could not look to that company for payment but to the plaintiff company, which had no interest in the property. The plaintiff company's ability to pay depended on the funding made available to it by or through the defendants, and how those funds were used.

Having been allowed to become insolvent, the company claimed at the instigation of its liquidators against Mr. and Mrs. Griesel as former directors alleging, among other matters, mismanagement and neglect of its affairs, and against their land-holding company on grounds that included the allegation that debts were incurred by the plaintiff for its benefit, or on its behalf. The claims could not, at the stage of the application for security, be said to be likely either to fail or succeed.

Taylor JA said when giving judgment of the Court:

> *"The question on which the outcome of the appeal turns is whether Mr. and Mrs. Griesel and their investment company can rely on the fact that the company has been allowed to become insolvent as a ground for requiring that it secure the potential liability to them for costs that it would incur should the action fail. Could it be said to be unjust that they rank in such circumstances with the company's other creditors? An answer to this question does not require that we reach any conclusion on the issues of fact and law on which the action itself will turn. A finding that the company's impecuniosity is due to action or inaction of the defendants would not mean that they should be held liable to compensate the company on that account. Much more would, of course, have to be established in order for the present claims to succeed."*
>
> In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* ... Lord Denning M.R., said (at page 284) *"... that there will necessarily be many cases "where a company is insolvent and yet the Court would not order security to be lodged", and added ... that in cases where "want of means has been brought about by any conduct by the defendants" such an order may properly be denied.*
>
> *It is the operation by the Griesels of a corporate scheme under which debts were incurred by the plaintiff company for the improvement of land held by another of their companies, and their conduct thereafter in failing to ensure that the plaintiff company was so managed and funded as to meet those obligations, that has resulted in the present insolvency. This is not an ordinary case of commercial misfortune, in which impecuniosity has arisen in the normal course of a trade or business or as a result of the operation of market forces. The insolvency results from the nature of the corporate scheme established by the Griesels and the manner in which the plaintiff has been funded by the defendants and those funds used by it.*
>
> *The judge was in our view entitled to take this aspect into account and for that reason to deny the application in the proper exercise of her discretion. ..."*

Applications for costs by a successful party against a receiver

In *Peter Mills v Robert William Birchall and another* [2008] EWCA Civ 385, the court was concerned with an appeal which raised the question whether, when a receiver appointed under a bank charge causes an insolvent company to sue, the action is unsuccessful and the successful party is unable to recover costs against the company, the successful party may recover the costs from the receiver under the jurisdiction in section 51 of the Supreme Court Act 1981 to award costs against a non-party. The grounds on which Mr. Mills sought an order that the Receivers should pay his costs were that (1) the Receivers brought the claim at the request of the Bank; (2) the Bank alone had any financial interest in the claim; (3) the Bank had funded and directed the proceedings throughout; and (4) it would be a grave injustice to Mr. Mills, a man of modest means, if he had to bear his own costs, especially as he was a substantial creditor of Orb Estates plc, the parent of the company.

Lawrence Collins LJ, as he then was, considered the position of receivers and liquidators at paragraphs 23 to 28. As to Receivers, he said:

> *"Receivers are deemed to be agents for the company and the company as mortgagor is solely responsible for their acts and defaults by virtue of section 109(2) of the Law of Property Act 1925 and also, in this case, by virtue of the terms of the Banks' charge...*
>
> *In Silven Properties Limited v Royal Bank of Scotland plc [2003] EWCA Civ 1409 this court ... said that this agency of the receivers is a real one, even though it has some peculiar incidents.*
>
> *Prior to Aiden Shipping, in Newhart Developments Ltd v Co-operative Commercial Bank Ltd [1978] 1 QB 814 at 819 Shaw LJ said that a receiver could institute proceedings in the name of the company without exposing himself to the risk of liability for costs if they should fail."*

As to third party costs orders and receivers, Lawrence Collins LJ referred to a number of authorities at paragraphs 29 to 50 and said at paragraph 51:

> *"The effect of these authorities is that there is a recognition that injustice might be caused where litigation is conducted by a receiver on behalf of an insolvent*

company for the benefit of secured creditors, and that in appropriate cases a non-party costs order against a receiver or against the secured creditor may be made, especially where the non-party is the 'real party'. A costs order against receivers will be more readily made where the company is in liquidation and the receiver's agency has terminated, or where the successful party has not been able to obtain security for costs or adequate security for costs."

As to the relevance of security for costs, Lawrence Collins LJ said at paragraph 52:

"Where the action is brought in the name of the company by a receiver, the defendant can normally obtain security for costs. The availability of security for costs has been considered in a number of decisions involving the personal liability of those causing an insolvent company to bring proceedings, some of which I have already mentioned."

Having referred to a number of authorities at paragraphs 53 to 61, Collins LJ said at paragraph 62:

"These decisions show that the availability of security is an important factor in the exercise of the discretion, and that the discretion may be exercised more readily in favour of the successful litigant if security was not available at all ... or where adequate security is not available."

As to impropriety or unreasonableness as a factor, Collins LJ referred to a number of authorities at paragraphs 63 to 68, and said at paragraph 69:

"I would not, therefore, agree with the Chancellor's suggestion that Evans-Lombe J was wrong in B.E. Studios Ltd v Smith & Williamson [2006] 2 All ER 811 not to require an element of impropriety or unreasonableness. In that case the claim brought by BE Studios had failed and it was ordered to pay three-quarters of the defendant's costs of the action. The defendant then applied for an order that a director (who was also a shareholder and loan creditor of B.E. Studios) should pay those costs. Evans-Lombe J concluded (at [18]):

""In my judgment, in the light of the Privy Council's decision in the Dymocks case as interpreted and applied by the Court of Appeal in the Goodwood case ... [i]t is not a requirement for the making of a non-party costs order against a director who has funded and controlled litigation consequent on a claim brought by his company at his instance, that impropriety must be shown in the way that the claim was prosecuted.""

As to the exercise of the discretion by the Chancellor who had decided the case at first instance, Collins LJ said at paragraph 74:

> *"My conclusion on this aspect is that the Chancellor properly applied the 'exceptional circumstance' test by considering whether this action was out of the ordinary run of cases, and ultimately (in conjunction with the other factors) whether it was just to make the order. I agree with him that this was an entirely normal case of receivers seeking to enforce a contractual right forming part of the security.*
>
> *I accept the argument for the Receivers that although in Bacal and Anderson weight was given to the fact that in an action by the liquidator on behalf of creditors the costs of a successful defendant are secured, whereas in an action by the receiver the successful defendant is left to rank as unsecured, this court has since held that it is not in any way exceptional or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper while lacking the means to pay the defendant's costs if they should fail; the defendant's remedy is to apply for security for costs and have the proceedings dismissed if the claimant fails to provide whatever security was ordered ...."*

Collins LJ set out his overall conclusion in paragraphs 84 to 88. At 85 he said:

> *"I do not consider that Aiden Shipping justifies the judicial creation of a substantive rule that receivers (and such a rule would apply equally to receivers who bona fide defend a claim against a company) should be personally responsible for the costs of a successful party. If an order were made in this case then it would be made in... virtually all such cases. The normal expectation in a case such as this is that someone in Mr. Mills' position will and normally should seek security for costs."*
>
> *"It is unfortunate that the effect of the application and of the appeal is that Mr. Mills will have expended far more on them than the amount of costs he was claiming. But the reality is that any injustice which has occurred is due largely to the failure of his advisers to take advantage of his right to apply for security of costs.*
>
> *Where the application for security for costs is made on the basis that the claimant is a company which will be unable to pay the defendant's costs (CPR 25.13(2)(c); Companies Act 1985, section 726(1)), and where the receiver is in a position to provide security from realisations or from funds provided by the secured creditor, I can see no reason why the court should not take fully into account the need to*

ensure that the defendant is adequately protected from incurring irrecoverable costs if the action fails. The amount which the court orders by way of security is, of course, within the discretion of the court. But in such a case the court should be robust in its assessment of the amount of the security, amounting in appropriate cases to the full amount of the estimated standard costs. To order adequate security in this type of case could not possibly run the risk of depriving the claimant company of its right to access to the courts."

The present case

I turn to consider the present case in the light of the principles set out above.

As to the defence insofar as it relates to the validity of the Receivers' appointment regarding registered land, the Defendants say that the Receivers' appointments do not apply with respect to the assets of the Receivership Companies comprised of registered land, or the rents or profits from registered land, because the Lender has failed to serve certain statutory notices required under the Registered Land Law.

I have given directions for the service of skeleton arguments to clarify this issue, and I refer to the Defendants' submissions on the validity summons of 26 July and the Plaintiffs' submissions in answer of 8 August.

Mr. Robinson, in my opinion correctly, concedes that if it be held that the Receivers were not lawfully appointed over registered land or the income or profits therefrom or for any other reason, the Receivers (not the Plaintiffs) will have to pay any resulting order for costs in favour of the Defendants (See generally Lightman & Moss, The Law of Administrators and Receivers of Companies, 4th edition, ch.6, and Picarda, The Law Relating to Receivers, Managers and Administrators, 4th edition, Ch.8.

There is no suggestion that Receivers will not be in a position to meet any order for costs made against them.

Is there reason to believe that if the Defendants are successful in the defences, the assets of the Plaintiffs will be insufficient to pay the Defendants' costs?

The Defendants rely on a letter from Deloitte, dated 1 August 2012, in the following terms:

> *"We understand that you will be making an application for security for costs, or an indemnity claim in the alternative, in respect of [FSD 58 of 2012]. In this regard, you have asked us to comment on the recorded financial position of the four 'Receivership Companies' ... based on the draft unaudited balance sheets of the Companies as at 12 March 2012.*
>
> *The recorded asset and recorded liability positions of each of the Companies as at 12 March 2012 are summarized in the table below. For ease of reference we have attached the draft unaudited 12 March 2012 financial statements to our letter."*

The table lists the four companies in the left-hand column, the total assets in the second column ($260,518,000), the total liabilities in the third column ($601,158,000) and the deficit in the final column (Assets Less Liabilities) ($340,640,000).

> *"Based on a comparison of recorded assets and recorded liabilities on the Companies' balance sheets at 12 March 2012 as summarized in the above table, each of the Companies has insufficient recorded assets to meet their recorded liabilities as at that date. I further note that on a combined basis, the Companies' recorded liabilities at 12 March 2012 are greatly in excess of their recorded assets.*
>
> *It is also important to note that all of the assets are charged and that the secured lender has appointed receivers with the intention of realising their security. As I understand the Plaintiffs' attorneys have already confirmed, in the event an order for costs was made in the Defendants' favour the only circumstances in which the Companies would be in a position to pay the full costs order would be if there was a surplus following the disposal of the Companies' assets and the payment of the lender's costs.*
>
> *We understand that the secured lender's claim is for approximately $250,000,000. Assuming the Companies' assets were sold for their book value of $260,518,000 and the secured lender's costs were $2,000,000 then that would leave a surplus of $8,518,000. Against this, there would still be unsecured creditors of $351,158,000. On this basis the Companies would be liable to be placed in liquidation. In a liquidation, ignoring liquidation costs, an unsecured creditor*

could on these figures at best expect a dividend of no more than 2.5 cents on the dollar.

Deloitte have relied on the accuracy of the financial information supplied. Deloitte have not performed an audit or a review made in accordance with International Standards on Auditing, and accordingly no such assurance is expressed. No consideration has been given to the possible fair market value of the Companies' assets and liabilities."

In addition to above, Mr. Huskisson for the Defendants relies on the following passage in a letter written by Mourant Ozannes on behalf of the Plaintiffs dated 30 March 2012:

"In our letter of 19 March 2012, we also requested details of the location of the Companies' documents, which were previously held at the premises occupied by Orion Developers Ltd at the Ritz-Carlton resort. Please address this point by return.

Finally, our clients continue to reserve all rights against your client and will take such steps as they may be advised to take, including litigation for any loss caused to the Company due to your client's failure to deliver up the Companies' property in a timely manner and/or his failure to cause proper books and records to be maintained.

On this point, it is important to note that in terms of any litigation, the Companies have no unsecured assets available to meet an indemnity claim, even if the Companies were to accept that your client had such a right to be indemnified. Moreover, it is by no means certain that there will be any surplus available to return to the Companies at the conclusion of the receiverships and even if there is such a surplus, your client would have to compete with other creditors such as the Cayman Islands Government, which alleges that Cesar Hotelco (Cayman) Limited owes it approximately CI $6 million."

Mr. Lawson in his First Affidavit says, at paragraph 11:

"The Receivers are currently engaged in the exercise of gathering in the assets of the Receivership Companies with a view to their realization in due course and establishing the level of liabilities of the Receivership Companies. It is not yet possible to determine with certainty whether there will be any surplus available to return to the Receivership Companies following the satisfaction of the secured debt. It is therefore impossible to say, at present, whether or not there will be any surplus available to the Receivership Companies to pay an order for costs at the

conclusion of the action. It is the very nature of a receivership that any surplus of assets is only known when the receivership is completed."

In the circumstances set out above, I will assume that if the Defendants are successful in the defences, the assets of the Plaintiffs will be insufficient to pay the Defendants' costs (to the extent that such costs are not recoverable from the Receivers).

The discretion under Section 74 whether to order security for costs having regard to all the circumstances of the case.

I will consider the seven *Lindsay Parkinson* (supra) circumstances in turn:

(1) In my opinion, the Plaintiffs' claims are bona fide.

(2) In *Eagle Ltd and Falcon Ltd* (supra) [2012] EWHC 2261 (TCC) Coulson J said, at paragraph 23:

"As to the second stage, it is very difficult (if not impossible), in a complex commercial dispute like this, for the court to form a view as to the respective merits of the claim and defence. An application for security for costs should not be sidetracked into an investigation into the merits of the case, unless it can be clearly demonstrated that there is a high degree of success or failure: see Fernhill Mining Limited v Kier Construction Limited [2000] CP 69. Certain matters, such as admissions or significant offers, may be taken into account in the court's consideration of the overall justice of making an order for security (see Jones v Environcom [2010] Lloyd's Reports 190), but the general position is that success or otherwise at trial is not a relevant factor: see Mastermailer Stationery v Sanderson [2011] LTL April 21 2011, a decision of Vos J."

In my opinion, it is very difficult (if not impossible) in the present case to form a view as to the respective merits of the claims, defences (and counterclaims) at this stage of the proceedings.

As to (3) - (Whether there is an admission by the Defendants in their defence or elsewhere that money is due) Mr. Robinson relies on a discrete matter which he submits constitutes a partial admission.

The second head of claim is as follows. It is alleged that the Defendants hold rental deposits received from tenants of condo properties at the Resort on trust for the Plaintiffs. The Defendants deny the deposits were held on trust for the Plaintiffs (or the relevant tenants) and say that when Orion was managing the rental programme, it would utilise the deposits to meet the expenses of the Resort. The Defendants claim that when the deposits were due to be repaid, the repayments were funded out of the current cash-flow. It is further claimed that this system only stopped when the Receivers cancelled Orion's authority to continue managing the rental programme.

Mr. Robinson relies on the following passage in Mr. Ryan's First Affidavit under the heading "The Events leading up to the Receivership" which he says constitutes a partial admission.

At paragraph 56, Mr. Ryan said:

> *"The consequence of the inability to meet sales targets and, as a result, use these funds to cover the on-going business operation costs, meant that the Group was under pressure to meet cashflow requirements. The Group was using, among other sources, the income being generated by the rental of residences to temporarily meet the fees, expenses and operating costs for the Project. That is, gross rental income received from the Rental Programme was being used to fund Group operations (by which I mean, pay expenses). Although the Receivership Companies were liable to account to the residence owners for the bulk of the rental receipts (i.e. rental income less commission and expenses), the liability to pay the owners did not accrue for a significant period of time after the rental proceeds had been received. This meant that the Group companies could use the gross rental proceeds to meet expenses, knowing that when the liability to pay the net rental proceeds to owners did accrue there would be funds available from ongoing operations at that time. There was no apparent obligation or reason to keep such funds on trust for owners or tenants. Furthermore, this funding was a steady and renewable source of cash for the Group and the system worked well. At no time prior to the appointment of Receivers were any owners or tenants*

unpaid, because when the obligation to make payments arose, funds would be able to do so."

In my opinion, although there is a serious issue to be tried in respect of the second head of claim, I do not consider that I should be sidetracked into an investigation into the merits of one out of the five existing heads of claim.

Circumstances (4) - (Whether there is a substantial payment into court or an "open offer" of a substantial amount);

(5) - (Whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim); and

(7) - (Whether the application for security is made at a late stage of the proceedings),

do not apply in the present case.

I turn to consider (6) – (Whether the claimant's want of means has been brought about by any conduct by the defendant, such as delay in paying or in doing their part of any work).

In my opinion, the relevant circumstances, whether considered under (6) or generally, include the following:

The present case is far removed from the ordinary case where a company (satisfying the stage one test) acting by a receiver appointed by a debenture holder sues an unconnected defendant with whom the company has contracted.

The Lender appointed the Receivers over the Receivership Companies by two deeds of appointment dated 12 March 2012. If Deloitte are correct (see their letter of 1 August) as at the date of appointment the total deficit (assets less liabilities) in the case of the first four Plaintiffs was US$(340,640,000).

All of the Plaintiff and Defendant companies are ultimately over 90 percent owned by Mr. Ryan.

The Plaintiffs are all Cayman Islands registered companies. I.R.R. is the ultimate parent of all the Receivership Companies. ESL is a wholly owned subsidiary of CGCR. Mr. Ryan was a director of each of the Receivership Companies and ESL for several years until 12 March 2012, the date of the Receivers' appointment, when he resigned his appointment in each of them.

Orion, Deckhouses Construction Ltd, Endless Service Management Ltd and Bluetip are owned and controlled by Mr. Ryan outside the I.R.R. umbrella. They are all Cayman Islands registered companies.

The inter-company relationships are shown in the two charts at Appendix 1 and 2 hereto.

Mr. Ryan was, I repeat, a director of each of the Receivership Companies and ESL for several years until 12 March 2012, by which date, (if Deloitte are correct), the total deficit (assets less liabilities) in the case of the first four Plaintiffs was US$(340,640,000).

Lord Denning's circumstance (6) is not, in my opinion, to be read like a statute. Further it is necessary to look at all the circumstances of the case. Mr. Ryan was responsible as director for the affairs of the Receivership Companies and his conduct (in the broad sense) of the affairs of the Receivership Companies was such that immediately prior to the Receivership their position was, according to Deloitte, US$(340,640,000). In my opinion, this is a relevant circumstance to take into account when considering whether security for costs should be ordered in favour of Mr. Ryan and the companies he owns 100 percent.

In *Griesel*, (supra), (a case, I repeat, where security for costs was sought against a company in liquidation, not in receivership) Taylor JA posed the question:

> *"Could it be said to be unjust that* [Mr. and Mrs. Griesel] *rank in such circumstances with the company's other creditors?"*

The circumstances in *Griesel* were very different from those in the present case. A similar question in the present case would be — could it be said to be unjust that Mr. Ryan and the defendant companies he owns 100 percent should rank in all the circumstances with the Plaintiffs' other unsecured creditors? Mr. Ryan and the companies he owns a 100 percent are not independent parties who have dealt with the Plaintiffs at arms' length, but are very closely connected parties forming part of the same group.

For completeness, I record that I have disregarded the fact that there are counterclaims. See the notes in the current edition of the White Book at 25.13.1.1.

It is necessary to stand back and look at all the circumstances of the present case set out above in the round. I pay appropriate regard to all the circumstances set out above.

There is one circumstance which is worthy of emphasis and repetition. All of the Plaintiff and Defendant Companies are, I repeat, ultimately over 90 percent owned by Mr. Ryan. The Plaintiff and Defendant Companies formed part of the group described above. Mr. Ryan was responsible as director for the affairs of the Receivership Companies and his conduct (in the broad sense) of the affairs of the Receivership Companies was such that immediately prior to the receivership their position was, according to Deloitte, US$(340,640,000).

I do not consider in the exercise of my discretion under Section 74 that I should order security for costs having regard to the (most unusual) circumstances of the present case identified above.

INDEMNITY, ANALYSIS AND CONCLUSIONS

The mere existence in the articles of a provision to benefit an officer (here indemnification) does not, without more, mean that the provision was incorporated into any contract between the company and that officer. Gore-Browne on Companies Part II 6[6] citing *Globalink Telecommunications Ltd v Wilmbury Ltd and others* [2003] 1 BCLC 145.

In *Globalink*, Stanley Burnton J, as he then was, was concerned with Article 18 of the Articles of Association of the company which was in these terms:

> *"Subject to the provisions of section 310 of the Act every Director or other officer of the Company shall be indemnified out of the assets of the company against all losses or liabilities which he may sustain or incur in or about the execution of the duties of his office or otherwise in relation thereto, including any liability incurred by him in defending any proceeding, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under Sections 144(3) or (4) or Section 727 of the Act in which relief is granted to him by the Court, and no other Director or other officer shall be liable for any loss, damage or misfortune which may happen to or be incurred by the Company in the execution of the duties of his office or in relation thereto. In this connection the Company may pursuant to Section 310(3) of the Act purchase and maintain indemnity insurance cover for its Directors and other officers. Such indemnity shall extend to former Director and officers of the Company."*

At paragraph 28 and following of his judgment, Stanley Burnton J said in relation to Article 18:

> *"In my judgment the Court should in an appropriate case take a provision such as Article 18 into account, and apply it, when dealing with questions of costs. It is not necessary for there to be a formulated claim or counterclaim pleading such a provision.*
>
> *However, the authorities show that on applications such as those before me, a provision such as Article 18 should be applied by the Court only if its application is straightforward and not susceptible of real dispute: see the judgment of Ferris J in John v Price Waterhouse [2002] 1WLR 953. If there is a real dispute, the Court should leave the person seeking to rely on such an alleged provision to bring appropriate proceedings to enforce his contractual right.*
>
> *The Articles of Association of a company are as a result of statute a contract between the members of a company and the company in relation to their membership. The Articles are applicable to the relationship between a company and its officers as such. In so far as the Articles are not automatically binding as between a company and its officers, the Articles may be expressly or impliedly incorporated in the contract between the company and a director. They will be so incorporated if the director accepts appointment "on the footing of the Articles,*

and relatively little may be required to incorporate the Articles by implication: per Ferris J at paragraph 26 of his judgment."

In my opinion it is not appropriate to grant the indemnity sought at this stage of the proceedings in light, among others, of the following facts and matters:

(a) Mr. Huskisson very properly informed me in the course of arguments that *"Mr. Ryan recalls there was a contract but he has not been able to find it."* It is to be noted that there is no reference to this in Mr. Ryan's list of documents. Mr. Huskisson rightly concedes that it should have been referred to.

(b) It would be highly material to identify (if and when the contract is found) with which company or companies any contract of employment was entered into and the precise terms thereof and which Articles (if any) are referred to.

(c) This is particularly important given that the Articles of Hotelco (the First Plaintiff) differ from those of Cesar Properties (the Second Plaintiff) which in turn differ from those of CGCR (the Third Plaintiff).

The Articles of Hotelco provide at Article 146:

"Expenses incurred in defending any civil or criminal action or proceeding for which indemnification is required pursuant to these Articles shall be paid by the Company in advance of the final disposition of such action or proceeding upon receipt of an undertaking by or on behalf of the Indemnified Person to repay such amount if it shall ultimately be determined that the Indemnified Person is not entitled to be indemnified pursuant to these Articles. Each Member of the Company, by virtue of his acquisition and continued holding of a Share, shall be deemed to have acknowledged and agreed that the advances of funds may be made by the Company as aforesaid, and when made by the Company under this Article are made to meet expenditures incurred for the purpose of enabling such Indemnified Person to properly perform his or her duties to the Company. [*Any indemnity obligations pursuant to the Articles shall in all events be fully subordinated to the Debt and will not give rise to a claim against the Company in the event that cashflow in excess of the amount required to pay the Debt is insufficient to pay such obligations*]."

The final sentence in square brackets is clear in its terms. Any indemnity obligations pursuant to the Articles are subordinated to the Debt and do not give rise to a claim

the event that cashflow in excess of the amount required to pay the Debt is insufficient to pay such obligations]."

The final sentence in square brackets is clear in its terms. Any indemnity obligations pursuant to the Articles are subordinated to the Debt and do not give rise to a claim against the company in the event that cash-flow in excess of the amount required to pay the Debt is insufficient to pay such obligations.

The Articles of Cesar Properties are in the same terms as those of Hotelco, save that the words in square brackets are not included. The Articles of CGCR are in entirely different terms.

(d) The application (if any) of the differing articles in the present case is to borrow the words of Stanley Burnton J, albeit in different context, "susceptible of real dispute".

For these reasons, the application for indemnity at this stage fails and it is unnecessary to consider the other objections raised by Mr. Robinson.

The applications for both security for costs and indemnity are accordingly dismissed.

DATED this 25th day of September 2012

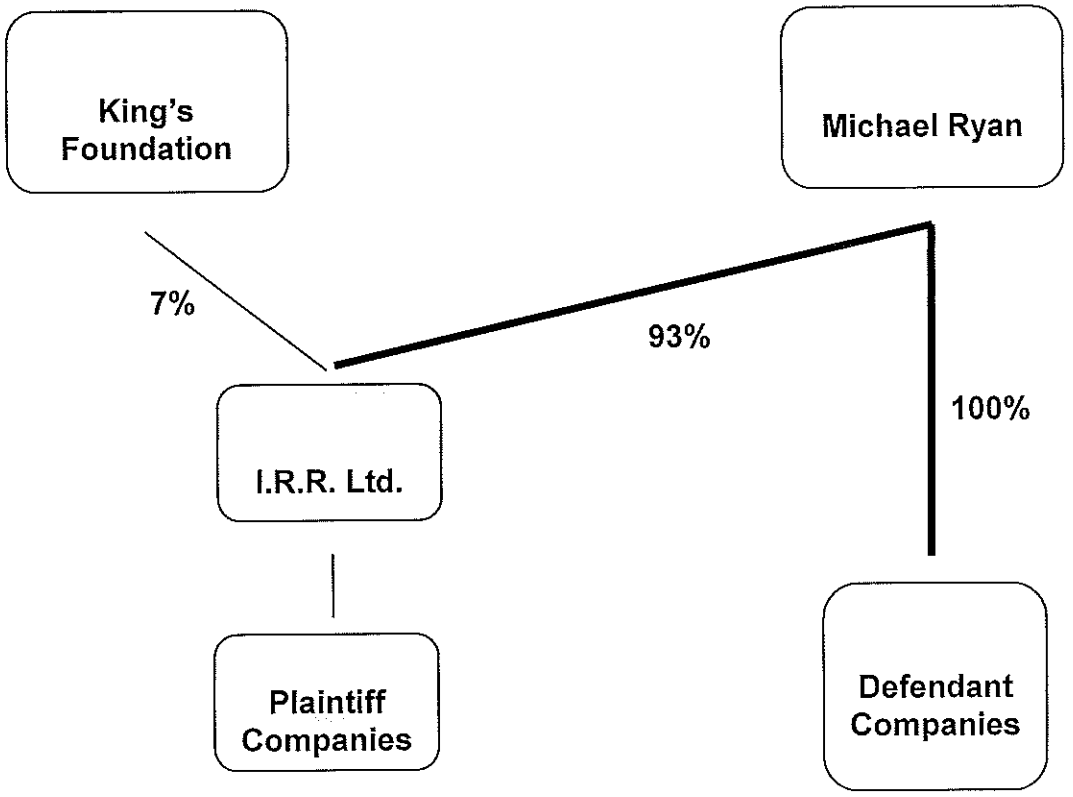
Cresswell J

The Honourable Justice Cresswell
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS

Appendix 1

STRUCTURE CHART



Appendix 2