

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3 **CAUSE NO FSD: 58 OF 2012 (PCJ)**
4

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

10 **PLAINTIFFS**

11
12 **AND** (1) MICHAEL RYAN
13 (2) ORION DEVELOPERS LTD.
14 (3) DECKHOUSES CONSTRUCTION COMPANY LTD.
15 (4) I.R.R. LIMITED
16 (5) ENDLESS SERVICE MANAGEMENT LTD.
17 (6) BLUETIP WATERSPORTS LTD.

18 **DEFENDANTS**
19

20 **APPEARANCES:** Mr. Hector Robinson of Mourant Ozannes for the Plaintiffs
21 Mr. Ian Huskisson of Thorp Alberga for the Defendants
22

23 **JUDGMENT – PRELIMINARY ISSUES**

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25

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1 **1. THE PRELIMINARY ISSUES**

2

3 **Directions**

4

5 On 14 August 2012 I directed that there should be a trial of a preliminary issue as to whether the
6 Receivers were validly appointed in terms of the Registered Land Law (2004 Revision) ("the
7 RLL"), (the "Preliminary Issue").

8

9 On 19 September 2012 I directed that the Preliminary Issue be expanded to include the question
10 whether the Receivers have authority to bring this proceeding. This direction reflected an issue
11 raised in paragraph 12.4 of the Amended Defence.

12

13 **2. INTRODUCTION**

14

15 The earlier ruling in this action dated 25 September (security for costs) and the judgment in FSD
16 98/2012 dated 1 November (application for an injunction) set out the background to this action
17 (the Receivers' action) and to FSD 98 (the Guarantee action).

18

19 The Defendants' position in this action is that if the Court were to hold that there was an event of
20 default by P2 and P4 and a valid demand under the guarantees given by P1 and P3, the Lender
21 would be entitled to appoint receivers under the Debentures.

22

23 The Defendants say however that such an appointment could not extend to the exercise of
24 powers which are inconsistent with the RLL without first complying with the notice provisions
25 thereof, and that the powers reserved to the Receivers under the Debentures do not entitle them
26 to bring the claims in this action.

27

28 Issues as to whether there was an event of default by P2 and P4 and a valid demand under the
29 guarantees given by P1 and P3 are not considered in this judgment. The Court will, after delivery
30 of this judgment, give case management directions in both actions to ensure that all parties in

1 both actions are bound by the result of the determination of the event of default and demand
2 issues.

3
4 This judgment addresses preliminary issues as to whether the Defendants are correct in their
5 contentions (a) that the appointment of the Receivers could not extend to the exercise of powers
6 which are inconsistent with the RLL without first complying with the notice provisions thereof
7 and (b) that the powers reserved to the Receivers under the Debentures do not entitle them to
8 bring the claims in this action.

9
10 This judgment considers (among others) an issue of considerable general importance in the
11 Cayman Islands - Does the RLL contain a mandatory statutory code, the effect of which is that a
12 Receiver may only be appointed in respect of income from land upon the expiry of three months
13 following service of a valid notice under S.72(1) of the RLL and do S.75(2) and S.78 of the RLL
14 further restrict the right of entry of a lender's receiver onto charged land until after a bid has been
15 accepted for the sale of the land at an auction, as the Defendants contend, or were the Receivers
16 validly appointed in respect of income from and entitled to enter onto the charged land because
17 the appointment was outwith the RLL, because (as the Plaintiffs contend) the appointment was
18 pursuant to contractual rights under the Debentures or rights arising in equity and such an
19 appointment is not subject to the RLL? It is conceded by the Plaintiffs that if the RLL applies, it
20 was not complied with.

21
22 Before turning to consider the agreed list of questions for the preliminary issues it is convenient
23 to set out/ refer to:

- 24
25 - SUMMARY OF CLAIMS AND COUNTERCLAIMS IN THIS ACTION AND
26 RELATED LITIGATION (chapter 3);
27
28 - AGREED FACTS (chapter 4);
29
30 - THE CHRONOLOGY OF NOTICES, APPOINTMENTS, LETTERS ETC. (chapter 5);
31 and



1 - THE DEBENTURES (chapter 6).

2

3 **3. SUMMARY CLAIMS AND COUNTERCLAIM IN THIS ACTION AND**
4 **RELATED LITIGATION**

5

6 **Re-Amended Statement of Claim**

7

8 The claims in the Re-Amended Statement of Claim (and the defences) are as follows.

9

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

14

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

23

24 3. It is alleged that the Defendants owe the Plaintiffs commission in relation to condo
25 rentals. The Defendants deny this. The Defendants claim that the commissions due to
26 the relevant Plaintiffs have been accounted for and utilised to meet legitimate business
27 expenses.

28

29 4. It is alleged that Mr Ryan improperly transferred a valuable asset of the Receivership
30 Companies to his benefit. This claim is disputed.

31



1 5. It is alleged that significant sums have been paid to Mr Ryan from the Hotelco and the
2 CGCR bank accounts for which Mr Ryan has failed adequately to account to the
3 Receivers. These claims are disputed.

4
5 6. It is alleged that significant sums having been paid to Orion from the Hotelco, CGCR and
6 Cesar Properties bank accounts for which Orion has failed adequately to account to the
7 Receivers. These claims are disputed.

8
9 7. It is alleged that agreements for the sale of properties belonging to the Receivership
10 Companies were entered into for consideration amounting to hundreds of millions of
11 dollars, for which Mr Ryan has failed to adequately account to the Receivers. These
12 claims are disputed.

13
14 8. It is alleged that Orion collected "Tourism Tax" on behalf of the Receivership Companies
15 and failed to pay it over to the appropriate government authority or adequately to account
16 to the Receivers. This claim is disputed.

17
18 9. It is alleged that Mr Ryan and Orion are in possession of significant books and records of
19 the Plaintiffs which, despite demands, they have failed to deliver up to the Receivers.
20 This claim is disputed.

21
22 **Defendants' Counter Claims**

23
24 The Defendants' Counter Claims are as follows.

25
26 By Mr. Ryan

27
28 It is alleged that Mr Ryan is owed outstanding salary of \$1,228,938 and loans of \$550,000. The
29 Plaintiffs do not admit that Mr Ryan is entitled to any salary or other compensation from the
30 Receivership Companies. Nor do the Plaintiffs admit the existence of any "loans" from Mr Ryan
31 or any liability to repay Mr Ryan any amount.



1 By Orion

2

3 Orion claim \$4,354,438 in outstanding fees and expenses pursuant to the Development
4 Management Agreement (“DMA”) and damages for breach and unlawful termination of the
5 DMA. None of the claimed fees and expenses are admitted by the Plaintiffs. The Plaintiffs also
6 do not admit that the DMA is binding and enforceable.

7

8 By Bluetip

9

10 Bluetip claim declarations, damages, and an injunction for a claimed breach of the Asset
11 Purchase Agreement dated 21 October 2011 (“APA”) and interference with Bluetip’s rights
12 under an alleged Licence to operate the water sports business from the Docks. None of Bluetip’s
13 claims are admitted by the Plaintiffs.

14

15 FSD 98/2012

16

17 The judgment in FSD 98/2012 dated 1 November (application for an injunction) sets out the
18 background to FSD 98 (the Guarantee action).

19

20 **4. AGREED FACTS**

21

22 The following facts are agreed.



23 Mr Ryan has been the principal owner and developer of the project since its inception, as part of
24 that he has overseen the construction and development of the Resort beginning in 1997. He
25 procured the acquisition of the beachfront site (previously a Holiday Inn) and combined it with
26 land on the opposite side of the West Bay Road into a single 144-acre parcel stretching from
27 Seven Mile Beach to the North Sound. The Ritz-Carlton Hotel is on both sides of West Bay
28 Road connected by a gallery. The east side of the property also includes the 9 hole Greg Norman
29 Golf Course, the tennis facility, canals, Exclusive Island, the Deckhouses, the parcel designated
30 for Secret Harbour, and also the Marina Towers parcel. Amongst other things, he led the clean

1 up and repair operations following Hurricane Ivan in 2004 and ensured that the hotel was able to
2 open for business in late 2005.

3 The real estate and associated services offered at the Resort included the design, construction,
4 sale and rental of residences, the design, construction and operation of a golf course and the
5 provision of a suite of luxury services (under the "Endless Services" brand, a concept created by
6 Mr. Ryan) and including internal fit-out of their Residences, a fleet of cars and boats to
7 participating owners of the condominiums/residences offered for sale as part of the Resort. From
8 2007 to the commencement of the receivership, Orion managed a number of these operations
9 (amongst other things) on behalf of the First, Second, Third and Fourth Plaintiffs ("the
10 Receivership Companies"). Aspects of the Resort, comprising the hotel, and related amenities,
11 golf course, Residences, Exclusive Island, the Deckhouses are managed by Ritz-Carlton through
12 a number of service agreements including, the Operating Agreement, the Marketing and
13 Licensing agreement, the Condominium Management Agreement, the Deckhouses Management
14 Agreement, and the Golf Course Management Agreement.



16 **Relevant Historical Background**

17 The Debentures form part of a security which, in part, dates back to the original financing of the
18 Resort in 2001. This original financing was provided by RBS to Humphreys (Cayman) Ltd
19 (which is the former name of Hotelco). Humphreys was then the registered proprietor of
20 leasehold interest in the land on which the Resort was subsequently developed. The land was
21 then registered as Block 12C Parcel 11/1 but has since been subdivided into multiple parcels.
22 Parcel 11/1 subsequently became parcel 393/1 which is the parcel on which the hotel is now
23 situated (the Hotel Parcel).

24 The security for the RBS financing included the RBS Debenture dated 21 March 2001 between
25 Humphreys and RBS. The security also included a "Collateral Charge" registered against the
26 land register for, as it then was, Parcel 11/1. The Collateral Charge is shown on the land register
27 for Parcel 393/1 (formerly Parcel 11/1) as Instrument No. 2272/01.

28 The Collateral Charge on its face states that it is "*Collateral to a Debenture between Humphreys*
29 *(Cayman) Limited and The Royal Bank of Scotland plc* " The Collateral Charge was registered at

1 the Land Registry on 6 April 2001, as per the endorsement appearing at the bottom of the first
2 page. The RBS Debenture was not registered at the Land Registry.

3 The Land Register for the Hotel Parcel shows all the encumbrances against the register. It shows
4 the variations of the Collateral Charge on the occasion of each additional advance.

5 In 2007 the RBS loan was refinanced by Column Financial. This refinancing involved a loan by
6 Column of US\$250 million to the Receivership Companies as set out in the Loan Agreement
7 dated April 16, 2007. As a result of the refinancing, the RBS Debenture was assigned to Column
8 and varied by an Assignment and Variation of Debenture dated 16 April, 2007. By this time the
9 resort land had been subdivided into several parcels. The Collateral Charge dated 21 March
10 2001, which was registered against the vast majority of the parcels, was transferred to Column
11 and varied.

12 At the same time a new Collateral Debenture was given by CGCR, Cesar Properties and
13 Condoco Properties to Column. CGCR, Cesar Properties and Condoco Properties were not
14 parties to RBS Debenture, but were made parties to the Loan Agreement with Column. This
15 Collateral Debenture expressly states that it is collateral to the debenture between Hotelco,
16 (formerly Humphreys (Cayman) Limited), and RBS, as assigned to Column and varied. Neither
17 the assigned and varied Debenture nor the new Collateral Debenture was registered at the Land
18 Registry against any of the parcels.

19 Clause 5.1.19 of the Loan Agreement provided that within 60 days, Hotelco and CGCR, should
20 transfer all their right title and interest to their property, including their leasehold interests in
21 their real estate, to Cesar Properties and Condoco Properties respectively. The First Amendment
22 to the Loan Agreement dated 10 January 2008, between the Receivership Companies and
23 Column, among others, recites, (at the last recital on p. 2), the fact that pursuant to clause 5.1.19
24 of the Loan Agreement, Hotelco and CGCR have transferred their interests in the real estate to
25 Cesar Properties and Condoco Properties respectively. These transfers are now reflected on the
26 land registers for the respective parcels: e.g. see land register for the Hotel Parcel, which shows
27 that the Hotel Parcel was transferred to Cesar Properties on 20 February 2008 by Instrument No.
28 1261/08.



1 The Defendants contend that consequent on the First Amendment to the Loan Agreement, CGCR
2 and Hotelco became guarantors not primary obligors. Further, the assigned and varied
3 Debenture between Hotelco and RBS was amended and restated to constitute the Amended and
4 Restated Debenture dated January 10 2008, and the Collateral Debenture granted by CGCR,
5 Cesar Properties and Condoco Properties to Column was, on the same date, amended and
6 restated to constitute the Amended and Restated Collateral Debenture dated January 10, 2008.
7 Neither the Amended and Restated Debenture nor the Amended and Restated Collateral
8 Debenture were registered at the Land Registry. Material provisions of the Debentures are set out
9 in chapter 6 below.

10 Also on 10 January 2008, the Receivership Companies entered into Deeds of Assumption and
11 Restatement. By these Deeds, the Lender consented to the transfer of some (but not all) of
12 Hotelco's property to Cesar Properties and some (but not all) of CGCR's property to Condoco
13 Properties; the Receivership Companies agreed to the transfers; and the Receivership Companies
14 undertook to perform and discharge the liabilities, duties and obligations contained in the
15 Collateral Charge.

16 The Amended and Restated Debenture and the Amended and Restated Collateral Debenture were
17 assigned by Column to the Lender on 30 June 2011 by an Assignment of Amended and Restated
18 Debenture and an Assignment of Amended and Restated Collateral Debenture respectively, both
19 dated 30 June 2011. The Collateral Charge dated 21 March 2001 as subsequently varied and
20 transferred to Column Financial on 16 April 2007 and registered against each land register, was
21 transferred to the Lender in May 2011, which transfer was registered on the land register for each
22 relevant parcel. By May 2011 the registered chargors were Cesar Properties and Condoco
23 Properties. By May 2011 the chargors were Cesar Properties and Condoco Properties. The
24 Lender's assigned interest under the Amended and Restated Debenture and under the Amended
25 and Restated Collateral Debenture was not registered at the Land Registry.

26 It was pursuant to the assigned Amended and Restated Debenture and the assigned Amended and
27 Restated Collateral Debenture that the Lender asserts it appointed the Receivers on 12 March
28 2012, following notices of default served on the Receivership Companies on 16 February, 2012,



1 5 March 2012 and 7 March 2012, and a notice of acceleration of payment served on Cesar
2 Properties and Condoco Properties on 12 March 2012.

3 On 16 February, 5 and 7 March 2012, the Lender served notices on the Receivership Companies
4 of various alleged Events of Default under the Loan Agreement. These Events of Default are set
5 out in paragraph 19 of the Re-Amended Statement of Claim. The alleged Events of Default were
6 alleged performance breaches.

7 The Notices dated 16 February, 5 and 7 March 2012 reserve the right to demand repayment of
8 the Mortgage Loan and without further notice to Receivership Companies to exercise the
9 Lender's other rights, powers and remedies available under the "Loan Documents" which include
10 the Debenture and the Collateral Debenture. Repayment of the Mortgage Loan was demanded of
11 Cesar Properties and Condoco Properties on 12 March 2012. No demand for the repayment of
12 the Mortgage Loan has been made of Hotelco or CGCR. The Plaintiffs say no further demand
13 for the repayment of the Mortgage Loan was required. The Plaintiffs also say this is irrelevant to
14 the Preliminary Issue.

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

19 Upon the appointment of the Receivers on 12 March 2012 Mr Ryan resigned his office as a
20 director of each of the Receivership Companies and as a member of the Executive Committee of
21 all the strata corporations. Mr. Scott Elphinstone and Mr William Messer, who were members of
22 the boards of directors of all the Receivership Companies prior to the appointment of the
23 Receivers, remained in their office and now constitute the board of directors of each of the
24 Receivership Companies.

25 The Receivers claim Mr. Ryan did not object to the appointment of the Receivers over the
26 Receivership Companies prior to his resignation and that none of the boards of directors of the
27 Receivership Companies, whether before or after the resignation of Mr. Ryan, objected to the



1 appointment of the Receivers over the Receivership Companies. The Defendants do not accept
2 this and say that even if it were correct it does not give the Receivers authority to sue them.

3 The Receivers claim Mr. Ryan met with the Receivers on 12 March 2012 and offered to and did
4 co-operate with the Receivers in the performance of their duties as evidenced in a chain of e-mail
5 correspondence exchanged between Mr. Ryan and Mr Keith Blake, one of the Receivers, on 15
6 March 2012. Through Mr Tony Haddad, an agent of Orion. Mr Ryan provided documents to the
7 Receivers. The Defendants claim this is of no consequence except as a demonstration of Mr.
8 Ryan's alleged good faith.

9 Mr. Elphinstone and Mr. Messer agreed to be appointed directors of CGCR's wholly owned
10 subsidiary ESL by written resolution dated 16 March 2012. Further Mr. Elphinstone and Mr
11 Messer passed resolutions on 24 April 2012 authorising the transfer of the registered offices of
12 the Receivership Companies to KPMG. It is the Plaintiffs' position that Mr. Scott Elphinstone
13 and Mr. William Messer, in their capacity as the board of directors of each of the Receivership
14 Companies, have co-operated and assisted the Receivers in the carrying out of their duties and in
15 instituting the present action. For example, it is claimed they authorised the Receivers to issue
16 the current proceedings on behalf of ESL and further authorised Mr Keith Blake to provide his
17 five affidavits in these proceedings on behalf of ESL (first affidavit of Mr. Blake (paragraph 3),
18 second affidavit of Mr. Blake (paragraph 2), third affidavit of Mr. Blake (paragraph 2), fourth
19 affidavit of Mr. Blake (paragraph 2) and fifth affidavit of Mr. Blake (paragraph 2)). The
20 Defendants admit the two resolutions were passed but deny the Receivers have any authority to
21 act on ESL's behalf.

22
23 On 23 March 2012 s.72 Notices were served on behalf of the Lender on Cesar Properties and
24 CGCR. That notice demanded the principal and interest then said to be due under the Loan
25 Agreement of \$233,896,319. Further, it put the Receivership Companies on notice that if the
26 money said to be owing was not paid by 23 June 2012 the Lender intended to exercise its rights
27 under Section 72(2) of the Registered Land Law (2004 Revision) and appoint a receiver over the
28 income of the Charged Property or sell the Charged Property. The Lender in the exercise of its
29 powers under the charges registered under the Registered Land Law scheduled a sale of the real
30 property owned by the Receivership Companies by way of public auction on 31 October 2012.



1 Between 12 March 2012 and 23 June 2012 the Receivers have (amongst other things) taken the
2 following steps:

3
4 (1) They have collected rent and other income from the real estate comprised within
5 the Charged Property. The income has been applied towards some of the
6 liabilities of the Receivership Companies, and the Receivers' fees and expenses.

7
8 (2) On or around 16 March 2012 (following service of a letter from their attorneys of
9 the same date) they took possession of the Docks, padlocked the entrance to the
10 Docks, erected a wire barrier allegedly in breach of a claimed licence Bluetip
11 assert was granted to them by Hotelco. The Plaintiffs say the Docks are partially
12 situated on land of which Cesar Properties is the registered owner. On 23 March
13 2012 the Receivers, acting on a request from the management of the Resort,
14 removed all barriers to access to the Docks (i.e. the padlock and wire barrier).
15 The Plaintiffs' position is that no valid licence for the use of the Docks was
16 granted by Hotelco since, on the date the licence was purportedly granted,
17 Hotelco had no right or title to the dock.

18
19 (3) On or around 10 April 2012 they caused the Receivership Companies and ESL to
20 commence legal proceedings against Mr Ryan, Orion, Deckhouses Construction,
21 I.R.R., ESML and Bluetip.

22
23 Mr. Ryan and the other Defendants, through their attorneys' letters dated 4 and 10 April 2012,
24 wrote to the Receivers attorneys alleging that they had not complied with the notice requirements
25 of the RLL. The Plaintiffs' attorneys responded in writing to these letters on 27 April 2012.

26
27 On 31 October 2012 the Resort was sold by public auction to the Lender for US\$177.5 million.



1 5. THE CHRONOLOGY OF NOTICES, APPOINTMENTS, LETTERS ETC.

2
3 16 February 2012

4
5 On 16 February 2012 Five Mile Capital Real Estate Advisors LLC (“Five Mile”) wrote to Cesar
6 Properties and Condoco Properties. The letter referred inter alia to the Loan Agreement of 14
7 April 2007 as amended, the Loan Extension Agreement of 9 May 2011, the Guarantee
8 Agreement dated 16 April 2007, the Payment and Performance Guarantee dated 10 January 2008
9 (as amended) and the assignment of 30 June 2011.

10
11 The letter stated:

12
13 *“As of the date hereof, the Loan has been transferred to special servicing and the*
14 *undersigned is the special servicer.....*

15
16 *Lender [RCC] hereby notifies Borrower [Cesar Properties and Condoco Properties] that*
17 *Events of Default have occurred under the LEA and Loan Agreement as follows:*

18
19 *(i) as a result of Borrower’s failure to deliver to Lender on or before November 9,*
20 *2011, as required by Section 10 of the LEA, evidence reasonably satisfactory to*
21 *Lender that Borrower has initiated substantive communications with The Ritz-*
22 *Carlton Hotel Company of the Cayman Islands, Ltd (“Ritz-Carlton”) to extend*
23 *the subordination of Ritz-Carlton’s management fees for a period of time*
24 *(satisfactory to Lender in its reasonable discretion) beyond May 9, 2012;*

25
26 *(ii) as a result of Borrower’s failure to deliver to Lender on or before February 9,*
27 *2012, as required by Section 10 of the LEA, (x) evidence of Borrower’s ability to*
28 *refinance the Loan prior to the Maturity Date or (y) other information such that*
29 *Lender shall be reasonably satisfied that the potential expiration of the*
30 *subordination of Ritz-Carlton’s management fees to the Loan pursuant to the*
31 *NDA will not prohibit a refinancing of the Loan;*



1 (iii) under Section 8.1(a)(ix) of the Loan Agreement, as a result of Borrower's failure
2 to obtain Lender's prior written consent, as required by Section 5.2.10 of the
3 Loan Agreement, prior to permitting a Sale or Pledge of a portion of the Property
4 to occur pursuant to the terms of that certain Golf Agreement dated July 13, 2011,
5 executed and delivered by Cesar Hotelco, The Proprietors, Strata Plan No. 404,
6 Waterworks Limited and Dragon Bay Limited; and

7
8 (iv) under Section 8.1(a)(ix) of the Loan Agreement, as a result of Borrower's failure
9 to obtain Lender's prior written consent, as required by Section 5.2.10 of Loan
10 Agreement, prior to permitting a Transfer of approximately \$1.27 million in or
11 about August 2011 withdrawn from the Reserve (as established pursuant to
12 Section 5.6 of the Second Amended and Restated Operating Agreement effective
13 as of November 30, 2006 between Cesar Hotelco, as Owner, The Proprietors,
14 Strata Plan No. 404, 436, 437, 438, and 447, as Strata Corps., and Ritz-Carlton,
15 as Operator, as amended).

16
17 In connection with such Events of Default, Lender (i) reserves the right to declare the Loan
18 immediately due and payable, and (ii) reserves the right, without further notice to Borrower or
19 any other party, to exercise the other rights, powers and remedies available to Lender under the
20 Loan Documents or at law or in equity, in such manner and at such times as Lender in its sole
21 and absolute discretion deems appropriate.....”

22
23 **17 February 2012**



24
25 On 17 February 2012 Morgan Lewis as outside counsel to Cesar Properties and Condoco
26 Properties (the Borrowers) and Hotelco and CGCR (the Original Borrowers) replied to Five
27 Mile's letter dated 16 February set out above. The reply stated

28
29 “...Based on the foregoing, the Borrowers have satisfied their obligations as set forth in
30 the Loan Agreement and the Extension Agreement and the Borrowers are not in default
31 under either agreement. As a result, no Events of Default have occurred, and the Senior

1 Lender has no right (i) to declare the Loan immediately due and payable, or (ii) to
2 exercise any other rights, powers and remedies available to it under the Loan Agreement
3 and the other documents executed in connection thereto or at law or in equity upon the
4 occurrence of an Event of Default....

5
6 the Borrowers reserve all rights, remedies, positions and defenses they may have under
7 the Loan Documents, at law or in equity.”

8
9 **5 March 2012**

10
11 On 5 March 2012 Five Mile wrote to Cesar Properties and Condoco Properties

12
13 “Lender has learned that a portion of the Property known as West Bay Beach South,
14 Block 12C, Parcel 451/3H10H12 was transferred to David Morrison in violation of the
15 provisions of Section 5.2.10 and Section 9.8 of the Loan Agreement. Such transfer
16 constitutes an immediate Event of Default under Section 8.1 (iv) of the Loan Agreement.

17
18 In connection with such Event of Default, Lender (i) reserves the right to declare the
19 Loan immediately due and payable, and (ii) reserves the right, without further notice to
20 Borrower or any other party, to exercise the other rights, powers and remedies available
21 to Lender under the Loan Documents or at law or in equity, in such manner and at such
22 times as Lender in its sole and absolute discretion deems appropriate”



23
24 **6 March 2012**

25
26 The Letter of Engagement between RCC and the Receivers dated 6 March 2012 provided

27
28 “...Agency of Receivers

29
30 The Receivers, once validly appointed, shall be agents of the Companies. ...

31 Scope of engagement

1 *The Receivers will either be appointed pursuant to the security as set out in the Security*
2 *Documents, or by the Grand Court of the Cayman Islands.... with all and every power*
3 *and authority specified by the Security Documents or by the Court....*

4
5 *We understand that one option that the Lender is considering would be to, where*
6 *necessary and appropriate, negotiate settlements with other lending parties and other*
7 *stakeholders so as to acquire a controlling interest in the Companies. To this end the*
8 *Receivers would be able to assist by coordinating any such negotiations with relevant*
9 *parties on behalf of the Lender, arranging a public and transparent sale process, and*
10 *dealing with any associated Court process for obtaining approval to any such*
11 *transaction..*

12
13 *We will need to engage an independent firm of Cayman attorneys to advise the Receivers*
14 *on any legal matters that may arise during the course of this engagement as well as the*
15 *validity of the appointment itself.*

16
17 *The Receivers will have to comply with the requirements of the relevant Cayman laws*
18 *including, but not limited to, the Companies Law, the Bankruptcy Law (insofar as it*
19 *relates to receiverships), the Land Law and the Labour Law in carrying out their*
20 *duties..."*



21
22 **7 March 2012**

23
24 On 7 March 2012 Five Mile wrote to Cesar Properties and Condoco Properties. The letter
25 stated:-

26
27 *"...Borrower has failed to deliver to Lender certified copies of the existing Policies by*
28 *March 6, 2012, as required by the March 1 Letter. Borrower's failure to deliver to*
29 *Lender certified copies of the existing Policies by March 6, 2012 constitutes an*
30 *immediate Event of Default under Section 8.1(a)(iii) of the Loan Agreement.*

1 Furthermore, Borrower has failed to deliver to Lender by March 5, 2012 (ten(10) days
2 prior to the expiration date of the Policies) certificates of insurance evidencing the
3 renewal Policies, accompanied by evidence satisfactory to Lender of payment of the
4 premiums due thereunder as required by Section 6.1(b) of the Loan Agreement.
5 Borrower's failure to deliver certificates of insurance evidencing the renewal Policies,
6 accompanied by evidence satisfactory to Lender of payment of the premiums due
7 thereunder, constitutes a Default under the Loan Documents.

8
9 Lender hereby demands that Borrower immediately deliver to Lender certificates of
10 insurance evidencing the renewal Policies, accompanied by evidence satisfactory to
11 Lender of payment of the premiums due thereunder. If Borrower fails to provide such
12 evidence in a form satisfactory to Lender by 6:00 p.m. (eastern) today, March 7, 2012,
13 Lender intends immediately thereafter to take all necessary steps to procure the same and
14 pay the insurance premiums therefor on Borrower's behalf in accordance with the
15 provisions of Section 6.1(f) of the Loan Agreement.

16
17 Pursuant to Section 6.1(f) of the Loan Agreement, all premiums incurred by Lender in
18 connection with obtaining such insurance and keeping it in effect shall be paid by
19 Borrower to Lender upon demand and, until paid, shall be secured by the Mortgage, the
20 Mortgage of Shares and the Debenture and shall bear interest at the Default Rate.

21
22 In connection with the aforementioned Event of Default and Default, Lender (i) reserves
23 the right to declare the Loan immediately due and payable, and (ii) reserves the right,
24 without further notice to Borrower or any other party, to exercise the other rights,
25 powers and remedies available to Lender under the Loan Documents or at law or in
26 equity, in such manner and at such times as Lender in its sole and absolute discretion
27 deems appropriate....."

28
29 Morgan Lewis in a letter dated 7 March 2012 addressed to Haynes and Boone LLP replied to
30 Five Mile's letter of 7 March set out above, disagreeing that a Default occurred and attaching a
31 copy of the existing Policies. Further correspondence followed on 8 and 9 March.



1 **12 March 2012**

2
3 A Notice of Acceleration dated 12 March 2012 from Five Mile to Cesar Properties and Condoco
4 Properties stated:-

5
6 *"...Reference is further made to those certain letters to you from the undersigned, dated*
7 *February 16, 2012, March 5, 2012 and March 7, 2012 pursuant to which, among other*
8 *things, you were notified that certain Events of Default had occurred.*

9
10 *In view of such Events of Default, the Debt is hereby accelerated and demand is made for*
11 *immediate payment in full of the Debt...."*

12
13 The two Deeds of Appointment of the Receivers were dated 12 March 2012.

14
15 The Deeds of Appointment referred in the recitals to the Amended and Restated Debenture and
16 the Amended and Restated Collateral Debenture both dated 10 January 2008 and the Deed of
17 Assignment dated 30 June 2011.

18
19 The Recitals continued:-

20
21 *"Pursuant to clause 17.2 of the Debenture, upon the occurrence of an Event of Default*
22 *(as defined in the Debenture), the Lender shall be entitled, inter alia, to appoint by*
23 *instrument any person or persons to be a receiver or receivers of the Charged Property*
24 *and assets charged under the Debenture....*

25
26 *Events of Default referred to in the Debenture have occurred and the Lender's rights*
27 *under the Debenture have become enforceable ..."*

28
29 The Deeds then continued

30
31 *"NOW THIS DEED WITNESSETH AS FOLLOWS:*



1 1. *In exercise of the powers conferred upon the Lender pursuant to the Debenture,*
2 *the Lender appoints Kris Beighton and Keith Blake to be receivers of all the*
3 *assets referred to and comprised in and charged by the Debenture, upon the terms*
4 *set out therein and the letter of engagement between the Lender and Receivers*
5 *dated 6 March 2012... ”*

6
7 Also on 12 March 2012 Morgan Lewis wrote to Haynes and Boone:

8
9 *“In its letter dated March 12, 2012 to Cesar Properties Ltd and Condoco Properties Ltd,*
10 *Five Mile Capital declared that in view of the purported Events of Default previously*
11 *asserted by Five Mile Capital, the Debt was accelerated and a demand was made for*
12 *immediate payment in full of the Debt. In addition, Cesar Hotelco (Cayman) Ltd,*
13 *Condoco Grand Cayman Resort Ltd, Cesar Properties Ltd and Condoco Properties Ltd*
14 *(collectively, the “Companies”) are in receipt of a letter dated March 12, 2012 from*
15 *KPMG notifying the Companies that KPMG has been appointed Joint and Several*
16 *Receivers of the Companies pursuant to Deeds of Appointment by RC Cayman Holdings*
17 *LLC.*

18
19 *As we have previously stated in our letters to you dated February 17, 2012, March 7,*
20 *2012 and March 9, 2012, Borrower disputes that a Default or an Event of Default has*
21 *occurred or exists. However, in an effort to preserve the limited resources available to*
22 *the Companies and given the upcoming maturity of the Loan on May 9, 2012, the*
23 *Companies will not contest the appointment of KPMG as a receiver on behalf of the*
24 *Lender. This election not to contest shall not be construed as an admission or waiver of*
25 *any rights of the Companies, and all such rights are expressly reserved.”*

26
27 **22 March 2012**

28
29 On 22 March 2012 Appleby as attorneys for Mr Ryan wrote to the Receivers’ attorneys:



1 “We are concerned that your clients appear to be assuming a role to which they have not
2 been appointed, namely an investigative role which is inappropriate to receivers
3 appointed under a debenture, and demanding information to which they have no
4 contractual or statutory right.....”



5
6 **23 March 2012**

7
8 On 23 March 2012 Conyers on behalf of RCC issued Notices of Demand to Cesar Properties and
9 Condoco Properties in the following terms:

10
11 *“TAKE NOTICE THAT the entire amount of principal and interest secured by*

- 12
13 *(1) An Amended and Restated Collateral Debenture dated 10 January 2008 which*
14 *was assigned and transferred to [RCC] (“the Lender”) on 30 June 2011 and*
15 *collateral to a Debenture made on 21 March 2011 (as amended by deeds of*
16 *amendment dated 11 July 2003 and 16 July 2004 (“the Debenture”), and*
17 *(2) A Collateral Charge over properties described in Schedule A attached hereto*
18 *(“the Charge”)*

19
20 *has become due and payable pursuant to your default under the terms of the Debenture*
21 *and the Charge by failing to perform and observe the provisions of the Debenture and*
22 *Charge and such default has continued for a period in excess of 30 days.*

23
24 *The amount due us at 16 March 2012 was US\$233,896,319.32 being US\$232,829,781.15*
25 *principal and US\$1,066,538.17 non-default and default interest and interest will continue*
26 *to accrue at the rate of:...*

27
28 *AND TAKE FURTHER NOTICE THAT we hereby DEMAND payment of the entire*
29 *amount of principal and interest with interest accruing at the abovementioned daily rate*
30 *until the date of payment and if the money owing is not paid within three (3) months of*

1 service of this notice, we intend to exercise our rights under Section 72 (2) of The
2 Registered Land Law (2004 Revision) and:-

3
4 (a) appoint a receiver of the income of the charged property; or

5
6 (b) sell the charged property. . .”



7
8
9 **4 April 2012**

10
11 On 4 April the Defendants' attorneys wrote to the Plaintiffs' attorneys stating:

12
13
14 “It has come to our attention that demands complying with the Law were only made on
15 23 March 2012. Accordingly, pursuant to ss.72(1) and (2) and 77 of the Law, the
16 Receivers (and secured creditors) did not have, and still do not have, the legal right to
17 enter into possession of the charged land or the land comprised in a charged lease, or to
18 receive the rents and profits arising from the said land. Any such funds which are
19 recovered between now and the expiry of the four-month stand down period under s.72 of
20 the Law are held for the benefit of all creditors, including Orion.

21
22 We invite your clients to confirm that they will:

23
24 (a) Segregate all rents, receipts and profits arising in any way from the registered
25 land so that such amounts are not allocated to the secured creditor or the
26 Receivers' fees;

27
28 (b) Account to our client and other unsecured creditors as to the receipt and use of
29 the rents, receipts and profits from the land; and

30
31 (c) Return to our client all records and any cash wrongfully demanded and
32 recovered by them as a result of their purported by apparently invalid exercise
33 of Receivers' power in relation to the registered land.

1 *We look forward to hearing from you on this point.*"



2
3 **10 April 2012**

4
5 On 10 April, the Defendants' attorneys wrote another letter stating:

6
7 *"Please note that, since the purported commencement of the receivership, Orion has*
8 *received the sum of US\$37,225.00 by way of rental receipts in respect of Condoco*
9 *apartments, as per the attached spreadsheet.*

10
11 *We await your response to our letter of 4 April 2012."*

12
13 **27 April 2012**

14
15 The response by the Receivers' attorneys, in their letter of 27 April was as follows:

16
17 *"The points made on the second page of your letter dated 4 April 2012, perpetuated by*
18 *your letter dated 10 April 2012, are entirely misconceived. The powers of the Receivers*
19 *are fully set out in the Deeds of Debenture and Collateral Debenture under which they*
20 *have been appointed. They include the power to "take possession of, collect and get in all*
21 *or any part of the Charged Property." The nature of the charged property over which*
22 *they have control is also fully set out in the Debentures. It includes not only the land,*
23 *buildings fixtures and fittings, but also, without limitation, all the Receivership*
24 *Companies' investments, plant and machinery, credit balances, book debts, insurances,*
25 *development documents, hotel documents, hedging arrangements, lease documents,*
26 *licences, agreements relating to the purchase of any property and "all the undertaking*
27 *and all the assets, rights and income" of the Receivership Companies. The Receivers*
28 *have taken no step which they are not empowered to take in accordance with the terms of*
29 *their appointment and have done nothing which is in breach of the Registered Land Law.*
30 *They have no duty to account to Orion in the manner you have requested that we confirm*
31 *and no such confirmation will be provided."*



1 **6. THE DEBENTURES**

2
3 Clause 18.1 of the Amended and Restated Collateral Debenture dated 10.1.08 (CGCR, Cesar
4 Properties and Condoco Properties) sets out the powers of the Receivers as follows:

5
6 18.1 *In addition to all other rights or powers statutory or otherwise vested in the*
7 *Lender or a Receiver or Receivers appointed by it, the Lender or a Receiver so*
8 *appointed shall have the following powers:*

9
10 18.1.1 *to enter upon the Charged Property, to take possession of, collect and*
11 *get in all or any part of the Charged Property and for that purpose to*
12 *take any proceedings in the name of the Chargor or otherwise as may*
13 *seem expedient;*

14
15
16 18.1.2 *to carry on or concur in carrying on the business of the Chargor and*
17 *with the consent of the Lender to raise money from the Lender or*
18 *others on the security of any Charged Property;*

19
20 18.1.3 *to sell, call in, collect and convert into money or let and to accept*
21 *surrenders of leases or tenancies of the Charged Property or any of it*
22 *either by public auction or by tender or by private contract with power*
23 *to buy in at any sale by auction or to rescind or vary any contract for*
24 *sale and to resell without being answerable for any loss or diminution*
25 *in price and to carry out such sale, calling in, collection and*
26 *conversion and such letting on such terms and conditions and for such*
27 *consideration as the Lender shall think fit and with liberty also to give*
28 *effectual receipts for the purchase money or the proceeds thereof and to*
29 *do all other acts and things [for] completing any sale, calling in,*
30 *collection and conversion which the Receiver may think fit and without*
31 *thereby becoming liable as a mortgagee in possession;*
32

- 1 18.1.4 *to make any arrangement or compromise which the Lender or any*
2 *Receiver shall think expedient;*
- 3
4 18.1.5 *to make and effect all repairs, improvements and insurances;*
- 5
6 18.1.6 *to appoint managers, officers, accountants, attorneys and agents for the*
7 *aforesaid purposes at such salaries as the Receiver may determine;*
- 8
9 18.1.7 *to call up all or any portion of the uncalled capital of the Chargor;*
- 10
11 18.1.8 *to do all such other acts and things as may be considered to be*
12 *incidental or conducive to any of the matters or powers aforesaid and*
13 *which the Receiver lawfully may or can do as agent for the Chargor;*
14 *and the Chargor will do all acts and things and will execute all such*
15 *assurances, assignments and instruments as the Receiver shall require*
16 *the Chargor to do or execute for the purpose of exercising or giving*
17 *effect to the exercise of the powers conferred on the Receiver hereunder*
18 *or any of them and the Chargor hereby irrevocably appoints the*
19 *Lender to be the lawful attorney in fact of the Chargor to do any act or*
20 *thing and to execute and to exercise all the powers of the Chargor in*
21 *carrying out or effecting any of the powers hereby conferred upon the*
22 *Receiver."*

23
24 Clause 19 provides as follows:

25
26 *"Any Receiver appointed pursuant to the provisions of this Debenture shall so far*
27 *as it concerns responsibility for his acts be deemed to be an agent of the Chargor*
28 *and the Lender shall not in any way be responsible for any misconduct or*
29 *negligence on the part of any such Receiver, and the Chargor hereby forever*
30 *irrevocably releases the Lender from such claims whatsoever and howsoever*
31 *arising."*



1 The Amended and Restated Debenture of 10.1.08 (Hotelco) is in identical terms to the above
2 save that clause 18.1.1 starts – “to enter upon the Hotel and Property, to take possession of.....”
3

4 **7. AGREED LIST OF QUESTIONS FOR PRELIMINARY ISSUES**

5 Preamble

6
7
8 The Defendants’ position is that if the Court were to hold that there was an event of default by
9 P2 and P4 and a valid demand under the guarantees given by P1 and P3, the Lender would be
10 entitled to appoint receivers under the Debentures.

11
12 The Defendants say however that such an appointment could not extend to the exercise of
13 powers which are inconsistent with the RLL without first complying with the notice provisions
14 thereof, and that the powers reserved to the Receivers under the Debentures do not entitle them
15 to bring the claims in this action.

16
17 Issues as to whether there was an event of default by P2 and P4 and a valid demand under the
18 guarantees given by P1 and P3 are not considered in this judgment. The Court will, after delivery
19 of this judgment, give case management directions in both actions to ensure that all parties in
20 both actions are bound by the result of the determination of the event of default and demand
21 issues.

22
23 This judgment addresses preliminary issues as to whether the Defendants are correct in their
24 contentions (a) that the appointment of the Receivers could not extend to the exercise of powers
25 which are inconsistent with the RLL without first complying with the notice provisions thereof
26 and (b) that the powers reserved to the Receivers under the Debentures do not entitle them to
27 bring the claims in this action.

28
29 The Defendants also say that the following issues will fall to be determined. The first is as
30 to the claim made by ESL, which is not in receivership. The Defendants say that they will seek
31 to have this claim struck out on the basis that ESL has not given the Receivers corporate
32 authority to bring these claims. The second is the claim for delivery up of books and records.



1 The Defendants accept that (subject to determination that there has been an event of default
2 and/or that proper demand has been served) validly appointed Receivers will have the right to
3 claim delivery up of books and records. This claim is however subject to the Defendants' alleged
4 lien in respect of their counterclaims. These further issues are not considered in this judgment.

5
6 **List of Preliminary Issues considered in this Judgment**

7
8 Do the Defendants have standing to challenge the appointment of the Receivers to the extent the
9 Receivers' actions are inconsistent with the RLL?

10
11 Does the RLL contain a mandatory statutory code, the effect of which is that a Receiver may
12 only be appointed in respect of income from land upon the expiry of three months following
13 service of a valid notice under S.72(1) of the RLL and do S.75(2) and S.78 of the RLL further
14 restrict the right of entry of a lender's receiver onto charged land until after a bid has been
15 accepted for the sale of the land at an auction, as the Defendants contend, or were the Receivers
16 validly appointed in respect of income from and entitled to enter onto the charged land because
17 the appointment was outwith the RLL, because (as the Plaintiffs contend) the appointment was
18 pursuant to contractual rights under the Debentures or rights arising in equity and such an
19 appointment is not subject to the RLL? [It is conceded by the Plaintiffs that if the RLL applies, it
20 was not complied with].

21
22 If the Defendants succeed in showing that they have standing to challenge the appointment
23 and/or authority of the Receivers, Issue 1, and it is held the RLL contains a mandatory statutory
24 code, the effect of which is that a Receiver may only be appointed in respect of income from
25 Land upon the expiry of three months following service of a valid notice under S72(1) of the
26 RLL and that S.75 (2) and S.78 of the RLL further restrict the right of entry of a lender's receiver
27 onto charged land until after a bid has been accepted for the sale of the land at an auction, Issue
28 2, are the Defendants estopped from challenging such appointment and/or authority and/or
29 actions dependent on the appointment and/or authority of the Receivers?



1 Do the Receivers have authority to bring these proceedings on behalf of P1-4 having regard to
2 the state of the pleadings?

3

4 It is common ground that even if the Plaintiffs succeed on the issues set out above they will have
5 to establish at trial an event or events of default under the Debentures. Absent such event or
6 events of default, there was no power to appoint the Receivers.

7

8 Further issues- (Do the Receivers have the authority to bring these proceedings on behalf of P5?
9 and Do the Receivers have any powers in relation to P1 and P3 in the absence of a demand
10 served under the guarantees given by these companies?), will not be determined as preliminary
11 issues, but will be a matter for the Defendants to argue at a later date (and the Defendants are not
12 precluded from doing so as a result of this judgment on preliminary issues).

13

14 **8. THE RLL ISSUE**

15

16 It is convenient to consider the RLL Issue first.

17

18 **Does the RLL contain a mandatory statutory code, the effect of which is that a Receiver**
19 **may only be appointed in respect of income from land upon the expiry of three months**
20 **following service of a valid notice under S.72(1) of the RLL and do S.75(2) and S.78 of the**
21 **RLL further restrict the right of entry of a lender's receiver onto charged land until after a**
22 **bid has been accepted for the sale of the land at an auction, as the Defendants contend, or**
23 **were the Receivers validly appointed in respect of income from and entitled to enter onto**
24 **the charged land because the appointment was outwith the RLL, because (as the Plaintiffs**
25 **contend) the appointment was pursuant to contractual rights under the Debentures or**
26 **rights arising in equity and such an appointment is not subject to the RLL? (It is conceded**
27 **by the Plaintiffs that if the RLL applies, it was not complied with).**

28

29 **The Defendants' Submissions**

30

31 Mr Huskisson for the Defendants submitted as follows.



1 Receivers may be appointed by the Court by way of execution under GCR O.51, in certain
2 circumstances in respect of segregated portfolio companies under the Companies Law or by a
3 lender exercising statutory powers under the Registered Land Law (2004 Revision) ("the RLL").
4 Only the RLL is relevant for present purposes. In the Cayman Islands, the rights of a (secured)
5 lender to appoint receivers over and/or enter into possession of charged land, are set out in the
6 RLL. There are policy reasons for protecting owners and occupiers from forced dispossession or
7 sale of land. The principles, the relevant provisions of the legislation, and their practical
8 application were considered by the Court of Appeal in *Paradise Manor Limited (in Liquidation),*
9 *W.M. Becker and M.L. Becker v Bank of Nova Scotia* [1984 – 85] CILR 437 ("*Paradise*
10 *Manor*").

11
12 The RLL contains a mandatory code. The code makes no distinction between business and
13 residential property. "Land" is defined widely. Although a charge or a debenture may contain
14 contractual rights in respect of charged land such as the appointment of receivers, entry into
15 possession, or rights of foreclosure and sale, such rights are expressly subject to the provisions of
16 the Law. Section 3 provides that "*except as otherwise provided in this Law no other Law and no*
17 *practice or procedure relating to land shall apply to land registered under this Law so far as it is*
18 *inconsistent with this Law*".

19
20 Section 64(2) states, in relation to repayment of money secured by a charge:



21
22 *A date for the repayment of the money secured by a charge may be specified in the*
23 *charge instrument and, where no such date is specified or repayment is not demanded by*
24 *the chargee on the date specified, the money shall be deemed to be repayable three*
25 *months after the service of a demand in writing by the chargee.*

26
27 The effect of s.64(2) is that, unless the charge specifies the date for repayment, or the demand is
28 made on a specific date, the money is deemed repayable three months after the service of a
29 demand in writing by the chargee. See *Paradise Manor* at page 448, line 30.

30

1 S.72(1) requires that any alleged breach relied on in enforcing a charge or agreement contained
2 in a charge must have been outstanding for one month before a notice may be served under that
3 section. The notice must require the specified breach to be remedied. Only if it is not remedied
4 within another three months, can the chargee enforce the charge under s.72 (2).

5
6 Section 73 (3) gives a receiver appointed under the RLL a limited power of agency "*in respect of*
7 *the purpose for which he is appointed*", namely to receive income from land after service of the
8 requisite notices. Section 73 (4) provides a receiver with the right to demand and recover (by
9 action or otherwise) the income in respect of which he is appointed receiver.

10
11 Section 78 provides that a lender shall not be entitled to enter into possession of charged land
12 only by reason of default in the payment of principal or interest or in performance or observance
13 of any agreement expressed or implied in the charge. "*Default in the payment of principal or*
14 *interest or in performance or observance of any agreement expressed or implied in the charge*"
15 does no more than entitle the chargee to serve notice (and only then if the default has subsisted
16 for a month) under s72. Once the relevant time limits have expired, the remedies of appointing a
17 receiver or selling the property (by auction) become available to the chargee.

18
19 Section 75 (1) requires a chargee to enforce a power of sale by public auction in good faith and
20 with regard to the interests of the chargor. Section 75 (2) provides that the chargee may only
21 recover possession of the land upon a bid being accepted at an auction sale. This links in to s.78,
22 which provides that a default is of itself insufficient to entitle a chargee to enter / regain
23 possession.

24
25 Section 77 provides that any of the above provisions (except s.78) may be varied in the charge,
26 but the variation shall not be acted upon without leave of the Court. No such application has
27 been made.

28
29 If, as the Defendants contend, the Receivers were not lawfully appointed over the registered land
30 or the income or profits therefrom, then they had and have no lawful authority to:

- 31
32 (a) exercise control over charged assets which are subject to the Law;



1 (b) exclude the Defendants from the land; or

2
3 (c) demand from the Defendants income or profit derived from the charged land and
4 lawfully in the possession of the Defendants.
5

6 Further, to the extent the Receivers have recovered income and profits from the charged land to
7 the detriment of the Defendants, the sums should be accounted for by the Receivers to the
8 Plaintiffs and by the Plaintiffs to the Defendants, insofar as they would otherwise have been
9 payable to the Defendants or retained by them. An obvious example of this is the retention by
10 the Receivers of all rental income earned since the date of their appointment to the detriment of
11 Orion. Similar issues will arise with respect to the Plaintiffs' other creditors, having regard to
12 their doubtful solvency.

13

14 For the reasons set out above a chargee wishing to appoint a receiver must:

15

- 16 - identify a default which has continued for one month (s.72(1));
- 17 - serve a notice demanding performance with the charge (s.72(1)); and
- 18 - await the expiry of a further 3 month period prior to appointing a receiver.

19

20 See *Paradise Manor* at page 449, line 15.

21

22 If the chargee does not wish to await the expiry of the notice periods, and the charge document
23 so provides, the chargee must apply to abridge the time limits in s.72 by making an application
24 under s.77. A properly appointed receiver is also subject to s.73 of the Law.

25

26 (Further provisions apply with respect to a power of sale exercised by the receiver. However,
27 these provisions are not relevant here.)

28 The Receivers were appointed at some point during the day on 12 March 2012. There was no
29 prior notice given with respect to the appointment of receivers.

30

31 On 16 February 2012, 5 March 2012 and 7 March 2012, three notices of demand were sent by
32 the agent and special servicer of the Lender, to the Receivership Companies. However:



- 1 (i) these notices appear to have been drafted by US attorneys rather than Cayman
2 counsel;
3
- 4 (ii) none of the notices referred to the appointment of receivers, nor make any
5 reference to the RLL;
6
- 7 (iii) the terms of the alleged defaults did not relate to non-payment of principal or
8 interest, but rather to other alleged breaches of the loan agreement, all of which
9 were denied and disputed. Furthermore, the "notices" did not specify any date for
10 repayment of principal and interest which would displace the deemed repayment
11 date of three months after service of an appropriate notice under s.64 (2) of the
12 RLL;
13
- 14 (iv) all of the allegations regarding events of default were denied and disputed in
15 writing by the Receivership Companies through their attorneys; and
16
- 17 (v) therefore, it is not clear that any of these notices would qualify as a notice under
18 s.64(2) or s.72 of the Law.
19

20 It was only on 12 March 2012 (the date of appointment of Receivers) that a demand notice was
21 issued that purported to accelerate the loan and demanded immediate payment in full of the debt.
22 That notice stated:

23
24 *Reference is further made to those certain letters to you from the undersigned, dated*
25 *February 16, 2012, March 5, 2012 and March 7, 2012 pursuant to which, among other*
26 *things, you were notified that certain Events of Default had occurred.*

27 *In view of such Events of Default, the Debt is hereby accelerated and demand is made for*
28 *immediate payment in full of the Debt.*

29
30 *In connection with such Events of Default or any other Default or Event of Default that*
31 *may exist, Lender reserves the right, without further notice to Borrower or any other*
32 *party, to exercise the other rights, powers and remedies available to Lender under the*



1 *Loan Documents or at law or in equity, in such manner and at such times as Lender in its*
2 *sole and absolute discretion deems appropriate.*

3
4 It is not clear whether the Lender will contend that this notice was suitable to meet the
5 requirements of s.64(2) and, if so, what the deemed date for repayment was. This issue does not
6 directly concern the Defendants other than in their capacities as creditors of the Plaintiffs: it is
7 primarily a matter between the chargors and the chargee.

8
9 However, the validity of the appointment of the Receivers on the same day is of importance to
10 the Defendants. The Defendants do not contest the contractual appointment of the Receivers
11 over the charged assets which are not registered land. However, for there to be an effective
12 appointment by the chargee of receivers over charged assets which comprise registered land:

- 13 - under s.72(1), a notice of default had to have been given, and must have
14 continued for one month, following which another notice had to be served; and
15 - under s.72(2), the chargor must have failed to comply with the second notice for 3
16 months after the date of service.

17 The Defendants have been unable to locate any notices complying with these provisions prior to
18 the appointment of the Receivers and, despite requests made of the Receivers and the Lender, no
19 such notices have been produced or referred to.

20
21 However, on 23 March 2012 (i.e. almost 2 weeks after the appointment of the Receivers), the
22 Lender's Cayman attorneys sent notices under s.72 of the RLL, which stated:

23 *"The amount due as at 16 March 2012 was US\$233,896,319.32 being*
24 *US\$232,829,781.15 principal and US\$1,066,538.17 non-default and default interest and*
25 *interest will continue to accrue at the rate of:*

- 26
27 (i) *LIBOR plus a Spread of 2.25% per annum at a current daily rate of*
28 *US\$16,116.99 from 17 March 2012 until date of payment ("non-default*
29 *interest"); and*



1 (ii) 5% per annum at the daily rate of US\$32,337.47 from 17 March 2012
2 until date of payment ("default interest").
3

4 *AND TAKE FURTHER NOTICE THAT we hereby DEMAND payment of the entire amount of*
5 *principal and interest with interest accruing at the abovementioned daily rate until the date of*
6 *payment and if the money owing is not paid within three (3) months of service of this notice, we*
7 *intend to exercise our rights under Section 72 (2) of The Registered Land Law (2004 Revision)*
8 *and:-*

9 (a) *appoint a receiver of the income of the charged property; or*

10
11 (b) *sell the charged property.*
12

13 *AND TAKE FURTHER NOTICE THAT the money owing is to be paid at"*
14

15 Therefore, on the Lender's own notice, the Receivers were not to be validly appointed over the
16 registered land until at least 23 June 2012, assuming there had been proper service of a s.64(2)
17 notice and a default which had continued for one month under s.72(1). Neither the Lender nor
18 the Receivers have made an application to Court under s.77 of the Law to abridge the statutory
19 time limits.

20
21 The approach in the Receivers' attorneys' letter of 27 April was incorrect as a matter of law.
22

23 The RLL contains a mandatory code that cannot be contracted out of (absent an order under
24 s.77). The code affords precisely the same status under s72 to the appointment of receivers over
25 income as it does to the exercise of a power of sale.
26

27 Further where a lender relies on a performance breach, the breach must have been continuing for
28 a month and the borrower must then be given three months' notice to comply (by rectifying the
29 alleged breach relied on in the notice) failing which the lender may appoint a receiver over
30 income or sell the charged property.



1 The s.72 (1) notices dated 23 March 2012 relied on by the Lender were only served on two of the
2 Plaintiff companies, Cesar Properties and Condoco Properties. The notices required payment of
3 the full amount claimed to be outstanding under the Loan Agreement within three months,
4 failing which the Lender reserved the right to appoint a receiver. Ignoring the fact that the
5 Lender had already purported to appoint a receiver (and that there had been no event of default),
6 this notice was defective because the earliest the Lender could claim to have been entitled to
7 demand full repayment was 12 March 2012, when it served its acceleration notice. The s.72 (1)
8 notice was sent 11 days later. The notice therefore falls foul of the requirement under s.72 (1)
9 that the breach relied on had been outstanding for a month.

10
11 No notices of demand of any kind have been served on Hotelco or CGCR. Accordingly, (i) there
12 is no unsatisfied Secured Obligation in respect of Hotelco or CGCR and (ii) no right to appoint a
13 receiver has arisen. No s.72 (1) notices has been served on either of these companies.

14
15 Mr Huskisson submitted that the reasoning in Village Cay Marina (see below) was wrong in a
16 number of respects.

17
18 **The Plaintiffs' Submissions**

19
20 Mr Robinson for the Plaintiffs submitted as follows.



21
22 **The Relevant Law**

23
24 Where the security covered by a debenture includes registered land, even though unregistered, it
25 is valid and enforceable as a contract, or as an equitable charge between the company as chargor
26 and the debenture holder.

27
28 Although the RLL was intended to constitute a comprehensive code of the law in the Cayman
29 Islands with respect to registered land, the RLL has done nothing to affect any rights created
30 between parties by contract and which exist and are enforceable as between parties in equity.

31 This is the effect of s. 3 which provides:

1 *"Except as otherwise provided in this Law, no other law and no practice or procedure*
2 *relating to land shall apply to land registered under this Law so far as it is inconsistent*
3 *with this Law..."*

4
5 Section 3 must therefore be read subject to all other provisions of the RLL, including s. 37.

6
7 Section 37(1) of the RLL provides:

8
9 *'No land, lease, or charge registered under this Law shall be capable of being disposed*
10 *of except in accordance with this Law, and every attempt to dispose of such land, lease or*
11 *charge otherwise than in accordance with this Law shall be ineffectual to create,*
12 *extinguish, transfer, vary or affect any estate, right or interest in the land, lease or*
13 *charge."*

14
15 Significantly, s. 37(2) provides:

16
17 *"Nothing in this section shall be construed as preventing any unregistered instrument*
18 *from operating as a contract, but no action may be brought upon any contract for the*
19 *disposition of any interest in land unless the agreement upon which such action is*
20 *brought, or some memorandum or note thereof, is in writing, and is signed by the party*
21 *to be charged or by some person thereunto by him lawfully authorised."*

22
23 There is no requirement under the RLL for a debenture which charges registered land to be
24 registered. Section 105 (1) of the RLL provides that:

25
26 *"Every disposition of land, a lease or a charge shall be effected by an instrument in the*
27 *prescribed form or in such other form as the Registrar may in any particular case*
28 *approve, and every person shall use a printed form issued by the Registrar unless the*
29 *Registrar otherwise permits."*



1 Part V of the RLL sets out the dispositions which are registrable under the RLL which are: under
2 Division 2 – leases; under Division 3 – charges; under Division 4 – transfers; under Division 5 –
3 easements, restrictive agreements, profits and licences; and under Division 6 - instruments
4 creating co-proprietorship and partition. Part VIII prescribes the means by which to impose
5 restraints on dispositions which are: under Division 1 - by inhibitions; under Division 2 – by
6 cautions; and under Division 3 – by restrictions. The Registered Land Rules (2003 Revision),
7 made under the R.L.I., contain the prescribed forms under the RLL. There is no prescribed form
8 for a debenture.

9
10 It is therefore perfectly permissible within the scheme of the RLL for companies to charge their
11 property, including registered land, by way of a contractual, unregistered debenture.

12
13 This position has been confirmed by the Cayman Islands Court of Appeal in *Paradise Manor*.
14 At p. 447 of his judgment, after reciting sections 3 and 37(1) and (2) of the RLL, Zacca, P. said
15 in relation to an unregistered debenture:

16
17 *"Although s.37 does not affect the contractual rights of the parties, the proposition that*
18 *the bank may dispose of the registered title to the land by reason of the terms of the*
19 *debenture without complying with the provisions of Division 3 of the Registered Land*
20 *Law (Revised) cannot be sustained. The debenture could therefore operate as a contract*
21 *but any power of sale conferred by it cannot extend to the registered land and such land*
22 *cannot be sold without complying with the provisions of the Registered Land Law*
23 *(Revised)."*

24
25 There are critical distinctions between the facts in *Paradise Manor* and the facts of the present
26 case.

- 27
28 (a) In *Paradise Manor*, the Court was dealing with the exercise of a power of sale and not
29 the power to appoint a receiver. In *Paradise Manor*, the chargee bank appointed a
30 receiver under the terms of the debenture a mere 2 days after serving the notice of
31 demand and the receiver took possession of the company's assets and stopped building



1 works being undertaken on the property. None of the three judges of the Court of
2 Appeal found that this appointment was in any way invalid, notwithstanding the fact that
3 the bank had served no notices under s. 72 of the RLL. None of the actions of the
4 receiver pursuant to such an appointment were impugned by the Court, or appear to have
5 been in issue on the appeal. By confirming that the debenture took effect as a contract
6 between the company and the bank, the Court must be taken to be holding that there was
7 no requirement that the bank comply with s. 72 of the RLL in order to appoint a receiver
8 under the debenture.

- 9
10 (b) The Court was addressing the right of the bank, that is, a party other than the registered
11 proprietor of the land, to exercise a power which would have had the effect of displacing
12 the title of the registered proprietor. This is most evident from the judgment of Henry,
13 J.A. at p. 480 where he said:

14
15 *"By applying the definition of "disposition" to s. 37, the meaning that emerges is*
16 *that no right of a proprietor in or over his land, lease or charge registered under*
17 *the Law shall be capable of being affected in accordance with the Law and the*
18 *system of registration established by it. This does not prevent a proprietor from*
19 *entering into an agreement to transfer, lease or charge registered land but where*
20 *such an agreement is unregistered or is otherwise not in accordance with the Law*
21 *it can only operate as a contract. Any attempt to affect the right of the proprietor*
22 *otherwise than in accordance with the Law is ineffectual for that purpose."*

23
24 The final sentence encapsulates the *ratio decidendi* of that case. The Receivers in this
25 case are doing nothing which can amount to a "*disposition*" under s. 37 or which could be
26 said to constitute a displacement of the title of the registered proprietors.

27
28 The specific question determined by the Court of Appeal in *Paradise Manor* arose by virtue of
29 the following ground raised in the respondent's notice:



1 *"The learned trial judge erred in law in failing to find that the bank could dispose of the*
2 *registered title to the lands concerned without adhering to the provisions of the [RLL] by*
3 *means of the power of sale exercisable under the debenture."* (*Paradise Manor, supra, at*
4 *p. 445.*)
5

6 The decision is authority for the proposition that a registered chargee may not dispose of the
7 registered title to lands within the Cayman Islands without adhering to the provisions of Part V.
8 It is not authority for any proposition that the holder of an unregistered debenture may only
9 appoint a receiver over registered land after complying with the provisions applicable to the
10 appointment of a receiver by a registered chargee.

11
12 The Defendants' argument that the reasoning of the judges in *Paradise Manor* should apply to
13 the power of the holder of an unregistered debenture to appoint a receiver over land because, by
14 virtue of s. 72 of the RLL, that power is on the same level as the power to sell, is wrong on a
15 number of grounds:

16
17 (a) The Court in *Paradise Manor* was not considering the power of the holder of an
18 unregistered debenture to appoint a receiver.

19
20 (b) S. 72 is an enabling provision. It provides for the powers of a registered chargee in
21 the event of default. It does not in any way restrict the powers the chargee may have
22 under any other security.

23
24 (c) It is wrong to construe s. 72 as modifying s. 37 with respect to what constitutes a
25 disposition of land, lease or charge.

26
27 A flaw in the Defendants' argument is the apparent assumption that once the security includes
28 land registered under the RLL, the powers of the Receivers under the Debentures are incapable
29 of affecting registered land. This is contrary to the holding of the Court of Appeal in *Paradise*
30 *Manor* that the debenture would in such a case be effective as a contract. This effect was



1 acknowledged by Smellie, C.J. in *Scotiabank (Cayman Islands) Limited v Treasure Island Resort*
2 *(Cayman) Limited* [2004-05 CII.R 423].

3
4 This flaw is further revealed by the decision of the Privy Council in *Village Cay Marina Ltd v*
5 *Acland* [1998] 2 BCLC 327. In *Village Cay Marina VCM* challenged the underleases granted
6 by the receiver on the ground that, under s. 72 of the BVI Registered Land Ordinance (which is
7 in identical terms to s. 72 of the RLL), the bank's power to appoint a receiver was confined to a
8 case where there had been default for more than a month and the chargee had served notice in
9 writing requiring payment or performance of some obligation under the charge which had not
10 been complied with for three months. This argument is identical to the Defendants' argument in
11 the present case.

12
13 It was further argued that by virtue of s.3 (also identical to s.3 of the RLL), the Ordinance was
14 exhaustive in its application to dealings in registered land where it provides: "*no other written*
15 *law and no practice or procedure relating to land shall apply to land registered under the*
16 *Ordinance*". Again the Defendants make the same argument in the present case.

17
18 The Privy Council rejected these arguments and upheld the validity of the leases granted by the
19 receiver. See Lord Hoffmann (who delivered the Board's advice), at paragraph 5 of the judgment.
20 The principles there set out apply fully to the facts and circumstances of the present case.

21
22 As suggested by Lord Hoffmann in *Village Cay Marina*, the Lender in the present case could
23 have protected its unregistered debenture by lodging a caution under s. 127 of the RLL (also
24 identical to the BVI provision). In this case however, the Lender went one better and obtained
25 collateral security in the form of the Collateral Charge against the land register for each property.
26 Note, for example, that clause 2.2.1 of the Amended and Restated Collateral Debenture provides
27 that the Chargor:

28
29 *"does simultaneously cause and procure the grant to the Lender of a registered first legal*
30 *charge over the Property and all present and future buildings and fixtures thereon*
31 *pursuant to the Charges..."*



1 This security is separate from, and collateral to the Debentures, and there is nothing to prevent
2 the Lender from proceeding under both, that is, to appoint receivers under the terms of its
3 contractual debentures, and exercise its power of sale under the collateral charges, in which case
4 the Lender would have to comply with the provisions of s. 72. Although the Lender has the
5 power under the Collateral Charge and the RLL to appoint a receiver it has not sought to exercise
6 that power because it already has the power to do so under the Debentures, which do not require
7 compliance with any of the notice provisions of the RLL.

8
9 In line with the decision in *Village Cay Marina*, the Receivership Companies, acting through the
10 agency of the Receivers, took the steps impugned by the Defendants in their List of Questions.
11 No issue has been raised as to the authority of the Receivership Companies to enter into the
12 property and collect their own rental income. The Receivership Companies agreed by way of the
13 Debentures to the appointment of the Receivers to act as their agents with respect to all their
14 assets and income.

15
16 The Defendants' challenge to the Receivers' appointment with respect to the RLL is without
17 merit and should be dismissed.

18 19 **THE RLL ISSUE. ANALYSIS AND CONCLUSIONS**

20 21 **The authorities**

22
23 It is necessary to refer in some detail to (among others) two key authorities, *Paradise Manor*, a
24 decision of the Court of Appeal and *Village Cay Marina*, a decision of the Privy Council on
25 appeal from the BVI.

26
27 ***Paradise Manor Limited (In Liquidation), W.M. Becker and M.L. Becker v. Bank of Nova***
28 ***Scotia [1984 – 85] CILR 437***

29
30 The respondent bank (“the bank”) applied to the Grand Court for an order under the Registered
31 Land Law (Revised), s.77 permitting the sale by private treaty of properties owned by the first
32 appellant company (“the company”) and charged to the bank as security for loans.



1 In 1980 the bank advanced loans to the company to finance the building of an hotel, apartments
2 and a shopping complex. Repayment of the principal and interest was to be made on May 31st,
3 1981 and was secured by a debenture which contained collateral charges over the land on which
4 the new development was to be built and over certain other lands. The collateral charges,
5 registered under the Registered Land Law (Revised), provided that if the company should fail to
6 discharge its liabilities under the terms of the debenture (i) the whole of the principal and interest
7 should immediately become due and payable; (ii) ss. 72 and 75 of the Registered Land Law
8 (Revised) should apply subject to modifications which stated, inter alia, that (a) the power of sale
9 and appointing a receiver and any other remedies available to the bank should become
10 immediately exercisable without further notice; and (b) when the power of sale arose, the bank
11 should have the right to sell the premises by private treaty as well as by public auction.

12
13 In May 1981, when the hotel was partially built, the company encountered financial difficulties
14 and no payment was made by it or demanded by the bank. Later that year, at the request of the
15 bank, the second and third appellants, the sole shareholders in the company, executed personal
16 guarantees in respect of the company's liability to the bank.

17
18 In May 1982 the company defaulted in the payment of interest and in July 1982 the bank made a
19 written demand for repayment of the principal and interest and warned the company of its
20 intention to proceed with the available remedies. A few days later the bank appointed a receiver
21 under the terms of the debenture; the receiver took possession of the company's assets and
22 stopped all building work.

23
24 In October 1982 the bank made a written demand for payment of the sums guaranteed by the
25 second and third appellants but they too defaulted and the bank decided to sell the lands charged
26 in its favour by public auction. The sale was extensively advertised and several hotel chains were
27 approached. In March 1983 the receiver obtained a valuation report which valued the hotel site
28 and adjoining lands at US\$14.42m. In the same month the public auction took place, attended by
29 the second appellant and 119 other persons but no bids were forthcoming even when an opening
30 bid of US\$3m was requested.



1 After some further unsuccessful attempts to interest potential buyers, the land was valued again,
2 in October 1984, at US\$7.6m. and in November 1984 the bank negotiated a sale by private treaty
3 for US\$7.5m. Under the proposed transaction the bank would provide part of the necessary
4 finance and when 50% of its contribution had been repaid there would be a form of profit-
5 sharing.

6
7 Having obtained leave under the Companies Law (cap. 22), s.98, the bank applied to the Grand
8 Court for an order under the Registered Land Law (Revised), s.77 authorising the sale by private
9 treaty and the second and third appellants were added as parties to the proceedings.

10
11 The appellants opposed the application submitting that (i) the bank could not properly apply for
12 leave to sell the lands by private treaty (a variation of the power to sell by public auction under
13 s.75) without first acquiring the power to sell by public auction; (ii) that power would arise only
14 when the necessary notices had been issued under ss. 64 and 72 and the bank had as yet failed to
15 comply with these mandatory provisions; (iii) the written demand for repayment made by the
16 bank in July 1982 did not operate as a demand in writing within s.64(2) since it did not specify
17 the date, three months later, on which the money should be repaid; and (iv) the bank had failed in
18 its duty to obtain the best possible price for the land and its participation in the proposed
19 transaction indicated that it had acted in its own interests in agreeing to a sale at an undervalue.

20
21 The bank submitted that (i) under the terms of the debenture it was entitled to sell the land
22 without complying with the statutory provisions concerning notice; and (ii) it had made every
23 effort to sell the land at the best possible price, but that since it had received only one genuine
24 offer, the amount of that offer reflected the true market value of the land and it had not acted
25 improperly in accepting it.

26
27 The Grand Court (Hull, J.) granted the order allowing the sale by private treaty holding that (i)
28 the bank was not at liberty to sell the lands without complying with the provisions of the
29 Registered Land Law (Revised) - a registered proprietor could not charge his registered title
30 except in accordance with the provisions of that Law and the powers of variation conferred by
31 s.77 related solely to powers exercisable under registered charges; (ii) the bank had, however,



1 sufficiently complied with the statutory requirements since (a) no notice of demand under s.64(2)
2 was necessary when there had been a default in the payment of interest because s.64(2) was
3 designed only to determine the date on which the principal was to be repaid, and (b) although a
4 notice under s.72 should normally specify separately the principal moneys and interest
5 outstanding, the notice given in July 1982 which did not make this distinction was not invalid,
6 since the appellants knew how much principal had been advanced; (iii) even if no notice had
7 been given under s.72, the terms of the application were sufficiently wide to allow the court to
8 grant an order under the Registered Land Law (Revised), s.77 dispensing with the notice
9 requirements of s.72 and such an order could properly be made since the parties themselves had
10 agreed to variations of s.72, the appellants had had ample notice of the bank's intention to
11 exercise the power of sale and both parties had been legally advised; (iv) the proposed sale was
12 not at an undervalue—the bank had made considerable efforts to obtain an attractive offer and
13 although the agreed price was considerably lower than the original valuations, it was in fact the
14 only real evidence of the market value of the property.

15
16 On appeal the parties repeated their submissions in the court below.

17
18 The Court of Appeal held, dismissing the appeal:

- 19
20 1. The bank had no power to sell the land without complying with the provisions of
21 the Registered Land Law (Revised). Under s.37 of the Law, no right of a
22 proprietor in or over his land, lease or charge registered under the Law was
23 capable of being affected except in accordance with the Law and the system of
24 registration effected by it; and since, in the present case, the debenture was not in
25 the prescribed form and was not registered under the Law, it could have effect
26 only as a contract and could not by itself and independently of the Law confer any
27 power affecting the rights of a proprietor of registered land. Any purported
28 exercise of the power of sale conferred by the debenture would therefore be
29 ineffectual to transfer any right or interest in the land.



1 2. The findings of the trial court that s.64(2) did not relate to the payment of interest
2 was incorrect. The repayment of both principal and interest was secured by the
3 registered charges and the words “repayment of the money secured by a charge”
4 in s.64(2) related to the interest as well as the principal. The bank’s letter of July
5 1981 could properly be regarded as a demand in writing for the purpose of s.64(2)
6 in relation to both the principal and interest—it was unnecessary to specify the
7 exact date of repayment in the notice since, by operation of law, the money
8 became due three months after it was served. The letter could not properly have
9 been regarded as a notice under s.72 since it did not specify the amount of money
10 claimed as interest.

11
12 3. There had been no compliance with the notice requirements of s.72 but an order
13 under s.77 of the Registered Land Law (Revised) dispensing with these
14 requirements could properly be made. The registered charges contained variations
15 to s.72, whereby once there had been a default in payment of interest or principal
16 the bank was empowered to sell the lands without giving notice under s.72; and
17 they also contained variations to s.75, providing that the bank should be permitted
18 to sell by private treaty as well as by public auction. Variations of both these
19 sections were permitted under the terms of s.77 and, in considering the bank’s
20 application for an order approving the sale of the land by private treaty the court
21 could properly consider all sections of the Registered Land Law (Revised) which
22 were relevant to the granting or rejection of the application, including s.77. Since
23 the variations had been agreed by parties negotiating at arm’s length with legal
24 advice available to them, and since the company was aware of its indebtedness
25 and had ample notice of the bank’s intention to sell the lands, the trial court had
26 acted properly in exercising its jurisdiction to order the variations contained in the
27 registered charges to be acted upon.

28
29 4. The sale was not at an undervalue and the bank had not failed in its duties to the
30 mortgagor and the guarantors. Over a lengthy period of time the bank had made



1 every reasonable effort to sell the property at the best price reasonably obtainable
2 and the lack of prospective purchasers merely reflected the fact that the property,
3 which required further large capital expenditure to complete the building work,
4 was not an attractive proposition. Taking these market conditions into account,
5 the proposed sale price, which might otherwise have been considered rather low,
6 could properly be regarded as the best price reasonably obtainable, particularly in
7 view of the fact that only one genuine offer had been received for the property.
8 There was no inflexible rule that the bank, as mortgagee, could not sell to a
9 company in which it had an interest and since there was no evidence that the level
10 of the offer was affected by the bank's participation in the project or that the bank
11 had acted in bad faith, it was proper to grant leave to proceed with the sale.

12
13 Zacca P said at page 447:

14
15 *"Although s.37 does not affect the contractual rights of parties, the proposition that the*
16 *bank may dispose of the registered title to the land by reason of the terms under the*
17 *debenture without complying with the provisions of Division 3 of the Registered Land*
18 *Law (Revised) cannot be sustained. The debenture could therefore operate as a contract*
19 *but any power of sale conferred by it cannot extend to the registered land and such land*
20 *cannot be sold without complying with the provisions of the Registered Land Law*
21 *(Revised). The respondent's notice therefore fails."*

22
23 Kerr JA said at page 460:

24
25 *"It is self-evident that the intent of the Law is to control or put certain restraints on the*
26 *disposition of land in these Islands, to provide a timetable for certain dispositions and to*
27 *confer on the court a watching jurisdiction."*

28
29 Henry JA said at page 479:



1 *"One of the arguments advanced on behalf of the bank was that the bank had by the*
2 *debenture been given the power to appoint a receiver and to sell the lands in the event of*
3 *default by the company and that these powers were exercisable independently of the*
4 *provisions of the Registered Land Law (Revised) as regards registered land.*
5 *Consequently, it was argued, the bank had the power to sell the lands notwithstanding*
6 *any restrictions imposed by the Law. This argument was rejected by the learned trial*
7 *judge and it was repeated before us in support of the respondent's notice. If the argument*
8 *is correct there was no need to apply to the court for leave to proceed with the sale and*
9 *an application for that purpose coupled with an allegation that no leave is required*
10 *appears self-contradictory and futile. But this apart, I do not consider that there is merit*
11 *in the argument. Section 3 of the Law provides that "except as otherwise provided in this*
12 *Law, no other law and no practice or procedure relating to land shall apply to land*
13 *registered under this Law so far as it is inconsistent with this Law"."*



14
15 Henry JA added at page 480:

16
17 *"It seems clear therefore that the intention is that only those charges in the prescribed*
18 *form which are registered under the Law should have effect for the purpose of affecting*
19 *the rights of a proprietor of registered land. An unregistered instrument can have effect*
20 *only as a contract. As a contract it may be enforced by applying to the court for specific*
21 *performance compelling the other party to the contract to execute an instrument in the*
22 *prescribed form containing the relevant terms of the contract and registering it under the*
23 *Law. But it cannot by itself and independently of the Law confer any power affecting the*
24 *rights of a proprietor of registered land. It should also perhaps be observed that in so far*
25 *as a charge is concerned the extent to which it may modify the provisions of the Law is*
26 *limited by s.77. Consequently a clause in an unregistered charge which purported to*
27 *make some other modification could not be included in a registered charge and could not*
28 *therefore be enforced."*

29
30 In *Mums Incorporated and Thiam-Hong Tan v. Cayman Capital Trust Company, B.V.* Randall
31 and E.G. Randall 2000 CILR 131 Georges JA said at page 134 -

1 *"The long title of the RLL reads: "A Law to make provision for the registration of land and for*
2 *dealing in land so registered and for purposes connected therewith." Section 3 states: "Except*
3 *as otherwise provided in this Law, no other law and no practice or procedure relating to land*
4 *shall apply to land registered under this Law so far as it is inconsistent with this Law." There is*
5 *a proviso which is not relevant to the circumstances under discussion. Section 164 provides:*

6
7 *"Any matter not provided for in this Law or in any other Law in relation to land, leases and*
8 *charges registered under this Law and interests therein shall be decided in accordance with the*
9 *principles of justice, equity and good conscience."*

10
11 *It would appear from these provisions that the RLL is intended to cover completely the matters*
12 *pertaining to the registration of land and dealings in registered land with which it purports to*
13 *deal. While concepts of English land law both before and after 1925 may provide a useful*
14 *backdrop against which to view the RLL, they should not be permitted to intrude upon its*
15 *interpretation.*



16
17 Section 37(1) of the RLL provides:

18
19 *"No land, lease or charge registered under this Law shall be capable of being disposed of except*
20 *in accordance with this Law, and every attempt to dispose of such land, lease or charge*
21 *otherwise than in accordance with this Law shall be ineffectual to create, extinguish, transfer,*
22 *vary or affect any estate, right or interest in the land, lease or charge." In the definitions section,*
23 *s.2, "disposition" is defined as meaning "any act inter vivos by a proprietor whereby his rights*
24 *in or over his land, lease or charge are affected, but does not include an agreement to transfer,*
25 *lease or charge."*

26
27 *These sections were considered by Henry, J.A. in Paradise Manor Ltd. v. Bank of Nova Scotia*
28 *and he concluded (1984-85 CILR at 480):*

29
30 *By applying the definition of 'disposition' to s.37, the meaning that emerges is that no*
31 *right of a proprietor in or over his land, lease or charge registered under the Law shall*

1 *be capable of being affected [except] in accordance with the Law and the system of*
2 *registration established by it."*

3
4 *I accept this dictum as accurately expressing the position."*



6 **Village Cay Marina Ltd v Acland & Ors. Privy Council 4 March 1998 [1998] B.C.C. 417**

7
8 This was an appeal against a decision of the British Virgin Islands Court of Appeal on the
9 validity of underleases of a property site granted by a company acting by its receiver appointed
10 by a bank under a debenture, and a cross-appeal against a decision of the court on the validity of
11 a company director's refusal to register a transfer of shares in the latter company to the former
12 company.

13
14 The share capital of a company 'VCM' had been acquired by P who entered into a joint-venture
15 agreement with 'A' in the residential development of part of property ('the site') held on lease by
16 VCM. Pursuant to the agreement another company, 'L', was incorporated and the shares in L
17 were held as to 51 by A and 49 by P. A was L's sole director. A loaned \$150,000 to L which
18 pursuant to an agreement L paid to VCM, in return for an option to require the grant of subleases
19 at a nominal consideration of the proposed residential units to such persons as L should
20 nominate. A bank held an all-moneys debenture issued by VCM creating a floating charge over
21 its assets and a fixed charge over the proposed site. The bank later refused to exclude the site
22 from the debenture and VCM granted to the bank a specific legal charge over the site which was
23 registered as a first charge in the Land Registry.

24
25 P died and by his will his 49 shares in L were to pass to his widow. Several months later a
26 creditor levied execution on VCM based on a writ issued shortly before P's death; this rendered
27 the moneys secured under the bank's debenture immediately payable but the bank was unaware
28 of the execution. Over a year later the bank sought repayment of the moneys secured (and later
29 argued that they had become payable by virtue of the execution), and appointed a receiver. VCM
30 did not dispute the appointment. Several weeks later VCM, via the receiver, granted at an
31 undervalue the disputed underleases to L's nominee, when L exercised its option. Several months

1 later the receiver was discharged in a deal involving finance from another company, 'VCH',
2 which was owned by 'E'. VCH acquired the shares in VCM from P's estate and E also agreed to
3 acquire the 49 shares which the estate held in L, as he wished these to be held by VCM. The
4 administrators of P's estate executed transfer forms in favour of VCM but when these were
5 presented to L, its director A refused to register the transfer, relying on a power of refusal in L's
6 articles of association.

7
8 As to the underleases, the BVI Court of Appeal agreed with the first instance judge that VCM
9 was estopped from disputing the validity of the appointment of the receiver. VCM argued that a
10 receiver appointed under the debenture could not grant underleases of the site because the bank
11 had agreed to exclude the site from the debenture and to rely on the specific charge granted to it.
12 The Court of Appeal agreed with the first instance judge that no such agreement had been
13 proved. The first instance judge had also rejected an argument by VCM that the receiver acted in
14 breach of duty in granting the subleases for a nominal consideration: VCM had been bound by
15 the option agreement and could not complain that the receiver had procured it to perform its
16 obligation. This latter point was not raised in the Court of Appeal. VCM appealed to the Privy
17 Council.

18
19 As to the refusal to register the transfer of shares in L to VCM, the first instance judge accepted
20 A's evidence that his reason for refusing was because of his concern that VCM was over
21 indebted to banks and owned by a holding company so that its beneficial ownership could
22 change without L's knowledge and held that A was entitled within the articles of association to
23 refuse registration. The Court of Appeal reversed this decision and held that A's reasons were
24 'incredible and implausible' and that his true reason was his personal interest in excluding VCM
25 from holding shares in L, rather than in the interests of the company. L and A cross-appealed.
26 The Privy Council held, dismissing the appeal but allowing the cross-appeal:

- 27
28 1. The debenture created a fixed charge over the site which, being unregistered at the
29 time, operated in equity outside the relevant statutory provisions. In any event the
30 underleases were not executed by virtue of any power conferred upon the bank by the
31 fixed charge: it was VCM, not the bank or the receiver, which granted them.



- 1
- 2 2. VCM had acquiesced in the exercise by the receiver of his powers and he thereby
- 3 acquired ostensible authority to do so. Notwithstanding any dispute as to the
- 4 appointment of the receiver and exercise of his powers, VCM had been under a
- 5 contractual obligation to grant the underleases to L's nominee for a nominal
- 6 consideration: even if VCM had succeeded in showing that such underleases had not
- 7 been properly granted, it would still be under a specifically enforceable obligation to
- 8 do so. Nothing would therefore be achieved by setting aside the original grants.
- 9
- 10 3. There was no doubt on the findings of fact that the site had not been excluded from
- 11 the debenture.
- 12
- 13 4. The receiver was not in breach of his duty to VCM to obtain a proper price for the
- 14 underleases: VCM had agreed to grant the underleases at a nominal consideration and
- 15 could not allege that the receiver was in breach of duty by causing the company to
- 16 perform its obligations. The appeal was dismissed.
- 17
- 18 5. The articles of L empowered the directors to decline to register any transfer of shares
- 19 without assigning any reason therefor. The articles went on to provide that
- 20 administrators of a deceased member were entitled to be treated by the company as
- 21 entitled to his shares and could either seek registration in their own names or
- 22 nominate a transferee. In either case the application was to be treated as a transfer and
- 23 subject to the directors' discretion to register.
- 24
- 25 6. A had written to VCM's solicitors giving notice of refusal of registration and stated
- 26 that he did not regard it as beneficial at that stage of L's development to involve third
- 27 parties in its ownership. In evidence at first instance he had referred to his concern as
- 28 to VCM's over indebtedness. There was no rule of law on this point by which
- 29 directors were confined to the reasons they had given.
- 30
- 31 7. Although the BVI Court of Appeal had found A's reasons 'incredible and
- 32 implausible', L had been incorporated as a vehicle for a joint venture in the nature of



1 partnership and it was not obviously unreasonable that A should have had concerns
2 about the financial standing of a prospective new partner or the possibility that he
3 might lose any practical form of control over further transfers of the beneficial
4 ownership in the shares. There was no adequate basis upon which the Court of
5 Appeal had been entitled to reject the finding of the trial judge that A believed in
6 good faith, for the reasons he gave in evidence, that registration would not be in the
7 interests of the company. The cross-appeal was allowed.

8
9 Lord Hoffmann said at paragraph 4:

10
11 *(a) The Registered Land Ordinance*

12
13 *“The first point taken by Dr Ramsahoye QC on behalf of VCM in its appeal was*
14 *entirely new. It had not been mentioned before the judge or in the Court of Appeal.*
15 *He said that under s. 72 of the Registered Land Ordinance, the power to appoint a*
16 *receiver was confined to a case in which there had been default for more than a*
17 *month and the chargee had served notice in writing requiring payment or the*
18 *performance of some other obligation under the charge which had not been complied*
19 *with for three months. No such notice had been served and therefore no receiver*
20 *could properly have been appointed. Furthermore, the powers of granting leases and*
21 *selling the property in s. 74 and 75 are conferred not upon the receiver but upon the*
22 *proprietor of the charge. Section 77 said that the provisions of s. 72, 74 and 75 could*
23 *be varied in the charge but such variation should not be ‘acted upon’ unless the court*
24 *so ordered. Dr Ramsahoye said that in relation to the site, the debenture created a*
25 *charge within the meaning of s. 2 of the Ordinance, which defined a charge as ‘an*
26 *interest in land securing the payment of money’. Section 3 made it clear that the*
27 *Ordinance was exhaustive in its application to dealings in registered land: ‘no other*
28 *written law and no practice or procedure relating to land shall apply to land*
29 *registered under this Ordinance’. The proviso to s. 77 requiring the consent of the*
30 *court to the enlargement of the statutory powers was, he said, unique to the Eastern*
31 *Caribbean and inserted for the protection of debtors.*



1 *Their Lordships think that this argument is based upon a misunderstanding of the*
2 *effect of the debenture. It is true the debenture created a fixed charge over the site.*
3 *But this charge was unregistered and operated entirely in equity, outside the system*
4 *of registered land. It could have been protected by a caution under s. 127 and, in the*
5 *absence of such a caution, would be liable to be overridden by a registered*
6 *disposition to a new proprietor. But that does not affect its validity as an equitable*
7 *charge as between VCM and the bank. In any event, the leases were not executed by*
8 *virtue of any power conferred upon the bank by the fixed charge. It was VCM, not the*
9 *bank or the receiver, which granted the leases. The function of the receiver was to be,*
10 *as cl. 10 says, 'agent for the company' in carrying on the company's business. The*
11 *receiver replaces the board as the person having authority to exercise the company's*
12 *powers and it was by virtue of that position that he authorised the company's seal to*
13 *be affixed to the underleases. So while it is true that the bank had an equitable fixed*
14 *charge over the site, the only function of that charge which is relevant to the present*
15 *proceedings is that it defined the property in respect of which the receiver could act*
16 *as agent of the company. There is therefore no question of requiring a variation of or*
17 *addition to the powers conferred upon a registered chargee by the Registered Land*
18 *Ordinance. The powers exercised by the receiver in this case were of an altogether*
19 *different kind.*

20
21 ***(b) Validity of the appointment***

22
23 *Their Lordships therefore turn to the validity of the appointment of the receiver*
24 *unencumbered by the provisions of the Registered Land Ordinance. Like the Court of*
25 *Appeal, they find it unnecessary to decide whether the judge was right in saying that*
26 *the bank could rely upon the execution as a justification for the appointment because*
27 *they agree with the judge and the Court of Appeal that VCM is estopped from*
28 *disputing it. The correspondence to which their Lordships have referred makes it*
29 *clear that VCM acquiesced in the exercise by the receiver of his powers to carry on*
30 *the company's business and that he thereby acquired ostensible authority to do so:*
31 *see Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480*



1 . Indeed it may be said that since the principles as to ostensible authority are not in
2 dispute and the only question is whether the facts came within it, any challenge to the
3 findings of the lower courts is excluded by the practice of their Lordships not to
4 disturb concurrent findings of fact. The ostensible authority of the receiver is
5 sufficient to validate the grant of the subleases to Rhyto. So far as the action against
6 the receiver himself is concerned, there is the additional protection of the release
7 executed by VCM. Mr Braham, junior counsel for VCM, submitted that the release
8 did not apply to the grant of the subleases because VCM did not know about them
9 when it executed the releases. He referred to authorities which hold that the equitable
10 doctrine of waiver or acquiescence requires knowledge of the right which is being
11 waived or the wrong which is being acquiesced in. But this case does not concern the
12 equitable doctrine. The receiver (and the bank) are protected by contractual releases
13 made for consideration and expressed in the widest possible terms. Their Lordships
14 consider that their effect is entirely a matter of construction and that they apply to all
15 claims, whether the agents of the company knew of them or not.

16
17 Their Lordships cannot however part from this point without noting how barren and
18 technical it is. On the unchallenged findings of the lower courts, VCM was under a
19 contractual obligation to grant the underleases to Landac's nominee for a nominal
20 consideration. Even if VCM had succeeded in showing that such underleases had not
21 been properly granted in 1991, they would still be under a specifically enforceable
22 obligation to do so. Nothing would therefore be achieved by setting aside the original
23 grants. ”

24
25 For completeness I refer to Grand Court Practice Direction No.5 of 2012 on Applications under
26 Sections 72, 75 and 77 of the RLL.



1 **Analysis and conclusions**

2
3 1. For present purposes the Court is concerned with the appointment of a receiver, not the
4 power of sale. It is necessary to distinguish between a RLL receiver and a receiver
5 appointed under a debenture.

6
7 2. Division 3 of the RLL deals with "Charges".

8
9 Section 64 provides for the form and effect of such charges. They must be in prescribed
10 form. The instrument must contain an acknowledgement signed by the chargor that the
11 chargor understands the effect of section 72 (s 64 (1)). See Registered Land Rules (2003
12 Revision) Form RL 9 ("...the...Chargor(s) hereby acknowledge that I/We understand the
13 effect of section 72 of the [RLL].". The charge must be completed by its registration (s 64
14 (3)).

15
16 Section 67 sets out agreements implied in charges.

17
18 Section 72 provides for the chargee's remedies. These remedies include (subject to
19 compliance with the notice provisions) the appointment of a receiver of the income of the
20 charged property or sale of the charged property.

21 Section 72 is as follows:

22
23 *"72. (1) If default is made in payment of the principal sum or of any interest or*
24 *any other periodical payment or of any part thereof, or in the*
25 *performance or observance of any agreement expressed or implied in any*
26 *charge, and continues for one month, the chargee may serve on the*
27 *chargor notice in writing to pay the money owing or to perform and*
28 *observe the agreement as the case may be.*

29
30 *(2) If the chargor does not comply within three months of the date of service,*
31 *with a notice served on him under subsection (1), the chargee may-*



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(a) *appoint a receiver of the income of the charged property; or*

(b) *sell the charged property;*

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under subsection (1).

(3) *The chargee shall be entitled to sue for the money secured by the charge only-*

(a) *where the chargor is bound to repay the same;*

(b) *where, by any cause other than the wrongful act of the chargor or chargee the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security; or*

(c) *where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the charger*

Provided that-

(i) *in the case specified in paragraph (a)-*

(A) *a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and*



1 (B) no action shall be commenced until a notice served in accordance
2 with subsection (1) has expired;

3 and

4
5 (ii) the court may, at its discretion, stay a suit brought under paragraph (a) or
6 (b), notwithstanding any agreement to the contrary, until the chargee has
7 exhausted all his other remedies against the charged property.

8
9 Section 73 provides for the appointment, powers, remuneration and duties of a receiver.
10 The chargee's powers of leasing and power of sale are set out in sections 74 and 75.

11
12 Section 77 provides that the provisions of section 70 (2) and (3), 72, 73, 74 and 75 may
13 be varied, provided the Court so orders.

14 Section 77 is as follows

15
16 *"The provisions of sections 70 (2) and (3), 72, 73, 74 and 75 may, in their application to*
17 *a charge, be varied or added to in the charge:*

18
19 *Provided that any such variation or addition shall not be acted upon unless the court,*
20 *having regard to the proceedings and conduct of the parties and to the circumstances of*
21 *the case, so orders."*

22
23 Division 3 thus contains a detailed code relating to registered charges in the prescribed
24 form, which (so far as is relevant for present purposes) includes provision in section 72
25 for the appointment of a receiver of the income of the charged property (" a RLL
26 receiver").

27
28 3. The power to appoint a receiver of the income of the charged property is not confined to
29 a case in which the provisions of section 72 as to notices etc have been complied with.
30 The RLL is not exhaustive in its application to dealings in registered land. The RLL does
31 not refer to debentures in the Definitions section 2.



1 A debenture may create a fixed charge over land, although the charge created by the
2 debenture is unregistered. Where a fixed unregistered charge over land is created by a
3 debenture, such a charge operates in equity, outside the system of registered land (Lord
4 Hoffmann in Village Cay Marina). It is valid as an equitable charge as between chargor
5 and chargee. Such a debenture may contain provisions for the appointment of a receiver.
6 Where a receiver is appointed under a debenture as agent of the chargor company, the
7 receiver replaces the board as the person having authority to exercise the company's
8 powers. In these circumstances (as Lord Hoffmann said) there is no question of requiring
9 a variation of, or an addition to, the powers conferred on a registered chargee by the RLL.
10

11 4. The analysis in 3 above is in my opinion supported by/consistent with:

- 12 (a) The decision and reasoning of the Privy Council in Village Cay Marina: and
13
14 (b) The fact that the Court of Appeal in Paradise Manor did not express any doubts
15 about the validity of the appointment of the receiver in July 1982 "under the
16 debenture with notice to the debtor." The receiver in Paradise Manor "took
17 possession of all the assets charged and no further work proceeded on the
18 hotel."(see page 443, Zacca P). (See further Kerr JA at page 470). The
19 appointment was on 29 July 1982, two days after the bank demanded in writing
20 immediate payment of all moneys due. Thus the notice provisions in section 72 (if
21 they applied) were not complied with.
22
23 (c) The provision in section 37(2) of the RLL that "*Nothing in this section shall be*
24 *construed as preventing any unregistered instrument from operating as a contract*
25 *....*"
26
27 (d) The statement by Zacca P in Paradise Manor at page 447 "*The debenture could*
28 *therefore operate as a contract but any power of sale conferred by it cannot*
29 *extend to the registered land and such land cannot be sold without complying*
30 *with the provisions of the [RLL].*" (See further Henry JA at 480 and 481).
31



1 (e) Section 164 of the RLL which provides: *"Any matter not provided for in this or*
2 *any other law in relation to land, leases and charges registered under this Law,*
3 *and interests therein, shall be decided in accordance with the principles of justice,*
4 *equity and good conscience."*

5
6 In my opinion the true construction of s 37 of the RLL is central to the analysis. Section 37 (1)
7 provides that "No land, lease or charge registered under this Law shall be capable of being
8 disposed of except in accordance with this Law....". Where a receiver is appointed under a
9 debenture as agent of the chargor company, the receiver replaces the board as the person having
10 authority to exercise the company's powers. The power conferred by a debenture to appoint a
11 receiver to receive income of a charged property and/or to enter onto the charged land does not
12 constitute a disposition within the meaning of that word in section 37 (1). No land, lease or
13 charge registered under the RLL is being disposed of. The words "disposed of" in s 37(1) must
14 be read in the context of Part V of the RLL - Dispositions. Part V makes provision for the
15 various dispositions which can be effected by a proprietor. "Disposition" is defined in s 2 as "any
16 act inter vivos by a proprietor whereby his rights in or over his land, lease or charge are affected,
17 but does not include an agreement to transfer, lease or charge." "Dispositions" are grouped
18 together in Part V, which is divided into six divisions as follows. Division 1 covers general
19 matters. Divisions 2, 3 and 4 deal with three principal forms of disposition, namely leases,
20 charges and transfers. The remaining Divisions are 5 (Easements, Restrictive Agreements,
21 Profits and Licences) and 6 (Co-proprietorship and Partition).

22
23 The Receivers were appointed under the Debentures as agents for the Receivership Companies.
24 Thus by clause 18.1.8 of the Debentures the Receivers powers included the power *"to do all*
25 *such other acts and things as may be considered to be incidental or conducive to any of the*
26 *matters or powers aforesaid and which the Receiver lawfully may or can do as agent for the*
27 *Chargor... "*. The Letter of Engagement dated 6 March 2012 provided that *"The Receivers, once*
28 *validly appointed, shall be agents of the Companies.... "*. By the two Deeds of Appointment of
29 the Receivers dated 12 March 2012 *"In exercise of the powers conferred upon the Lender*
30 *pursuant to the Debenture, the Lender appoint[ed] Kris Beighton and Keith Blake to be*
31 *receivers of all the assets referred to and comprised in and charged by the Debenture, upon the*



1 *terms set out therein and the letter of engagement between the Lender and Receivers dated 6*
2 *March 2012.... "*

3
4 For the reasons set out above I find in relation to the R.I.I. Issue that the Receivers were validly
5 appointed in respect of income from and entitled to enter onto the charged land because the
6 appointment was outwith the RLL. The appointment was pursuant to contractual rights under the
7 Debentures / rights arising in equity and such an appointment is not subject to the RLL.

8
9 In case I am wrong in reaching this conclusion in my opinion there is a further reason why the
10 Defendants cannot succeed on the RLL Issue.

11
12 On 12 March 2012 Morgan Lewis as outside counsel to Cesar Properties and Condoco Properties
13 (the Borrowers) and Hotelco and CGCR (the Original Borrowers), wrote to Haynes and Boone
14 (with copies to numerous other persons including the Receivers):

15
16 *"In its letter dated March 12, 2012 to Cesar Properties Ltd and Condoco Properties Ltd,*
17 *Five Mile Capital declared that in view of the purported Events of Default previously*
18 *asserted by Five Mile Capital, the Debt was accelerated and a demand was made for*
19 *immediate payment in full of the Debt. In addition, Cesar Hotelco (Cayman) Ltd,*
20 *Condoco Grand Cayman Resort Ltd, Cesar Properties Ltd and Condoco Properties Ltd*
21 *(collectively, the "Companies") are in receipt of a letter dated March 12, 2012 from*
22 *KPMG notifying the Companies that KPMG has been appointed Joint and Several*
23 *Receivers of the Companies pursuant to Needs of Appointment by RC Cayman Holdings*
24 *LLC.*

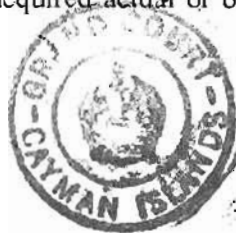
25
26 *As we have previously stated in our letters to you dated February 17, 2012, March 7,*
27 *2012 and March 9, 2012, Borrower disputes that a Default or an Event of Default has*
28 *occurred or exists. However, in an effort to preserve the limited resources available to*
29 *the Companies and given the upcoming maturity of the Loan on May 9, 2012, the*
30 *Companies will not contest the appointment of KPMG as a receiver on behalf of the*



1 *Lender. This election not to contest shall not be construed as an admission or waiver of*
2 *any rights of the Companies, and all such rights are expressly reserved."*

3
4 Thereafter the directors of the Receivership Companies cooperated with the Receivers in their
5 prosecution of this action against the Defendants: see Fifth Affidavit of Keith David Blake to
6 which I refer for its full terms and effect.

7
8 The Receivership Companies elected not to contest the appointment of the Receivers. Further the
9 Receivership Companies acquiesced in the exercise by the Receivers of their powers to carry on
10 the companies' business and they thereby acquired actual or ostensible authority to do so (see
11 Village Cay Marina (supra)).



12
13 **9. THE STANDING ISSUE**

14
15 **Do the Defendants have standing to challenge the appointment of the Receivers to the**
16 **extent the Receivers' actions are inconsistent with the RLL?**

17
18 It is unnecessary to consider this issue given my findings on the RLL Issue (8 above). For
19 completeness, however, I record the respective submissions of the parties on the Standing Issue.

20
21 **The Defendants' Submissions**

22
23 If, which is not admitted, the Receivership companies have acquiesced in or consented to the
24 appointment of the Receivers, that acquiescence/consent cannot invest the Receivers with
25 unlimited powers. Further any defendant in any case can raise a question as to the plaintiffs'
26 authority to make the claims they purport to make. Any other outcome would be a breach of
27 natural justice.

28
29 The Defendants are not asserting property rights of the Receivership Companies. They are
30 defending themselves from claims that the Receivers are not entitled to bring. Just as a
31 purchaser or potential purchaser might question a receiver's authority to give good title

1 (particularly where he or she was on notice of an irregularity) the Defendants are perfectly
2 entitled to question the authority of the Receivers to sue them.

3
4 [The position of ESL (fifth Plaintiffs) is outside the scope of the preliminary issues considered in
5 this judgment].

6
7 **The Plaintiffs' Submissions**

8
9 **The Defendants' Standing to Challenge the Validity of the Receivers' Appointment.**



10
11 The right to challenge a receiver's appointment under a debenture, or the validity of the acts of a
12 receiver, is not vested in the world at large. Such a challenge may be made by the company,
13 either through its directors exercising their residual powers, or a liquidator of the company: See
14 *Picarda, The Law relating to Receivers, Managers and Administrators*, 4th edition, pp. 99-100.

15
16 By challenging the validity of the receivers' appointment with respect to land registered under
17 the RLL, the Defendants are in effect asserting the property rights of the Receivership
18 Companies. The proper parties to assert such property rights are the Receivership Companies.
19 This is consistent with the rule in *Foss v Harbottle* [1843] 2 Hare 461 which established that
20 where a wrong has been done to a company, the proper party to seek relief for that wrong is the
21 company itself. The Defendants are in no better position than if they were bringing the actions
22 as plaintiffs to assert some claim based on the alleged invalidity of the Receivers' appointment.

23 The matter falls within the statement of the principle by Lord Davey in *Burland v Earle* [1902]
24 A.C. 83, at pp. 93-94. The rule has been adopted and applied many times in the Cayman Islands,
25 the leading authority being the decision of the Court of Appeal in *Schultz v. Reynolds* [1992-93
26 CILR 59].

27
28 The Defendants have not asserted, nor are they in a position to assert, any of the well-known
29 exceptions to the rule in *Foss v Harbottle*. The fact that Mr Ryan, through I.R.R., is the ultimate
30 beneficial holder of over 90 percent of the shares of the Receivership Companies does not avail
31 him or I.R.R. A shareholder of the company, even the sole shareholder, has no *locus standi* to

1 challenge a receiver's appointment: see *Hawkesbury Development Co. Ltd. v Landmark Finance*
2 *Pty. Ltd* [1969] 2 N.S.W.R. 782. Similarly, an action brought by a majority of the shareholders
3 acting together with the directors was held to be misconceived: *Watts v Midland Bank* [1986] 2
4 B.C.C. 98961.

5
6 Mr. Ryan resigned as a director of the Receivership Companies on the day of the Receivers'
7 appointment. A validly constituted board of directors continues in place for each of the
8 Receivership Companies. It would be for the board in each case, if they see fit, to challenge the
9 actions of the Receivers /the Receivers' appointment. The directors in each case have not
10 challenged the Receivers' appointment, nor have they challenged any of the Receivers' actions,
11 whether in relation to registered land or otherwise. By the letter dated 12 March 2012 from their
12 attorneys, Morgan Lewis, the Receivership Companies expressly stated that they did not contest
13 the appointment of the Receivers. Further, the directors have supported the Receivers in these
14 proceedings by approving each of the affidavits submitted by and on behalf of the Receivers: see
15 Fifth Affidavit of Keith David Blake.

16
17 The circumstances are similar to that of Landmark Finance, the company in *Hawkesbury*. See
18 also the decision of the English Court of Appeal in *Newhart Developments Ltd v Co-Operative*
19 *Commercial Bank Ltd* [1978] 2 All ER 896, where the court held that the power to appoint a
20 receiver did not deprive the company, acting by its board of directors, of the power to institute
21 proceedings against the debenture holder for breach of contract. (See further *Picarda, supra*, at
22 p. 116, *et seq.*)

23
24 The Defendants' counterclaims as potential creditors of the Receivership Companies take the
25 matter no further. An ordinary creditor, especially one with an unproven, unsecured debt, has no
26 standing to challenge the authority of a receiver appointed over a company's assets under a
27 debenture. In *Hawkesbury (supra)*, Street J at page 790 treated the question as one as to whether
28 a creditor could fall within the exceptions to the rule in *Foss v. Harbottle*.

29
30 The instances in which a party, other than the company itself, may challenge the validity of a
31 receiver's appointment under a debenture appear to be limited to those in which the challenging



1 party is asserting a claim to property, which claim competes with the claim of the company or of
2 the receiver. Examples include: where there is an issue as to the order of priority of multiple
3 debenture holders (*In re Metropolitan Amalgamated Estates, Limited* [1912] 2 Ch. 497); where
4 one of multiple debenture holders was held to exercise the power to appoint a receiver on trust
5 for the other debenture holders (*In re Maskelyne British Typewriter, Limited* [1898] 1 Ch. 133);
6 and where a receiver claimed goods already seized by an execution creditor (*Kasofsky v.*
7 *Kreegers* [1937] 4 All ER 374). None of these circumstances apply to any of the Defendants in
8 this case.

9

10 The Defendants have no standing to challenge the authority of the Receivers and are bound by
11 the Receivers' authority as agents of the Receivership Companies (which agency has not been
12 challenged).

13

14 10. THE ESTOPPEL ISSUE

15

16 **If the Defendants succeed in showing that they have standing to challenge the appointment**
17 **and/or authority of the Receivers, Issue 1, and it is held the RLL contains a mandatory**
18 **statutory code, the effect of which is that a Receiver may only be appointed in respect of**
19 **income from Land upon the expiry of three months following service of a valid notice**
20 **under S72(1) of the RLL and that S.75 (2) and S.78 of the RLL further restrict the right of**
21 **entry of a lender's receiver onto charged land until after a bid has been accepted for the**
22 **sale of the land at an auction, Issue 2, are the Defendants estopped from challenging such**
23 **appointment and/or authority and/or actions dependent on the appointment and/or**
24 **authority of the Receivers?**

25

26 It is unnecessary to consider this issue given my findings on the RLL Issue (8 above). For
27 completeness, however, I record the respective submissions of the parties on the Estoppel Issue.
28 Had it been necessary to consider this issue I would have held that (in the light of the oral and
29 documentary evidence) the Defendants are not estopped, because the legal ingredients of an
30 estoppel are not made out.

31



1 **The Defendants' Submissions**

2
3 As to estoppel against the Defendants in the context of promissory estoppel, Snell (at 12-012)
4 notes that "*It is also essential for the estoppel raiser, C, to establish that he or she relied on the*
5 *promise or assurance in the sense that he or she was induced to alter his or her position by the*
6 *statement or assurance*". Mr Blake, in cross examination, conceded that he would not have done
7 anything differently had Mr Ryan not cooperated with him on day one. As an experienced
8 insolvency practitioner, he was ready to proceed regardless of the attitude of former
9 management. The plea of estoppel falls at this first hurdle.

10
11 **The Plaintiffs' Submissions**

12
13 Even if the Defendants had locus standi to challenge the Receivers' authority, which is denied,
14 and even if the challenge had any merit, which is also denied, by their actions in dealing with the
15 Receivers, they are estopped from making such a challenge. Not only did Mr Ryan resign as a
16 director, there was no challenge or dispute by any of the Defendants to the Receivers' authority,
17 and Orion voluntarily moved its office from the hotel premises where it was located. The
18 Defendants have clearly recognised the Receivers' authority. They have provided them with
19 documents and have cooperated with them (though not sufficiently) in various ways, and are
20 therefore estopped from raising a challenge at this stage.

21
22 **11. THE AUTHORITY ISSUE**

23
24 **Do the Receivers have authority to bring these proceedings on behalf of P1-4 having regard**
25 **to the state of the pleadings?**

26
27 **The Defendants' Submissions**

28
29 Mr Huskisson submitted as follows.



1 The Powers of Suit

2
3 The Debentures do not give the Receivers power to bring these proceedings on behalf of the
4 relevant companies. The relevant clause in the Debentures 18.1.

5
6 *Debenture relating to Condoco Grand Cayman Resort Limited, Cesar Properties Limited*
7 *and Condoco Properties Limited*

8
9 *"...a Receiver so appointed shall have the following powers:*

10
11 *18.1 to enter upon the Charged Property, to take possession of, collect and get in all or*
12 *any part of the Charged Property and for that purpose to take any proceedings in*
13 *the name of the Chargor or otherwise as may seem expedient;"*

14
15 *Debenture relating to Cesar Hotelco (Cayman) Ltd.*

16
17 *"... a Receiver so appointed shall have the following powers:*

18
19 *18.1 to enter upon the Hotel and Property, to take possession of, collect and get in all*
20 *or any part of the Charged Property and for that purpose to take any proceedings*
21 *in the name of the Chargor or otherwise as may seem expedient;"*

22
23 These powers reflect the power contained in paragraph 1 of Schedule 1 of the English Insolvency
24 Act 1986, but with one important qualification. The powers in these Debentures are qualified by
25 inserting the words "*to enter upon the Hotel and Property*" and "*to enter upon the Charged*
26 *Property*" at the beginning of the relevant paragraph. The Receivers' power to take proceedings
27 is limited to when proceedings are necessary to gain access to the borrowers' property in order to
28 take possession of, collect and get in all or any part of the charged property.

29
30 This clause should be construed *contra proferentem* against the Receivers. No other reading of
31 the clause makes sense, without ignoring the insertion of the words "*to enter upon the Hotel and*



1 *Property*" and *"to enter upon the Charged Property"*. A qualification that has been deliberately
2 inserted into a well known formulation taken from a key English statute should not be ignored.

3
4 The draftsman could have left the clause intact, so that it followed the English statute verbatim.
5 The Debentures contain carefully chosen wording in other instances.

6 7 Limitations on the Statutory Powers of Suit

8
9 If the Defendants are wrong on the above construction argument (and the RLL), it does not
10 follow that the Receivers have the right to bring these proceedings on behalf of the Plaintiff
11 companies.

12
13 The list of powers reserved to a receiver in the English Insolvency Act 1986 is (following Sir
14 Kenneth Cork's recommendation) taken from existing Scottish legislation. The list contains the
15 power to bring proceedings in the following circumstances:

16
17 1. *"Power to take possession of, collect and get in the property of the company and,*
18 *for that purpose, to take such proceedings as may seem to him expedient"* ("Power
19 One").

20
21 5. *"Power to bring or defend any action or other legal proceedings in the name and*
22 *on behalf of the company"* ("Power Five").

23
24 The authorities that followed the incorporation of these powers into the Scottish statute book
25 suggest that the first power is limited to the gathering in of a physical asset, such as a director's
26 company car. The Scottish authorities (with one exception) go further, in holding that a cause of
27 action (*jus crediti*) for a debt cannot be sued for by a receiver under Power One alone.

28
29 In departing from the reasoning of the Court in *McPhail v Lothian Regional Council* 1981 S.L.T.
30 173 Lord Ross explained his views in *Taylor, Petitioner* 1982 S.L.T. 172. The opinion of Lord



1 Ross in *Taylor* was followed by Lord Prosser in *Myles J. Callaghan Ltd. (In Receivership) v*
2 *Glasgow District Council* 1987 SC 171.

3
4 Kerr on Receivers (17th Edition, page 517) suggests that the views of Lord Prosser in *Callaghan*
5 represent what is now the preferred construction of Power One. Kerr goes on to note that even
6 where the wider powers to sue under Power Five might seem the more logical choice, Power
7 One does allow a receiver to bring proceedings for the recovery of property.

8
9 There is support for this analysis in the English authorities post the 1986 Insolvency Act. In *MC*
10 *Bacon Ltd (No 2)* [1990] BCLC 607 Millett J found that a liquidator's claim to set aside a
11 transaction as a preference was not a claim "to get in assets". In *Tudor Grange Holdings v*
12 *Citibank* [1992] Ch 53 the Vice Chancellor noted that a receiver (and the directors) would have
13 the power to bring a misrepresentation claim exercising Power Five.

14
15 As to the authorities before the 1986 Insolvency Act, in *Re Sacker* (1888) 22 QBD 179 the Court
16 of Appeal held that in relation to a debt due to the company "*the receiver is only appointed to*
17 *receive it; there is no vesting in him of any cause of action...*". By way of contrast, in *Wheeler v*
18 *Warren CA* [1928] 1 Ch 840 the Court of Appeal held that an express power in a debenture to
19 "*get in assets*" when combined with an express power of agency, carried with it an implied
20 power to sue for debts or other money of the chargor in the hands of third parties. In *Gough's*
21 *Garages v Pugsley* [1930] 1 KB 615 it was held that a receiver had the right to claim a new lease
22 in lieu of compensation under the Landlord and Tenant Act 1927.

23
24 These last two authorities could if necessary be distinguished on the current facts. *Wheeler v*
25 *Warren* is of no relevance because the clause in question in this case contains an express power
26 to sue. The Receivers do not require an implied power to sue. The Court of Appeal also placed
27 significant reliance on the statutory power to sue contained in the Law of Property Act 1925 and
28 a clear, unqualified contractual power of agency in the relevant charge. Neither of these features
29 appears in this case. *Gough's Garages* is limited to the application of a particular statutory right
30 under English Landlord and Tenant legislation.



1 Modern English textbooks reflect the wide powers to sue granted to a receiver under Schedule 1
2 of the 1986 Insolvency Act. As such, they do not reflect the law of the Cayman Islands. Pre
3 1986 English textbooks on the subject (applying *Wheeler v Warren*) suggest that the powers of a
4 receiver in standard form pre 1986 Insolvency Act debentures to bring proceedings are limited to
5 when necessary to "obtain possession of the company's tangible assets which are under the
6 control of its officers or other persons. and also to obtain the payment of debts owed to the
7 company" (Pennington Company Law, Second Edition 1967 p 409).

8
9 The power to sue (under Power One) must at least be limited to claims that involve the recovery
10 of pre-existing tangible physical assets, undisputed debts, or statutory claims. This formulation
11 assumes against the Defendants that *Taylor and Callaghan* places the bar on debt claims too
12 high, and is consistent with *Wheeler and Gough's Garages*. The Receivers do not have authority
13 to take proceedings beyond the recovery of pre-existing tangible physical assets, undisputed
14 debts, or statutory claims.

15
16 The authorities support these contentions. The Scottish cases of *Taylor and Callaghan* limit the
17 application of Power One to gathering in physical assets, the company car being the best
18 example. Millett J in *Mc Bacon No 2* found that a liquidator's claim to set aside an antecedent
19 transaction was not a claim to gather in an asset of the company, because until the claim had
20 succeeded there was no asset. The Vice Chancellor in *Tudor Grange* found that Power Five
21 (which the Receivers do not have) would be required to bring a misrepresentation claim.

22 23 The Power to Defend

24
25 As to the counterclaims, there is no power reserved to the Receivers under the Debentures to
26 defend proceedings, including the counterclaims. Power Five under the 1986 Insolvency Act
27 would give the Receivers the necessary power to defend the counterclaims, but this is absent in
28 the Debentures. The omission of a power to defend counterclaims is also indicative of an
29 intention not to give the Receivers power to make claims in respect of disputed assets in the first
30 place.



1 **The Plaintiffs' Submissions**

2
3 Mr Robinson submitted as follows.

4
5 The Receivers' Authority Under the Debentures to Bring Proceedings.

6
7 The Defendants raise a point of construction. On the plain meaning of the words of the
8 Debentures the Receivers do have the power and authority to bring these proceedings. Taking
9 the language of the Amended and Restated Collateral Debenture, this power is expressly granted
10 by clause 18.1.1 which provides that the Receivers shall have the power:

11
12 *"to enter upon the Charged Property, to take possession of, collect and get in all*
13 *or any part of the Charged Property and for that purpose to take any proceedings*
14 *in the name of the Chargor or otherwise as may be expedient."*

15
16 "*Charged Property*" is defined at clause 2.3 to mean, effectively, all the assets set out in clauses
17 2.2.1, 2.2.2 and 2.2.3. By virtue of this definition the Charged Assets include:

- 18
19 (a) the assets charged by way of fixed charge under clause 2.2.2, which include: all
20 the real estate subject to the registered charge; all land, buildings, fixtures, plant
21 and machinery; the benefits of all covenants for title; all Investments; all credit
22 balances, including the Chargor's rights in respect of any amount standing to the
23 credit of any account; all book and other debts, including "*all... monies due and*
24 *[owing]to it*"; the benefit of all rights, securities or guarantees of any nature
25 enjoyed or held by [the Chargor] in relation to the Chargor's book and other
26 debts; the benefits of any insurance; the Chargor's rights under the "Hotel
27 Documents", "Hedging Arrangements", and any lease documents; the benefits of
28 all licences, consents and authorisations; agreements relating to the purchase of
29 any property; and
30



1 (b) at 2.2.4, upon crystallisation of the floating charge, "*all the undertaking and all*
2 *the assets, rights and income of the Chargor both present and future not*
3 *otherwise effectively charged or assigned* [by way of the fixed charge].

4
5 The power to bring proceedings therefore covers proceedings brought to realize any of the assets
6 defined among the "Charged Property". In any event, even in the absence of an express power to
7 bring proceedings, the courts will imply such a power as a necessary corollary to a power to "*get*
8 *in ...the Charged Property*": see *Picarda (supra)*, pp. 126 to 128; *M Wheeler & Co Ltd v.*
9 *Warren* [1928] Ch. 840.

10
11 The Receivers also have extremely wide powers under clause 18.1.8 of the Debentures which
12 cover the authority to bring or defend proceedings on behalf of the Receivership Companies.

13 Assuming there has been an Event of Default, every claim by the Receivers in this action (if not
14 a claim falling within the definition of the assets covered by the fixed charge), is a claim to
15 recover part of the "*undertaking, assets, rights and income*" of the Receivership Companies
16 charged to the Lender as part of the floating charge. This has now crystallised with the events of
17 default, and the subsequent appointment of the Receivers.

18
19 The Defendants rely on a number of Scottish authorities which seek to interpret the effect of a
20 Scottish statutory provision. This provision is not comparable to the terms of the Debentures in
21 this case.

22
23 The clause 18.1.1 power in the Debentures is more the equivalent of a combination of both
24 Power 1 and Power 5 since, in addition to conferring on the Receivers the power to bring
25 proceedings to bring in the Charged Property (Power 1), it also confers on the Receivers the
26 express power to bring proceedings "in the name of the [Receivership Companies]" (Power 5).

27
28 In all the cases relied on by the Defendants the decision turned on whether the receiver in
29 question was entitled to bring the action in his own name. It is not known why in each case the
30 receiver brought the action in his own name, but it is clear that in every case the receiver could



1 have validly brought the action in the name of the company, that is, under Power 5, which the
2 Receivers in this case have express power to do, and have in fact done, under clause 18.1.1.

3 The decisions in *Wheeler* and *Gough's Garages* are more applicable to the present case than the
4 other cases relied on by the Defendants. In each case, the English court was interpreting the
5 power under a debenture before the enactment of the Enterprise Act 2002.

6
7 *Pennington* at p. 409 states:

8
9 *"Debentures and trust deeds which provide for the appointment of a receiver out of court,*
10 *always empower the receiver to take possession of all assets of the company which are*
11 *subject to the debentures, and for that purpose, and also for the purpose of enforcing*
12 *rights of action which the company has against other persons, to bring actions in the*
13 *company's name. This power is undoubtedly valid [citing M. Wheeler & Co. Ltd. v.*
14 *Warren], and may be used to obtain possession of the company's physical assets which*
15 *are under the control of its officers or other persons, and also to obtain payment of debts*
16 *owed to the company."*

17
18 In *Wheeler*, where the debenture contained no express power to bring proceedings, the court held
19 that the power to *"take possession and get in the property thereby charged"* implied a power to
20 sue for specific performance and rescission.

21
22 The Defendants' submission is inconsistent with the decision in *Gough's Garages*. There the
23 power in a debenture gave the receiver authority to *"take possession of, collect and get in the*
24 *property charged and for that purpose to take any proceedings in the name of the company or*
25 *otherwise as may seem expedient."* The terms of this power are materially identical to the power
26 granted to the Receivers in the Debentures in this case. Far from restricting that power to the
27 recovery of *"pre-existing tangible assets"* the English Court of Appeal held that the power
28 authorised the receiver to apply for renewal of a lease under section 5 of the Landlord and
29 Tenant Act: see in particular the judgment of Greer, L.J. at p. 621.



1 The Power to Defend

2

3 The submission that the Receivers have no power to defend the counterclaims is unsustainable.
4 In this case the debentures confer express power under clause 18.1.8 on the Receivers to "*do all*
5 *such other acts and things as may be considered incidental or conducive to any matters or*
6 *powers aforesaid...*" It appears that even in the absence of such an express power, such a power
7 is implicit: see *Picarda, at p. 125*.

8

9 **THE AUTHORITY ISSUE. ANALYSIS AND CONCLUSIONS**

10

11 In my opinion the Receivers (if validly appointed) have authority to bring these proceedings on
12 behalf of P 1-4, having regard to the state of the pleadings.

13 I refer to and repeat the Summary of Claims and Counterclaim set out above in chapter 3 of this
14 judgment.

15

16 It is elementary that the answer to this issue depends on the true construction of the Debentures
17 of 10.1.08 and that in construing the Debentures it is necessary to have regard to the full terms
18 thereof.

19

20 In chapter 6 above Clause 18.1 of the Amended and Restated Collateral Debenture dated 10.1.08
21 (CGCR, Cesar Properties and Conduco Properties) is set out. It is convenient to repeat the first
22 part of Clause 18.1:

23

24 18.1 *In addition to all other rights or powers statutory or otherwise vested in the*
25 *Lender or a Receiver or Receivers appointed by it, the Lender or a Receiver so*
26 *appointed shall have the following powers:*

27

28 18.1.1 *to enter upon the Charged Property, to take possession of, collect and*
29 *get in all or any part of the Charged Property and for that purpose to*
30 *take any proceedings in the name of the Chargor or otherwise as may*
31 *seem expedient;*"



1 The Amended and Restated Debenture of 10.1.08 (Hotelco) is in identical terms to the above
2 save that clause 18.1.1 starts – “to enter upon the Hotel and Property, to take possession of.....”

3
4 The “Charged Property” is very widely defined in the Debentures.

5
6 Clause 2.3 states that “*All of the above mentioned assets whether mortgaged or charged by way
7 of specific or floating charge, are hereinafter sometimes referred to as the “Charged Property”.
8 The Charged Property included by way of first fixed charge (clause 2.2.2.[2.2.1 in the case of the
9 Hotelco Debenture]): Land, Investments, Plant and Machinery, Credit Balances, Book debts etc,
10 Insurances, Development Documents, Hotel Documents, Hedging Arrangements, Lease
11 Documents, Licences etc and Agreements relating to the purchase of [any] property.”*

12 By clause 2.2.4 [2.2.3 in the case of the Hotelco Debenture]) the Chargor charged “*by way of
13 floating charge all the undertaking and all the assets, rights and income of the Chargor both
14 present and future not otherwise effectively charged or assigned under clause 2.2.1, 2.2.2 or
15 2.2.3 [2.2.1 or 2.2.2] hereof.”*

16
17 By clauses 2.3.2 of the Debentures the floating charge “*shall automatically and without notice
18 be converted into a fixed charge in respect of any floating property subject to it :.....if an Event
19 of Default occurs.”*

20
21 Thus by clause 18.1.1 of the Debentures the Receivers have the power to “*to take any
22 proceedings in the name of the Chargor or otherwise as may seem expedient”* for the purpose of
23 taking possession of, collecting and getting in “*all or any part of the Charged Property”* as
24 defined in the wide terms referred to above.

25
26 Assuming that there has been an Event of Default, in my opinion the Receivers have authority by
27 virtue of the powers conferred by the Debentures to bring these proceedings on behalf of P 1-4,
28 having regard to the state of the pleadings.



1 **12. CONCLUSION**

2

3 The decisions in this judgment on the preliminary issues will be reflected in an order in the usual
4 way. I would be grateful if the parties would submit a draft order as soon as practicable, for my
5 consideration.

6

7 If and to the extent that leave to appeal is necessary, I would be minded to grant leave in view of
8 the importance of the RLL Issue.

9

10

11 DATED the 19th day of December 2012

12

13

Cresswell J

**The Honourable Justice Cresswell
Judge of the Grand Court**

