

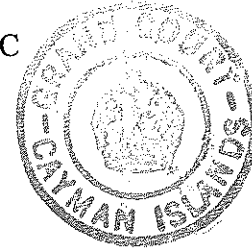
1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

FSD 98/2012 (PCJ)

2  
3 **The Honourable Sir Peter Cresswell**  
4 **In Chambers on 24 and 29 October 2012**  
5 **Judgment in Open Court 30 October 2012**

6  
7 **BETWEEN:**

8 **RC CAYMAN HOLDINGS LLC**



**Plaintiff**

9  
10 **and**

11 **MICHAEL RYAN**

**Defendant**

12  
13  
14  
15  
16 **APPEARANCES:** Mr. Nigel Meeson QC and Mr. Fraser Hughes of Conyers Dill & Pearman  
17 for the Plaintiff

18  
19 Mr. Richard Millett QC with and instructed by Mac Imrie of Maples and  
20 Calder for the Defendant  
21

22 **JUDGMENT**

23 **INDEX**

- 24 **1. THE APPLICATION**
- 25 **2. THE EVIDENCE**
- 26 **3. THE BACKGROUND**
- 27 **4. SUBMISSIONS ON BEHALF OF MR. RYAN**
- 28 **5. RCC'S SUBMISSIONS**
- 29 **6. ANALYSIS AND CONCLUSIONS**

30  
31 **1. THE APPLICATION**

32  
33 The Defendant Mr. Ryan ("Mr. Ryan" or "the applicant") seeks the following order

- 34
- 35 1 The respondent ("RCC" or "the Lender") be restrained from selling or attempting to sell
- 36 those assets of Cesar Properties Ltd and/or Condoco Properties Ltd which are subject to

1 the respondent's charge insofar as those assets comprise registered land ("Land Assets")  
2 for an initial period of 28 days, or such other period as may be agreed in writing by the  
3 parties in order that:  
4

5 1.1 The issue of whether adequate notice was given by the respondent pursuant to section  
6 72 of the Registered Land Law ("RLL") so as to permit the respondent to exercise a  
7 power of sale over the Land Assets may be resolved by this Court by way of the  
8 preliminary issue trial in Cause No. FSD 58 of 2012; and  
9

10 1.2 The Defendant and any other interested parties may fully investigate the  
11 circumstances surrounding the inclusion of Block and Parcel 12C 451/3 ("Golf  
12 Course") in the security being offered by the respondent for sale, including the recent  
13 transfer of title to said land to Cesar Properties Ltd.  
14

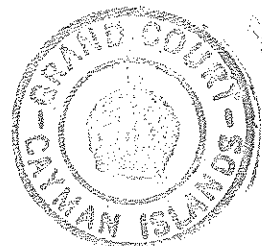
## 15 2. THE EVIDENCE

16  
17 The evidence before the Court is as follows:

- 18 (a) First Affidavit of Michael Ryan;
  - 19 (b) Second Affidavit of Michael Ryan;
  - 20 (c) First Affidavit of Richard C. Schoenstein;
  - 21 (d) Second Affidavit of Jim Glasgow;
  - 22 (e) First Affidavit of Michael Lesser;
  - 23 (g) First Affidavit of Tania Dons;
  - 24 (h) Second Affidavit of Tania Dons;
  - 25 (i) First Affidavit of Paul Drake; and
  - 26 (j) First Affidavit of Scott Elphinstone.
- 27  
28

## 29 3. THE BACKGROUND

30  
31 There are two related actions – the Receivers' action – FSD 58 of 2012 and the Guarantee action  
32 – FSD 98 of 2012.



1 **The Receivers' action**

2  
3 The background to and issues in the Receivers' action are set out in my Ruling of 10 August.

4  
5 The Plaintiffs in FSD 58 of 2012 were property owners of the Ritz-Carlton Grand Cayman  
6 Resort ("the Resort") and the Defendants provided a full range of services with a view to  
7 developing and then operating a world class luxury resort.

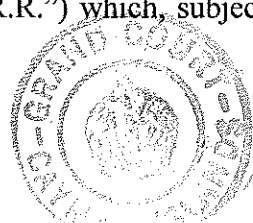
8  
9 Mr. Ryan says that all of the Plaintiff and Defendant companies in FSD 58 are ultimately over 90  
10 percent owned by him (RCC does not accept this without proof). The registered owner of the  
11 shares in Cesar Properties Ltd ("Cesar Properties") and Condoco Properties Ltd ("Condoco  
12 Properties") is RCC pursuant to a legal mortgage over their shares by way of security.

13  
14 The Plaintiffs' and Defendants' accounts were managed on a consolidated basis. Until 2010, the  
15 accounts were audited on an annual basis by Ernst & Young.

16  
17 As to the Resort, the hotel is owned by Cesar Properties. The unsold condominiums are owned  
18 by Condoco Properties, Cesar Properties, Cesar Hotelco (Cayman) Ltd ("Hotelco") and Condoco  
19 Grand Resort Ltd ("CGCR"). Cesar Properties also owns the 14 unsold lots on which  
20 deckhouses are intended to be constructed. The golf course, the condominiums and deckhouses  
21 are part of a total of 7 strata plans within the Resort, registered under the Strata Titles  
22 Registration Law (2005 Revision).

23  
24 The hotel, golf course and 24 of the condominiums are currently managed and operated by the  
25 Ritz-Carlton Hotel Company of the Cayman Islands Ltd. through various service agreements  
26 with one or more of the First to Fourth Plaintiffs in FSD 58 of 2012 ("the Receivership  
27 Companies") and, variously, the strata corporations in which the different properties fall. FSD  
28 58 of 2012 does not directly concern those properties being managed and operated by the Ritz-  
29 Carlton Hotel Company of the Cayman Islands Ltd.

30  
31 The Resort was developed by Mr. Ryan through companies controlled by him and directly or  
32 indirectly owned by the Fourth Defendant, I.R.R. Limited ("I.R.R.") which, subject to security



1 granted over the Receivership Companies, the First to Fourth Plaintiffs, was the ultimate holding  
2 company of the group. I.R.R. is owned by entities controlled by Mr. Ryan and by The King's  
3 Foundation – Investment Cayman Ltd.

4  
5 The Plaintiffs in FSD 58 of 2012 are all Cayman Islands registered companies. I.R.R. is the  
6 ultimate parent of all the Receivership Companies (the First to Fourth Plaintiffs). Endless  
7 Service Ltd. (“ESL”) is a wholly owned subsidiary of CGCR, the Third Plaintiff.

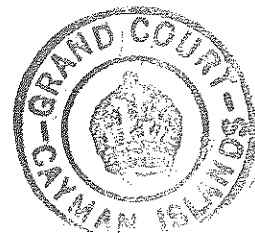
8  
9 Mr. Ryan was a director of each of the Receivership Companies and ESL for several years until  
10 12 March 2012, the date of the Receivers’ appointment, when he resigned his appointment in  
11 each of them.

12  
13 The Defendant companies, Orion Developers Ltd. (the Second Defendant), Deckhouses  
14 Construction Company Ltd. (the Third Defendant), Endless Service Management Ltd. (the Fifth  
15 Defendant), and Bluetip Watersports Ltd. (the Sixth Defendant), are owned and controlled by  
16 Mr. Ryan outside the I.R.R. umbrella. They are all Cayman Islands registered companies.

17  
18 The Second Defendant Orion Developers Ltd (“Orion”) performed and managed the operations  
19 and day-to-day activities of the Receivership Companies.

20  
21 RC Cayman Holdings LLC (“RCC” or the “Lender”) is the assignee of a loan in the original  
22 principal amount of US\$250,000,000 (the “Loan”) made by Column Financial Inc. to the  
23 Receivership Companies. The Loan was advanced pursuant to a Loan Agreement dated 16 April  
24 2007.

25  
26 The Loan is secured by (among other securities) (a) an Amended and Restated Debenture dated  
27 10 January 2008 granting a fixed and floating charge over the assets and undertaking of the First  
28 Plaintiff, Hotelco (the “Debenture”), and (b) an Amended and Restated Collateral Debenture  
29 dated 10 January 2008 over the assets and undertakings of CGCR, Condoco Properties and Cesar  
30 Properties (the “Collateral Debenture”). The Debenture and the Collateral Debenture were  
31 assigned to the Lender by an Assignment of Amended and Restated Debenture and an



1 Assignment of Amended and Restated Collateral Debenture respectively, both dated 30 June  
2 2011.

3  
4 The Lender appointed the Receivers over the Receivership Companies by two deeds of  
5 appointment dated 12 March 2012, one under the Debenture in respect of Hotelco and the other  
6 under the Collateral Debenture in respect of CGCR, Cesar Properties and Condoco Properties.

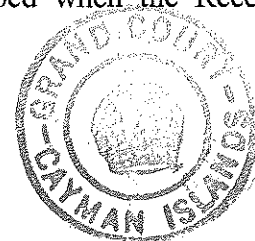
7  
8 The Defendants deny that the Receivers' contractual appointments applied with respect to assets  
9 of the Receivership Companies insofar as the assets were comprised of registered land or leases  
10 of registered land, or the rents or profits therefrom, because it is said the Lender had (and still  
11 has) not served the notices required by the RLL, such that the Receivers had no power or  
12 authority with respect to land owned by the Receivership Companies or the rents or profits  
13 derived therefrom.

14  
15 The intercompany relationships are shown in two charts — appended to my Ruling of 10 August.

16  
17 It is alleged in the Re-Amended Statement of Claim that the Defendants are liable to the  
18 Plaintiffs in (among other) the following respects.

19  
20 Firstly, it is alleged that assets belonging to the Plaintiffs have been sold in a transaction with no  
21 or illusory consideration. In response to this, the Defendants say that the market price was paid  
22 and that the consideration was then spent on the Resort's day-to-day operations in accordance  
23 with the contractual arrangements in place.

24  
25 Secondly, it is alleged that the Defendants hold rental deposits received from tenants of condo  
26 properties at the Resort on trust for the Plaintiffs. The Defendants deny the deposits were held on  
27 trust for the Plaintiffs (or the relevant tenants) and say that when Orion was managing the rental  
28 programme, it would utilise the deposits to meet the expenses of the Resort. The Defendants  
29 claim that when the deposits were due to be repaid, the repayments were funded out of the  
30 current cash-flow. It is further claimed that this system only stopped when the Receivers  
31 cancelled Orion's authority to continue managing the rental programme.



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

4  
5 Fourthly, the Plaintiffs claim that a number of payments made by the Defendants were  
6 unexplained, or paid to affiliates of Mr. Ryan improperly. The Defendants say they have  
7 explained each transaction and contend that the expenses were legitimate business expenses of  
8 the Plaintiffs in respect of which payment was permitted pursuant to the agreements in place  
9 between the Plaintiffs, Mr. Ryan and Orion.

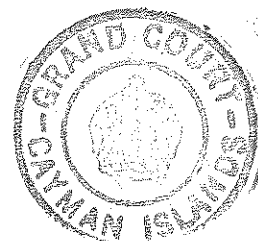
10  
11 Fifthly, the Plaintiffs claim that they are entitled to exercise a set-off between sums due on the  
12 Defendants' counterclaims and sums they claim Mr. Ryan and Orion are liable to account for in  
13 respect of payments made to them out of the bank accounts of the Plaintiffs between 2005 and  
14 2012 (for Mr. Ryan) and 2007 and 2012 (for Orion).

15  
16 The First, Second and Sixth Defendants counterclaim for unpaid fees and expenses along with  
17 damages for the claimed wrongful termination of the development and operational agreements  
18 that were entered into.

19  
20 **The Guarantee Action**

21  
22 As to this action the Amended Statement of Claim sets out the Plaintiff's (RCC's) case as  
23 follows

24  
25 The Plaintiff (RCC) is the current owner and holder of a mortgage loan in the original principal  
26 amount of \$250,000,000.00 (the "Loan") made by Column Financial, Inc. ("Column") to Cesar  
27 Properties, Condoco Properties ("Current Borrowers"), Condoco GC and Cesar Hotel Co  
28 ("Original Borrowers") and advanced pursuant to the Loan Agreement dated April 16, 2007  
29 between Column, as lender, and Current Borrowers and Original Borrowers, collectively as  
30 borrowers, as amended (the "Loan Agreement").



1 Among other instruments executed and delivered in connection with the Loan Agreement was a  
2 Guarantee agreement dated 16 April 2007 (“the Guarantee Agreement”) entered into between the  
3 Defendant and The Marvin M. Schwan Charitable Foundation (a South Dakota charitable  
4 foundation), as guarantors and Column.

5  
6 On 9 May 2011 the Current Borrowers and Column entered into a loan extension agreement (the  
7 “LEA”).

8  
9 On 30 June 2011, Column assigned all of its rights, title and interest in and to the Loan  
10 Agreement and all related Loan documents, including the Guarantee Agreement and the LEA, to  
11 the Plaintiff, RCC and its successors and assigns.

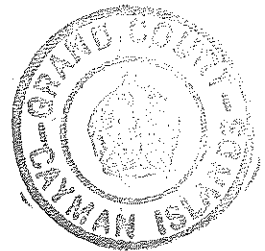
12  
13 Clause 1.1 of the Guarantee Agreement stated that the:

14  
15 *“Guarantor hereby irrevocably and unconditionally guarantees to Lender and its successors and*  
16 *assigns the payment and performance of the Guaranteed Obligations as and when the same shall*  
17 *be due and payable, whether by lapse of time, by acceleration of maturity or otherwise.*  
18 *Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the*  
19 *Guaranteed Obligations as a primary obligor.”*

20  
21 Clause 1.2 of the Guarantee Agreement defined the Guaranteed Obligations.

22  
23 Clause 1.5 of the Guarantee Agreement provided that:

24  
25 *“If all or any part of the Guaranteed Obligations shall not be punctually paid when due,*  
26 *whether at demand, maturity, acceleration or otherwise the Guarantor shall, immediately*  
27 *upon demand by Lender, and without presentment, protest, notice of protest, notice of*  
28 *non-payment, notice of intention to accelerate the maturity, notice of acceleration of the*  
29 *maturity, or any other notice whatsoever, pay in lawful money of the United States of*  
30 *America, the amount due on the Guaranteed Obligations to Lender at Lender’s address*  
31 *as set before herein. Such demand(s) may be made at any time coincident with or after*



1           *the time for payment of all or part of the Guaranteed Obligations, and may be made from*  
2           *time to time with respect to the same or different items of Guaranteed Obligations. Such*  
3           *demand shall be deemed made, given and received in accordance with the notice*  
4           *provisions hereof."*

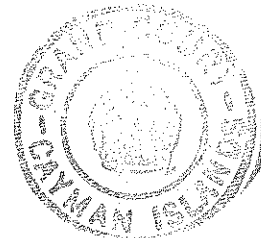
5  
6       Clause 1.8 of the Guarantee Agreement provided that in the event that the Defendant should  
7       breach or fail to timely perform any provisions of the Guarantee Agreement, the Defendant shall,  
8       immediately upon demand by the Plaintiff, pay the Plaintiff all costs and expenses (including  
9       Court costs and reasonable attorneys' fees) incurred by the Plaintiff in the enforcement or  
10      preservation of the Plaintiff's rights.

11  
12      Notice of Default

13  
14      On 16 February 2012, the Plaintiff gave notice in writing to Cesar Properties, Condoco  
15      Properties, Condoco GC and Cesar Hotelco of default of the terms of the Loan Agreement and  
16      the LEA. The said notice provided:

17  
18      (i)     *"as a result of Borrower's failure to deliver to Lender on or before November 9, 2011,*  
19             *as required by Section 10 of the LEA, evidence reasonably satisfactory to Lender that*  
20             *Borrower has initiated substantive communications with The Ritz-Carlton Hotel*  
21             *Company of the Cayman Islands, Ltd. ("Ritz-Carlton") to extend the subordination of*  
22             *Ritz-Carlton's management fees for a period of time (satisfactory to Lender in its*  
23             *reasonable discretion) beyond May 9, 2012;*

24  
25      (ii)    *as a result of Borrower's failure to deliver to Lender on or before February 9, 2012,*  
26             *as required by Section 10 of the LEA, (x) evidence of Borrower's ability to refinance*  
27             *the Loan prior to the Maturity Date or (y) other information such that Lender shall be*  
28             *reasonably satisfied that the potential expiration of the subordination of Ritz-*  
29             *Carlton's management fees to the Loan pursuant to the NDA will not prohibit a*  
30             *refinancing of the Loan;*



1 (iii) under Section 8.1(a)(ix) of the Loan Agreement, as a result of Borrower's failure to  
2 obtain Lender's prior written consent, as required by Section 5.2.10 of the Loan  
3 Agreement, prior to permitting a Sale or Pledge of a portion of the Property to occur  
4 pursuant to the terms of that certain Golf Agreement dated July 13, 2011, executed  
5 and delivered by Cesar Hotelco, The Proprietors, Strata Plan No, 404, Waterworks  
6 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 to  
9 obtain Lender's prior written consent, as required by Section 5.2.10 of the Loan  
10 Agreement, prior to permitting a Transfer of approximately \$1.27 million in or about  
11 August 2011 withdrawn from the Reserve (as established pursuant to Section 5.6 of  
12 the Second Amended and Restated Operating Agreement effective as of November 30,  
13 2006 between Cesar Hotelco, as Owner, The Proprietors, Strata Plan No. 404, 436,  
14 437, 438, and 447, as Strata Corps., and Ritz-Carlton, as Operator, as amended).”

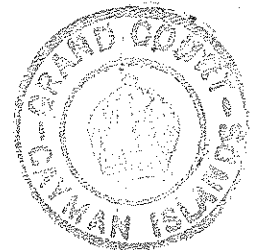
15  
16 (the “16 February 2012 Notice”)

17  
18 Within the 16 February 2012 Notice, the Plaintiff reserved its right to (i) declare the Loan  
19 immediately due and payable, and (ii) exercise any and all additional rights, powers and  
20 remedies available to the Plaintiff.

21  
22 On 5 March 2012, an additional written notice was given to Cesar Properties, Condoco  
23 Properties, Condoco GC and Cesar Hotelco, which stated (amongst other things) that:

24  
25 *“Lender has learned that a portion of the Property known as West Bay Beach South,*  
26 *Block 12C, Parcel 451/3H10H12 was transferred to David Morrison in violation of the*  
27 *provisions of Section 5.2.10 and Section 9.8 of the Loan Agreement. Such transfer*  
28 *constitutes an immediate Event of Default under Section 8.1(iv) of the Loan Agreement.”*

29  
30 *“In addition, please be advised that, notwithstanding anything to the contrary contained*  
31 *in the Loan Documents, during the continuance of an Event of Default Lender may grant*  
32 *or withhold its consent in its sole and absolute discretion to the release or discharge of*



1            *any Condominium Unit(s) or Release Parcel(s) from the Lien of the Mortgage and the*  
2            *other Loan Documents in connection with the sale of Condominium Unit(s) or Release*  
3            *Parcel(s)."*

4  
5            (the "5 March 2012 Notice")  
6

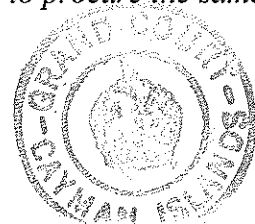
7            Within the 5 March 2012 Notice, the Plaintiff reserved its right to (i) declare the Loan  
8            immediately due and payable, and (ii) exercise any and all additional rights, powers and  
9            remedies available to the Plaintiff.  
10

11           On 7 March 2012, a further written notice was given to Cesar Properties and Condoco  
12           Properties, which stated (amongst other things) that:  
13

14           *"Borrower has failed to deliver to Lender certified copies of the existing Policies by*  
15           *March 6, 2012, as required by the March 1 Letter. Borrower's failure to deliver to*  
16           *Lender certified copies of the existing Policies by March 6, 2012 constitutes an immediate*  
17           *Event of Default under Section 8.1(a)(iii) of the Loan Agreement.*  
18

19           *Furthermore, Borrower has failed to deliver to Lender by March 5, 2012 (ten (10) days*  
20           *prior to the expiration date of the Policies) certificates of insurance evidencing the*  
21           *renewal Policies, accompanied by evidence satisfactory to Lender of payment of the*  
22           *premiums due thereunder as required by Section 6.1(b) of the Loan Agreement.*  
23           *Borrower's failure to deliver certificates of insurance evidencing the renewal Policies,*  
24           *accompanied by evidence satisfactory to Lender of payment of the premiums due*  
25           *thereunder, constitutes a Default under the Loan Documents.*  
26

27           *Lender hereby demands that Borrower immediately deliver to Lender certificates of*  
28           *insurance evidencing the renewal Policies, accompanied by evidence satisfactory to*  
29           *Lender of payment of the premiums due thereunder. If Borrower fails to provide such*  
30           *evidence in a form satisfactory to Lender by 6:00 p.m. (eastern) today, March 7, 2012,*  
31           *Lender intends immediately thereafter to take all necessary steps to procure the same and*



1        *pay the insurance premiums therefor on Borrower's behalf in accordance with the*  
2        *provisions of Section 6.1(f) of the Loan Agreement.*

3  
4        *Pursuant to Section 6.1(f) of the Loan Agreement, all premiums incurred by Lender in*  
5        *connection with obtaining such insurance and keeping it in effect shall be paid by*  
6        *Borrower to Lender upon demand and, until paid, shall be secured by the Mortgage, the*  
7        *Mortgage of Shares and the Debenture and shall bear interest at the Default Rate.”*

8  
9        (the “7 March 2012 Notice”)

10  
11        Within the 7 March 2012 Notice, the Plaintiff reserved its right to (i) declare the Loan  
12        immediately due and payable, and (ii) exercise any and all additional rights, powers and  
13        remedies available to the Plaintiff.

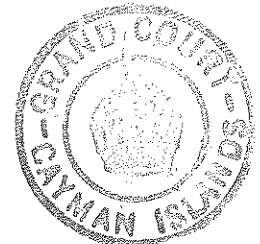
14  
15        Despite service of the 16 February 2012 Notice, the 5 March 2012 Notice and the 7 March 2012  
16        Notice, neither the Current Borrowers, nor the Original Borrowers, remedied the defaults.

17  
18        On 12 March 2012, the Plaintiff provided written notice to the Current Borrowers that the debt  
19        had been accelerated and demanded immediate payment of the Loan in full.

20  
21        The Current Borrowers have failed to repay the Loan.

22  
23        Pursuant to the Guarantee Agreement the Guarantor became liable for the entire amount of the  
24        Debt upon the occurrence of:

- 25  
26            a. the events of default numbered (iii) and/or (iv) described in the 16 February 2012  
27            Notice and/or the events of default described in the 5 March 2012 Notice; and/or  
28  
29            b. the breach of Section 5.2.10, of the Loan Agreement by the Current Borrowers or  
30            Original Borrowers, without Lender’s consent, by diverting proceeds of the rental



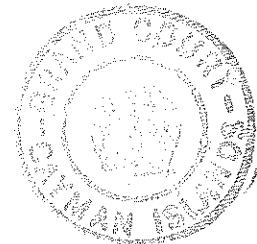
1 of certain residential condominium units from the Current Borrowers to an affiliate  
2 of the Defendant, namely Orion Developers Ltd; and/or

3  
4 c. the breach of Section 5.2.10 of the Loan Agreement by Current Borrowers or  
5 Original Borrowers, without Lender's consent, by transferring pursuant to an  
6 Agreement dated 21 October 2011 the following:

- 7  
8 i. a 2007 Phantom Rolls Royce (VIN#SCA1568077UX01098);  
9  
10 ii. an Aquariva 33 yacht;  
11  
12 iii. a 1999 Intrepid 356 Cuddy Offshore Fisherman "BLUE TIP"  
13 (IDN#IBW355085I899);  
14 iv. an Intrepid 356 Cuddy Offshore Fisherman "BLUE TIP II"  
15 (IDN#IBW36097B999);  
16  
17 v. an Intrepid 356 Cuddy Offshore Fisherman "BLUE TIP III"  
18 IDN#IBW30509J899);  
19  
20 vi. a 2006 Oculus Glass Bottom Boat (Engine No.OP417269 Verado 275XL);  
21  
22 vii. all permits, licenses, easements, and rights of use or way required to  
23 operate the items listed in (i)-(vi) above; and  
24  
25 viii. a non-exclusive, perpetual, royalty-free worldwide licence, with the right  
26 to sub-license, to use the intellectual property mark "Blue Tip"

27  
28 to affiliates of the Defendant, namely Endless Service Management Ltd and  
29 Bluetip Watersports Ltd; and/or

30  
31 d. the breach of Section 4.1.30, of the Loan Agreement by the Current Borrowers or  
32 Original Borrowers, by each of them failing to maintain itself as a Special Purpose  
33 Entity (as defined in the Loan Agreement) by, amongst other things, failing to  
34 maintain separate accounts, books and records and co-mingling its funds or assets  
35 with those of another Person (as defined in the Loan Agreement), namely each  
36 other and/or Orion Developments Ltd and/or other companies.



1 On 15 March 2012, the Plaintiff demanded payment of the sum of US\$233,933,167.99 from the  
2 Defendant in accordance with clause 1.5 of the Guarantee Agreement.

3  
4 The Defendant has failed and/or refused to pay the Plaintiff the sum of US\$233,933,167.99 or  
5 any part thereof and the said sum remains due and owing from the Defendant to the Plaintiff.

6  
7 RCC's claim in the Guarantee action is for US\$232,829,781.15 and interest

8  
9 Mr. Ryan disputes the claim on the grounds set out in his Defence.

10

### 11 **The Proposed Auction**

12

13 On or about 20 August 2012 RCC as Debenture Holder and Chargee announced a Public  
14 Auction of the Ritz-Carlton Grand Cayman Resort on 31 October 2012 pursuant to section 75(1)  
15 of the RLL, their statutory right as chargee.

16

17 There have been three versions of the Terms and Conditions of Auction (issued on or about  
18 20.8.12, 10.10.12 and 17.10.12)

19

20 The auction is due to take place at 10:00am tomorrow Wednesday, 31 October.

21

22 The hearing of this application finished at about 4pm yesterday. This judgment has been  
23 prepared and typed over night.

24

### 25 **4. SUBMISSIONS ON BEHALF OF MR. RYAN**

26

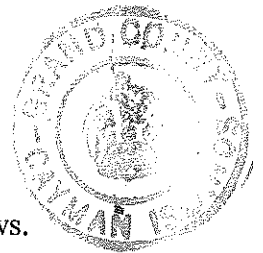
27 Mr. Richard Millett QC and Mr. Mac Imrie on behalf of Mr. Ryan submitted as follows.

28

### 29 **Summary**

30

31 The sale of the charged land, and its effect on the quantum of any guarantee claim against Mr  
32 Ryan, is an issue on the pleadings. In the related Receivers' Action, the Defendants have



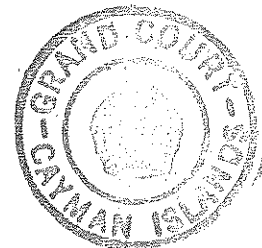
1 challenged the validity of the Receivers' appointments because RCC failed to serve the required  
2 statutory notices. After the preliminary issue in the Receivers' Action had been set down for  
3 hearing on 29 August, RCC announced that the charged property would be sold, not by the  
4 Receivers but instead by virtue of the Lender's statutory power to sell by public auction pursuant  
5 to the RLL.

6  
7 Mr. Ryan was concerned that there was insufficient time and data available to the likely  
8 purchasers of a world-class trophy asset. The terms of sale were onerous. He sought to obtain  
9 information about the proposed public auction. The information sought was not available on the  
10 website. RCC refused to make any disclosure, on the basis that no duties were owed to Mr  
11 Ryan, nor were the documents relevant to the action, and therefore were not subject to  
12 disclosure.

13  
14 Mr. Ryan warned that if he did not receive the information in a timely manner, he would have no  
15 option but to issue a summons. The warning was ignored. A summons was issued, seeking  
16 disclosure and, if necessary, an injunction. The first stage was the disclosure application.  
17 Whether the injunction proceeded would depend on the facts disclosed by RCC and whether any  
18 interested parties pre-qualified for the bidding. On Friday 19 October, RCC's attorneys  
19 confirmed that two independent parties had pre-qualified, and that RCC, or/and an affiliate, also  
20 intended bidding.

21  
22 The disclosure revealed unusual features of the proposed auction:

23  
24 The auction terms gave no warranties as to title, and were slanted in a way which would  
25 discourage purchasers to bid enthusiastically to acquire the assets. The terms emphasise  
26 risk, uncertainty and inequality of information. Of the 750 parties emailed about the  
27 opportunity to purchase, not one physically inspected the property. One of the two  
28 independent qualified bidders has now withdrawn. If the auction takes place on 31  
29 October, it will consist of one independent bidder and RCC (and/or its affiliate).



1 RCC confirmed that no additional notices had been served on the borrowing companies.  
2 The original notices, dated 23 March 2012 (but possibly served on 26 March 2012), do  
3 not comply with the requirements of s.72 of the RLL. Consequently, there is no right to  
4 sell the property by public auction. Any sale will be unlawful and potentially invalid.

5 The Golf Course was belatedly added to the auction parcels to be sold. The certificate of  
6 title for the parcel (12C 451/3), previously owned as "common property" in the master  
7 strata corporation incorporated for that purpose (strata 404), had been altered and  
8 backdated by the Registrar at the request of RCC, to change the name of the proprietor  
9 and impose a charge. No notice was given to the former proprietor (Strata 404) and the  
10 requirements for a valid alteration in s.139(1) of the RLL have not been met. In addition,  
11 none of the notices required under the RLL with respect to the appointment of receivers  
12 or a lender's power of sale have ever been served with respect to this parcel.

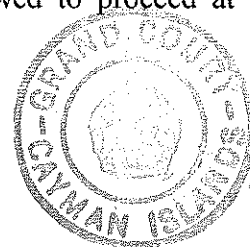
13  
14 The pre-qualified bidders had not been told about these issues, and the lender did not  
15 intend telling them.

16  
17 Mr. Ryan therefore proposed a postponement of the auction for a period of 28 days, so that  
18 directions could be given so as to resolve the disputed issues. He also proposed that the  
19 registered bidders be informed of the issues, and asked whether they would agree to a short  
20 postponement pending their resolution. RCC rejected all these suggestions. Unless restrained by  
21 the Court, the auction will proceed on 31 October.

22  
23 Mr Ryan submits that no lender selling as mortgagee, acting reasonably and properly in  
24 accordance with its duty of good faith, would proceed to an auction in these circumstances, and  
25 that an injunction should be granted, on the basis that:

26  
27 There are serious issues to be tried with respect to the s.72 notices and the validity of any  
28 sale of the golf course, and he has a good arguable case in respect of each issue.

29  
30 He will suffer irreparable damage if the auction is allowed to proceed at this stage,  
31 because:



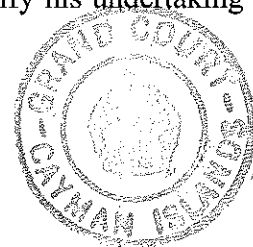
1 (a) The sale will be mired with uncertainty and almost certainly subject to legal  
2 challenges, delay, and additional unrecoverable costs. If the sale is ultimately  
3 unsuccessful, perhaps because it is unlawful or otherwise subject to legal challenges  
4 or disputes, the Property and the sale process will be tainted;

5  
6 (b) He will, in due course, be left to challenge the appropriate "credit" on the guarantee  
7 debt – an immensely difficult and expensive hindsight task, for which he will have  
8 significant unrecovered fees and expenses; and

9  
10 (c) Unless a portion of the auction proceeds are retained within the jurisdiction, the  
11 proposed manner and timing of the sale will render nugatory the current security for  
12 costs arrangements.

13  
14 The balance of convenience lies in favour of granting a short postponement of the  
15 auction, so as to enable these issues to be resolved to determine whether the auction can  
16 lawfully proceed. RCC has the right to withdraw the property from the auction on any  
17 terms it wishes. It is quite likely that a well-advised bidder would agree to a short  
18 postponement so that certainty can be obtained. That may lead to an increase in price  
19 when the auction is held.

20  
21 Mr. Ryan is willing to fortify a cross-undertaking for the exposure to damages of a short  
22 postponement. Such damages and costs might in fact be zero. Because of the rigid pre-  
23 qualification process, there is no risk of bidders turning up "on the day". There is only  
24 one pre-qualified bidder, whose position can be ascertained by a single phone call or  
25 email. The actual costs of changing the date of the auction are minimal. If there is  
26 concern that a change of date might cause the one pre-qualified bidder to withdraw then  
27 an assessment would need to be made of the reasons for the withdrawal: the defendant  
28 would only be liable on the cross-undertaking if the withdrawal was caused solely by the  
29 delay, not the substantive points. The "loss" would be the loss of the chance to sell to  
30 that bidder on that day. Therefore, Mr Ryan's proposal to fortify his undertaking with a



1 payment into the Court of US\$100,000 is sufficient to meet any reasonable exposure to a  
2 claim.

3  
4 **Good Arguable Case / Serious Issue to be Tried**

5  
6 **Section 72 RLL**

7  
8 The mandatory s.72 procedure has not been followed. The notices (dated 23.3.12 and served on  
9 about 26.3.12) to each borrowing company were non-compliant because they were a demand to  
10 rectify a payment breach, not a demand to rectify a performance breach. The payment breach  
11 only occurred on 12.3.12 when the notice of acceleration of that date was sent under Section 72.  
12 The Lender needed to wait for the expiry of 30 days before serving the Section 72 notices. No  
13 subsequent notices were served. No notice has ever been served with respect to the golf course.

14  
15 As the requisite procedure mandated by s 72 of the RLL was not followed, then any sale would  
16 not be valid. The very late affidavit of Mr Elphinstone does not assist because the consent of the  
17 chargors is not sufficient to displace s.72. No application has been brought to vary the  
18 provisions of s.72, or abridge time.

19  
20 The issues with respect to the notices will be determined in the outcome of the preliminary issue  
21 in the Receivers' Action (FSD 58 of 2012), due for hearing immediately after this application.

22  
23 RCC is attempting to silence any s.72 objection until after it is too late to stop the sale. The  
24 major point taken by RCC, based on its New York law evidence, is that because Mr. Ryan is not  
25 a chargor he cannot complain of an infringement of s 72. This is incorrect for a number of  
26 reasons, set out below.

27  
28 **New York law and Mr Ryan's standing**

29  
30 On 12 October, the respondent raised various general objections to the applicant's summons,  
31 based on New York law. Immediately prior to the commencement of the hearing, the respondent  
32 filed an affidavit on New York law on 24 October.



1 When it comes to enforcement of the Guarantee, New York law is irrelevant. Under both the  
2 Guarantee and the Loan Agreement, Cayman Islands law governs the sale (clause 5.3 of the  
3 Guarantee and clause 10.3 of the Loan Agreement, and in particular clause 10.3B.)  
4

5 It is clear from the fact that clause 5.3 of the Guarantee does not provide for New York law but  
6 simply tracks clause 10.3 that the parties intended that in respect of all matters regarding the  
7 enforcement of security so far as relevant to the Guarantee, Cayman Islands law would govern.  
8 This means that the question of what duties the respondent owes to Mr Ryan as guarantor in  
9 relation to the proposed sale of the charged Property is governed by Cayman Islands law.  
10

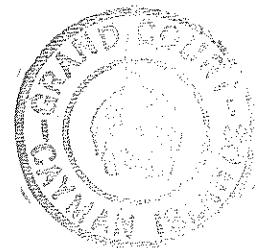
11 As to the position under Cayman Islands law with respect to a chargee's duties to a guarantor  
12 when exercising a power of sale, the parties are agreed that, while there is no duty on a chargee  
13 to enforce a security, the chargee owes a "general duty to the guarantor when exercising a power  
14 of sale over securities held for the enforcement of a principal obligation", i.e. once the chargee  
15 elects to enforce its security, it owes a guarantor duties in respect of said enforcement.  
16

17 These duties, which are owed in equity, are to: (1) act in good faith in respect of the exercise of  
18 the power of sale; and (2) to take reasonable care to obtain a proper price, i.e. the true market  
19 value, for the mortgage property.  
20

21 The parties are also agreed that, under Cayman Islands law, any breach of duty with regard to the  
22 security will discharge the guarantor pro tanto.  
23

24 It follows that, if the applicant is correct about the application of Cayman Islands law to the  
25 exercise of the respondent's power of sale, Mr Ryan clearly has an interest in the proposed  
26 auction of the Property because:  
27

28 The respondent owes Mr Ryan an equitable duty of good faith in respect of the sale and a  
29 duty to obtain a proper price for the Property;  
30  
31



1 Because the duties are common law duties owed in equity, Mr Ryan does not need to rely  
2 on the statutory expression of the same duties as owed by the respondent to the chargor  
3 companies in section 75 RLL; and  
4

5 While Mr Ryan denies that he is liable under the Guarantee, the amount of any potential  
6 liability, and therefore the quantum in the wider claim, depends entirely on the amount  
7 realised when the Property is sold. Mr Ryan is entitled to protect and seek to maximise  
8 the proper credit for the sale proceeds that he must be allowed as against his alleged  
9 Guarantee liability.  
10

### 11 **The Position Under New York Law**

12

13 Even if the respondent is right that New York law governs the proposed sale of the Property, Mr  
14 Ryan has an interest in the auction.  
15

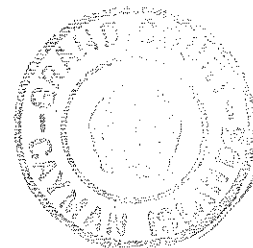
16 There is an implied covenant of good faith and fair dealing in all contracts under New York law.  
17  
18

### 19 **Purported Waiver of Rights Under the Guarantee**

20

21 The waiver clauses do not purport to waive the guarantors' rights with respect to bad faith on the  
22 part of the respondent – only in relation to the respondent's failure to act with due care and  
23 diligence; and in any event, the duty of good faith arguably cannot be waived under Cayman  
24 Islands law.  
25

26 Irrespective of whether New York law or Cayman Islands law applies, Mr Ryan cannot be said  
27 to have waived his rights with respect to the duty of good faith owed to him by the respondent in  
28 the exercise of its power of sale.  
29  
30  
31



1 **The Late Inclusion Of The Golf Course In The Proposed Auction**

2  
3 The ownership and rights with respect to the Golf Course are in issue in this action, because of  
4 the allegation by the Plaintiff that, by entering into a "Golf Agreement", Mr Ryan breached a  
5 term of the Guarantee.

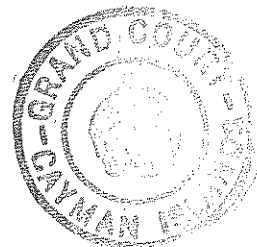
6  
7 On the current pleadings, the Plaintiff accepts that, at the time the Golf Agreement was entered  
8 into, the Golf Course was owned by Strata 404. In Answer 3.7 of the Further and Better  
9 Particulars, dated 3 August 2012, the Plaintiff pleads: *"Members of the Strata 404 Proprietors*  
10 *own the common property, including the Blue Tip Nine, as "proprietors in common" and that*  
11 *interest is both a real and personal property interest. The Current Borrowers therefore have a*  
12 *direct and undivided ownership in the Blue Tip Nine" ...*

13  
14 Until very recently, no-one disagreed with these propositions. Not surprisingly, the original  
15 terms and conditions dated 20 August 2012 did not include the Golf Course.

16  
17 However, about 7 days before the pre-qualification period for the auction was due to close, the  
18 terms and conditions dated 10 October 2012 were amended to expressly include the golf course.

19  
20 The entries for the land register show substantive changes to the certificate of title, the  
21 consequences of which are that the proprietor changed and a charge was imposed. No clear  
22 explanation is set out in the offering documents provided to potentially interested bidders.

23  
24 Conyers Dill & Pearman ("Conyers") acted for the former lenders Credit Suisse and Column  
25 Financial, and also now act for Five Mile and RCC. Conyers drafted the terms and conditions of  
26 the auction sale and advised RCC about ownership of the golf course in January 2012. Conyers  
27 also provided the Answers to Further and Better Particulars. Despite all of this, Conyers now say  
28 that the entry showing Master Strata 404 as the registered proprietor in the register was wrong,  
29 and had been wrong for many years.

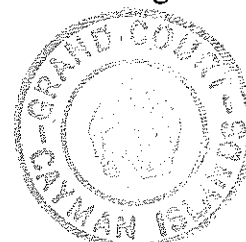


1 Paragraphs 11 to 13 of Ms Dons' First Affidavit said that the error was discovered in June 2012  
2 by Mr Cronier, the surveyor who had filed the last strata plan. The error noticed by Mr Cronier  
3 was said to be that the transfer to Strata Plan 404 should not have occurred until the land in  
4 question was fully developed. As the land was not yet fully developed, it is suggested that the  
5 transfer to Strata 404 was premature. Ms Dons claimed that Mr Cronier telephoned the Land  
6 Registry and got them to change the entry on the register because of the error. On 11 July,  
7 Conyers obtained a copy of the register and noted that the change had been made.

8  
9 This explanation raised numerous questions, which were set out in submissions and  
10 correspondence between the parties. Ms Dons provided a second affidavit. Contrary to her first  
11 explanation, she now claims that it was Conyers that discovered the error, and not Mr Cronier.  
12 However, Ms Dons' second affidavit also discloses correspondence, not referred to in her earlier  
13 affidavit, which paints an entirely different picture. In exhibit "TD9", there is no mention of an  
14 error. Instead Mr Cronier was instructed by RCC, and the Receivers, to draw up a new strata  
15 plan, to create a separate title, and to seek to file the new strata plan. This, it seems from the  
16 letter, led to a question being raised about whether the last strata plan filed in 2008 really was the  
17 "final" one, upon which title should have been transferred to the Master Strata. The second  
18 affidavit of Ms Dons also discloses other correspondence written when the Registrar demurred  
19 about making the change. Conyers' communications, and those of Mr Cronier, eventually  
20 persuaded the Registrar to make the change and (even later) to impose and backdate the charges  
21 and transfers of charges without seeking the permission of the former charge holder (i.e. Credit  
22 Suisse, who "couldn't be contacted"). There is more disclosure that should be made from  
23 Conyers' files. Mr Ryan believes other documents must exist to support his view that the  
24 transfer to strata 404 was properly made.

25  
26 The method by which these changes took place does not comply with s.139(1) of the RLL. None  
27 of sections 139(1)(a), (b), (c) or (d) apply. Specifically:

- 28  
29 (a) does not apply because the exercise was not a mere rectification of a "formal matter"  
30 or "error or omission", but a wholesale amendment showing the history of the



1 encumbrances. Even if there was an error or omission, it did materially affect the interest  
2 of the proprietor.

3  
4 (b) does not apply because Master Strata 404 did not consent, which has now been  
5 confirmed by Mr. Drake's affidavit.

6  
7 Section 139(2) was not complied with. There was no written application from Cesar  
8 Properties seeking the change. Although initially said to have been done over the  
9 telephone by Mr Cronier, the newly produced letters do not assist the Plaintiff. The  
10 change was effected unlawfully or invalidly.

11  
12 **The Lender's equitable duty to a guarantor**

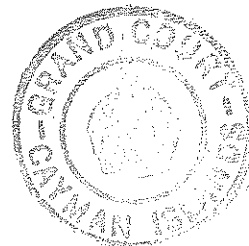
13  
14 By reference to the lender's equitable duty to a guarantor, there is prima facie case of bad faith  
15 because no honest and reasonable lender in the position of RCC would press ahead with a sale  
16 such as this, in circumstances where:

17  
18 There is an unresolved and fundamental issue about compliance with s.72 of the RLL;

19  
20 There is an unresolved and fundamental issue about the inclusion of the golf course in the  
21 sale, and compliance with s.139(1) of the RLL; and

22  
23 The Court in Cause FSD 58 of 2012 is about to hear a preliminary issue with respect to  
24 the validity of the Receivers' appointment, the conclusion of which might change the  
25 view of the chargors about these fundamental and unresolved issues.

26  
27 As further evidence of bad faith, RCC has refused to make any disclosure to the single potential  
28 independent purchaser, and has refused to enquire as to whether that purchaser, in the  
29 circumstances, might agree to a short postponement to enable the issues to be resolved.



1 The proposition that bad faith must equate with fraud or dishonesty is not accepted. Bad faith  
2 can include acting with improper intent so as to be reckless see *Medforth v Blake and others*  
3 [2000] Ch 86 at 103 Sir Richard Scott VC.

4  
5 The appropriate approach of the Court to this application is stated by Lord Diplock in *American*  
6 *Cyanamid Co. v Ethicon Ltd* (H.L(E)) [1975], AC at 406, F – H and at page 407, G, to page 408,  
7 B:

8  
9 This test was applied by Smellie CJ, in *Cayman Islands Stock Exchange v Nealon* (1999 CILR  
10 359), see pages 365, line 41, to page 366, line 13. A practical formulation of this approach  
11 consistent with *Stock Exchange v Nealon*, is that set out by Laddie J in *Series 5 Software Ltd v*  
12 *Clarke and others* [1996]1 All ER 853 at 865:

13  
14  
15 **Irreparable Damage**

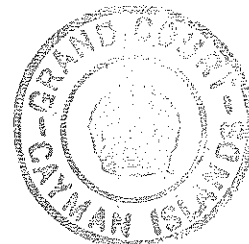
16  
17 Irremediable prejudice arises out of the following harm which will occur to Mr Ryan if the sale  
18 is allowed to proceed in its present timetable:

19  
20 There will not be another opportunity for a "clean auction", unaffected by a "botched" first  
21 attempt;

22  
23 If RCC is right about New York law, then Mr. Ryan has no recourse against anyone, even RCC,  
24 for the difference between the "guaranteed obligations price" and the "true best price";

25  
26 The unrecoverable costs involved in challenging the legitimacy of the sale process and  
27 establishing the credit to be applied to any debt due after the assets are sold at auction;

28  
29 By the consent order of 2 August 2012, Mr. Ryan is entitled to 21 days notice of an intended  
30 transfer. When reminded of this RCC hurriedly served a notice on 17 October. RCC has refused  
31 to agree, or even propose, a suitable retention for security for costs.



1 **Balance of Convenience**

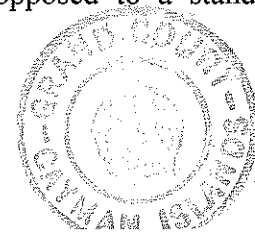
2  
3 If (which is denied) there is any doubt as to the inadequacy of damages in respect of a hasty sale  
4 subject to these uncertainties, the balance of convenience should be assessed in accordance with  
5 the principles set out by Lord Diplock in *American Cyanamid*.

6  
7 The measured approach proposed by the Plaintiff will have the benefit that the decision in the  
8 preliminary issue in the Receivers' action about the validity of the s.72 notices will have been  
9 given. If the notice procedure appointing the receivers was not compliant with s.72 RLL, then  
10 any sale following the auction would also be defective unless fresh notices are served and the  
11 three month cure period under s.72(2) RLL first elapses. Letting a sale go ahead pursuant to the  
12 auction will or may effectively pre-judge the preliminary issue. It is hard to see why RCC would  
13 wish to effect a sale in circumstances where it cannot warrant that it has power to do so, and  
14 where the sale would be unlawful. The only answer to this appears to be that RCC has no  
15 intention of selling to the independent bidder, but rather to itself. This is not permitted, and if it  
16 indeed occurred then the question of whether at the proposed auction the Plaintiff could sell to  
17 itself, or to an affiliate, will be another issue requiring resolution at the trial.

18  
19 As a matter of discretion, there is no prejudice to RCC in having a 28 day postponement. There  
20 is no evidence that the sole independent bidder will walk away if the auction is postponed, given  
21 that it has advanced US\$8,875,000 to take part.

22  
23 If the sale is postponed until after the court has handed down judgment in the preliminary issue  
24 and the Golf Course issues can be resolved, it will enable RCC to warrant that it has authority to  
25 sell. However, if it sells on 31 October and it then turns out that the sale was unlawful for breach  
26 of s 72, it will be exposed to a claim by the buyer (who may also be exposed to a claim). Indeed,  
27 it will potentially increase the number of bidders who may be interested in a later auction and so  
28 enhance the likelihood of the best price being achieved.

29  
30 Much of the difficulty alleged by RCC disappears if the application to postpone the auction is  
31 granted as case management of the quantum issue in the case, as opposed to a standard



1 application for an injunction. Mr Ryan has pleaded that he is entitled to credit for the proceeds  
2 of a properly conducted, good faith sale. Much if not all the argument about that at the trial, and  
3 the expert and factual evidence needed to resolve it, will disappear if the Court manages the sale  
4 process itself. The Court has a jurisdiction actively to manage the case fairly in accordance with  
5 the Overriding Objective to reduce costs and time, and that includes directing the auction to be  
6 postponed. In any event, however, the requirements for serious issue and balance of  
7 convenience and inadequacy of damages are all amply made out.

### 8 9 **Cross-Undertaking as to Damages / Costs**

10  
11 Mr Ryan has offered to fortify an undertaking as to damages by payment of US\$100,000 into  
12 Court. There is no evidence as to what the cost of postponing the auction will be. It may be  
13 nothing, if after a phone call the sole bidder agrees. There may be some consequential wasted  
14 costs, or some additional costs of re-fixing the date. However, these cannot be substantiated as  
15 the "auction" is scheduled to take place at Conyers' offices, attended by a handful of people.

## 16 17 18 **5. RCC'S SUBMISSIONS**

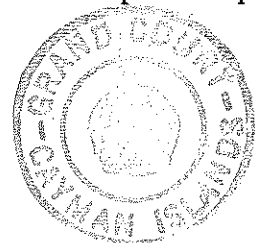
19  
20 Mr. Meeson QC on behalf of RCC submitted as follows.

### 21 22 **Summary**

23  
24 The applicant fails to meet the legal test for an interlocutory injunction as laid down by the  
25 House of Lords in *American Cyanamid*.

26  
27 There is no serious issue to be tried because the applicant's only legally viable case would  
28 require him to establish bad faith, and he has not adduced any credible evidence of dishonesty on  
29 the part of the respondent.

30  
31 Even if the applicant were to succeed at trial, and establish that the property had been sold at  
32 auction at an undervalue, and establish that such sale gave rise to a cause of action, the reduction  
33 of his liability would adequately compensate him and so no injunction is required to protect his  
34 interests.



1 By contrast, the respondent would not be adequately compensated by the cross undertaking in  
2 damages if an injunction were granted to prevent it from exercising its legal right. The loss  
3 would be difficult to quantify, but would be measured in millions of dollars and the applicant  
4 cannot satisfy his cross-undertaking. The respondent is exercising a statutory right which it can  
5 exercise “without being answerable for any loss occasioned thereby” (s.75(1) RLL).

6  
7 It would be quite inappropriate to grant an injunction to prevent a public auction where both the  
8 chargors and the chargee want the property sold and it will not be sold for less than the value as  
9 appraised by an independent valuer. It would be perverse and contrary to public policy to do so.

10  
11 **The Legal Test for an interlocutory injunction**

12  
13 The test for the granting of such an injunction is that laid down by the House of Lords in  
14 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).

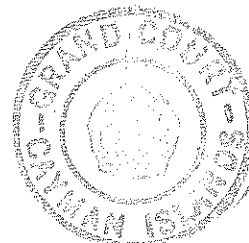
15  
16 **No good arguable case on the merits**

17  
18 The applicant has to show that he has a cause of action and that he has a good arguable case that  
19 he will succeed in establishing liability on the part of the respondent.

20  
21 This action is brought by the respondent on a Guarantee, and the applicant must therefore show  
22 (a) that he has a potential claim against the respondent under the Guarantee; and (b) that such a  
23 potential claim has merit.

24  
25 The applicant is not entitled to assert that he has some other right, in some other capacity, such as  
26 that floated of being the “ultimate beneficial owner” of the various Ritz resort companies, or is  
27 entitled to speak for Master Strata 404 (“404”). This is not a technical point.

- 28  
29 a. Any other claim would require a separate writ to be issued in order to assert that  
30 cause of action and a statement of claim or an affidavit provided which  
31 particularises the cause of action and the claim.



1           b. In so far as the applicant seeks to assert rights on behalf of the chargor companies  
2           then he would be required to establish the right to bring a derivative action.  
3           Given the structure of the companies involved this would have to be a multiple  
4           derivative action.

5  
6           c. Derivative actions are governed by GCR O.15 r.12A and the procedural steps  
7           therein.

8  
9           d. In any event, this route is not open to Mr. Ryan because the shares in the chargor  
10          companies are registered in the name of the respondent.

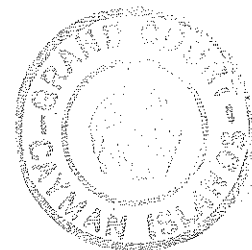
11  
12       Absent contractual terms, a lender who enforces security owes a duty in equity to a guarantor as  
13       regards the realization of the security which, if broken, would potentially reduce the liability of  
14       the guarantor under the Guarantee.

15  
16       However, this Guarantee contains contractual terms which remove any such liability in equity.  
17       This is standard in a modern Guarantee. Reliance is placed in particular on clauses 1.4, 1.6, 1.10,  
18       2.7, 2.8 and 2.13.

19  
20       There is a potential issue as to whether these terms are to be construed under New York Law or  
21       under Cayman Islands law. However, nothing would appear to turn on this issue for present  
22       purposes because these are clear words in a commercial document which will be construed and  
23       given effect according to their ordinary and proper meaning.

24  
25       The effect of the express terms of the Guarantee exclude the equitable duty which would  
26       otherwise be owed by the lender to the guarantor in respect of the realization of the collateral  
27       security by public auction.

28  
29       The most that the applicant can say is that such contractual terms would not be effective to  
30       exclude liability for fraud.



1 The applicant's counsel said they did not allege "fraud", but did allege "bad faith". However  
2 there is no difference. The applicant has to allege that the respondent is acting dishonestly. This  
3 is a serious allegation which has been made quite improperly without any credible evidence to  
4 support it.

5  
6 The applicant's case is that:

7  
8 *"there are indications that if the auction is proceeded with in the present circumstances it*  
9 *gives rise to a prima facie case of bad faith sale because no honest and reasonable*  
10 *lender:*

11  
12 *a. would go ahead with a sale to bidders with an unresolved issue under section 72 of*  
13 *the RLL where that issue was going to be resolved by the Court within a matter of*  
14 *days or weeks;*

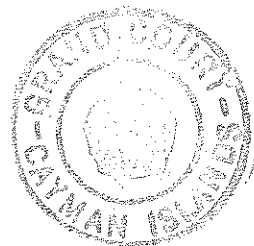
15 *b. would press ahead with the auction which purported to include the golf course in*  
16 *circumstances where there was on the face of it a very real issue or concern about*  
17 *who is the registered proprietor and without giving those claiming to be the*  
18 *registered proprietor an opportunity to be heard."*

19  
20 These points do not give rise to any inference of dishonesty as against the guarantor, and they are  
21 also wrong as a matter of fact.

22  
23 A sale in breach of section 72 does not affect the purchaser, but may render the lender liable in  
24 damages to the chargor. Section 75(3) provides:

25 *A transfer by a chargee, in exercise of his power of sale, shall be made in the prescribed*  
26 *form, and the Registrar may accept it as sufficient evidence that the power has been duly*  
27 *exercised, and any person suffering damage by an irregular exercise of the power shall*  
28 *have his remedy in damages only against the person exercising the power.*

29  
30  
31 Thus once sold the purchaser will have good title.



1 Similarly, Cesar Properties is in fact the registered proprietor of the golf course.

2  
3 If there was any “dishonesty” it could only be against the chargor for selling without complying  
4 with section 72. This would not be dishonest, just wrongful. It would not be dishonest because  
5 the lender honestly believes that it has complied with section 72. Not only is that an honest  
6 belief, it is in fact correct as a matter of law.

7  
8 It is difficult to see how any dealing with the golf course could be “dishonest” as against anyone.  
9 The issue is whether the condition precedent to the transfer of the golf course from Cesar  
10 Properties to Master Strata 404 has already occurred or whether it has not yet occurred. The title  
11 to the golf course is a technicality because it will one day become registered in the name of  
12 Master Strata 404 and the “rights” of Strata 404 are not infringed. In fact 404 has no “rights” as  
13 such because it exists solely for the purpose of holding the common property of the resort.

14  
15 RCC is not acting dishonestly as regards the interests of the guarantor.

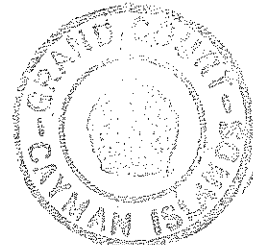
16  
17 RCC has engaged Eastdil, a premier advisor in the resort hotel market both to advise on the  
18 process and to conduct the auction process.

19  
20 Moreover, the points relied upon in support of the dishonesty allegation are each wrong as a  
21 matter of fact.

22  
23 *Section 72*

24  
25 Section 72 provides as follows:

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



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

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

5  
6  
7           *Provided that a chargee who has appointed a receiver may not exercise the power of sale*  
8           *unless the chargor fails to comply, within three months of the date of service, with a*  
9           *further notice served on him under subsection (1). Thus the notice required under section*  
10           *72 may be given if there is default in any obligation for 28 days.*

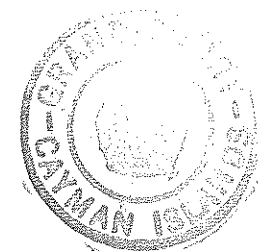
11  
12 It should be noted that in the present case the lender (chargee) did not appoint a receiver of the  
13 income of the charged property under s.72(2)(a). The only receiver appointed was a contractual  
14 receiver appointed pursuant to the debenture. Accordingly, the proviso to s.72(2) is not  
15 applicable.

16  
17 The section 72 notice was served on 23 March 2012 and so the only pertinent question is  
18 whether there had been any default outstanding for 28 days as at that time. In other words had  
19 there been any default which had occurred prior to 23 February 2012?

20  
21 The following 4 events of default defaults had occurred prior to that date:

22  
23 Golf Agreement – 31 July 2011

24  
25 Under Section 8.1(a)(ix) of the Loan Agreement, as a result of the Borrower's failure to obtain  
26 Lender's prior written consent, as required by Section 5.2.10 of the Loan Agreement, prior  
27 permitting a Sale or Pledge of a Portion of the Property to occur pursuant to the terms of that  
28 certain Golf Agreement dated 31 July 2011, executed and delivered by Cesar Hotelco, The  
29 Proprietors, Strata Plan No. 404, Waterworks Limited and Dragon Bay Limited.



1 Transfer of Approximately \$1.27 Million – August 2011

2  
3 Under Section 8.1(a)(ix) of the Loan Agreement, as a result of Borrower’s failure to obtain  
4 Lender’s prior written consent, as required by Section 5.2.10 of the Loan Agreement, prior to  
5 permitting a Transfer of approximately \$1.27 million in or about August 2011 withdrawn from  
6 the Reserve (as established pursuant to Section 5.6 of the second Amended and Restated  
7 Operating Agreement effective as of November 30, 2006 between Cesar Hotelco, as Owner, The  
8 Proprietors, Strata Plan No. 404, 436, 437, 438, 447 as Strata Corps., and Ritz-Carlton, as  
9 operator, as amended).

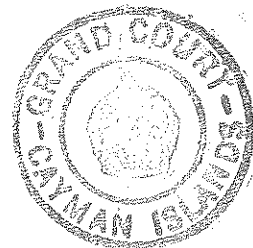
10  
11 Communications with The Ritz-Carlton Hotel Company of the Cayman Islands, Ltd. –  
12 November 9, 2011

13  
14 As a result of Borrower’s failure to deliver to Lender on or before November 9, 2011, as required  
15 by Section 10 of the LEA, evidence reasonably satisfactory to Lender that Borrower has initiated  
16 substantive communications with The Ritz-Carlton Hotel Company of the Cayman Islands, Ltd.  
17 (“Ritz-Carlton”) to extend the subordination of Ritz-Carlton’s management fees for a period of  
18 time (satisfactory to Lender in its reasonable discretion) beyond May 9, 2012.

19  
20 Evidence of Borrower’s Ability to Refinance – February 9, 2012

21  
22 As a result of Borrower’s failure to deliver to Lender on or before February 9, 2012, as required  
23 by section 10 of the LEA, (x) evidence of Borrower’s ability to refinance the Loan prior to the  
24 Maturity Date or (y) other information such that Lender shall be reasonably satisfied that the  
25 potential expiration of the subordination of Ritz-Carlton’s management fees to the Loan pursuant  
26 to the NDA will not prohibit a refinancing of the Loan.

27  
28 Thus the section 72 notice was validly served on 23 March 2012 so that the respondent became  
29 entitled to sell the charged land 3 months later on 24 June 2012. In fact RCC waited some 4  
30 months more than that required by the RLL.



1 Because the appointment of the receivers was not made under section 72 of the RLL, but was  
2 made under the debentures, the preliminary issue to be heard by the Court in Cause 58 will not  
3 determine the validity of the section 72 sale notices, as that question does not arise. Moreover,  
4 the validity of the lender's section 72 notice in respect of the sale could not be determined in that  
5 action because RCC are not a party to that action and will not be bound by the result. This is not  
6 a sale by the receivers.

7

8 *The Golf Course*

9

10 The technical legal title to the golf course is irrelevant because it is subject to the strata plan  
11 under which it will become vested in Strata 404 when the last price of undeveloped land (the  
12 "Asterix land") is registered as a separate title. The key point is that title to the "Asterix land"  
13 (which has not yet been separated in title from the golf course) was mistakenly registered in the  
14 name of Strata 404.

15

16 The golf course has no value in itself because its value is to the hotel and to the condominiums  
17 who are entitled to use it as common property. Those rights are not affected by the technicality  
18 of who the registered owner is at any point in time. Ultimately title will vest in Strata 404.

19

20 **Damages are an adequate remedy**

21

22 An injunction should be refused on the basis that the applicant suffers no loss at all. The  
23 consequence if he is right is that his liability under the Guarantee is diminished. If the applicant  
24 succeeds with this claim at trial it will simply reduce pro-tanto his liability. This is an even  
25 stronger case than normal because there are no damages to be recovered, just a reduction in the  
26 applicant's liability.

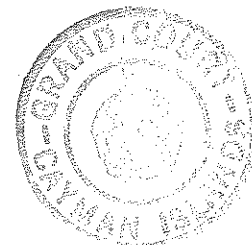
27

28 The applicant is unable to overcome this fundamental requirement in *American Cyanamid*.

29

30 *A cross-undertaking would not adequately compensate the Respondent*

31



1 If the injunction were granted the respondent would not be adequately compensated by the cross  
2 undertaking because:

3  
4 a. The effect of the court cancelling the auction at the 11<sup>th</sup> hour would be difficult to  
5 quantify either prospectively (for the purpose of fixing the amount of any bond or  
6 other fortification) or retrospectively upon enforcement of the undertaking. It would  
7 be necessary to speculate as to the extent to which the price had been affected.

8  
9 b. The applicant has refused to reveal his assets and therefore must be assumed to have  
10 none in his own name against which an undertaking in damages could be enforced.  
11 He has offered security in the extremely low amount of US\$100,000 which would not  
12 even cover the legal costs which have been incurred by the respondent. At the very  
13 least putting off the auction for 28 days will increase the liability of the chargor  
14 companies under the loan by in excess of US\$1.5M in interest alone. On a worst case  
15 basis the potential loss is the difference between the reserve price and the amount  
16 outstanding under the loan, an amount of at least US\$70M.

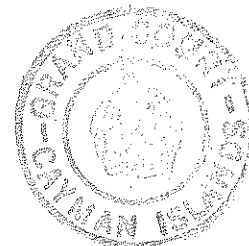
17  
18 *Balance of convenience*

19  
20 The balance of convenience plainly favours allowing the auction to proceed.

21  
22 The respondent has disclosed the Charterland valuation. This was an entirely private exercise  
23 solely for the purposes of the lender and is not part of the auction materials. The valuation date  
24 is 1 June 2012. The applicant has not provided any valuation.

25  
26 The respondent will not sell the hotel at less than the Charterland Valuation and so if it is sold,  
27 then prima facie it will have realized full value.

28  
29 If the hotel is sold for a price which equals or exceeds the amount of the loan and expenses  
30 c.US\$250M, then the indebtedness is discharged and with it the liability under the Guarantee as  
31 principal obligor.



1 The auction will crystallize the quantum at issue and bring certainty. The quantum issue will be  
2 limited to the difference between the amount realized at auction (which will not be less than  
3 US\$177.5M) and the amount of the applicant's (as yet unascertained or disclosed) valuation.  
4 That difference could turn out to be zero. It could turn out to be small, in which case there may  
5 be greater prospects for settlement. But whatever it is, it will be known.

6  
7 By contrast, granting an injunction on the eve of the auction would not only interfere with the  
8 rights of the respondent to realize its security, but also with the rights of the chargor companies  
9 who want the auction to proceed. It would also interfere with the commercial interests of the  
10 third party bidder who has prepared for an auction on that date, presumably with the intention  
11 that it will take the hotel on that date if it is not outbid at the auction.

12  
13 The respondent has a statutory right to bid at a public auction – see section 75(1) of the RLL.

14  
15 That right would also be interfered with by an injunction.

16  
17 Since the hotel will not be sold for less than the independent Charterland valuation, it cannot  
18 possibly be appropriate to interfere with the auction process.

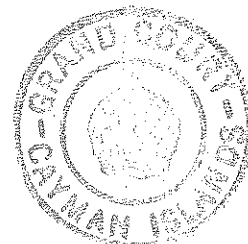
19  
20 The respondent's statutory right to sell at public auction is "without being answerable for any  
21 loss occasioned thereby".

22  
23 **6. ANALYSIS AND CONCLUSIONS**

24  
25 I have carefully considered all the affidavits. It is convenient to refer to two of these at the  
26 outset.

27  
28 **The position of the Chargor Companies**

29  
30 Mr. Scott Elphinstone is a director of Cesar Properties and Condoco Properties. In his affidavit  
31 he says that he is authorised by Mr. William Messer, the only other director of the Chargor  
32 Companies, to make his affidavit on behalf of the Chargor Companies.



1 After sections headed "Section 72 Notices Appear Valid" and "Right to sell the Golf Course" his  
2 affidavit concludes:-

3  
4 "[Mr.] Ryan's attempt to thwart the auction process, ostensibly acting on behalf of the Chargor  
5 Companies is troubling. I believe that his arguments are aimed at avoiding liability on his  
6 personal guarantee and are to the detriment of the Chargor Companies. He has no right to  
7 advance these alleged concerns and no authority to do so on behalf of the Chargor Companies.

8  
9 I can confirm that the Chargor Companies support the continuation of the auction irrespective of  
10 the concerns raised by Ryan, allegedly on behalf of the Chargor Companies."

11  
12 **The position of Strata 404**

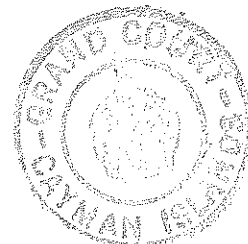
13  
14 In his short affidavit Mr. J Paul Drake says that he is "one of the two Executive Committee  
15 Members of Strata Plan No. 404 ("Strata 404"), the other being Roger Priaulx, and I am speaking  
16 for both. I have been a member since 17 February 2012 when I was appointed by RC Cayman  
17 Holdings LLC pursuant to its rights to exercise the powers of Cesar Properties Ltd and Condoco  
18 Grand Cayman Resort Ltd as Developers pursuant to the strata By-Laws."

19  
20 Mr. Drake concludes:

21  
22 "As a member of the Executive Committee of Strata 404, I am fully aware that I have a fiduciary  
23 duty to act in the best interest of Strata 404 and I take this duty seriously. The rights of Strata  
24 404 are fully reserved. However, I can confirm that Michael Ryan has no authority to make  
25 representations on behalf of Strata 404 in respect of the Golf Course, or at all. The authority to  
26 make any representations on behalf of Strata 404 is vested solely in the executive committee."

27  
28 **Principles and Guidelines to be applied (American Cyanamid Co. Case)**

29  
30 The procedure to be adopted by the court in hearing an application for an interlocutory  
31 injunction, and the tests to be applied, were laid down by the House of Lords in *American*  
32 *Cyanamid Co v Ethicon Ltd* [1975] A.C. 396 HL.



1 According to the *American Cyanamid Co* case, when an application is made for an interlocutory  
2 injunction, in the exercise of the court's discretion an initial question falls for consideration.  
3 That is:

- 4  
5 (1) Is there a serious question to be tried? If the answer to that question is, "yes", then  
6 two further related questions arise; they are:  
7 (2) Would damages be an adequate remedy for a party injured by the court's grant of, or  
8 its failure to grant, an injunction?  
9 (3) If not, where does the "balance of convenience" lie?

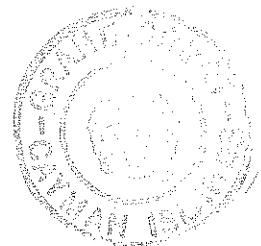
10  
11 Before I turn to the application of these principles it is necessary to consider a number of matters.

12  
13 **When a charge exercises a power of sale**

14  
15 "When and if the mortgagee does exercise the power of sale, he comes under a duty in equity  
16 (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take  
17 reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for  
18 the mortgaged property at the date of the sale... The mortgagee is not entitled to act in a way  
19 which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to  
20 pay off his debt: [*Palk v Mortgage Services Funding plc* [1993] Ch 330 at 337-338 per Nicholls  
21 V-C]. He must take proper care whether by fairly and properly exposing the property to the  
22 market or otherwise to obtain the best price reasonably obtainable at the date of sale. The  
23 remedy for breach of this equitable duty is not common law damages, but an order that the  
24 mortgagee account to the mortgagor and all others interested in the equity of redemption, not just  
25 for what he actually received, but for what he should have received: see *Standard Chartered*  
26 *Bank Ltd v Walker* [1982] 1 WLR 1410 at 1416."

27  
28 Lightman J sitting in the Court of Appeal in *Silven Properties Ltd v Royal Bank of Scotland*  
29 [2004] 1 WLR 997 cited with approval by Longmore LJ in *Den Norske ASA v Acemex*  
30 *Management Co Ltd* [2004] 1 ALL ER (Comm) 904 at 911.

31  
32 These principles apply to a chargee exercising a power of sale.



1 **The extent of the creditor's duty to a guarantor if securities are enforced**

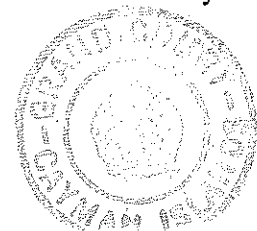
2  
3 In *Skipton Building Society v Stott* [2001] QB at 261 Evans LJ said at 269

4  
5 “The guarantor may be discharged by a variation in the terms of the debtor’s contract,  
6 made without his consent, but the creditor’s failure to obtain the proper value of a  
7 security which he sells reduces pro tanto the amount for which the guarantor is liable.... It  
8 remains possible that the guarantor may be freed from further liability if the creditor’s  
9 breach of the contract of surety is properly regarded as repudiatory.....”

10  
11 The relevant principles (reflecting the decision in *Skipton Building Society v Stott*) are in my  
12 opinion as set out in *O’Donovan and Phillips* The Modern Contract of Guarantee 2<sup>nd</sup> English  
13 edition at page 513 and following:-

14  
15 “In exercising the powers of enforcement the creditor must comply with and exercise those  
16 powers as contemplated by the security document. If the security is impaired as a result of a  
17 failure to do so, the guarantor will be discharged to the extent of the loss, unless there is an  
18 express or implied term of the contract of guarantee that a particular condition be observed. No  
19 such term is usually implied, but, if it is, the guarantor will be absolutely discharged when the  
20 creditor is in breach of that term.

21  
22 Sometimes the creditor may breach an express term of the principal contract regarding the  
23 enforcement of the security (for example, provisions regarding notice), but the creditor also has a  
24 general duty to the guarantor when exercising a power of sale over securities held for the  
25 enforcement of the principal obligation. The early cases did not precisely define that duty  
26 referring, for example, to the duty of creditors to make “the most of their security”, but it is now  
27 clear that it is a duty to take reasonable care to obtain a proper price that is, the true market value  
28 of the mortgage property. Despite earlier authority to the contrary, this obligation is not based  
29 upon the tort of negligence, (thus giving a right to claim damages), but is an aspect of the  
30 creditor’s well established equitable duty towards the guarantor. A breach of the duty therefore  
31 means that the guarantor’s liability is reduced to the extent that the value of the security has been



1 impaired as a result of the breach. The duty applies to the creditor exercising a power of sale as  
2 mortgagee and also to a receiver exercising a power of sale....

3  
4 The burden of proof is probably upon the creditor to show that he has taken reasonable care to  
5 obtain a proper price. Reasonable steps must be taken to expose the property to the market....  
6 generally a mortgagee exercising a power of sale can safely accept the highest bid for a correctly  
7 described and advertised property at a properly advertised auction. There is no duty to postpone  
8 a sale whilst steps are taken to effect any increase in value or improvement of the property. Any  
9 alleged failure on the part of the creditor to obtain a reasonable price will involve the court  
10 determining the market value of the property at the date of the sale (not at the date of the  
11 creditor's decision to sell). This market value will be determined objectively as an historical fact  
12 on the basis of expert evidence.”

13  
14 **The express terms of the Guarantee**

15  
16 The Guarantee contains clauses excluding liability for the creditor's action in releasing or  
17 impairing securities.

18  
19 Those terms are as follows:



20  
21 *“1.1 Guaranty of Obligation. Guarantor hereby irrevocably and unconditionally*  
22 *guarantees to Lender and its successors and assigns the payment and performance of the*  
23 *Guaranteed Obligations as and when the same shall be due and payable, whether by*  
24 *lapse of time, by acceleration of maturity or otherwise. Guarantor hereby irrevocably*  
25 *and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations*  
26 *as a primary obligor.*

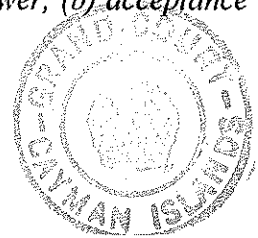
27  
28 *1.3 Nature of Guaranty. This Guaranty is an irrevocable, absolute, continuing*  
29 *guaranty of payment and performance and not a guaranty of collection. This Guaranty*  
30 *may not be revoked by Guarantor and shall continue to be effective with respect to any*  
31 *Guaranteed Obligations arising or created after any attempted revocation by Guarantor*

1 and after (if Guarantor is a natural person) Guarantor's death (in which event this  
2 Guaranty shall be binding upon Guarantor's estate and Guarantor's legal  
3 representatives and heirs). The fact that at any time or from time to time the Guaranteed  
4 Obligations may be increased or reduced shall not release or discharge the obligation of  
5 Guarantor to Lender with respect to the Guaranteed Obligations. This Guaranty may be  
6 enforced by Lender and any subsequent holder of the Note and shall not be discharged by  
7 the assignment or negotiation of all or part of the Note.

8  
9 1.4 *Guaranteed Obligations Not Reduced by Offset.* The Guaranteed Obligations and  
10 the liabilities and obligations of Guarantor to lender hereunder, shall not be reduced,  
11 discharged or released because or by reason of any existing or future offset, claim or  
12 defense of Borrower, or any other party, against Lender or against payment of the  
13 Guaranteed Obligations, whether such offset, claim or defense arises in connection with  
14 the Guaranteed Obligations (or the transactions creating the Guaranteed Obligations) or  
15 otherwise.

16  
17 1.6 *No Duty to Pursue Others.* It shall not be necessary for Lender (and Guarantor  
18 hereby waives any rights which Guarantor may have to require Lender), in order to  
19 enforce the obligations of Guarantor hereunder, first to (a) institute suit or exhaust its  
20 remedies against Borrower or others liable on the Loan or the Guaranteed Obligations  
21 or any other person, (b) enforce Lender's rights against any collateral which shall ever  
22 have been given to secure the Loan, (c) enforce Lender's rights against any other  
23 guarantors of the Guaranteed Obligations, (d) join Borrower or any others liable on the  
24 Guaranteed Obligations in any action seeking to enforce this Guaranty, (e) exhaust any  
25 remedies available to Lender against any collateral which shall ever have been given to  
26 secure the Loan, or (f) resort to any other means of obtaining payment of the Guaranteed  
27 Obligations. Lender shall not be required to mitigate damages or take any other action  
28 to reduce, collect or enforce the Guaranteed Obligations..

29  
30 1.7 *Waivers.* Guarantor agrees to the provisions of the Loan Documents, and hereby  
31 waives notice of (a) any loans or advances made by Lender to Borrower, (b) acceptance

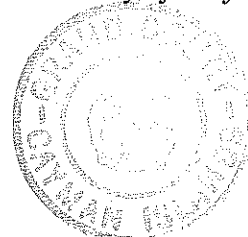


1 of this Guaranty, (c) any amendment or extension of the Note, the Loan Agreement or of  
2 any other Loan Documents, (d) the execution and delivery by Borrower and Lender of  
3 any other loan or credit agreement or of Borrower's execution and delivery of any  
4 promissory notes or other documents arising under the Loan Documents or in connection  
5 with the Property, (e) the occurrence of any breach by Borrower or an Event of Default,  
6 (f) Lender's transfer or disposition of the Guaranteed Obligations, or any part thereof,  
7 (g) sale or foreclosure (or posting or advertising for sale or foreclosure) of any collateral  
8 for the Guaranteed Obligations, (h) protest, proof of non-payment or default by  
9 Borrower, and (i) any other action at any time taken or omitted by Lender, and,  
10 generally, all demands and notices of every kind in connection with this Guaranty, the  
11 Loan Documents, any documents or agreements evidencing, securing or relating to any  
12 of the Guaranteed Obligations.

13  
14 *1.10 Waiver of Subrogation, Reimbursement and Contribution.* Notwithstanding  
15 anything to the contrary contained in this Guaranty, Guarantor hereby unconditionally  
16 and irrevocably waives, releases and abrogates any and all rights it may now or  
17 hereafter have under any agreement, at law or in equity (including, without limitation,  
18 any law subrogating the Guarantor to the rights of Lender), to assert any claim against  
19 or seek contribution, indemnification or any other form of reimbursement from Borrower  
20 or any other party liable for payment of any or all of the Guaranteed Obligations for any  
21 payment made by Guarantor under or in connection with this Guaranty or otherwise.

22  
23  
24 *EVENTS AND CIRCUMSTANCES NOT REDUCING OR DISCHARGING*  
25 *GUARANTOR'S OBLIGATIONS*

26  
27 Guarantor hereby consents and agrees to each of the following, and agrees that  
28 Guarantor's obligations under this Guaranty shall not be released, diminished, impaired,  
29 reduced or adversely affected by any of the following, and waives any common law,  
30 equitable, statutory or other rights (including without limitation rights to notice) which  
31 Guarantor might otherwise have as a result of or in connection with any of the following:  
32

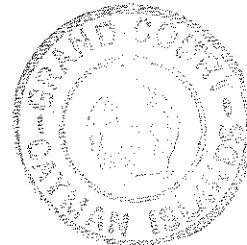


1       2.7   *Release of Collateral.*   Any release, surrender, exchange, subordination,  
2       deterioration, waste, loss or impairment (including without limitation negligent, wilful,  
3       unreasonable or unjustifiable impairment) of any collateral, property or security at any  
4       time existing in connection with, or assuring or securing payment of, all or any part of  
5       the Guaranteed Obligations.

6  
7       2.8   *Care and Diligence.*   The failure of Lender or any other party to exercise  
8       diligence or reasonable care in the preservation, protection, enforcement, sale or other  
9       handling or treatment of all or any part of such collateral, property or security, including  
10      but not limited to any neglect, delay, omission, failure or refusal of Lender (a) to take or  
11      prosecute any action for the collection of any of the Guaranteed Obligations or (b) to  
12      foreclose, or initiate any action to foreclose, or, once commenced, prosecute to  
13      completion any action to foreclose upon any security therefore, or (c) to take or  
14      prosecute any action in connection with any instrument or agreement evidencing or  
15      securing all or any part of the Guaranteed Obligations.

16  
17      2.10   *Offset.*   Any existing or future right of offset, claim or defense of Borrower against  
18      Lender, or any other Person, or against payment of the Guaranteed Obligations, whether  
19      such right of offset, claim or defense arises in connection with the Guaranteed  
20      Obligations (or the transactions creating the Guaranteed Obligations) or otherwise.

21  
22      2.13   *Other Actions Taken or Omitted.*   Any other action taken or omitted to be taken  
23      with respect to the Loan Documents, the Guaranteed Obligations, or the security and  
24      collateral therefor, whether or not such action or omission prejudices Guarantor or  
25      increases the likelihood that Guarantor will be required to pay the Guaranteed  
26      Obligations pursuant to the terms hereof, it is the unambiguous and unequivocal  
27      intention of Guarantor that Guarantor shall be obligated to pay the Guaranteed  
28      Obligations when due, notwithstanding any occurrence, circumstance, event, action, or  
29      omission whatsoever, whether contemplated or un contemplated, and whether or not  
30      otherwise or particularly described herein, which



1 *obligation shall be deemed satisfied only upon the full and final payment and satisfaction*  
2 *of the Guaranteed Obligations.”*

3  
4 **RLL**

5  
6 Grand Court Practice Direction No 5 of 2012 concerns applications under sections 72, 75 and 77  
7 of the RLL. The Practice Directions seek to explain the practice of the Court which has emerged  
8 as result of a number of decisions of the Court.

9  
10 **The Golf Course**

11  
12 **The three versions of the Terms and Conditions of Auction**

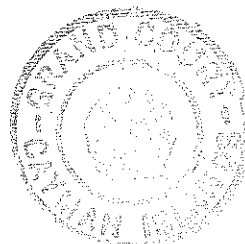
13  
14 There have been 3 versions of the Terms and Conditions of Auction (“the Auction T&C”).

15  
16 In version 1 (about 20.8.12) the Auction T&C said “The Property is comprised of Golf Course  
17 Rights: Appurtenant to ownership of the hotel, condominium units and deckhouses is the right to  
18 use the 9-hole Blue Tip golf course situated on common property of the Resort.....The golf  
19 course is part of the common property of one of the strata plans and is not included with the  
20 Property that is offered pursuant to the auction.”

21  
22 Version 2 of the Auction T&C (about 10.10.12) omitted the words “The golf course is part of the  
23 common property of one of the strata plans and is not included with the Property that is offered  
24 pursuant to the auction.” Schedule A to Version 2 Real Estate included at 2 – [Registration  
25 Section] West Bay Beach South [Block] 12 C [Parcel] 451/3 [Description] Golf course and  
26 future development land [Area] 136 acres.

27  
28 A Marketing Update of 10 October stated:

29  
30 “The golf course (block 12c parcel 451/3) is now part of the collateral for sale. However,  
31 once the strata plan is fully registered, the golf course will become common property as  
32 contemplated by the filed strata plan.”  
33



1 Version 3 of the Auction T&C (17.10.12) was in this respect in identical terms to Version 2.

2

3 **Entries in the Land Register**

4

5 **March and August 2008**

6

7 The entry in the Land Register for Block and Parcel No.12C 394/3 including the “asterix” land  
8 “Future Development Raw Land Strata Lot” opened 7.3.08 and stamped 18.3.08 and 15.8.08  
9 showed in the Property Section [Entry No 9] [Date] 20.2.08 [Instrument No] 1264/08 [Name  
10 and Address of Proprietor(s)] Cesar Properties Ltd. The Incumbrances Section contained  
11 particulars of 12 instruments.

12

13

14 **15.8.11 and 5.6.12 and 22.6.12**

15

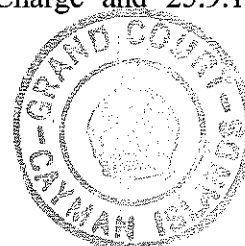
16 The entry in the Land Register for Block and Parcel No.12C 451/3 opened 15.8.11 and stamped  
17 5.6.12 and 22.6.12 showed in the Proprietorship Section [Entry No] 1 [Date] 27.5.08 [Instrument  
18 No] SP No 404 [Name and Address of Proprietor(s)] “The Proprietors of Strata Plan  
19 404....Restriction: No dealings unless by Order of the Court or Registrar of Lands JW (See 12C  
20 394/3) JW”. The Incumbrances Section contained two entries (dated 12.4.02 Restrictive  
21 Covenants and 24.10.06 Restrictive Agreements).

22

23 **25.9.12**

24

25 The entry in the Land Register for No.12C 451/3 opened 25.9.12 and stamped 26.9.12 and  
26 12.10.12 showed under the heading Name and Address of Proprietors [Entry] 1 [Date] **20.2.02**  
27 instead of 27.5.08 [Instrument No] 1264/08 instead of SP No 404 [Name and Address of  
28 Proprietor(s)] Cesar Properties Ltd instead of The Proprietors of Strata Plan 404.The  
29 Incumbrances Section contained twelve entries including ten ( 12.4.01 Collateral Charge, 28.8.02  
30 Variation of Charge and 17.7.03 Variation Collateral Charge, 1.10.03 Variation Collateral  
31 Charge, 6.7.04 Variation Collateral Charge, 12.11.04 Variation Collateral Charge, 17.8.05  
32 Variation Collateral Charge, 3.5.07 Variation Collateral Charge and 25.9.12 T/Charge) in



1 addition to the two earlier entries ( dated 12.4.02 Restrictive Covenants and 24.10.06 Restrictive  
2 Agreements).

3  
4 **10.7.12 and 30.8.12**

5  
6 There are further intermediate entries in the Land Register for No.12C 451/3

7  
8 -opened 10.7.12 and stamped 10.7.12 showing Cesar Properties as Proprietor and 9  
9 Incumbrances and

10 -opened 30.8.12 and stamped 30.8.12 showing Cesar Properties as Proprietor and 11  
11 Incumbrances.

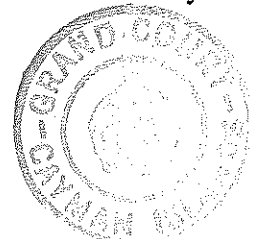
12  
13 **Ms. Dons' Affidavits**

14  
15 I refer to Ms. Dons' two affidavits and to the exhibits thereto for their full terms and effect.

16  
17 The conclusion in her second affidavit reads

18  
19 "Through what appears to be a mistake by the Land Registrar, our client lost a sizable  
20 chunk of its security and title to the Asterix Land. The subsequent amendment and  
21 rectification of the Register has simply put the matter to rights. As discussed above,  
22 Strata 404 is not entitled to hold the legal interest in the land until the final phase of the  
23 Ritz development is complete, and the Asterix Land has a separate title. Throughout,  
24 Strata 404 has retained its beneficial in the property and its use rights. Once the final  
25 phase of the Ritz development is complete, legal title to the common property will  
26 automatically pass to Strata 404. Any sale of the Golf Course by the Plaintiff is subject  
27 to all of those interests, rights and requirements as clearly set out in the materials  
28 provided to potential bidders.

29  
30 The Land Registry appears to have taken practical steps to rectify their mistake. There  
31 was no "mysterious purpose" or suspicion surrounding the Registrar's decision to rectify  
32 the initial error by transferring the Golf Course back to Cesar Properties"



1 **Mr. Ryan's case**

2

3 Mr. Ryan's case is that the "asterix" land is owned by Master Strata 404 as part of the common  
4 property within the Golf Course, and yet it is being offered at auction as the property of Cesar  
5 Properties.

6

7 **Mr. Meeson's statement on behalf of RCC**

8

9 In the course of the hearing yesterday Mr. Meeson said the following-

10

11 "The independent bidder did make written inquiries on Friday evening [26 October] as to how  
12 and when the Golf Course title reverts back to Strata 404 and RCC are providing an answer to  
13 that question. RCC are also going to explain in relation to the asterix land that when separate  
14 title for that land is created, that land will not go with the Golf Course to Strata 404 but will  
15 remain with the successful bidder"

16

17 **The application of the American Cyanamid Principles in the present case**

18

19 Mr. Ryan faces considerable difficulties in relation to the question (1) Is there a serious issue to  
20 be tried? including the following

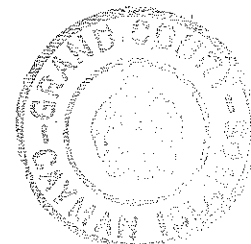
21

22 (1) The Chargor Companies support the continuation of the auction irrespective of the  
23 concerns raised by Mr. Ryan.

24

25 (2) The terms of the Guarantee in Article 1 (Nature and Scope of Guarantee) and in Article II  
26 (Events and circumstances not reducing or discharging Guarantor's obligations)  
27 including in particular (but without limitation) clauses 1.6, 1.10, 2.7, 2.8 and 2.13 above.  
28 On the material before me I doubt whether it makes any significant difference whether  
29 these clauses are construed in accordance with Cayman Islands or New York law.

30



1 I refer to *O'Donovan and Phillips* (supra) at 8-92 and following for the principles that  
2 apply to the construction of clauses in a guarantee excluding liability for the creditor's  
3 action in releasing or impairing securities.

4  
5 But even if there was a serious question to be tried, in my opinion Mr. Ryan faces an insuperable  
6 difficulty at the second stage (would damages be an adequate remedy for Mr. Ryan injured by  
7 the Court's failure to grant an injunction?).

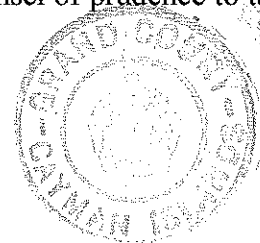
8  
9 As to adequacy of damages as a remedy and the balance of convenience in *Fellowes & Son v*  
10 *Fisher* [1976] 1 Q.B. 122 at p.137, CA, Browne L.J. set out Lord Diplock's guidelines in an  
11 enumerated series as follows.

12  
13 (1) The governing principle is that the court should first consider whether, if the claimant  
14 succeeds at the trial, he would be adequately compensated by damages for any loss  
15 caused by the refusal to grant an interlocutory injunction. If damages would be adequate  
16 remedy and the defendant would be in a financial position to pay them, no interlocutory  
17 injunction should normally be granted, however strong the claimant's claim appeared to  
18 be at that stage.

19 (2) If, on the other hand, damages would not be an adequate remedy, the court should then  
20 consider whether, if the injunction were granted, the defendant would be adequately  
21 compensated under the claimant's undertaking as to damages. If damages in the measure  
22 recoverable under such an undertaking would be an adequate remedy and the claimant  
23 would be in a financial position to pay them, there would be no reason upon this ground  
24 to refuse an interlocutory injunction.

25 (3) It is where there is doubt as to the adequacy of the respective remedies in damages that  
26 the question of balance of convenience arises. It would be unwise to attempt even to list  
27 all the various matters which may need to be taken into consideration in deciding where  
28 the balance lies, let alone to suggest the relative weight to be attached to them. These  
29 will vary from case to case.

30 (4) Where other factors appear to be evenly balanced it is a counsel of prudence to take such  
31 measures as are calculated to preserve the status quo.



1 (5) The extent to which the disadvantages to each party would be incapable of being  
2 compensated in damages in the event of his succeeding at the trial is always a significant  
3 factor in assessing where the balance of convenience lies.

4 (6) If the extent of the uncompensatable disadvantage to each party would not differ widely,  
5 it may not be improper to take into account in tipping the balance the relative strength of  
6 each party's case as revealed by the written evidence adduced on the hearing of the  
7 application. This, however, should be done only where it is apparent upon the facts  
8 disclosed by evidence as to which there is no credible dispute that the strength of one  
9 party's case is disproportionate to that of the other party.

10 (7) In addition to the factors already mentioned, there may be many other special factors to  
11 be taken into consideration in the particular circumstances of individual cases.

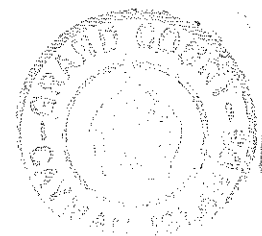
12  
13 As to (1) I refer to the principles set out above under the heading – “The extent of the creditor’s  
14 duty to a guarantor if securities are enforced.” Mr. Ryan in my opinion fails at stage (1) because  
15 the creditor’s failure to obtain the proper value of a security which he sells reduces pro tanto the  
16 amount for which the guarantor is liable. In my opinion any difficulty that the Court may face in  
17 determining the quantum of the pro tanto reduction (if it falls to be made) is not a reason for  
18 granting an injunction.

19  
20 For completeness as to (2) I am not persuaded that, if the injunction were granted, a cross-  
21 undertaking fortified by a payment into Court of US\$100,000.00 would provide an adequate  
22 remedy, if RCC succeeded at trial.

23  
24 Further there are a number of points that could be made as to the practicality of the injunction  
25 sought. For example I doubt whether any decision on a preliminary issue in FSD 58 will  
26 necessarily resolve relevant issues in FSD 98.

27  
28 Conclusion

29  
30 For these reasons the application for an injunction fails.



1 Footnote

2

3 I add the following footnote to this judgment

4

5 I refer to:-

6

7 1. The three versions of the Terms and Conditions of Auction

8

9 (Compare version 1:-

10

11 “...The golf course is part of the common property of one of the strata plans and is not included  
12 with the Property that is offered pursuant to the auction.”

13

14 with

15

16 the Marketing Update accompanying version 2:-

17

18 “The golf course (block 12c parcel 451/3) is now part of the collateral for sale. However, once  
19 the strata plan is fully registered, the golf course will become common property as contemplated  
20 by the filed strata plan.”)

21

22 2. The changes in the Land Register entries set out above.

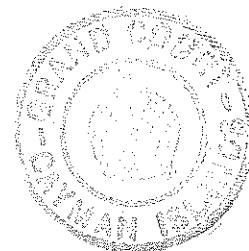
23

24 Despite Ms. Dons’ two affidavits, in my opinion when the evidence before the Court is looked at  
25 in the round, the status of the Golf Course is a matter which an independent bidder would want  
26 to examine on the basis of complete information.

27

28 Section 75 (1) of the RLL expressly provides that “A chargee exercising his power of sale shall  
29 act in good faith and have regard to the interests of the chargor”

30




1 The Grand Court Practice Direction No 5 of 2012 refers to “The standard of care required of the  
2 chargee: that of a reasonable man in respect of the conduct of his own private affairs (*Paradise*  
3 *Manor Ltd v Bank of Nova Scotia*)”

4  
5 (See also the reference to “fairly and properly exposing the property to the market” in *Silven*  
6 *Properties supra*)

7  
8 The auction tomorrow is to be a contest between an independent bidder and a bidder associated  
9 with RCC.

10  
11 In my opinion it is elementary that (to the extent that they have not already done so) RCC and its  
12 advisers should take all appropriate steps to ensure that the independent bidder (a) is given all  
13 appropriate information in response to the written inquires Mr. Meeson said it made on Friday  
14 evening and (b) has been afforded proper access to and a reasonable time to consider the same  
15 material information in relation to the Golf Course as is known to the associated bidder, so that  
16 there is a level playing field.

17  
18  
19 DATED this 1<sup>st</sup> day of November 2012

20  
21 

22  
23 **The Hon Sir Peter Cresswell**  
24 **Judge of the Grand Court**

