

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **IN THE CIVIL DIVISION**  
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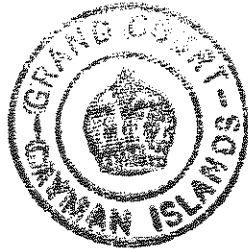
5 Cause No: G0395/2012

6 **BETWEEN:**

7 **DAVID MORRISON**

8 **PLAINTIFF**

9  
10  
11 **AND:**



12 **SOLOMON HARRIS (A FIRM)**

13 **DEFENDANT**

14  
15  
16  
17 **Appearances:**

18 **Mr. Kenneth Farrow Q.C. instructed by**  
19 **Mr. Stephen Symons of Bodden & Bodden**  
20 **on behalf of the Plaintiff**

21  
22 **Mr. Thomas Lowe Q.C. instructed by Mr.**  
23 **David Herbert of Harneys on behalf of the**  
24 **Defendant**  
25

26 **Before:**

**The Hon. Mr. Justice Charles Quin**

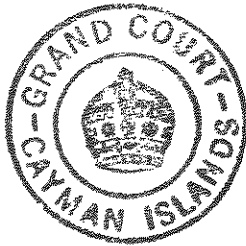
27 **Heard:**

**13<sup>th</sup> and 14<sup>th</sup> June 2013**

28  
29 **JUDGMENT**  
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- 31  
32 1. On the 21<sup>st</sup> September 2012 the Plaintiff issued a Writ of Summons claiming  
33 damages for professional negligence arising out of the Plaintiff's instructions to the  
34 Defendant to act for him in relation to his proposed purchase of an undeveloped Lot  
35 ("Lot 12") and the subsequent construction of a detached residence thereon at West  
36 Bay Beach South, Block 12C, Parcel 394/3H10 (subsequently re-numbered as  
37 Parcel 451/3H10) being another development forming part of the Ritz Carlton  
38 complex and known as The Deckhouses at the Ritz Carlton ("the Deckhouses")  
39 /Ritz Carlton Deckhouses #12.

1           2.       On the 12<sup>th</sup> October 2012 the Plaintiff filed his Statement of Claim, claiming that  
2                   the Defendant had failed to exercise the necessary skill and care expected of it in  
3                   relation to the acquisition of property in the Cayman Islands and further, that it had  
4                   breached a similar duty of care in tort. The Plaintiff set out the following particulars  
5                   of negligence on the part of the Defendant:



- 6                   i.       The Defendant failed to pay sufficient attention to the terms of the  
7                   Reservation and failed to appreciate that the sums held in escrow by  
8                   Cesar<sup>1</sup> and Maples and Calder were not intended to serve as, or as part  
9                   of, the purchase price for the Lot but, as confirmed by the “Services  
10                  Agreement”, were to be transferred to, in the event, the Contractor;
- 11                  ii.       The Defendant permitted the Plaintiff to enter into an agreement,  
12                  namely, the “Purchase Agreement”, which was drafted on the incorrect  
13                  assumption that Cesar held a sum of US\$600,000.00 in escrow pending  
14                  completion [of The Deckhouses #12] when it would be released to  
15                  Cesar as the purchase price for the Lot;
- 16                  iii.       The Defendant failed to appreciate, although the same was perfectly  
17                  plain from a consideration of the Reservation<sup>2</sup> and the Services  
18                  Agreement<sup>3</sup>, that the purchase price of US\$600,000.00 was to be paid  
19                  by the Plaintiff on the 1<sup>st</sup> June 2011;

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<sup>1</sup> Cesar Properties Ltd., the vendor of the proposed condominium at West Bay Beach South, being a development forming part of the Ritz Carlton complex known as Secret Harbour.

<sup>2</sup> A Reservation Agreement dated the 24<sup>th</sup> March 2011 and executed on or about March 2011 by the Plaintiff between Orion Developments Ltd. (“Orion”), Cesar, the Plaintiff and the Plaintiff’s wife.

<sup>3</sup> The Plaintiff, in his Amended Statement of Claim at paragraph 9, states that on the 25<sup>th</sup> March 2011 the Defendant obtained drafts of two agreements, one of which was an Agreement for Services (“Services Agreement”) between Deckhouses Construction Company Ltd. (“the Contractor”) and the Plaintiff.

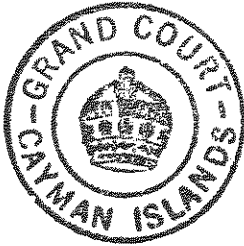
1 iv. Although aware that the Plaintiff was contractually obliged to pay an  
2 aggregate sum of US\$2 million on the 1<sup>st</sup> June 2011, the Defendant  
3 failed to advise the Plaintiff that, of that aggregate sum, US\$600,000.00  
4 should be paid to Cesar and not to the Contractor;

5 v. The Defendant failed to obtain and provide to the Plaintiff any wire  
6 transfer instructions which would enable the Plaintiff to pay the  
7 purchase price to Cesar as opposed to the Contractor;

8 vi. The Defendant failed to take any steps prior to the Plaintiff's payment  
9 of US\$2 million, pleaded above, or at all, to ensure that the purchase  
10 price was paid to Cesar, which payment was a necessary pre-condition  
11 of obtaining the release of the Lot from the Charge;

12 vii. The Defendant failed to communicate with the Chargee, prior to the  
13 said payment of US\$ 2 million with a view to ascertaining the terms  
14 upon which it would release the Lot from the Charge;

15 viii. The Defendant failed, prior to such payment, to take any steps to ensure  
16 that the Chargee's terms were met and, in particular, since those terms  
17 would inevitably require that the whole or some part of the purchase  
18 price was paid to the Chargee, failed to ensure that such payment was  
19 made in exchange for the release of the Lot from the Charge.



20 3. The Plaintiff claims that he has suffered loss and damage, namely, the sum of US\$  
21 3 million which he had paid out and obtained nothing in return, as well as further  
22 damages.

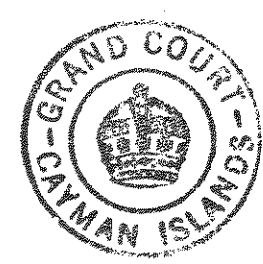
1       4.       The Plaintiff's application for Summary Judgement filed on the 4<sup>th</sup> December 2012  
2               is supported by his First Affidavit sworn on the 11<sup>th</sup> December 2012 and his Second  
3               Affidavit sworn on the 23<sup>rd</sup> May 2013.

4       5.       In opposition to the Plaintiff's application for Summary Judgement the Defendants  
5               rely on the First Affidavit of Ian Jamieson ("Mr. Jamieson"), sworn on the 15<sup>th</sup> May  
6               2013, and on the Second Affidavit of Mr. Jamieson, sworn on the 11<sup>th</sup> June 2013.

7       6.       Leading counsel, Mr. Farrow Q.C. on behalf of the Plaintiff has said that his client  
8               is not pursuing paragraph 23.7 in the Statement of Claim.

9       7.       On the 30<sup>th</sup> May 2013, the Plaintiff amended his Statement of Claim to include an  
10              additional breach at paragraph 23.(2a) which reads:

- i.   The Defendant failed to ensure that Cesar retained US\$600,000.00 out  
     of the US\$718,000.00 held in escrow, but arranged for the whole of  
     such US\$718,000.00 to be transferred to the Contractor.



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*FACTS OF THE CASE*

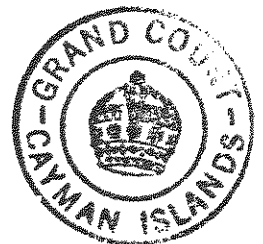
8. In March 2010 the Plaintiff and his wife, who are Canadian citizens, instructed the Defendant in relation to their proposed purchase and construction of a condominium at West Bay Beach South, Block 12C, Parcel No. 394/3H9, being a development forming part of the Ritz Carlton complex and known as Secret Harbour.

9. On the 16<sup>th</sup> April 2010 the Plaintiff and his wife signed an agreement which dealt with the construction and sale of Secret Harbour.

10. On the 15<sup>th</sup> March 2011 Mr. Jamieson forwarded to the Plaintiff an email he had received from Michael Ryan ("Mr. Ryan"), which stated that the Secret Harbour development was to be "*temporarily put....on hold*".

11. As the Plaintiff states in his First Affidavit: "*[Mr. Ryan's] email went on to offer purchasers the return of their money or the possibility of investing in an alternative Ritz Carlton development.*" However, by this time, the Plaintiff had paid a total of US\$718,000.00 in respect of the Secret Harbour purchase, of which US\$179,500.00 was held by Cesar's then attorneys, Maples and Calder, and the balance of US\$538,500.00 was held on escrow by Cesar.

12. The Plaintiff discussed the content of the email with Mr. Jamieson and, on the 21<sup>st</sup> March 2011, instructed Mr. Jamieson to send an email to Mr. Ryan/Cesar's attorneys, Maples and Calder – requesting the return of his money.



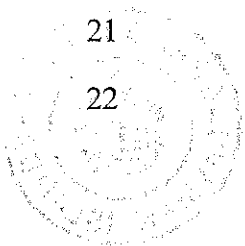
1 13. On the 24<sup>th</sup> March 2011, the Plaintiff said he had a further discussion with a  
2 representative of The Residences at The Ritz Carlton, and, as a result of that  
3 discussion, the Plaintiff made an informal offer for an undeveloped Lot – Lot 12 –  
4 which formed part of the Deckhouses Development in the Ritz Carlton complex.

5 14. The Plaintiff said that on the 24<sup>th</sup> March 2011 he spoke to Mr. Jamieson and  
6 provided him with brief details of the offer relating to the Deckhouses  
7 Development. The Plaintiff states that he cannot remember if the Deckhouses were  
8 expressly mentioned, but the conversation proceeded on the basis that the  
9 Defendant would be instructed to act, just as it had been in relation to the Secret  
10 Harbour purchase/project.

11 15. The Plaintiff said that on the 25<sup>th</sup> March 2011 Mr. Jamieson was sent a copy of the  
12 Reservation Agreement.

13 16. It was the Plaintiff's case that on the 28<sup>th</sup> March 2011 the Plaintiff executed the  
14 Reservation Agreement however, in his Second Affidavit the Plaintiff accepts that  
15 he probably signed the Reservation Agreement by the time it was sent to Mr.  
16 Jamieson on the 25<sup>th</sup> March 2011. The Plaintiff returned the executed Reservation  
17 Agreement to Cesar.

18 17. By the Reservation Agreement, the Plaintiff confirmed his intention to purchase a  
19 Deckhouses Lot from Cesar, and, at the same time, enter into a separate contract  
20 with a company chosen by Orion/Cesar. As the Plaintiff stated in his First Affidavit,  
21 Orion/Cesar chose Deckhouses Construction Company Ltd. (a Contractor) for the  
22 subsequent construction of a dwelling house on Lot 12.



1 18. Cesar's then attorneys, Maples and Calder, held US\$179,500.00 (although it was  
2 incorrectly stated to be US\$174,550.00) and Cesar already held US\$538,500.00,  
3 making the total US\$718,000.00. These sums totalling US\$718,000.00 were to be  
4 paid by the Plaintiff to Cesar and were described as a "non-refundable deposit".

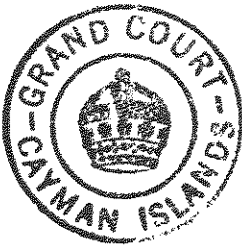
5 19. By the Reservation Agreement, signed by the Plaintiff and his wife, Lot 12 was  
6 reserved at the price of US\$4,500,000.00, for fourteen (14) days from the receipt by  
7 Cesar of the original or faxed copy of the Reservation Agreement signed by the  
8 Plaintiff. That sum was payable in accordance with the terms of Schedule 1 to the  
9 Reservation Agreement.

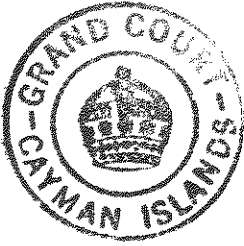
10 20. The Plaintiff agreed to instruct Cesar's attorneys, Maples and Calder, to transfer the  
11 funds held by them – US\$179,500.00 – to Cesar.

12 21. The Plaintiff, in his First Affidavit stated: "*On execution of the agreement to*  
13 *purchase Lot 12, the deposit should be paid to Deckhouses Construction*  
14 *Company.*" A Payment Schedule as set out in Schedule 1 to the Reservation  
15 Agreement was outlined as follows:

16 i. US\$282,000 – Payment 1: Schedule 1 to the Reservation, provided that  
17 US\$282,000.00, which, with the US\$718,000.00 totalled US\$1 million,  
18 and was payable on the 1<sup>st</sup> May 2011 and expressed as being Payment  
19 One for the Agreement for Services.

20 ii. US\$600,000.00 – Payment 2: This was payable on the 1<sup>st</sup> June 2011  
21 and was expressed to be Payment Two for the Deckhouse Lot Contract.





1                   iii. US\$1,400,000.00 – Payment 3: This was also payable on the 1<sup>st</sup> June  
2                   2011 and was expressed to be “Payment Three for the Agreement for  
3                   Services”.

4                   iv. US\$1,500,000.00 – Balance: This was payable on the 1<sup>st</sup> June 2012 and  
5                   was expressed to be the final balance due for Agreement for Services.

6           22.       On the 29<sup>th</sup> March 2011 Mr. Jamieson emailed the Plaintiff, formally accepting the  
7                   Plaintiff’s instructions to act on his behalf in relation to his purchase of Lot 12 and  
8                   the construction of the condominium.

9           23.       On the 25<sup>th</sup> March 2011 the Plaintiff avers that Mr. Jamieson received drafts to two  
10                  Agreements. One was a Strata Lot Purchase Agreement (“the Purchase  
11                  Agreement”) between Cesar and the Plaintiff. The other was an Agreement for  
12                  Services (“Services Agreement”) between Deckhouses Construction Company Ltd.  
13                  (“Deckhouse Construction”) and the Plaintiff.

14           24.       At this stage Maples and Calder no longer acted for Cesar. Cesar and Deckhouses  
15                  Construction Company had appointed Mr. J. Samuel Jackson (“Mr. Jackson”) as  
16                  their attorney.

17           25.       On the 4<sup>th</sup> April 2011 Mr. Jamieson obtained certified copies of the Land Register  
18                  relating to Lot 12. Under the proprietorship section of the Land Register it was  
19                  stated that there could be no transfer without the consent of the Chargee; Column  
20                  Financial Inc. (“Column”).

21           26.       On the 4<sup>th</sup> April 2011 Mr. Jamieson wrote to the Plaintiff stating that he had  
22                  reviewed the Title to the land, the Agreement for Sale and Purchase and the  
23                  associated documents “... which, after some negotiation are now in agreed form.”

1 In this letter Mr. Jamieson also stated that the Lot was subject to a mortgage, but  
2 that he (Mr. Jamieson) would ensure that this was removed from Lot 12 at the time  
3 it was transferred to the Plaintiff.

4 27. The Purchase Agreement between Cesar and the Plaintiff was dated the 4<sup>th</sup> April  
5 2011 and was executed by the Plaintiff on the 16<sup>th</sup> April 2011 – having been  
6 executed on the 5<sup>th</sup> April 2011 by Cesar.

7 28. The Services Agreement between Deckhouses Construction and the Plaintiff is  
8 dated the 25<sup>th</sup> March 2011 and was executed by Deckhouse Construction on the 5<sup>th</sup>  
9 April 2011 and by the Plaintiff on the 16<sup>th</sup> April 2011.

10 29. By Clause 2, the obligation of Deckhouses Construction was expressed to be  
11 subject to the fulfillment by the Plaintiff of all the conditions and obligations set  
12 forth in the Purchase Agreement and the Services Agreement.

13 30. By Clause 3.3. by the Services Agreement the Plaintiff agreed to pay to  
14 Deckhouses Construction, the sum specified in the Payment Schedule – previously  
15 defined as “ Schedule C” and outlined at paragraph 21 above. Schedule C sets out  
16 the following payment schedule:

17 a. *US\$282,000 – Payment 1- (being \$1,000,000.00 less \$718,000 from the Secret*  
18 *Harbour Payments, the receipt of which the vendor, Cesar, hereby*  
19 *acknowledges) due on or before the 1<sup>st</sup> May 2011;*

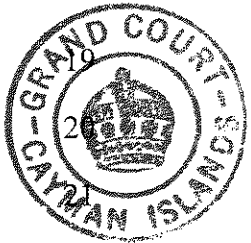
20 b. *US\$1,400,000.00 – due on or before the 1<sup>st</sup> June 2011;*

21 c. *US\$1,500,000.00 – Balance, due on or before the 1<sup>st</sup> June 2011 (less any*  
22 *amount held back pursuant to Clause 3.4 of the Agreement).*



1           31.     The purchase price of the property, Lot 12, was US\$600,000.00. The Plaintiff states  
2                   in his affidavit that Cesar held that sum pursuant to a non-refundable Reservation,  
3                   and that, upon the execution of the Purchase Agreement, Cesar would continue to  
4                   hold the sum as a deposit, until completion, at which time it would be paid to Cesar.  
5                   Cesar was holding the sum US\$718,000.00 – being the money paid to them by the  
6                   Plaintiff, and to their first attorneys, Maples & Calder. However, this statement is  
7                   inconsistent with the Reservation Agreement, which, itself, provided that this sum  
8                   was to go to Deckhouses Construction Company. The Plaintiff was not aware of  
9                   this inconsistency and the Plaintiff also alleges that Mr. Jamieson, on behalf of the  
10                  Defendant, did not draw this to his attention.

11           32.     The Plaintiff and Cesar agreed that the Plaintiff would simultaneously enter into the  
12                   Services Agreement with Deckhouses Construction which was Cesar’s designated  
13                   contractor. Under Clause 2 the Plaintiff agreed to pay the price in the installments  
14                   and within the time period stated in the Purchase Agreement. As the Plaintiff stated  
15                   in his affidavit he agreed to pay, “...*the price in the installments and within the time*  
16                   *periods stated in this Agreement. All payments and the Balance shall be paid by a*  
17                   *wire transfer of funds to the following Butterfield Bank account, giving details of an*  
18                   *account in the name of the Contractor, [Deckhouses Construction].”*



Clause 3.1 provides that completion should take place within 14 days of the satisfaction of all conditions in the Purchase Agreement, and in any event not later than 1<sup>st</sup> June 2011.

22           Clause 5.2 states that Cesar undertakes to discharge, on or before completion, any  
23           financial charge registered against the property.

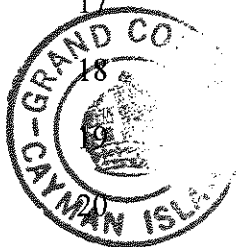
1 33. On the 20<sup>th</sup> April 2011 Mr. Jamieson wrote to Cesar's previous attorneys, Maples  
2 and Calder, asking them to transfer the sum of US\$718,000.00 which they held on  
3 account as part payment for the Secret Harbour purchase, in order to be put towards  
4 the Plaintiff's purchase of Lot 12. That sum was to be transferred to the account in  
5 the name of Deckhouses Construction.

6 34. Cesar's attorneys, Maples and Calder confirmed that they held US\$179,500.00 as  
7 the deposit sum and that the rest of the funds had been held directly by Cesar. Mr.  
8 Loutas of Maples and Calder stated that, pending instructions from Cesar he would  
9 make arrangements for the deposit sum to be transferred into the account set out in  
10 Mr. Jamieson's email. Furthermore, Mr. Loutas stated that he would request Cesar  
11 to transfer the funds to the [Butterfield] account towards the purchase of a  
12 Deckhouse by the Plaintiff.

13 35. Also on the 20<sup>th</sup> April 2011 Mr. Ryan's PA, Ms. Frances Doud ("Ms. Doud"),  
14 wrote to Mr. Jamieson stating that the Secret Harbour escrow account shall transfer  
15 the funds into the Deckhouses Construction account.

16 36. Also on the 20<sup>th</sup> April 2011 Mr. Jamieson wrote to Mr. Jackson – the attorney now  
17 acting for Cesar and Deckhouses Construction, to state that he was in receipt of the  
18 fully signed documents. Mr. Jamieson confirmed that Mr. Jackson, had more than  
19 the purchase price for the land and, as there were no outstanding issues, he looked  
20 forward to completion and to receiving a draft transfer for review in due course.

21 37. On or about the 21<sup>st</sup> April 2011 the Plaintiff paid US\$282,000.00 to Deckhouses  
22 Construction, using the wire transfer instructions set out in the contract.

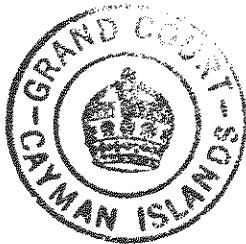




1       43.     On the 26<sup>th</sup> May 2011 the Plaintiff wrote to Mr. Ryan’s PA, Ms Doud, confirming  
2             that he would be wiring the next payment. Ms. Doud replied to the Plaintiff on the  
3             same day and stated that she would look out for the funds and get a statement out to  
4             the Plaintiff when the funds were received. Ms. Doud confirmed that Mr. Ryan had  
5             been working with the team on determining a schedule for the completion of the  
6             Plaintiff’s home. Ms. Doud confirmed that she would communicate further on this  
7             in the following week. Ms. Doud confirmed that the next payment would be for the  
8             Lot<sup>6</sup>, and stated that she was sure that Mr. Jamieson would assist the Plaintiff in  
9             getting the transfer done.

10       44.     On the 31<sup>st</sup> May 2011 Ms. Doud wrote to the Plaintiff confirming receipt of the  
11             funds. The Plaintiff stated in his First Affidavit that he paid US\$2 million by wire  
12             transfer in accordance with the wire transfer instructions set out in the purchase  
13             agreement. The Plaintiff did not make any distinction between US\$600,000.00 and  
14             US\$1,400,000.00 and alleges that neither did Mr. Jamieson ever advise that he  
15             should make a distinction between the two sums. The Plaintiff’s evidence is that  
16             Cesar’s recently appointed Receivers have confirmed that there is no evidence of  
17             any payment by Deckhouses Construction, the Contractor to Cesar of  
18             US\$600,000.00 or any other amount subsequent to the 31<sup>st</sup> May 2011.

19       45.     On the 7<sup>th</sup> June 2011 the transfer for Lot 12 from Cesar to the Plaintiff was  
20             submitted to the Land Registry for registration. The Plaintiff’s evidence is that the  
21             documents were returned on the 8<sup>th</sup> June 2011 – with the Land Registry stating that  
22             a consent letter was required from the Chargee.



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<sup>6</sup> Lot 12

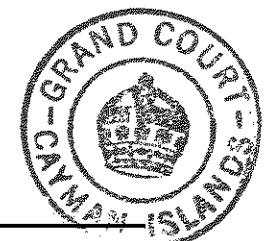
1       46.     On the 9<sup>th</sup> June 2011 Mr. Jamieson received the documents back from the Land  
2             Registry and wrote to Mr. Jackson – the attorney acting for Cesar and Deckhouses  
3             Construction Company, under the subject “Cesar Properties to Morrison”. Mr.  
4             Jamieson asked Mr. Jackson whether he (Mr. Jamieson) could send over the  
5             transfers to Mr. Jackson to have the changes to the Parcel Number initialled and to  
6             deal with “items 2, 4, and 5.”

7       47.     Mr. Jackson, acting on behalf of Cesar, wrote back on the 9<sup>th</sup> June 2011 and copied  
8             his communication to Mr. Ryan and Ms. Doud, stating: “*We will do what needs to*  
9             *be done to sort this out.*” Mr. Jackson stated that he could not understand why the  
10            Planning Department had put a restriction on the register and stated: “*I don’t think*  
11            *they have a right to register a restriction anyhow (and I have told them that many*  
12            *times now).*”

13      48.     On the consent letter from the Chargee Mr. Jackson asks: “*Didn’t we do a*  
14            *discharge of Charge for the Lot?*” Mr. Jackson goes on to state: “*In any event we*  
15            *will get it sorted for you. Please send the forms to me (or Frances [Doud]) at your*  
16            *earliest convenience.*”

17      49.     On the 10<sup>th</sup> June 2011 Mr. Jamieson writes to Mr. Jackson and thanks him for his  
18            assurances and states: “*I will get the documents over to you now. Looking at the file,*  
19            *I don’t think I ever received discharges which is an oversight on my part.*”

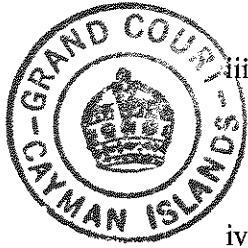
20      50.     On the 10<sup>th</sup> June 2011 Mr. Jackson replied to Mr. Jamieson stating: “*I am pretty*  
21            *sure we requested the discharges from Appleby, but in any event we will get them. It*  
22            *might be best to send the documents to Frances [Doud]....*”



1 51. On the 10<sup>th</sup> June 2011 Mr. Jackson wrote to Mr. Jamieson, copied to Ms. Doud,  
2 stating: *"It appears that the discharges were never issued by Appleby and we have*  
3 *now asked for them to be produced ASAP."* Mr. Jamieson acknowledges receipt of  
4 this and thanks Mr. Jackson for his help.

5 52. On the 8<sup>th</sup> June 2011 the Registrar of Lands wrote back with a "Documents Missing  
6 Record" and "Check List" and stated the following:

- 7 i. Amend Parcel Number to state 394/3H10/H12 not 394/5H10/0
- 8 ii. Please state transferor or capacity in front of forms
- 9 iii. There is a stay to be registered and we will block the registration for 14  
10 days
- 11 iv. There is also a restriction from 'Planning' which needs to be removed.
- 12 v. Consent letter required from the Chargee.



13 53. On the 1<sup>st</sup> July 2011 Mr. Jackson writes to Mr. Jamieson and copies his letter to Ms.  
14 Doud and Mr. Ryan stating: *"We have been chasing Appleby, to no avail as yet, but*  
15 *will agitate vigorously again today to get the discharges from them forthwith."*

16 54. Also on the 1<sup>st</sup> July 2011 Mr. Jackson writes to Mr. Jamieson and states: *"We were*  
17 *under the impression that Appleby were obtaining the discharges from the time*  
18 *when the transfer forms were signed (I believe that Norm [Mr. Klein] actually*  
19 *notarized those) until they came back recently to say that they needed a list of the*  
20 *closing costs."* Mr. Jackson confirms to Mr. Jamieson that Fran (Ms. Doud) is on  
21 their case, but *"it might help if you called Norm and asked him [Mr. Klein] to*  
22 *expedite it."*

1 55. Also on the 1<sup>st</sup> July 2011 Ms. Doud writes to Wendy Denman (“Ms. Denman”) at  
2 Appleby – copied to Mr. Ryan, Mr. Klein and Mr. Jackson regarding Deckhouse  
3 #12 said: *“Can you please provide an update on this?...The purchaser [i.e. the*  
4 *Plaintiff] is getting upset that we have not been able to provide the release as yet*  
5 *(Our first request was 10<sup>th</sup> June).”*

6 56. On the 1<sup>st</sup> July 2011 Mr. Jamieson writes to Mr. Jackson confirming that Mr. Klein  
7 of Appleby has told him that everything is with your client’s bank, Column, for  
8 processing.

9 57. On the 1<sup>st</sup> July 2011 Mr. Jamieson writes to Mr. Jackson asking him to put pressure  
10 on Mr. Klein. Mr. Jamieson states that he hopes that we can still use the existing  
11 documentation before the need to prepare a new batch of transfers.

12 58. On the 1<sup>st</sup> July 2011 Mr. Jackson tells Mr. Jamieson that the hold was caused  
13 because Column had recently been sold to another entity and adds: *“It looks like it*  
14 *is moving now ...but if the both of us keep Norm [Mr. Klein] under some pressure*  
15 *we should get it.”*

16 59. Ms. Doud writes to Appleby copying Mr. Ryan and Mr. Jackson saying *“Please*  
17 *provide an update the purchaser [Plaintiff] is getting upset that we have not been*  
18 *able to provide the release as yet.”* Ms. Doud again points out the first request for  
19 the release was the 10<sup>th</sup> June 2011.

20 60. On the 21<sup>st</sup> July 2011 Mr. Klein states that the security has been transferred to a  
21 new security agent so they cannot obtain the discharges until the transfer of Charge  
22 has been registered. Mr. Klein goes on to state that nobody seems to think that there  
23 would be an issue and that he was unaware that the Charge was being transferred.



1 61. On the same date Mr. Jamieson writes to Mr. Klein asking him, *"...have you had*  
2 *any joy in getting the discharges?"*

3 62. On the 29<sup>th</sup> July 2011 The Plaintiff writes in response to Ms. Doud's email of the  
4 26<sup>th</sup> May 2011 which said that Mr. Ryan was working with the team in getting a  
5 schedule together for the completion of the Plaintiff's home. The Plaintiff stated  
6 that he has not received any kind of update or construction plan or engineering  
7 report, *"...and the place has sat half-built for some time."*

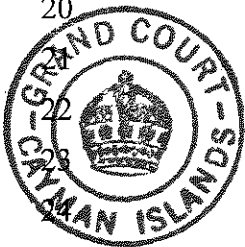
8 63. On the 5<sup>th</sup> August 2011 Ms. Doud, in a letter copied to Mr. Ryan and the parties'  
9 attorneys states: *"We are pleased to report, as you will see from [Mr. Ryan's] letter*  
10 *attached that we have been diligently moving forward in regard to your beautiful*  
11 *home."* Mr. Ryan's letter is addressed to the Plaintiff and dated the 4<sup>th</sup> August 2011.  
12 Mr. Ryan assures the Plaintiff that a lot of effort is going into the completion of his  
13 Deckhouse home.

14 64. On the 4<sup>th</sup> August 2011 Mr. Ryan writes to the Plaintiff and he deals specifically  
15 with the registration of title and states that the process here in Cayman:

16 *"...is straightforward but very slow, it requires that we put in the application to*  
17 *the senior lender to release and transfer the security to you, which in turn*  
18 *allows you to get the Lot registered at the Registry office."*

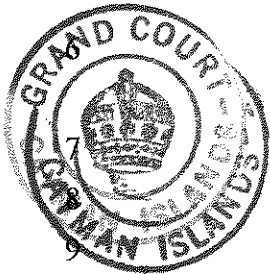
19 Mr. Ryan goes on to state:

20 *"One additional wrinkle in this case was caused by the lending group*  
21 *transferring internally who directed the servicing agent necessary to authorise*  
22 *this, as a result the registration of the change among the lenders had to happen*  
23 *at the Registry before we could complete the transfer documentation for you.*  
24 *This has now occurred and we anticipate completing your transfer shortly."*



25

1 65. The Plaintiff did not make any distinction between Cesar and Deckhouses  
2 Construction assuming that they were both under the control of Mr. Ryan. Mr.  
3 Ryan, as the developer and principal for both Cesar and Deckhouses, reassures the  
4 Plaintiff and does not reveal that there are any insurmountable problems with the  
5 Charge. In relation to the contracting and procurement Mr. Ryan also writes to the  
Plaintiff stating::



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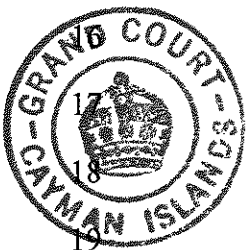
1 70. Mr. Jamieson “chased” Appleby on the 14<sup>th</sup> September and the 22<sup>nd</sup> September  
2 2011.

3 71. On the 23<sup>rd</sup> September 2011 Mr. Jamieson spoke with Mr. Ryan. Mr. Jamieson  
4 stated in his First Affidavit that Mr. Ryan asked Mr. Jamieson what he needed to  
5 complete the registration. Mr. Jamieson explained in his First Affidavit that he told  
6 Mr. Ryan that the primary issue was the lack of discharges and Mr. Ryan said he  
7 would chase these. There is no suggestion from Mr. Ryan that the necessary  
8 discharge would not be forthcoming.

9 72. On the 5<sup>th</sup> October 2011 Mr. Jamieson wrote directly to Mr. Ryan regarding the sale  
10 to the Plaintiff. Mr. Jamieson reminded him that he [Mr. Ryan] “*had asked me to*  
11 *tell you if the discharges for David Morrison’s purchase were not forthcoming.*”  
12 Mr. Jamieson told Mr. Ryan that he had not received them.

13 73. On or about the 27<sup>th</sup> October 2011 Mr. Jamieson met with Ms. Doud. Mr. Jamieson  
14 stated in his First Affidavit that Ms. Doud had received the discharges back, but  
15 could not lay her hands on them at that time. On the 27<sup>th</sup> October 2011 Mr.  
16 Jamieson wrote an email pointing out that in that meeting Ms. Doud had told him  
17 that she had received the discharges for the Plaintiff and he asked Ms. Doud to send  
18 them to him. Again on that date Ms. Doud wrote to Mr. Jamieson and said Mr.  
19 Ryan has to sign these [discharges] and she would follow up with him (Mr. Ryan)  
20 as soon as he was on the island next week.

21 74. On the 16<sup>th</sup> November 2011 Mr. Jackson emailed Mr. Jamieson stating that he was  
22 awaiting agreement from the lender to release the parcel, so that Mr. Jamieson  
23 could have the discharges. Mr. Jackson, acting for both Cesar and Deckhouses  
24 Construction said in his email, “*Mike [Mr. Ryan] said he spoke to them very*



1                   *recently and they had now agreed to sort it out. We expect to get this sorted for you*  
2                   *in the very near future.”*

3           75.       On the 2<sup>nd</sup> December 2011 the Plaintiff received an out-of-office auto reply email  
4                   response from one of the developer’s contacts stating that he was on a long term  
5                   sabbatical and all enquiries should be directed to Stingray Construction Co. Ltd.  
6                   The Plaintiff immediately sent an email to Ms. Doud, copied to Mr. Ryan and Mr.  
7                   Jamieson stating, *“What the hell is going on down there?”*

8           76.       In response to this email Ms. Doud arranged a telephone call between the Plaintiff  
9                   and Mr. Ryan to discuss the project generally.

10          77.       On the 5<sup>th</sup> December 2011 the Plaintiff and Mr. Ryan had a telephone call and Mr.  
11                   Ryan subsequently emailed Mr. Jamieson stating:

12                   *“Spoke with Mr. Morrison and updated him that we continued to have a delay*  
13                   *with getting the senior lender to finalise the transfer....I explained the*  
14                   *background of Five Mile [the new lender] taking over from CS, and that they*  
15                   *were a smaller outfit who did not have the resources to focus on this like a CS*  
16                   *would and they continued to swim in circles while they got their head around*  
17                   *the situation of the security.”*

18          78.       Mr. Jamieson in his First Affidavit stated that at no point throughout the transaction  
19                   did Mr. Ryan indicate that he had not forwarded the requisite funds to either lender  
20                   [Column or CS] in order to pay off the charge over the property.

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1 79. On the 5<sup>th</sup> December 2011 Ms. Doud wrote to Mr. Jamieson and copied Mr. Ryan  
2 saying that she had spoken to the Plaintiff and updated him regarding the delay in  
3 getting the senior lender to finalise the transfer. She confirmed that they were  
4 “ready to go with sub trades and procurement, but did not want to start until land  
5 transfer occurred and the property was in his name.”

6 80. On the 7<sup>th</sup> December 2011 Mr. Jamieson said the Plaintiff called him and said that  
7 he was due to speak to Mr. Ryan on the following Monday, but that he was minded  
8 to withdraw his funds. Mr. Jamieson wrote to the Plaintiff advising him of ways to  
9 protect his investment, which included:

10 a. Seeking a personal guarantee from Mr. Ryan regarding the ultimate  
11 construction of the Deckhouses;

b. Set some timescales for the works to commence and for the legal documents  
(including the discharges) to be returned to Mr. Jamieson so that he could  
arrange for the transfer of land to take place;

15 c. To seek the return of monies already paid by the Plaintiff.

16 81. On the 12<sup>th</sup> December 2011 Mr. Jamieson spoke to the Plaintiff and the Plaintiff  
17 told him he wanted his money returned.

18 82. On the 13<sup>th</sup> December 2011 Mr. Jamieson’s evidence is that the Plaintiff had spoken  
19 to Mr. Ryan who assured him [the Plaintiff] that he was not being taken advantage  
20 of, and he would have the unit transferred to the Plaintiff straightaway, and that he,  
21 Mr. Ryan, would personally fund the remainder of the project until completion. The  
22 Plaintiff instructed Mr. Jamieson to wait until Mr. Ryan had got in touch with him  
23 with these further proposals.



1       83.     Mr. Jamieson sent reminders to the Plaintiff on the 3<sup>rd</sup> January 2012, 12<sup>th</sup> January  
2                   2012, 4<sup>th</sup> February 2012, and each time the Plaintiff emailed to confirm that he had  
3                   not heard anything from Mr. Ryan. The Plaintiff instructed Mr. Jamieson to “chase”  
4                   Mr. Ryan.

5       84.     On the 4<sup>th</sup> February 2012 Mr. Jamieson wrote to Mr. Ryan requesting a formal  
6                   response. Mr. Ryan responded by email stating, *“I wanted to let you know that I*  
7                   *will be responding to you on the release and the go forward program within this*  
8                   *week, I know that your client has been very patient and please rest assured I am*  
9                   *doing everything in my power to make sure everything works out as he and I*  
10                  *discussed.”*

11       85.     Mr. Ryan failed to respond as promised, despite the follow-up correspondence from  
12                  Mr. Jamieson. The Plaintiff then attempted to convene a conference with Mr. Ryan  
13                  and Ms. Doud. After a further exchange of emails Mr. Jamieson again asked Mr.  
14                  Ryan to follow up with the lenders for the discharges and Mr. Ryan responded by  
15                  email, dated the 27<sup>th</sup> February 2012, that he was still working with the lender on  
16                  this.

17       86.     On the 29<sup>th</sup> February 2012 Mr. Jamieson spoke to Mr. Ryan and he obtained the  
18                  contact details of a Mr. Glasgow and a Mr. Latimer of Five Mile Capital.

19       87.     On the 1<sup>st</sup> March 2012 US attorneys acting for Five Mile Capital asked Mr.  
20                  Jamieson for proof of the fact that his client, the Plaintiff, had paid for Lot 12. Mr.  
21                  Jamieson responded by passing on the Plaintiff’s financial statements, showing the  
22                  monies paid – including purchase of Lot 12.



1 88. On or about the 19<sup>th</sup> March 2012, Receivers were appointed over the assets of Cesar  
2 following an event of default.

3 89. On the 29<sup>th</sup> March 2012 Mr. Jamieson spoke with Mr. Ryan who confirmed that he  
4 was trying to trace where the Plaintiff's payment had been sent. It transpired that  
5 the Receivers confirmed that the secured lender would only release the funds upon  
6 being paid the sum of US\$480,000.00.

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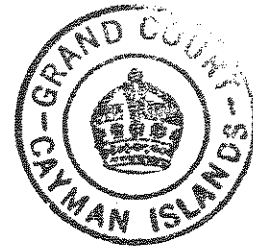
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*PLAINTIFF'S POSITION*

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90. As pleaded in his Amended Statement of Claim, the Plaintiff maintains that the US\$600,000.00 was to be held by Cesar pursuant to a “non-refundable reservation agreement”, which must be a reference to the reservation agreement, and maintains that the sum would continue to be held as a deposit until completion, at which time it would be paid to Cesar. Completion was to take place on the satisfaction of all the conditions in the agreement and, in any event, not later than the 1<sup>st</sup> June 2011.

91. However, this is inconsistent with the Reservation Agreement which itself provides that the money held by Cesar US\$718,000.00, was to be transferred to Deckhouses Construction on the execution of the Services Agreement or the Purchase Agreement of the 16<sup>th</sup> April 2011. The Reservation Agreement provided that the purchase price was to come from monies paid by the Plaintiff which Cesar/Maples and Calder held, but was to be paid by the Plaintiff on 1<sup>st</sup> June 2011. The Recital to the Purchase Agreement is also inconsistent with the Services Agreement, which, in so far as the payment due on the 1<sup>st</sup> May 2011 is concerned, replicates the provisions of the Reservation Agreement. Accordingly, the Reservation Agreement and the Services Agreement are consistent with each other, but the purchase Agreement is consistent with neither.

92. Clause 2 of the Purchase Agreement provides that the Plaintiff shall pay the purchase price “in the installments and within the time period stated in this Agreement.” Yet the Purchase Agreement contains no such statement, since it was predicated on the false assumption in the recital, namely, that Cesar held the whole of the purchase price as a deposit, and would continue to hold it until completion, when it would be released to Cesar. On this basis, no further payment would be

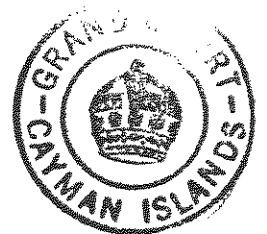
1 required from the Plaintiff. Clause 2 also provided the wire transfer details for an  
2 account in the name of Deckhouses Construction Company, at Butterfield Bank.  
3 These were the only wire transfer details which have ever been provided to the  
4 Plaintiff or the Defendant.

5 93. On or about the 20<sup>th</sup> April 2011 the Plaintiff made the top up payment of  
6 \$282,000.00. At that time, this money, together with the monies held by Cesar and  
7 Maples and Calder, were apparently transferred to Deckhouses Construction  
8 Company.

9 94. On the 31<sup>st</sup> May 2011 the Plaintiff paid the additional US\$2,000,000.00 to  
10 Deckhouses Construction, being the second and third payments referred to in  
11 Schedule 1 to the Reservation Agreement.

12 95. So, at the end of the date for completion, Deckhouses Construction held all of the  
13 US\$3 million paid and, despite the terms of the Purchase Agreement, Cesar held  
14 nothing.

15 96. Leading counsel for the Plaintiff, in his written submissions, points out that Mr.  
16 Jamieson's statement that there are "no outstanding issues" is only intelligible on  
17 the assumption that Cesar and Deckhouses Construction, both being under the  
18 ultimate control of Mr. Ryan at that time, could be treated as one and the same. As  
19 leading counsel, Mr. Farrow Q.C., submits, "*in any event, according to the*  
20 *Reservation Agreement, which was consistent with the Services Agreement, the*  
21 *purchase price was not due to be paid, whomever it was paid to, until 1<sup>st</sup> June*  
22 *2011.*"

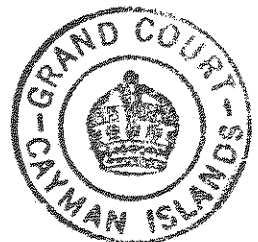


1 97. The draft transfer and associated documents were submitted to the Land Registry.  
2 The Land Registry refused to register the transfer. One of the requisitions raised  
3 was a letter from the Chargee consenting to the registration.

4 98. The Plaintiff relies on the fact that Cesar did not ultimately receive the  
5 US\$600,000.00 it was due from the monies held by Cesar and Maples and Calder,  
6 nor did Deckhouses Construction Company transfer US\$600,000.00 from the US\$2  
7 million it received from the Plaintiff to cover the Plaintiff's purchase of Lot 12. As  
8 Mr. Farrow Q.C. puts it, the US\$600,000.00 was performing two contradictory  
9 functions. First, US\$600,000.00 was used as the purchase price, which Cesar  
10 acknowledged it held and, second, as part of the first payment under the Services  
11 Agreement of which Deckhouses Construction also acknowledged receipt.  
12 However, the evidence bears out that Cesar retained no part of the US\$718,000.00.  
13 Deckhouses Construction did not repay US\$600,000.00, and, as Mr. Farrow Q.C.  
14 points out in his skeleton argument, Deckhouses Construction Company had been  
15 overpaid by US\$600,000.00.

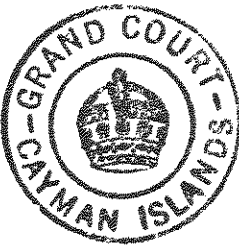
16 99. Leading counsel on behalf of the Plaintiff submits that the fatal assumption made  
17 by the Defendant was, not just that Cesar and Deckhouses Construction were under  
18 common control, but that they would remain under common control until  
19 completion had taken place. As Mr. Farrow Q.C. points out in his skeleton  
20 argument, "*It is highly probable that, had the point been raised in, say, June 2011,*  
21 *the Contractor would have accounted to Cesar for the US\$600,000.00 it had*  
22 *received, thus enabling the charge to be redeemed.*"

23



1 100. It is the Plaintiff's contention that it is difficult to see how Mr. Jamieson, acting on  
2 behalf of the Plaintiff can, in the absence of specific and informed instructions, ever  
3 be justified in structuring the transaction in a way which involves the whole of the  
4 purchase price being paid, not to the vendor, but to an affiliate of the vendor, *a*  
5 *fortiori*, where there is a charge that needs to be discharged.

6 101. The Plaintiff relies on the Privy Council decision of *Edward Wong Finance*  
7 *Company Limited v. Johnson Stokes and Master* [1984] A.C. 296 in which three  
8 questions are posed:



9 i. Did the acts or omissions of the firm involve a foreseeable risk?

10 ii. If so, could that risk have been avoided?

11 iii. If so, was the firm negligent in failing to take avoiding action?

12 102. The Plaintiff maintains that the transfer of the whole of the US\$718,000.00 initially  
13 held by Cesar to Deckhouses Construction and/or the payment of the whole of the  
14 US\$2 million to Deckhouses Construction created a risk that, whether, because of a  
15 change of control of either Cesar or Deckhouses Construction or other  
16 circumstances, Deckhouses Construction would be unwilling to account for the  
17 purchase price of US\$600,000.00 to Cesar, thus enabling the charge to discharged.  
18 This risk was foreseeable. The Plaintiff's position is:

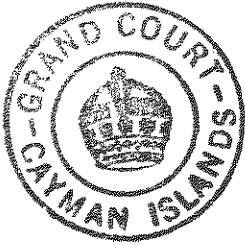
19 a. Whenever in respect of a contract to purchase land, subject to an existing  
20 charge, the whole of the purchase price is paid, not to the vendor but to a third  
21 party, a reasonable attorney would foresee the possibility that the vendor might  
22 not be put in funds to enable it to discharge the Charge.

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b. The risk could easily have been avoided by the Defendant ensuring that Cesar retained control of the purchase price of US\$600,000.00, and only allowing the balance of US\$400,000.00 to be transferred to Deckhouses Construction Company.

c. Alternatively, when the Plaintiff was paying US\$2 million, the Defendant should have ensured that the Plaintiff only paid US\$1,400,000.00 to Deckhouses Construction Company, and retained the US\$600,000.00 to be paid to Cesar.

103. Consequently, Mr. Farrow Q.C. submits that since the risk was foreseeable and easily avoided it must follow that the Defendant was negligent in failing to foresee that risk and take avoiding action.



1 *THE DEFENDANT'S POSITION*

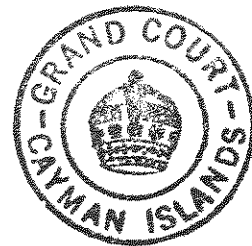
2 104. Leading counsel, Mr. Lowe Q.C., on behalf of the Defendant submits that there are  
3 significant factual disputes between the parties and there are a number of issues or  
4 questions in dispute, which ought to be tried at the trial of these proceedings.

5 105. The Defendant submits that it could never be the case that the Defendant has no  
6 defence to the Plaintiff's claim and further, the Defendant's statement of claim  
7 could not be determined without a full trial of the action.

8 106. The Defence contends through the evidence adduced by Mr. Jamieson that the  
9 Plaintiff had already agreed to substantial payments to Cesar and Deckhouses  
10 Construction without any security for these payments and before title to Lot 12 was  
11 transferred to the Plaintiff.

12 107. Leading counsel Mr. Lowe Q.C. relies upon the fact that it was a condition of sale  
13 that the vendor, Cesar, would discharge, on or before the completion date, any  
14 financial charge registered against the property. The vendor failed to discharge its  
15 duty and is thereby in breach of its contract with the Plaintiff.

16 108. The Defendant submits that the charge and the release of it are entirely matters for  
17 the vendor. The terms of the charge are matters within the vendor and his attorneys'  
18 knowledge, and not within the knowledge of the Plaintiff or the Plaintiff's  
19 attorneys. As such, the vendor was contractually obliged to secure the release of the  
20 Charge over Lot 12 before transferring title to the Plaintiff.



1       109.    The Defendant relies upon the fact that when the Plaintiff was in negotiations with  
2                   Orion, Cesar and Mr. Ryan for the purchase of Condominium 145 Harbour Loft,  
3                   Secret Harbour, Mr. Jamieson, acting on behalf of the Plaintiff, provided a formal  
4                   report on title to the Plaintiff in which he stated:

5                                *“Please note that the seller is entitled to use your deposit in the construction of*  
6                                *the condominiums once the first milestone payment has been made. This means*  
7                                *that, in effect, the seller will have used up your deposit before you have*  
8                                *received title to the condominiums. The risk with this is, if the seller were to fall*  
9                                *into liquidation, you could have a problem retrieving your deposit as your*  
10                              *specific deposit monies may have been spent and so you would need to claim*  
11                              *against the other liquid funds which the seller may have along with all the*  
12                              *sellers’ other creditors.”*

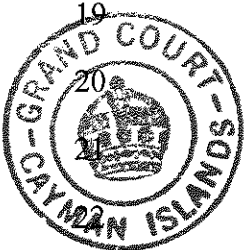
13       110.    Mr. Ryan then told the Plaintiff that as a result of some reorganization, he had  
14                   temporarily put Secret Harbour on hold whilst they reviewed the construction and  
15                   finance programme to ensure it is sustainable. In addition, in the same email Mr.  
16                   Ryan assured the Plaintiff, *“We appreciate your support and are happy to do*  
17                   *whatever you feel comfortable with, your funds are still in escrow.”*

18       111.    The Defendant relies upon Mr. Jamieson’s evidence in which he states that his  
19                   advice is significant as it applied equally to the Plaintiff’s subsequent purchase of  
20                   Deckhouse Lot 12, which is the subject of this claim. The vendor, Cesar’s  
21                   construction contracts with its designated contractor, Deckhouses Construction,  
22                   envisages that a purchaser would take the risk that the construction company would  
23                   not complete the work, or, indeed carry out any work.

1 112. It is the Defendant's position that the Plaintiff was pulling out of any further  
2 dealings with Mr. Ryan and was going to seek a return of his monies when he, the  
3 Plaintiff, informed Mr. Jamieson, that he had made an offer to pay the asking price  
4 for one of the units of Deckhouses. Evidence from Mr. Jamieson reveals that the  
5 Plaintiff told Mr. Jamieson that he had already agreed to transfer his funds held by  
6 Cesar for the Secret Harbour purchase to the new purchase for Lot 12, together with  
7 payment of a further US\$2 million on the 1<sup>st</sup> June 2011, with the balance to be paid  
8 on the 1<sup>st</sup> June 2012.

9 113. One material dispute of fact is that in the Plaintiff's First Affidavit he stated that he  
10 signed the reservation agreement on the 28<sup>th</sup> March 2011 and sent it to Cesar. Mr.  
11 Jamieson's evidence states that, on the 25<sup>th</sup> March 2011, Mr. Ryan's PA, Ms. Doud,  
12 circulated an executed Reservation Agreement signed by the Plaintiff, the  
13 Plaintiff's wife, Cesar and Orion. The Defendant maintained that it is highly  
14 significant that the Plaintiff had executed the Reservation Agreement without any  
15 reference to the Defendant.

16 114. The Defendant relies upon the terms of the Reservation Agreement entered into  
17 between the Plaintiff and Cesar, and in particular upon the statement "*in*  
18 *consideration Cesar acknowledges that it is holding US\$538,000.00 in escrow from*  
19 *the purchaser.*" The purchaser was to instruct Maples and Calder to transfer  
20 US\$174,550.00 to the vendor, and the US\$718,000.00 was to constitute the non-  
21 refundable deposit (the "Deposit") having been paid by the purchaser. In addition,  
22 Mr. Ryan's PA, Ms. Doud, stated in an email, "*As promised, attached is a copy of*  
23 *the executed Reservation Agreement from which you will see SH funds in escrow*  
24 *are non-refundable and these will be transferred to the DH purchase.*" So the  
25 Defendant contends that the monies the Plaintiff paid for the Secret Harbour

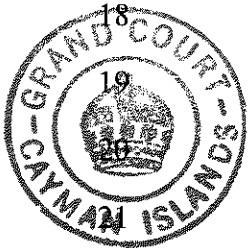


1 Condominium were now paid to Cesar as a non-refundable deposit for the purchase  
2 of Lot 12 by the Plaintiff.

3 115. Aside from not taking any active role in the Deckhouses Lot 12 transaction, and not  
4 having seen the Reservation Agreement before it was executed by the Plaintiff, it is  
5 the Defendant's position that the monies always remained with Cesar, initially in  
6 escrow, for the aborted Secret Harbour purchase and then as a deposit for the  
7 purchase of Lot 12.

8 116. Mr. Jamieson makes the point in his First Affidavit that the Plaintiff had executed  
9 the Reservation Agreement and had already agreed to make substantial payments to  
10 Deckhouses Construction without any security and before the title could be passed.  
11 Mr. Lowe Q.C. submits that the Plaintiff is a sophisticated man in business and it  
12 was no part of the duty of the Defendant to prevent the Plaintiff from assuming  
13 commercial risks. To put it another way, the Defendant contends that it is no part of  
14 the duty of Mr. Jamieson to re-write the elements of a commercial bargain entered  
15 into between the Plaintiff and Mr. Ryan.

16 117. The Defendant relies upon the fact that on the 1<sup>st</sup> April 2011 Cesar's new attorney,  
17 Mr. Jackson, who also acted for Deckhouses Construction, suggested that the  
18 Plaintiff's deposit of US\$718,000.00 should be split between the two contracts,  
19 with \$600,000.00 being used to fund the purchase of the bare land (i.e. Lot 12),  
20 pursuant to the Purchase Agreement, and the balance being applied to the first  
21 payment under the Services Agreement with Deckhouses Construction. Mr.  
22 Jamieson agreed for the funds to be split because, in his view, it would mean that  
23 the Plaintiff's purchase of the bare land would be completed before the first  
24 payment was due under the Services Agreement, it would provide the Plaintiff with

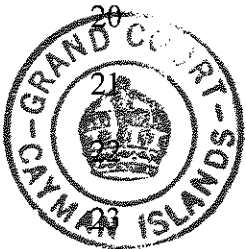


1 some security by way of title to the land, and it would limit the stamp duty payable  
2 by the Plaintiff. Accordingly, the Defendant contends that it is as a result of the  
3 vendor's attorneys' proposal of the payment for the purchase price, that  
4 US\$600,000.00 which was held by the vendor Cesar, was apportioned to the Strata  
5 Lot Purchase Agreement. The Defendant further contends that this was  
6 acknowledged as having discharged the Plaintiff's obligation under the Purchase  
7 Agreement.

8 118. The Defendant takes issue with the Plaintiff's statement of claim, in which the  
9 Plaintiff claims that funds for the purchase of the Lot did not reach Cesar. The  
10 Defendant maintains that Cesar was paid, but Cesar did not use the funds it received  
11 to secure a release over the Charge over Lot 12.

12 119. It is the Defendant's position that the Reservation Agreement was subsequently  
13 superseded by the Purchase Agreement. The Defendant maintains that this was  
14 reflected by Ms. Doud's email sent on the 4<sup>th</sup> April 2011, and also by the Amended  
15 Schedule C which shows the correct price for the Services Agreement of US\$3.9  
16 million, to reflect the fact that, of the total price of US\$4.5 million, US\$600,000.00  
17 was being paid in respect of the purchase of Lot 12, pursuant to the Strata Lot  
18 Purchase Agreement.

19 120. Accordingly, the Defendant's position is that the allocation of US\$600,000.00 for  
20 the purchase of Lot 12 would mean that, as of the 1<sup>st</sup> May 2011 (the date of the first  
21 installment due of US\$1 million under the Services Agreement) Deckhouses  
22 Construction would have been underpaid as it would only receive US\$400,000.00.  
23 This was the US\$118,000.00 deposit balance left over, once the initial deposit of  
24 US\$718,000.00 was partially used to allocate US\$600,000.00 as the payment price

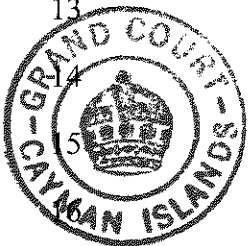


1 for the land; plus the amount of US\$282,000.00, being the first additional payment  
2 made by the Plaintiff. Mr. Jamieson maintains that he clarified this new breakdown  
3 by informing the Plaintiff that he would be paying US\$2million, made up of \$1.4  
4 million, the second installment due on the 1<sup>st</sup> June 2011, and a sum of  
5 US\$600,000.00 being the extent of the underpayment of the initial payment to  
6 Deckhouses Construction Company of US\$1 million.

7 121. On the 10<sup>th</sup> April 2011 the Plaintiff confirmed that he was happy with the terms of  
8 Mr. Jamieson's report on title and was ready to execute the Strata Lot Purchase  
9 Agreement with Cesar and the Agreement for Services with Deckhouses  
10 Construction Company.

11 122. The Defendant accepts that the payment schedule at Appendix C of the Services  
12 Agreement is inaccurate, in that, it indicates that the whole of the sum held by  
13 Cesar from the Secret Harbour payment of US\$718,000.00 was payable under the  
14 Services Agreement. The Defence maintains that the apportionment was not  
15 subsequently questioned by the vendor, Cesar, and that the inaccurate details in  
16 Schedule C of the Services Agreement did not become material. It is the  
17 Defendant's position that the vendor, Cesar, sent transfers to the Defendant on the  
18 footing that the purchase price had been credited to the Plaintiff.

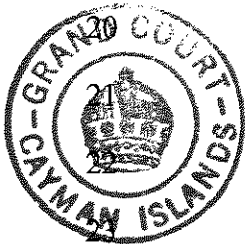
19 123. The Defence submits that the normal procedure is that, prior to completion, the  
20 purchaser's attorneys will have ensured that the purchase contract contains  
21 provision for the vendor to ensure that any security is discharged as a condition of  
22 completion, and that all charges in respect of that security are removed from the  
23 Land Register.



1 124. The Strata Lot Purchase Agreement specifically stated that completion shall take  
2 place “*within fourteen (14) days of the satisfaction of all conditions in this*  
3 *agreement.*”

4 125. Clause 5.2 provides that, “*The vendor undertakes to discharge on or before the*  
5 *completion date any financial Charge registered against the property as of the date*  
6 *of this agreement.*”

7 126. The Defendant maintains that as a consequence of the Purchase Agreement as to the  
8 use of the US\$600,000.00 of the funds already held by Cesar as purchase money for  
9 the land, Cesar was already holding the purchase monies and the Plaintiff had  
10 consequently already fulfilled his side of the bargain prior to formal completion.  
11 The Defence submits that the Plaintiff complains that the Defendant did not ensure  
12 that the purchase price was paid to Cesar. The Defence submits that this is incorrect  
13 and that the purchase price had been paid to Cesar prior to completion and that  
14 Cesar had received all that it was entitled to receive under the Strata Lot Purchase  
15 Agreement. It is the Defendant’s case that, since the vendor, Cesar, had already  
16 been paid the equivalent of the purchase price, it was for Cesar to procure the  
17 release of the Charge. The Plaintiff had already parted with his money when he  
18 entered into the Reservation Agreement, and thus, the Defence maintains that the  
19 Defendant was not in a position to exercise any greater control over what Cesar did  
with the purchase funds. The Defendant never had the funds in its possession, nor  
did the Defendant ever have any control of the funds. It is the Defendant’s position  
that the vendor, Cesar, is in breach of its contractual obligations to the Plaintiff, and  
it is for the Plaintiff to pursue the usual remedies for breach of contract.



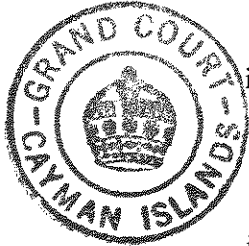
1           127. Mr. Lowe Q.C. submits that there are too many unanswered questions such as:

2                           i. What happened to the money?

3                           ii. Was Cesar paid?

4                           iii. The Plaintiff having paid his money, why did neither Cesar nor  
5                           Deckhouses Construction, nor Mr. Ryan pay the Chargee?

6                           iv. What did Mr. Morrison discuss with Mr. Ryan?



7                           and these are issues of fact which cannot be resolved in summary judgment  
8                           proceedings.

9           128. The Defendant submits that Mr. Jamieson and the Plaintiff had been assured on  
10                           numerous occasions by the vendor Cesar, by Mr. Ryan, by Mr. Ryan's PA, Ms.  
11                           Doud, and by the attorney, Mr. Jackson – acting for Cesar, Mr. Ryan and  
12                           Deckhouses – that the discharge of charge would be forwarded to the Defendant.  
13                           As can be seen from the long and tortured history of this matter, the vendor kept  
14                           promising to obtain the release, and such release never came.

15           129. The Plaintiff entered into the Agreement to purchase Lot 12 after his own  
16                           discussions with Cesar and Mr. Ryan. The Plaintiff signed the Agreement before  
17                           the Defendant saw it, and, the Defendant does not know what took place between  
18                           the Plaintiff and Mr. Ryan or the Plaintiff and Cesar.

19           130. The Defendant submits that the vendor, Cesar, and its nominated Contractor,  
20                           Deckhouses Construction, were under the common control of Mr. Ryan, with the  
21                           common attorney, Mr. Jackson. The Defendant posed the question: There must  
22                           have been a running account of some kind between Cesar and Deckhouses

1 Construction. The question must be asked: Why was the US\$600,000 which the  
2 Plaintiff paid for Lot 12 not used to pay the Chargee? Leading counsel on behalf of  
3 the Defendant submits that is the reason why the Plaintiff is not alleging that the  
4 Defendant should have prevented the Plaintiff from entering into the Purchase  
5 Agreement.

6 131. On the 21<sup>st</sup> April 2011 Cesar acknowledged that it had received US\$600,000.00 in  
7 accordance with the terms of the Strata Lot Purchase Agreement. The Defence  
8 contends that, in addition to Cesar's obligation to hold the purchase price in escrow,  
9 the Plaintiff had the benefit of the undertaking by Cesar in the Strata Lot Purchase  
10 Agreement to give clean and clear title and specifically to discharge any registered  
11 financial Charge on the property. Accordingly, Cesar has the obligation of a  
12 constructive trustee to obtain the discharge of the mortgage over Lot 12.

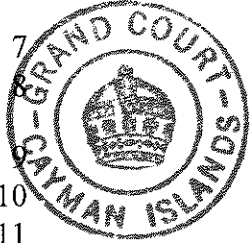
13 132. The Defence concludes by submitting that in all the circumstances it cannot be said  
14 that the Defendant has no defence.



1 *ANALYSIS AND CONCLUSION*

2 133. GCR O.14A reads:

3 “(1) *The Court may upon the application of a party or of its own motion*  
4 *determine any question of law or construction of any document arising*  
5 *in any cause or matter at any stage of the proceedings where it appears*  
6 *to the Court that –*



7 (a) *such question is suitable for determination without a full trial*  
8 *of the action; and*

9 (b) *such determination will finally determine (subject only to any*  
10 *possible appeal) the entire cause or matter, or claim or issue*  
11 *therein.*

12 (2) *Upon such determination the Court may dismiss the cause or matter or*  
13 *make such order or judgment as it thinks just.”*

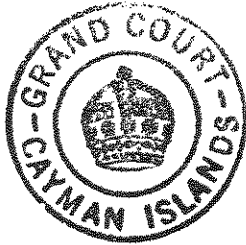
14 134. I am grateful to both leading counsel for their careful written submissions.

15 135. It is common ground between both leading counsel that the approach to Summary  
16 Judgment is set out in the English Court of Appeal case of *Swain v. Hillman and*  
17 *Another* [2001] 1 All E.R. 91 which has been followed by the Grand Court in  
18 *Rankine v. Scott, Martin and Ebanks* [2008] CILR Note 9. The approach can be  
19 summarised as follows:

20 i. In an appropriate case the Court will grant summary judgment to a  
21 Plaintiff;

22 ii. The issue on such an application is whether the Defendant has no real,  
23 as opposed to fanciful, prospect of success;

24 iii. The Court has to test that by reference to what would happen if the  
25 matter were allowed to go forward to a trial;



- 1                   iv. The Court should generally not grant summary judgment when there  
2                   are disputed issues of fact or where there should be a trial for some  
3                   other reason;
- 4                   v. Where there is a dispute of fact the Court should only grant summary  
5                   judgment where it can see with confidence that the issue would be  
6                   determined in favour of the applicant.

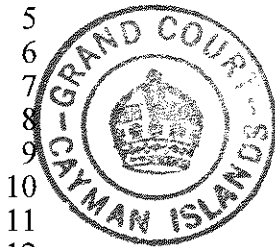
7           136. The learned editors of the Supreme Court Practice 1999 have referred to Lord  
8           Bingham's dicta, when he was Master of the Rolls in (*E (a Minor) v. Dorset*  
9           *County Council* [1995] 2 A.C. 633 [1994] 4 All. E.R. 640) at O.14A/2/5 on page  
10          200:

11                   *"Sir Thomas Bingham MR considering the inter-relation of striking out and*  
12                   *O.14A expressed unease at "... deciding questions of legal principle without*  
13                   *knowing the full facts". However, he continued "but applications of this kind*  
14                   *are fought on ground of a Plaintiff's choosing, since he may be generally*  
15                   *assumed to plead his best case....[if] the legal viability of a cause of action is*  
16                   *unclear ( perhaps because the law is in a transition), or in any way sensitive to*  
17                   *the facts, an order to strike out should not be made. But if, after argument, the*  
18                   *Court can be properly persuaded that no matter what (within the reasonable*  
19                   *bounds of the pleading) the actual facts [are] the claim is bound to fail for want*  
20                   *of a cause of action, I can see no reason why the parties should be required to*  
21                   *prolong the proceedings before that decision is reached."*

22

23          137. Having read the Plaintiff's two affidavits and the two affidavits of Mr. Jamieson, I  
24          find that there are questions which are not suitable for determination without a full  
25          trial of the action. As Lord Bingham stated in *E (a Minor) v. Dorset County*  
26          *Council*, I have considerable unease in endeavouring to decide questions of legal  
27          principle without knowing the full facts, and, in this case, there is a dispute on a few  
28          important material facts, and a significant dispute on their interpretation.

1 138. I refer to the Second Edition of *Civil Litigation in the Cayman Islands* by Deborah  
2 Barker Roye, at paragraph 12.9 on page 213. Ms. Roye refers to the case before the  
3 former Chief Justice Harre CJ., *Brown v. Green Thumb Nursery* [1994-5] CILR  
4 Note 7 and states:



5 “The Court took some time to deal with the appropriate use of, and test for,  
6 summary disposal on a point of law under O.14A. Harre CJ stated that the fact  
7 that matters of law are of complexity and importance did not render procedure  
8 under 14A inappropriate. The Court’s discretion under O.14A may be  
9 exercised even when summary determination requires extensive argument.  
10 Harre CJ held the test to be applied in deciding whether one should utilise  
11 O.14A was “whether all necessary and material facts had been duly proved or  
12 admitted so that the Court was not required to hear evidence or make its own  
13 findings of fact.”

14  
15 139. The Plaintiff submits that the Defendant failed to pay sufficient attention to the  
16 terms of the Reservation Agreement and failed to appreciate that the sums held in  
17 escrow by Cesar and Maples and Calder were not intended to serve as, or as part of,  
18 the purchase price for the Lot, but, as confirmed by the Services Agreement, were  
19 to be transferred to, in the event, Deckhouses Construction.

20 140. The Defendant claims that it was not instructed to advise on the terms of the  
21 Reservation Agreement and also that it was never in a position to change or amend  
22 the terms of the Reservation Agreement entered into by the Plaintiff and Orien and  
23 Cesar – after discussions between the Plaintiff and Mr. Ryan.

24 141. The Plaintiff claims that the Defendant permitted the Plaintiff to enter into the  
25 Purchase Agreement on the incorrect assumption that Cesar held the sum of  
26 US\$600,000.00 in escrow pending completion, when it would be released to Cesar  
27 as the purchase price for Lot 12. From the evidence in the affidavits of the Plaintiff

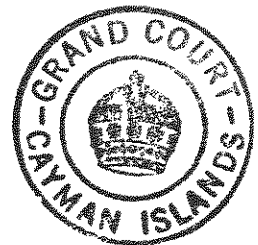
1 and Mr. Jamieson there is controversy and a dispute between the parties on this  
2 particular issue.

3 142. The Plaintiff filed an amended Statement of Claim dated the 30<sup>th</sup> May 2013 in  
4 which he added the claim that the Defendant had failed to ensure that Cesar retained  
5 US\$600,000.00 out of the US\$718,000.00 held in escrow, but arranged for the  
6 whole of such US\$718,000.00 to be transferred to the Contractor.

7 143. The Defendant maintains that, according to the Reservation Agreement, the funds  
8 the Plaintiff had paid were to be kept in escrow until the Purchase Agreement had  
9 been executed by the parties, and then the deposit would be released from escrow to  
10 Deckhouses Construction Company.

11 144. Furthermore, the Defendant contends that there was a further agreement entered  
12 into between Mr. Jamieson and Mr. Jackson – the latter acting on behalf of Cesar  
13 and Deckhouses Construction Company - whereby they agreed that US\$600,000.00  
14 of the sum of US\$718,000.00 would be held by Cesar in escrow pending  
15 completion of the purchase of the Lot, and the balance would be taken as part  
16 payment under the Services Agreement.

17 145. The Plaintiff claims that the Defendant failed to appreciate that the purchase price  
18 of US\$600,000.00 was to be paid by the Plaintiff on the 1<sup>st</sup> June 2001. The  
19 Defendant submits that on the affidavit evidence the Plaintiff had paid this purchase  
20 price to the vendor Cesar.



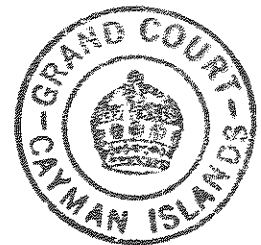
1       146.    The Plaintiff claims that the Defendant failed to advise him that the aggregate sum  
2                   of US\$600,000.00, should be paid to Cesar and not to Deckhouses Construction  
3                   Company. On Mr. Jamieson’s evidence in his affidavit, the Defendant maintains  
4                   that US\$600,000.00 was paid to Cesar, and then it became a matter for Cesar to  
5                   specify the account where this money would be held.

6       147.    From my review of all the affidavits and exhibits relating to the aforementioned  
7                   disputed facts, I cannot find that the Defendant has no real defence to the Plaintiff’s  
8                   Statement of Claim. Moreover, I find that the Defendant has more than a fanciful  
9                   prospect of success and, accordingly, it is not an appropriate case for summary  
10                  judgment. To adopt Harre CJ’s words in *Brown v. Green Thumb Nursery* [1994-5]  
11                  CILR Note 7, all the necessary and material facts have not been proved, which  
12                  would allow for summary determination under GCR O. 14A.

13       148.    The Plaintiff has paid over the initial sums that were agreed between him and Mr.  
14                   Ryan, pursuant to the Reservation Agreement, and without any security. If Cesar  
15                   had honoured its obligation to the Plaintiff, under their agreement, Cesar would  
16                   have paid the mortgagee, who then would have provided the release which would  
17                   have allowed the Plaintiff to obtain the title to Lot 12.

18       149.    The Court has considerable sympathy for the Plaintiff who, having paid significant  
19                   sums to Cesar and Deckhouses Construction, has nothing to show for these  
20                   payments but delay, expense and unfulfilled promises from Mr. Ryan, his PA, and,  
21                   Mr. Jackson, acting on the instructions of one or more of his clients – Cesar,  
22                   Deckhouses Construction, and/or Mr. Ryan.

23



1 150. From the evidence from both parties it is unclear where the US\$600,000.00 paid by  
2 the Plaintiff to Cesar ended up. There is a lack of evidence, and before this Court  
3 can make any final findings of fact, it would require full and frank discovery from  
4 Cesar and Deckhouses Construction.

5 151. It also seems to be common ground between the parties that both Cesar and its  
6 designated contractor, Deckhouses Construction, were controlled by Mr. Ryan.  
7 Again, before this Court can make any findings of fact in this regard, evidence by  
8 way of oral discovery or interrogatories or written statements or affidavits would  
9 need to be received from Mr. Ryan, Mr. Ryan's PA, Ms. Doud, and Mr. Jackson,  
10 who acted on behalf of Cesar, Deckhouses Construction and Mr. Ryan.

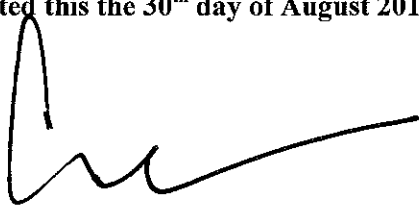
11 152. It is still open for the Plaintiff to succeed in proving his claim against the  
12 Defendant, but, it would be impossible for this Court in an application under GCR  
13 O.14A to make any final determination on either the question of where liability lies  
14 in relation to the Plaintiff's loss, or on quantum.

15 153. Accordingly, and for the aforesaid reasons, I reject the Plaintiff's application for  
16 summary judgment.

17 154. Should counsel wish to address me on costs, I will hear them at a time convenient  
18 to all parties.

19 **Dated this the 30<sup>th</sup> day of August 2013**

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23 **Honourable Mr. Justice Charles Quin**  
24 **Judge of the Grand Court**

