

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

3 **CAUSE NO. FSD 11 OF 2015 (IMJ)**

4
5 **BETWEEN:**

6
7 **TABITHA PHILANDER (AS THE TRUSTEE IN**
8 **BANKRUPTCY OF THE ESTATE OF ROBERT**
9 **DON FOSTER, A BANKRUPT)**

10 **PLAINTIFF**

11 **AND**

12 **(1) GKF HOLDINGS LIMITED**

13
14 **(2) GARY KIRK FOSTER**

15 **DEFENDANTS**
16

17 **Appearances:** **Mr. Peter McMaster Q.C. and Mr. Andrew Jackson of Appleby for**
18 **the Plaintiff**
19 **Mr. Thomas Lowe Q.C. appearing with Mr. Ian Huskisson and Ms.**
20 **Charmaine Richter of Travers Thorp Alberga for the Defendants**

21
22 **Before:** **The Hon. Justice Mangatal**

23
24 **Heard:** **2, 3, 4, 5, 8, 10 and 12 June 2015**

25
26 **Draft Judgment** **7 December 2015**

27 **Circulated:**

28
29 **Judgment Delivered:** **9 December 2015**
30



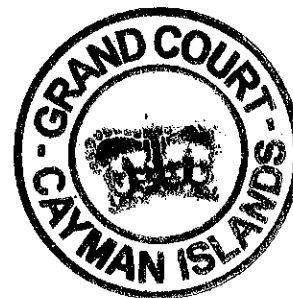
31 *Headnote*

32 *Claim by Trustee in Bankruptcy on behalf of Estate of Bankrupt - Claim as Guarantor - Implied*
33 *Contract - Equitable Subrogation - Restitutionary Remedies – Regard to be had to substance of*
34 *transactions - Unjust Enrichment*

35
36 **JUDGMENT**

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JUDGMENT

1. There is an area of land part of Bloody Bay, in Little Cayman, Cayman Islands, which has been owned by the Kirkconnell family for generations. This claim is concerned with rights allegedly arising in relation to a parcel of that land.

2. The Plaintiff is the Trustee in Bankruptcy of the Estate of Robert Don Foster, a Bankrupt ("the Trustee"). The Trustee was appointed as Trustee in Bankruptcy pursuant to Provisional and Absolute Orders for Bankruptcy, respectively dated 7 October and 9 December 2011.

3. The First Defendant GKF Holdings Limited ("GKF") is an ordinarily resident Cayman Islands Company. It was incorporated on 4 December 1990. It has its registered office at the offices of SH Corporate Services Ltd., 3rd Floor, Harbour Centre, George Town, Grand Cayman, Cayman Islands.

4. The Second Defendant, Gary Kirk Foster ("Gary") is a resident of the Cayman Islands, and the brother of the bankrupt, Robert Don Foster ("Don"). At all material times prior to 23 September 2010, Gary was a director and the sole shareholder of GKF. He remains a director of GKF, but now owns only fifty percent of its shares, having transferred the other fifty percent to his former wife, Teresa Owen Foster ("Teresa"), pursuant to an agreement settling their matrimonial proceedings. I should just say that no disrespect is meant by referring to these or other parties by their first names; I do so just for ease of

1 reference. Indeed, that is the manner in which, they, and other persons, are referred to in
2 the Statement of Claim.

3
4 5. The Statement of Claim indicates that no substantive relief is being sought against Gary,
and that he has been joined as a party because he is a party to the agreements pursuant to
which substantive relief is sought against GKF. The Trustee further indicates that she
would be content for Gary to play no active part, if he so chose.

9 6. Essentially, the Trustee maintains that a number of claims are available to her by
10 operation of law, these arising under the law of guarantee by way of implied contract,
11 under the law of unjust enrichment, and under the equitable doctrine of subrogation. The
12 Defendants deny that the Trustee is entitled to any of those rights.

13
14 7. I must say that this case has been a very complex and convoluted one. I have tried my
15 best to simplify as far as possible, and to summarize. However, that has not been easy,
16 given that the case has consisted of thousands of pages of documents, and over forty legal
17 authorities having been cited to me, accompanied by over a hundred pages of legal
18 submissions. The judgment is long and I have therefore provided an index, which I trust
19 will prove helpful.

20
21 8. I apologize for the delay in delivering the Judgment, but it has mainly been because of
22 the unusual nature of this case. I thank the parties for their patience.

1 **BACKGROUND**

2 9. Don and Gary are the sons of Captain Rudland Foster ("Captain Rudland") and Alex
3 Olivine Foster ("Miss Alex"). Both Captain Rudland and Miss Alex are now deceased.

4
5 10. The Grand Caymanian is a time share project that was built in two phases on a 32 acre
6 plot. The Grand Caymanian was originally a joint venture between Gary and his late
7 father Captain Rudland.

8
9 11. Grand Caymanian Beach Club & Resort Limited ("GCBCR") is a Cayman Islands
10 Company which owned the freehold interest in the land comprising the resort at the time
11 of this development, and up until the sale of the project, or certain parts thereof to Grand
12 Caymanian Limited ("GCL") in 2010. Grand Caymanian Resorts Limited ("GCR") is a
13 Cayman Islands Company which leased the resort from GCBCR under a long lease
14 (originally until 2050) and was responsible for its management, at least until 2010 when
15 the sale to GCL took place. GCBCR and GCR are together referred to as "GCR"
16 and in some instances as "the resort companies".

17
18 12. A loan agreement was made between Heller Financial Inc., (later GE Capital Real Estate)
19 ("Heller") and GCBCR on October 16 2000. The shares in GCBCR (like the shares in
20 GCR) were at the time owned 60% by Captain Rudland, and 40% by Gary. This loan,
21 and others, along with personal funds, especially those of Captain Rudland, funded Phase
22 1 of the Grand Caymanian development.

1 13. Miss Alex owned a parcel of land at Little Cayman West, Block 82A, parcel 20 ("Bloody
2 Bay"). In February 2002 Miss Alex had granted a third party collateral charge over
3 Bloody Bay to Cayman National Bank to secure lending of US\$3.5 million to one of
4 Captain Rudland's companies, Soundland, which company owned one of the original
5 tracts of land.

6
7 14. By a credit facility letter dated 19 January 2004, followed by a loan agreement dated 19
8 February 2004, First Caribbean International Bank Cayman Limited ("FCIB") agreed to
9 lend GKF the sum of US\$6.45 million. The Loan Agreement provides as follows:

10 *"Facility A, [which was in the sum of US\$4,200,000] which was intended*
11 *to be applied in or towards the repayment of an existing debt owed by*
12 *Grand Caymanian Beach Club & Resort Ltd to Heller Financial Inc.*
13 *Facility B [which was in the sum of US\$2,000,000] is intended to be*
14 *applied in or towards the repayment of an existing debt due from*
15 *Soundland Ltd to Cayman National Ltd and the repayment of an existing*
16 *debt due from the Borrower to the Scotia bank (Cayman Islands) Limited.*
17 *Facility C [which was an overdraft facility in the sum of \$250,000] is to*
18 *supplement the working capital requirements of the Borrower and for no*
19 *other purposes whatsoever."*
20

21 15. On 19 February 2004, Miss Alex charged Bloody Bay in favour of FCIB. The First
22 Charge secured lending by FCIB to GKF in a principal sum of US\$6,450,000 under the
23 loan agreement executed on even date.

24
25 16. Captain Rudland died in March 2004. On his passing, Miss Alex inherited his shares in
26 the resort companies.





1 17. On 12 July 2005, Miss Alex charged Bloody Bay in favour of FCIB to secure further
2 lending by FCIB to GKF.

3
4 18. Miss Alex died on the 9 April 2007, leaving her estate to Don and Gary in equal shares.
5 The legal title to Bloody Bay was transferred to them both, as joint proprietors, by Miss
6 Alex's personal representatives, by way of a Transfer of Land Form dated 10 October
7 2007, and registered on 31 October 2007. Bloody Bay was still subject to the Charges at
8 the time of this Transfer.

9
10 19. On Miss Alex's passing, on or about the 31 July 2007, 30% of the shares in the resort
11 companies, which Miss Alex had inherited from Captain Rudland, went to Gary and 30%
12 went to Don. This meant that Gary then had a total of 70% interest, while Don held 30%
13 interest as shareholders.

14
15 20. At all material times and over many years, Teresa assisted Gary with the financial affairs
16 of GKF. Teresa also handled the administrative and financial side of the Grand
17 Caymanian business, GCR, alongside Captain Rudland and Miss Alex (when they were
18 alive) and on her own afterwards.

19
20 21. Captain Charles Leonard Kirkconnell ("Captain Charles"), now deceased, was the brother
21 of Miss Alex and the Uncle of Don and Gary. Captain Charles was the owner of land
22 adjoining Bloody Bay. Both Bloody Bay and the land owned by Captain Charles had

1 been in the Kirkconnell family for some time (all located in the area of Little Cayman
2 known as Bloody Bay).

3
4 22. By an Agreement dated the 16 April 2008, Don, Gary and Captain Charles, entered into a
5 "Sale Agreement" ("the April 2008 Agreement"), which was in the following terms:

6 *"Sale Agreement*

7 *Sale Agreement between:*

8 *Robert Don Foster & Gary Kirk Foster, Landowners*

9 *AND*

10 *Captain Charles Kirkconnell Guarantor/Purchaser*

11 *And Dated: April 16, 2008*

12 *It is hereby agreed as follows:*

13 *Robert Don Foster and Gary Kirk Foster are the sole owners of Block 82A*
14 *Parcel 20 in Little Cayman. The land currently has a collateral charge*
15 *held by First Caribbean International Bank as part of a loan to the Grand*
16 *Caymanian Beach Club & Resort Ltd of which Robert Don Foster and*
17 *Gary Kirk Foster are the sole owners.*

18 *It has been agreed that Captain Charles Kirkconnell will sign a*
19 *Guarantee to First Caribbean International Bank for the value of the land*
20 *which is agreed upon at USD\$3,000,000.00 for a period of one year. At*
21 *the end of the year if Robert Don Foster and Gary Kirk Foster have not*
22 *repaid the monies advanced against this Guarantee then Captain Charles*
23 *Kirkconnell shall have the right to take the land for the total value of*
24 *USD\$3,000,000.00.*

25 *If there is a balance of less than the USD\$3,000,000.00 owed against this*
26 *Guarantee then Robert Don Foster and Gary Kirk Foster shall agree with*
27 *First Caribbean International Bank to personally accept responsibility of*
28 *the outstanding balance and use their own personal properties such as the*
29 *residences they own for collateral to obtain financing to repay the balance*



1 to Captain Charles Kirkconnell. At that time the land would remain in the
2 names of Robert Don Foster and Gary Kirk Foster.”

3 (My emphasis)

4
5 23. By letter dated the 17 April 2008, signed by FCIB’s representatives, Gary and Teresa as
6 Directors of GKF, and Gary, Teresa, Don and Captain Charles as Guarantors, FCIB
7 established a credit facility for GKF, to be read in conjunction with existing Credit
8 Agreements between GKF and FCIB. Some of the material terms of the Agreement are as
9 follows:

10 “

11 Borrower:

12 GKF Holdings Ltd

13 Loan Amount:

14 US\$3,000,000.00 ...

15 Purpose:

16 Loan proceeds are to be used to fund US\$600,000 of the outstanding bills
17 to contractors associated with Phase 2 of The Grand Caymanian Beach
18 Club and Resort, Loan proceeds of US\$250,000 to be placed in an
19 account for debt servicing purposes. The remaining funds totaling
20 US\$2,150,000.00 will be used to continue the construction of Phase 2 of
21 the Grand Caymanian Beach Club and Resort

22

23 Repayment:

24 Unless we make demand, the Borrower will pay First Caribbean as
25 follows:

26 The Facility is being guaranteed by Capt. Charles Kirkconnell supported
27 by hypothecated cash on deposit with First Caribbean in the name of the
28 Guarantor for a 12 month period (from the date of this Credit Agreement).

29 At the end of the 12 month period, if the Borrower is unable to repay the



1 facility totaling US\$3,000,000.00 from outside sources, the cash security
2 will be applied against Bank Loans.

3 Security:

4 The following security is required for the US\$3,000,000.00 increase:
5 Guarantee from Capt. Charles Kirkconnell in the amount of
6 US\$3,000,000.00 supported by Hypothecated Fixed Deposits held with
7 First Caribbean totaling US\$3,000,000.00.

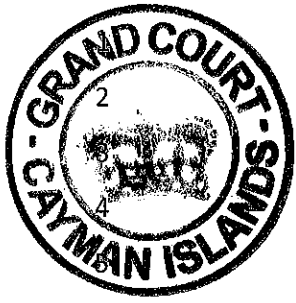
8 Conditions Precedent

- 9 1. Security outlined above is to be put in place prior to draw down of the
10 loan.
11 2. A debt service fund is to be established in an account with First
12 Caribbean for US\$250,000.00 from the loan proceeds.
13 3. Loan proceeds totaling US\$2,150,000 will only be accessed upon the
14 closing of the Foster Bay Villas sale and the net proceeds totaling
15 US\$6,000,000 applied to the outstanding facilities of the Borrower.
16 4. A copy of the purchase and sale agreement between Gary Kirk Foster
17 and Robert Don Foster and Capt. Charles Kirkconnell.
18 5. Independent Legal Advice duly executed by Robert Don Foster is to be
19 provided to First Caribbean

20 ”

- 21
22 24. Guarantees were executed by Don, Gary, Teresa, and Captain Charles on or about the 21st
23 April 2008. Each of the Instruments of Guarantee provided a continuing guarantee of
24 GKF's debts, and also contained an "all monies clause", by which each of the Guarantors
25 agreed to pay all monies outstanding, as principal debtors, in the manner set out in Clause
26 11. That Clause reads as follows:

27 "11. Principal Debtor. All monies and liabilities (whether matured or
28 unmatured, present or future, direct or indirect, absolute or contingent)
29 obtained from First Caribbean International Bank will be deemed to form



part of the Customer's Debts, notwithstanding the occurrence of any one or more of the events described in section 10(k). I will pay First Caribbean International Bank as principal debtor any amount that First Caribbean International Bank cannot recover from me as Guarantor immediately following demand as provided in this Guarantee."

6

7 25. In addition to the other forms of security which it obtained from Captain Charles, FCIB
8 also had Captain Charles execute an Instrument of Hypothecation by which Captain
9 Charles agreed that a deposit which he had in the sum of US\$3,000,000, or parts thereof,
10 could, in the event of default by GKF in the repayment of its indebtedness, be
11 appropriated by FCIB and applied to the indebtedness.

12

13 26. On the 23 April 2008, Don executed a "DECLARATION FROM THOSE WHO
14 DECLINE INDEPENDENT LEGAL ADVICE" which was in the following terms:

15 To:

16 FIRST CARIBBEAN INTERNATIONAL BANK (CAYMAN) LIMITED

17 YOUR BORROWER: GKF HOLDINGS LTD.

18 TYPE OF SECURITY: REAL ESTATE

19 BANK CHARGE FORM NO: DATED: 23 APRIL 2008

20 I hereby confirm and acknowledge as follows:

21 1) That I have given security to the Bank which covers the liabilities of
22 the Borrower. If the borrower does not repay the Bank, it may sell the
23 charged assets.

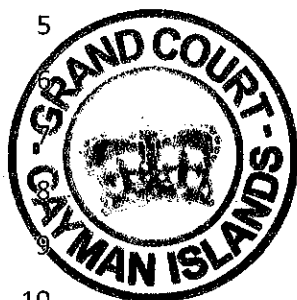
24 2) That I have given a guarantee and indemnity to the Bank. If the
25 borrower does not repay the Bank, I may have to pay instead.

26 3) You have recommended that I obtain independent legal advice before
27 signing the charge form/guarantee and I have declined to accept your
28 recommendation.

1 Signed [Don].....
2

3 (For Bank Use Only)

4 MANAGER'S NAME:



6 I confirm that I interviewed (name of surety) Robert Don Foster on
7 (date)22 April 2008 because they have declined to accept the Bank's
8 recommendation to obtain legal advice. The surety has given the
9 following reasons for declining:

10 Fully understand that the Land in Little Cayman has been pledged to
11 the Bank as security for loans to GKF Holdings Ltd.....
12 ”

13
14 27. The following year, by letter dated 3 April 2009, a clearly dissatisfied Captain Charles
15 wrote to Don and Gary as follows:

16 “April 3, 2009

17

18 Dear Gary and Don,

19 Re: SALES AGREEMENT & MY PERSONAL GUARANTEE FOR US\$3
20 MILLION

21 1) I refer to the above and to the following:

- 22 a) Document titled “Sales Agreement” among ourselves dated 16th
23 April 2008 (the “Sales Agreement”), a copy of which is attached for
24 your reference).
- 25 b) First Caribbean International Bank (“FCIB”) credit facility offer
26 letter to GKF Holdings Ltd .(“Offer Letter”) dated 17th April 2008,
27 wherein FCIB agreed to loan US\$3 million (the “Loan”) to GKF
28 Holdings Limited.
- 29 c) Guarantee from myself to FCIB dated 21st April 2008 (the
30 “Guarantee”).

1 2) I hereby remind you that pursuant to the Sales Agreement you have
2 several obligations to me so that my Guarantee and related
3 hypothecation of deposits with FCIB can be released on 15th April
4 2009. These obligations include:

5 a) Transferring to me land at Block 82A Parcel 20 ('Parcel 20') in
6 the event that, by 15th April 2009, you have failed to pay FCIB
7 sufficient monies to release the Guarantee. As you know, FCIB
8 advanced the Loan in April last year for your project Grand
9 Caymanian Beach Club and Resort Ltd., and my understanding
10 from FCIB is that the balance currently owing to FCIB is
11 approximately US\$2.2 million. Recently, it has come to my attention
12 that, upon signing the Sales Agreement and to this day, you have
13 had multiple charges on Parcel 20 totalling US\$7.4 million. I do
14 not yet know how I was misled to believe that Parcel 20 was not
15 materially encumbered. I need to know from you the current status
16 of any FCIB loans supported by those charges

17 b) Agreeing with FCIB to accept personal responsibility for the
18 outstanding balance owed to FCIB approximating US\$2.2 Million
19 and to have FCIB extinguish my Guarantee and return to me the
20 cash deposits that I have hypothecated to FCIB. Please note that, to
21 meet this obligation, you are obligated to pledge your own
22 properties as collateral, such as the residences you own. Recently,
23 it has come to my attention that, upon signing the Sales Agreement
24 and to this day, you have had multiple charges totaling US\$8.5
25 Million on at least one of those residences. I hope that I also have
26 not been misled with regard to the good collateral and financing
27 ability you claimed to have in the Sales Agreement.

28 3) In mid-March 2009, I reminded you that my Guarantee would soon
29 expire, and you committed to meet with FCIB about refinancing and to
30 let me have their decision by 31st March 2009. We are now in April
31 2009, and you have not provided any additional information regarding



1 the manner in which my guarantee will be released and my funds
2 returned to me.

3 4) To be clear, I expect you to resolve this matter fully and satisfactorily
4 on 15th April 2009, by complying with one of the obligations described
5 in 2(a) or 2(b) above. You have had almost a full year to prepare for
6 the expiration of my Guarantee, and you are very near the deadline for
7 fulfilling your obligations.

8 5) Because my Guarantee and my funds need to be released very soon, I
9 have copied this letter to FCIB and will follow up with them to ensure
10 that they focus on this issue.

11 Please send me your proposals regarding this matter by return
12 mail....”

13 (My emphasis)
14
15

16 28. A Resolution of the Directors of GKF, was passed, as of April 21 2009, to the following
17 effect:

18 “.....

19 WHEREAS

20 1. The Company procured a loan of US\$3 million (the “Loan”) from First
21 Caribbean International Bank (Cayman) Limited (the “Bank”) in relation to
22 its development known as the Grand Caymanian Beach Club and Resort.

23 2. A condition of the Loan was that Captain Charles Kirkconnell (“CLK”)
24 provide a guarantee (the “Guarantee”) to the bank, and further, CLK was
25 required by the Bank to hypothecate certain of his bank deposits to the Bank
26 to support the Loan.

27 3. As the Loan was discharged, pursuant to the arrangement between CLK,
28 Robert Don Foster and Gary Kirk Foster, the Guarantee will no longer be
29 required.



IT WAS RESOLVED to cancel the Guarantee and release CLK from any and all further or other obligations in connection with the Guarantee (including the hypothecation of bank deposits) and the Loan and that any one Director is authorized to sign the documentation in relation thereto."

(My emphasis)

6

7 29. On the 30 April 2009, Captain Charles, GKF, Don, and Gary entered into the following
8 written agreement:

9 "....

10 WHEREAS IT IS HEREBY ACKNOWLEDGED AND AGREED, AS
11 FOLLOWS:

12 (1) CLK and the Landowners entered into an agreement (the "Sale
13 Agreement") dated 16 April 2008. The Sale Agreement required CLK
14 to provide a guarantee (the "Guarantee") to First Caribbean
15 International Bank (Cayman) Limited (the "Bank") in connection with
16 a loan of US\$3m (the "Loan") provided by the Bank to GKF.

17 (2) Further, CLK was required by the Bank to hypothecate certain of his
18 bank deposits to the bank to support the Loan.

19 (2) [sic] CLK provided the Guarantee but the Landowners failed to repay
20 the Loan by the aforesaid date and the parties have now agreed that
21 (in consideration of all the agreements contained herein and in
22 particular, effective as at the date hereof and at a closing to be held at
23 the Bank):

24 (i) Upon CLK releasing from his deposits to the Bank US\$3m
25 effectively discharging the Loan, and

26 (ii) Upon the cancellation of the Guarantee by the Bank, and

27 (iii) Upon the return to CLK by the Bank of the excess above US\$3m
28 of his deposits hypothecated to the bank in connection with the
29 Loan, and

(iv) Upon the delivery by the Landowners to CLK of a valid and registrable transfer to CLK of land with title to Little Cayman West, Block 82A, Parcel 20 ("the Land") free and clear of all registered charges and encumbrances.

CLK shall be hereby released from any and all further or other obligations to the Landowners in connection with the Guarantee and the Loan and the Land and the Landowners shall be hereby released from any and all further or other obligations to CLK in connection with the Loan and the Land.



(4) This Agreement sets out the entire agreement between the parties in respect of the matters contained herein and all statements, representations, terms and conditions, warranties, guarantees, proposals, communications and understandings when ever given and whether orally or in writing shall be of no effect.

(5) This Agreement shall be governed by and construed in accordance with the laws of the Cayman Islands for the time being in force.

....."

THE PLEADINGS

THE STATEMENT OF CLAIM

30. The Statement of Claim avers in paragraph 9, that in or about, April 2008, FCIB was contemplating making a loan to GKF of US\$3,000,000, or alternatively, it was demanding payment from GKF of an existing loan of US3,000,000. Further, that GKF had also asked Captain Charles to provide a guarantee to FCIB to support the loan of US \$3,000,000. It is also stated that the Trustee has no personal knowledge of these arrangements, but infers them from statements in documents.

1 31. At paragraph 11, it is alleged that it was GKF, acting by Gary or by Teresa (or by both of
2 them) that proposed to Don that he and Gary should enter into an agreement with Captain
3 Charles to induce him to provide a guarantee to FCIB of liabilities owed by GKF in an
4 amount of US\$3,000,000 and Don then agreed to enter into the proposed agreement
5 together with Gary.

6
7 32. Paragraph 12 alleges that the April 2008 Agreement is unclear in certain respects and
8 contains an incorrect statement that the liability to FCIB was owed by GCBCR.

9
10 33. Paragraph 15 alleges that the nature of the April 2008 and April 2009 Agreements was
11 such that:

12 *"15. Under the two agreements.....:*

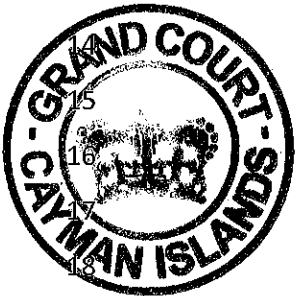
13 *15.1. Capt Charles agreed to guarantee the liability of GKF as principal*
14 *debtor to FCIB under a loan of US\$3,000,000.*

15 *15.2. Gary and Don agreed to guarantee Capt Charles' repayment of the*
16 *amount of US\$3,000,000 should Capt Charles be called upon under his*
17 *guarantee to FCIB. Alternatively they agreed to indemnify Capt Charles*
18 *in the full amount of US\$3,000,000 should Captain Charles be called*
19 *upon under his guarantee to FCIB.*

20 *15.3. The means by which Gary and Don agreed to perform their*
21 *obligation as -guarantors or indemnifiers was by transferring Bloody Bay*
22 *to Capt Charles.*

23
24 34. At paragraph 16, the Trustee alleges what the consequences of Captain Charles
25 releasing the deposits and transfer of Bloody Bay were, as follows:

26 *"16. As guarantor of GKF's liability to FCIB, Capt Charles, on meeting*
27 *the guaranteed liability by releasing his deposits, became entitled to*





1 receive the sum of US\$3,000,000 from GKF by reason of one or more of the
2 following:

3 16.1. As a matter of the law of guarantee, he was entitled to be
4 indemnified by GKF in the amount of US\$3,000,000;

5 16.2. Under an implied contract, he was entitled to such an indemnity as a
6 result of his having provided his guarantee at the request of GKF; AND

7 16.3. Under the law of restitution, he was entitled to a payment of
8 US\$3,000,000 from GKF to prevent GKF being unjustly enriched."

9
10 35. At paragraph 17, the Trustee continues her allegations as follows:

11 "17. As a party providing a guarantee or indemnity to Capt Charles in
12 respect of his own liability to FCIB in respect of the debt owed by GKF,
13 Don became entitled to receive the sum of US\$1,500,000 from GKF, by
14 reason of one [or] more of the following:

15 17.1. He became entitled to be subrogated to Capt Charles' rights against
16 GKF to be paid the sum of US\$3,000,000 on the bases pleaded above at
17 paragraph 16.

18 17.2. He became entitled under an implied contract directly between
19 himself and GKF to an indemnity in this amount as a result of having
20 agreed with Captain Charles, at the request of GKF, to transfer Bloody
21 Bay to him as part and parcel of the arrangements made under the April
22 2008 and April 2009 Agreements for Capt Charles' guarantee.

23 17.3. He became entitled to a payment of US\$1,500,000 from GKF under
24 the law of restitution to prevent GKF being unjustly enriched."

25
26 36. The Trustee's pleading concludes with a claim for payment from GKF in the sum of
27 US\$1,500,000 plus interest.

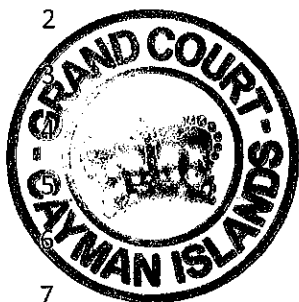
1 **THE AMENDED DEFENCE AND COUNTERCLAIM**

2 37. The Amended Defence denies paragraph 9 of the Statement of Claim, and at paragraph 6,
3 asserts that the correct position was as follows:

4 “6....



- 5 a. *The principal purpose for which the loan facility was obtained was*
6 *for FCIB to make advances to the Grand Caymanian Beach Club*
7 *& Resort Limited and The Grand Caymanian Resorts Limited*
8 *(together "GCR") in order to enable GCR to fund the construction*
9 *of an intended time share development of the same name (the*
10 *"Grand Caymanian").*
- 11 b. *From 9 March 2004 the shares in the GCR companies were*
12 *beneficially held by Gary and his mother. Miss Alex, Gary and*
13 *(following Miss Alex's death,) Don, had to give personal*
14 *guarantees and/or assume liability in respect of the FCIB loan*
15 *facilities which were secured, inter alios, by their respective*
16 *interests in the land at Bloody Bay.*
- 17 c. *FCIB was unwilling to accept GCR as borrower because it had no*
18 *certain income stream with which to service the loan and*
19 *insufficient assets to secure the debt. Accordingly FCIB required*
20 *the relevant loan facility to be formally in the name of [GKF]*
21 *because [GKF] was in a position to service the loan from rental it*
22 *received from a rental property known as Foster Bay Villas.*
- 23 d. *In reality, all material advances (and in particular the \$3million*
24 *repaid following the April 2009 Agreement) made by FCIB were*
25 *immediately remitted to GCR. [GKF] assumed formal liability*
26 *under the loan facility and gave security at the request of GCR*
27 *upon GCR's express or implied agreement to reimburse [GKF]. All*
28 *material advances (and in particular the \$3million repaid*
29 *following the April 2009 Agreement) were provided to GCR and*



[GKF] in substance stood in the position of surety and/or sub-surety as regard's GCR's borrowings.

- e. The Charges secured the loan facility and were given at the request of GCR and not at the request of [GKF] or for its material benefit.
- f. In late 2006, the facility with FCIB was approaching its limit of US\$6.5 million. Further advances were needed in order to enable GCR to continue with the development of the Grand Caymanian."

38. As regards the circumstances of the Bloody Bay discussions and transactions and who it was that first broached the subject, paragraph 6 of the Amended Defence describes the surrounding circumstances and indicates that it was Captain Charles who initiated the discussions and transactions.

39. In relation to paragraph 12 of the Statement of Claim, as regards who was the borrower under the April 2008 Agreement, the Defence states that since all material advances were made to GCR for the purpose of the development of the Grand Caymanian, it was correct for the April 2008 Agreement to state that GCBCR was the relevant borrower.

40. At paragraphs 11 and 12 of the Defence, it is stated as follows:

"11. Paragraph 15 is denied.

- a. Neither Gary nor Don acted as guarantors of [GKF]. They were the principals and shareholders of GCR which was the ultimate beneficiary of all funds advanced by FCIB.
- b. Gary and Don had given personal guarantees of the FCIB loan facilities, which were secured by a charge over their entire interest in Bloody Bay. Further, they inherited Bloody Bay



1 *subject to Charges, meaning they could not have sold Bloody*
2 *Bay without pledging new security to FCIB.*

- 3 *c. At all material times [GKF] had a right of recoupment against*
4 *GCR in respect of all the advances made to GCR and the*
5 *interest and/or principal which it had repaid to FCIB (in the*
6 *sum of US \$4,623,500) and/or a right to be subrogated to the*
7 *guarantees of Don and Gary and/or the Charges.*
8 *d. Although [GKF] was in point of form the principal debtor*
9 *under the loan facility, Capt Charles did not provide the*
10 *guarantee to FCIB at the request of [GKF].*
11 *e. The April 2008 Agreement was not a guarantee or indemnity as*
12 *alleged. It contained an agreement by Capt Charles to provide*
13 *a guarantee to FCIB in exchange for Don and Gary's*
14 *agreement to transfer Bloody Bay to Capt Charles in the event*
15 *Capt Charles' guarantee to FCIB was called upon.*

16 12. *Paragraph 16 is denied.*

- 17 *a. Capt Charles' rights were set out exclusively in the April 2008*
18 *and April 2009 Agreements. The April 2009 Agreement*
19 *contains an entire agreement clause and/or release which*
20 *precludes the implication of any contractual terms and/or*
21 *liabilities.*
22 *b. Captain Charles did not provide the guarantee or pledge*
23 *security at the request of [GKF]. The guarantee and pledge*
24 *was in fact for the benefit of GCR and was provided at the*
25 *request of and in the personal interests of Captain Charles,*
26 *alternatively Gary and Don. As far as [GKF] is concerned*
27 *Captain Charles' guarantee was officious and/or Capt Charles*
28 *was a volunteer.*
29 *c. Capt Charles had no further rights. He had agreed that in*
30 *return for his guarantee and pledging of cash deposits he was*
31 *to receive a transfer of Bloody Bay after 12 months if Don and*



Gary had not reduced the indebtedness or secured alternative security. Any right of indemnity was extinguished upon the transfer to Capt Charles of Bloody Bay in any event.

d. As far as [GKF] is concerned, Don and Gary acted as volunteers and/or in their own self-interest principally to reduce their liability under their personal guarantees and in order to enable GCR to continue to operate. Capt Charles also acted as a volunteer and was principally concerned to preserve his own interests as holder of neighbouring land. Neither of the April 2008 or April 2009 Agreements were entered into at the request of [GKF].”

41. The Defendants round out the pleaded Defence by denying paragraph 17 of the Statement of Claim, and stating that therefore, Capt Charles had no rights of subrogation to which Don could seek to attach. Captain Charles’ rights under the April 2008 and April 2009 Agreements were satisfied upon the transfer to him of Bloody Bay. It is also alleged that Capt Charles would not have been entitled to any rights of subrogation since he was a volunteer and there was no prior request by GKF.

42. The Defendants additionally say that there is no basis for the implication of any contract. In particular, there was no prior request by GKF and the 2009 Agreement contains an entire agreement clause and/or release which precludes the implication of any contractual terms and/or liabilities as alleged.

43. In the premises, the Defendants plead, there is no basis for granting to the Trustee equitable or any other type of relief.

1 **THE COUNTERCLAIM**

2 44. By way of counterclaim, GKF avers that it is entitled to be repaid by GCR the principal
3 and interest of US\$2,598,122 which it paid to FCIB and is entitled to be subrogated to
4 FCIB's security, including the Charges and Don's joint and several personal guarantee
5 and/or to claim equitable compensation from Don.

6
7 45. It is further averred that if, contrary to the Defence's position, it is found that Don has
8 any right in respect of his interest in Bloody Bay, GKF is entitled to claim against Don or
9 otherwise set-off against the Trustee so much of the US\$2,598,122 as it can recover by
10 way of its right of subrogation and/or equitable compensation.

11
12 46. GKF therefore claims the sum of US\$2,598,122, a declaration that GKF is subrogated to
13 FCIB's rights under the Charges and Don's personal guarantee and/or is entitled to
14 equitable compensation. GKF also claims interest and costs as an expense of the Estate in
15 priority to the Trustee's own costs and expenses.

16
17 **REPLY TO DEFENCE OF GKF AND DEFENCE TO COUNTERCLAIM**

18 47. In the Reply, the Trustee states that the allegation at paragraph 6(a) of the Defence that
19 the loan facility in the sum of US\$6,450,000 was obtained for FCIB to make advances to
20 GCR is not correct and the various facilities of the loan agreement are referred to once
21 more.



1 48. The Reply further states that the allegation at 6(e) that the charges were not for the
2 material benefit of GKF is fallacious. The Trustee's pleading continues, that, even if, (as
3 to which there is issue joined), there was an arrangement between GCBCR and GKF
4 under which GCBCR was obligated in some way to GKF, that does not affect Don's right
5 of recourse against GKF as set out in the Statement of Claim.
6

7 49. It is also the Trustee's position that if on investigation it should become apparent that
8 Don did indeed give such a guarantee and if, as suggested in the Defence, he entered into
9 the 2008 and 2009 Agreements because of his liability under that guarantee, then the
10 transfer of Don's share in Bloody Bay to Capt Charles was attributable to his liability as
11 guarantor under that agreement and Don is entitled to be indemnified by GKF as a
12 principal debtor whose liability was discharged by Don as a matter of law.
13

14 50. The Trustee maintains that GKF's reliance on the entire agreement clause in the 2009
15 Agreement is misconceived. GKF, paragraph 9 of the Reply states, relies on the clause as
16 a waiver by Don of the rights of recourse that he would otherwise have against GKF as a
17 matter of law as a normal incident of his having provided security under the 2008 and
18 2009 agreements or the alleged guarantee. The Trustee asserts that that is not the purpose
19 of the clause or its effect upon its true construction. Further, that the clause makes no
20 mention of any such waiver and is concerned purely with the transfer of land under the
21 2009 Agreement and the other matters set out at the third Clause of the 2009 Agreement
22 (mistakenly numbered "(2)"). The Trustee further states, that the entire agreement clause
23 does not operate on the 2008 Agreement, does not operate on the implied agreement that



1 arose when GKF asked Don to provide a guarantee and does not operate to preclude the
2 right as a matter of law to an indemnity upon being called upon to make good the default
3 of GKF as principal debtor or to preclude the right to restitution.

4
5 51. At paragraph 10, the Trustee pleads that further, or in the alternative, GKF gave no
6 consideration for the waiver or exclusion of rights that it now avers that the entire
7 agreement clause confers and it is therefore not entitled to rely upon it for that purpose.

8
9 **DEFENCE TO COUNTERCLAIM**

10 52. The Trustee denies that GKF is entitled to the relief sought in the Counterclaim.
11 However, at paragraph 11, the Trustee alleges that the Counterclaim is embarrassing, in
12 that it does not identify which specific allegations made in the Defence are relied upon,
13 making it impossible to plead by way of defence to the specific facts relied upon by way
14 of counterclaim.

15
16 **THE EVIDENCE**

17 **EVIDENCE ON BEHALF OF THE TRUSTEE**

18 53. Anne Rosalind Owen Scarbrough ("Anne") is the former wife of Don. On the Trustee's
19 application, I granted permission for Anne to give evidence from Florida by way of a
20 video-link.

21
22 54. In her evidence in chief, which took the form of a witness statement as modified in Court,
23 Anne stated that she and Don were married on 29 May 1999. They had one son, Charles,





1 born 5 June 2001. Charles was later diagnosed with learning disabilities and medical
2 problems. After 7 years of marriage the relationship broke down irretrievably and the
3 parties separated on 16 May 2006. Don and Anne agreed that Anne would petition for
4 their marriage to be dissolved on the grounds of his unreasonable behaviour. After
5 exchanging several drafts of the Petition with Don and his legal advisors, Anne presented
6 the Petition on 26 May 2006 in a form that was agreed to be acceptable. On 1 June 2006,
7 Don served a notice stating that he did not intend to defend the Petition and Anne then
8 applied for a Decree of Dissolution. The Decree was granted on 1 June 2006 by
9 Henderson J.

10
11 55. Anne states that at the same time, she and Don agreed to a Consent Order being made to
12 settle all ancillary issues arising out of their marriage. This included matters relating to
13 the custody, care and control and financial maintenance of Charles and the division of the
14 matrimonial estate.

15
16 56. At paragraph 5 of her witness statement, Anne describes the terms of the Consent Order
17 as follows::

18 *"5. The financial obligations which Don assumed under the Consent*
19 *Order were that:*

20 *5.1. He was to pay me US\$1m as a one-off capital lump sum child*
21 *maintenance payment. This was to be made "from the proceeds of*
22 *any property transactions in which [he] has an interest and/or*
23 *from his receipts of the proceeds of any future inheritance,*
24 *whichever is the earlier" : see paragraph 4 of the Consent Order. I*



1 *was to bear all costs of maintaining Charles until such time as that*
2 *payment was made: see paragraph 5 of the Consent Order; and*

3 5.2. *He was to pay me a capital lump sum of US\$1,583,334 in respect of*
4 *my share of the marital estate (US\$250,000 of which was*
5 *represented by the transfer of his interest in our former*
6 *matrimonial home). The balance of US\$1,333,334 was to be paid*
7 *from Don's share of the proceeds received from the sale of real*
8 *property in Grand Cayman which was to be developed into the*
9 *Waterford Private Residence Club and/or from the immediate*
10 *proceeds of any future inheritance, whichever was received*
11 *earliest in time but in any event not later than 4 years from the*
12 *date of the Consent Order(i.e. 1 June 2010) : see paragraph 8 of*
13 *the Consent Order.*

14 (My emphasis)

15
16 57. Anne claims that it is Don's failure to comply with the financial obligations to which he
17 agreed in the Consent Order that led to his bankruptcy.

18
19 58. Having referred the Court to the paragraph of the Consent Order (outlined above) that
20 speaks to future inheritances, Anne proceeds to describe the background to the Consent
21 Order. She stated that following their separation, Don told her that he wanted them to
22 divorce as soon as possible. He explained that he did not want her to become entitled to
23 receive a substantial share of his inheritance should his mother Miss Alex pass away
24 while they were still married. Her evidence is that Don also told her that Gary had told
25 him that, if their (Don and Anne's) divorce did not occur soon, he Gary was
26 contemplating speaking to Miss Alex's attorney to suggest varying her will to create a
27 trust for Don's inheritance, of which Gary would be the trustee so as to prevent Anne

1 becoming entitled to a share of Miss Alex's estate. Anne states that she does not know
2 what the effect of an arrangement like this would have been, but Don explained to her
3 that he did not want this to occur because, although Gary would be able to "protect"
4 Don's inheritance from her in this way, he (i.e. Don) personally wanted to have control
5 over his inheritance.
6

7 59. Anne states that when Captain Rudland passed away, she is aware that Don and Gary
8 took on the role of Captain Rudland's personal representatives and swore an inventory of
9 his estate (about six months before the Consent Order) which listed assets in the Cayman
10 Islands and their value to a total value of CI\$21,727,023 (US\$26.5 million in round
11 figures). Upon Captain Rudland's death Miss Alex stood to inherit a substantial estate,
12 and in addition, had assets of her own, including Bloody Bay.
13

14 60. It is Anne's evidence that before the terms of the Consent Order were settled and the
15 Consent Order was made on 6 June 2006, she and Don had direct discussions about the
16 financial relief that he would provide and further, she states that the figures in the
17 Consent Order are the figures that he proposed, to which she agreed.
18

19 61. The evidence continues that, less than a year after the Consent Order was made, Miss
20 Alex passed away. She left her property equally to her two sons as her will had directed.
21 Despite the appearance of an abundance of assets from which, Anne testifies, to pay her
22 some US\$2.3 million, after Miss Alex's death she received only approximately
23 US\$53,900 in interim child maintenance payments from Don, which he paid between

1 December 2008 and February 2011. Anne's evidence is that indeed, by the long stop
2 date for the payment of US\$1.33 million under paragraph 8 of the Consent Order (i.e. 6
3 June 2010), she had not received any part of that sum from Don.

4
5 62. In cross-examination, Anne refuted a suggestion that Gary never said anything to Don
6 about speaking to Miss Alex's attorneys about changing Miss Alex's will if the divorce
7 did not come through soon. She conceded however that Don was given to exaggerating
8 things, at times. Anne indicated that she is not on good speaking terms with Don, Gary or
9 Teresa.



10
11 63. In his witness statement, Mr. Michael Penner, states that he is a partner in the Financial
12 Advisory Group of Deloitte & Touche, Cayman Islands, and was appointed the agent of
13 the Trustee in Bankruptcy on 24 October 2011, pursuant to a provisional order of
14 bankruptcy dated 20 October 2011 in Cause No. FSD 183 of 2010. Mr. Penner provides a
15 detailed summary of the Trustee's case and analysis of the factual substratum. His
16 evidence could not assist with the actual facts of the case, based upon the nature and
17 timing of his involvement. However, in his Affidavit, Mr. Penner helpfully summarises
18 and states at paragraph 22 that:

19 *"22. Although he was an equal owner of the land that was sold for \$3*
20 *million, Don has received nothing in respect of the transaction. The*
21 *Consent Order required Don to pay the proceeds of any future inheritance*
22 *to Anne in satisfaction of his liability to her. Instead, he made the*
23 *proceeds of Bloody Bay available to GKF. He has never received*
24 *anything in return from GKF; indeed there is no suggestion by the*
25 *Defendants that he has received any benefit in return for the interest in the*

1 *land from anybody at any time. The Trustee maintains that he [Don] is*
2 *entitled as a matter of law to be paid one half of the benefit received by*
3 *GKF from the sale of his interest in Bloody Bay to Capt Charles and she*
4 *has brought these proceedings to recover that sum for the benefit of the*
5 *estate”.*
6

7 64. In cross-examination Mr. Penner denied that he told Gary he would be tied up in
8 litigation for years. He concedes, however, that he did tell Gary that it would be much
9 preferable for him to settle with the trust estate in a fair way, rather than going to
10 litigation, because obviously the time and costs involved in litigation ~~would be~~
11 significant.



12
13 **EVIDENCE ON BEHALF OF THE DEFENDANTS**

14 65. I did say earlier that this is a rather convoluted and complex case, and that is true for
15 varied reasons. Included in those reasons would have to be the fact that a witness
16 statement by Don had been filed on behalf of the Defendants. Thus, potentially the Court
17 was faced with the odd situation of a claim by the Trustee on behalf of the Estate of Don
18 Foster, as a bankrupt, in which Don Foster filed a witness statement on behalf of the
19 Defendants against whom the Trustee of his estate was laying claim. However, at the trial
20 learned Queen's Counsel Mr. Lowe, who appeared for the Defendants, indicated that, in
21 light of certain matters that had been in Anne's witness statement being withdrawn and/or
22 struck out, he would not be leading evidence from Don or calling him as a witness. In the
23 final analysis, therefore, Don's witness statement is not before the Court and formed no
24 part of my deliberations.

1 66. Gary gave evidence. In his witness statement he states that he is a builder and has been
2 involved in several local construction projects including Coral Sands, Coconut Harbour
3 and the Grand Caymanian Resort, now known as the Holiday Inn Resort ("the Grand
4 Caymanian"). He further states that he is a director and shareholder in GKF.
5

6 67. Gary's evidence is that since his brother Don was declared bankrupt on 9 December
7 2011, he has faced a barrage of questions, claims and threatened claims from agents
8 acting on behalf of the Trustee. He states that at an early meeting with the Trustee's agent
9 Mr. Penner, Mr. Penner threatened to cause him to be tied up in litigation for years.
10

11 68. His evidence continues, that a constant feature of Don's bankruptcy has been Don's third
12 ex-wife Anne's fascination with the Foster family fortune. He says that Anne seemed to
13 think this fortune had been hidden from her.
14

15 69. Whilst he concedes that it is true that the family was a very wealthy family at one time,
16 he states that various family assets, including several million dollars of his father's
17 money, Bloody Bay, and other assets were lost in what they now know was "a disastrous
18 family investment in the Grand Caymanian."
19

20 70. According to Gary, at the time Miss Alex first charged Bloody Bay she did not have any
21 share in the project. She later inherited Captain Rudland's 60% share. He and Don
22 inherited that 60% from her, as well as Bloody Bay. By the time he and Don inherited
23 Bloody Bay, it was subject to two charges which were part of a package of security



interests, including their own personal guarantees, securing over \$7 million of liabilities on the Grand Caymanian. He states that their interest in Bloody Bay was not worth anything as much as that.

5 71. Gary's evidence is that Bloody Bay was later pledged to their Uncle Captain Charles in
6 exchange for his agreeing to deposit \$3 million as collateral to allow the Grand
7 Caymanian companies to borrow \$3 million to complete the second phase of the project.
8 Gary asserts that the arrangement with Captain Charles was of benefit to the Grand
9 Caymanian because it enabled Phase 2 to be developed. Bloody Bay had already been
10 charged to FCIB anyway so the arrangement enabled the Grand Caymanian to borrow \$3
11 million to complete Phase 2, without providing any additional security.

12
13 72. It is Gary's evidence that the \$3 million loan was in the name of GKF at FCIB's request.
14 He claims that GKF did not borrow any of the \$3 million required to build Phase 2 or any
15 of the other Grand Caymanian borrowings. He asserts that in reality the resort companies
16 were the borrowers. As holders of all the shares in the resort companies, he and Don both
17 stood to benefit from the success of the project. They also both appreciated that if the
18 project failed they could lose Bloody Bay and would be exposed on personal guarantees
19 they both gave in support of the project lending. Gary wraps up this aspect of his
20 evidence by declaring that he and Don were both committed to the project and
21 appreciated the risks that they were running. He asserts that they never intended to make
22 claims against each other in the event the project was not a success.

1 73. In terms of his day to day involvement in the Grand Caymanian, Gary states that he was
2 principally involved on the construction side. Teresa handled the financial and
3 administrative side of the business. Don was involved in the sales and marketing aspects
4 prior to the passing of their parents and later, became more heavily involved after he
5 inherited his 30% share in GCR.
6

7 74. In relation to GKF and FCIB, Gary states that in February 2004 FCIB refinanced the
project's lending from Heller. The Heller loan was in the names of the resort companies
and not GKF. He recalled that the manager who they dealt with at FCIB, Mr. Hulse,
insisted during a number of meetings over the period late 2003 to early 2004, that FCIB
would not lend to a time share company. Mr. Hulse required that the named borrower
should be GKF. Gary states that he was unhappy about exposing GKF, a company with
no equity or other interest in the Grand Caymanian, to its existing liabilities to Heller and
any future liabilities to FCIB. However he felt there was no choice since the Grand
Caymanian badly needed the funding and nobody else was willing to provide it.
16

17 75. Gary then describes what led up to the transaction with Captain Charles in paragraphs 16-
18 21_(inclusive) as follows:

19 ***"The Transaction with Capt. Charles***

20 *16. Hurricane Ivan hit Grand Cayman very hard in late 2004. The*
21 *hurricane destroyed the existing structure of Phase 1. Rebuilding was*
22 *made more difficult and more expensive because of the shortage of*
23 *materials/labor as well as a dispute over the insurance coverage that left*
24 *us having to borrow yet more money from First Caribbean.*

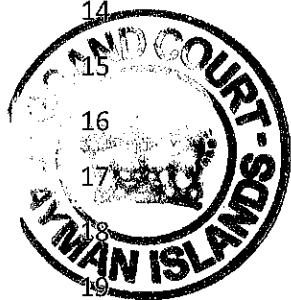
1 17. By early 2008, the First Caribbean loan was at its limit and we were
2 seriously behind on the construction of Phase 2. Phase 2 was supposed to
3 generate further sales to pay off the Grand Caymanian's debts. Don,
4 Teresa and I looked into selling off the Bloody Bay land so that we could
5 free up more funds. Our cousin Dervin Scott owned a real estate business
6 called Tranquil Realty. He secured an offer from Ken Hall for some \$2
7 Million. Don and I had by this time inherited Bloody Bay and were
8 prepared to sell in order to keep the Grand Caymanian afloat.

9 18. In around early April 2008, Don, Teresa and I were having a meeting
10 at Café del Sol just off the West Bay Road. We were discussing options for
11 raising funds, including the offer we had received on Bloody Bay. My cell
12 phone rang. It was my Uncle Charles. He said that he had heard about the
13 offer on Bloody Bay and was not happy about seeing the land going out of
14 the family. He said that he would like to help us with our financial
15 situation as far as he could. I returned to the café delighted and we all
16 drove over to Captain Charles' house in South Sound straight away.

17 19. Charles explained that he had a \$3 Million cash deposit with First
18 Caribbean and was prepared to put this up as collateral for the Grand
19 Caymanian. He said that he would let us have it for a year interest free but
20 that he would expect us to transfer Bloody Bay to him if we could not
21 repay him after the year was up. A lawyer at Higgs & Johnson drew up an
22 agreement which we all signed on 16 April 2008. GKF Holdings was not
23 party to the agreement because none of us viewed this as GKF's
24 borrowings. So far as we were concerned, it was on behalf of the GC
25 Companies that the funding was requested.

26 20. Following Charles' intervention, a further \$3 Million facility was
27 made available under account number 10316413 for Phase 2 construction
28 costs. None of this went to GKF. The money was used by the GC
29 Companies to build Phase 2.

30 21. Unfortunately Charles' funds were not sufficient to complete Phase 2
31 and sales nosedived as a result of the global recession from 2008 onwards





amongst other things. A year after Charles' loan was made the Grand Caymanian was not in a position to repay him or borrow from elsewhere. As a result Don and I accepted that he should take a transfer of the Bloody Bay land and release his \$3 million towards the debt with First Caribbean. A further agreement was drawn up to confirm this."

76. Gary indicates that things went from bad to worse over the following years. In 2009, bankruptcy specialists Krys Global were consulted. The following year, however, Gary states that they were able to negotiate a sale of the Grand Caymanian with local businessman Mr. Reginald "Choppy" Delapenha ("Mr. Delapenha"). At paragraphs 23-25 of his witness statement, Gary describes the circumstances surrounding the sale as follows:

"23..... The best deal we could get was for Mr. Delapenha to acquire the land and the business of the GC Companies for US\$4 million. This was the only deal in town. It was this or bankruptcy. Had it been possible to negotiate a higher price then we would of course have jumped at the chance.

24. It has been suggested on behalf of Don's Trustee that there might have been some further consideration passing hands due to the fact that Lands and Survey assessed the land for some US\$6 million for stamp duty purposes in 2012 (two years after the sale). I had no involvement in the registration of this transfer or the assessment of stamp duty, but can state categorically that there was no further payment in relation to the Project sale.

25. I would of course have jumped at the chance to receive further payments for the Project, since there was a shortfall of some US\$3 million on the First Caribbean loan following receipt of the \$4 million consideration paid by Mr. Delapenha. GKF had to borrow money from HSBC to meet the \$3 million shortfall. GKF struggled with having to



service this loan and was eventually pressured into selling its main asset, Foster Bay Villas, in order to pay off these legacy Grand Caymanian debts."

4

5 77. As part of his concluding remarks in his witness statement, Gary states that it was not in
6 GKF's interests for further lending to be made because it stood to gain nothing from the
7 Project. He further avers that GKF has footed the bill for the Grand Caymanian in the
8 region of \$5 million, received nothing in return and stood to gain nothing in the event that
9 the Project was a success. Gary claims that it was Don and himself that stood to gain the
10 most if the Grand Caymanian had been a success. He closes by saying that they were
11 prepared to sell Bloody Bay, (which was charged anyway), in order to keep the Project
12 going and benefitted from the transaction with Captain Charles in that it allowed them to
13 continue the Project.

14

15 78. In cross-examination, Gary said that the money was loaned to GKF for GCBCR. He
16 disagreed that the money went to GKF. He said he could not speak about what accounts
17 the money went to, but that he knew it went to the Grand Caymanian companies. He
18 stated that at the point in time when the \$3 million was borrowed, it was expected that the
19 monies advanced would be repaid and that he expected it to be repaid from the profits
20 from the Resort. He expected profits to come to the various companies involved in the
21 project and claimed that Don shared those expectations. They never discussed what
22 would happen if there were no profits at the end of the day.

23



1 79. In answer to a question from Mr. McMaster Q.C., Gary responded that both he and Don
2 knew, he Gary, being a 70% shareholder, and Don being a 30% shareholder, that Gary's
3 profit would be more than double what Don would get.

4
5 80. Gary was also referred to the Court Order restraining Don from transferring properties
6 and agreed that one of the properties Don would be restrained from transferring was
7 Bloody Bay. He absolutely denied that Don had ever personally told him about this order.
8 Gary denied that the true position was not that FCIB was calling in the borrowing, but
9 was ready to give fresh loans. He stated that FCIB had already started the discussion with
10 them to dispose of the Bloody Bay property through his cousin. He did say, however, that
11 he would accept "for now" that in April 2008 the Bank was offering to lend the company
12 another \$3 million dollars.

13
14 81. Gary was then taken to the April 2008 Credit Facility offer letter from FCIB. He was
15 referred to the Condition Precedent No. 4, involving Captain Charles. He agreed that
16 Captain Charles was giving them the opportunity to access \$3 million for one year.
17 Further, that he and Don knew that in order to get this money from FCIB, they had to get
18 this money from Captain Charles and that they would forfeit the land if not paid back in
19 the year. He said that they needed this agreement with Captain Charles in order to get this
20 money from FCIB. He said he didn't know that the funds would not be enough to
21 complete the project; he had been expecting more money from sales. However he knew
22 the \$3 million would not be enough by itself.

1 82. He indicated that there was an amalgamation or consolidation of loans in 2009, with a
2 review date of March 2010. He, Teresa and Don signed as Guarantors. FCIB was
3 prepared to continue the existing funding until March 2010.
4

5 83. In response to the suggestion that they were not in a position where they had to effect a
6 fire sale of the resort, Gary said he did not agree with that; he said something is only
7 worth what someone is prepared to pay. He indicated that the property was not listed in
8 order to market it and no advertisements were placed. He said no resort operations were
9 approached, although they had the possibility of a sale to Wyndham but that did not work
10 out.
11

12 84. In re-examination, Gary indicated that he is personal friends with persons at certain realty
13 companies including Caldwell Bankers, Century 21 and Rainbow Realty. He was told
14 that it was more or less a pipe dream to find anyone interested in buying a resort, based
15 upon the state the economy was in. These persons called around, called investors and in
16 fact it was Rainbow Realty that brought Mr. Delapenha to the table.
17

18 85. Gary also insisted that it was Captain Charles who first approached him about the Bloody
19 Bay land, and not the other way around. He called him, Gary, on his cell phone while
20 Gary was with Don and Teresa at Café del Sol.

21 **TERESA**

22 86. In her witness statement, Teresa states that she is a director and shareholder in GKF. She
23 discusses a good deal of history, including the construction and development of Coral

1 Sands Resort in 1995-96, which was a small-scale time-share resort that enjoyed great
2 success. She states that in 1997 Captain Rudland and Gary discussed developing a larger
3 scale time share project, which became the Grand Caymanian, on a portion of land that
4 Captain Rudland had purchased in the early 1990's.
5

6 87. The intention was to build the project in two Phases. The first phase was partially funded
7 by Captain Rudland's personal funds. Scotia Bank also made advances to GKF which
8 were used to fund Phase 1 construction costs. In October 2000, Teresa indicates that the
9 Scotia bank lending was refinanced through a specialist time share lender Heller. Heller
10 offered an \$11.6 million inventory loan and an \$8 million receivables loan. The Heller
11 loan agreement, the witness statement continues, was between Heller and the resort
12 companies.
13

14 88. In or around 2002 the resort companies were required to refinance the Heller loan
15 because they could not comply with Heller's requirement to have a branded time share
16 management company. A number of intermediate steps were taken before FCIB agreed to
17 refinance the Heller Project loan. FCIB had concerns about lending to time share
18 operations. Teresa's evidence is that she recalls that the manager Mr. Hulse refused to
19 lend to the resort companies. He expressed concerns about lending to time share
20 businesses generally and to the resort companies, given what he saw as the inadequacies
21 of their financial situation at the time. GKF was at the time owned outright by Gary.
22 Teresa confirms that she only became a shareholder after the divorce. GKF's financials
23 were very solid. It owned a 39-unit apartment complex, Foster Bay Villas, which had



1 enjoyed great success and a large cash flow, approximately \$60,000 per month at that
2 time. Teresa states at paragraph 9 of her witness statement:

3 *"...that Mr. Hulse made it clear that if we wanted the Project Companies*
4 *to borrow from his bank then the loan would have to be in the name of*
5 *GKF even though the project Companies, not GKF, were borrowing the*
6 *money for the Project."*
7

8 89. Teresa expands upon the terms of the 2004 FCIB facility, which were set out in a facility
9 letter dated 19 January 2004. FCIB was to make available a \$250,000 overdraft and \$4.2
10 million demand loan, the proceeds of which were required to be applied to the Project.
11 FCIB also made available a further \$2 million loan to refinance GKF's borrowings with
12 Scotia bank on other projects and personal facilities in the name of Captain Rudland.
13

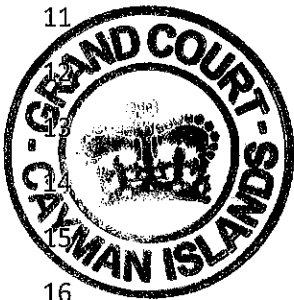
14 90. Paragraphs 6e-h (inclusive) and 7 of Teresa's Witness Statement, read as follows:

- 15 "6. e. *In the aftermath of Hurricane Ivan, which completely*
16 *destroyed Phase 1, First Caribbean agreed to lend a further \$3*
17 *million under facility letters dated 14 March and 16 June 2005.*
18 *This funding was again paid to the Project Companies in order*
19 *to assist with the reconstruction costs pending a dispute which*
20 *we had with our insurers. This took the total Project related*
21 *borrowing from First Caribbean to \$7.2 million.*
22 f. *In a facility letter dated 17 April 2008, First Caribbean agreed*
23 *to lend a further \$3 million to complete the construction of*
24 *Phase 2 amongst other things. A separate account was*
25 *established when the loan was drawn down and separate*
26 *guarantees and other security provided. This loan was repaid*
27 *the following year by Don and Gary's uncle Charles in return*
28 *for their agreement to transfer him land at Bloody Bay in Little*
29 *Cayman that they had inherited.*
30 g. *On 7 April 2009, Gary and I borrowed a further \$950,000*
31 *personally from Scotia Bank as bridging finance in order to*
32 *assist with the completion of Phase 2. At the time we could not*
33 *borrow any more from First Caribbean and were desperate to*



try to save the Project. As it happened this was not enough to complete Phase 2 or save the Project.

h. In February 2010 the Project was sold for \$4 million. This \$4 million was applied by First Caribbean to pay off part of the outstanding loans, leaving a balance of approximately \$2.5 million owing to First Caribbean. This \$2.5 million balance was subsequently paid by GKF with the benefit of a loan from HSBC. The purchaser also agreed to be responsible for the 2009 bridging loan to Gary and me.



7. The history of the project is an unfortunate one. It is tempting to speculate what would have happened had Hurricane Ivan and the global recession after 2008 not taken place. What I can say is that everyone involved bent over backwards to try to make the Project a success. Very large sums of money were borrowed, including by Gary and me personally towards the end. The Project was sold at a loss and GKF continued to meet the Project's bank debts even after the sale."

91. At paragraphs 20-21 Teresa gives evidence that is similar to Gary's as to how the Bloody Bay transactions with Captain Charles came about and as to who was the real borrower.

92. At paragraphs 22-25 she describes some of the last stages as follows:

Final attempts to save the Project

22. After the Wyndham transaction failed Gary and I solicited Scotia Bank again for construction lending on Phase 2. Scotia Bank was not willing however to provide the required funding for the rest of Phase 2 although they did advance just under \$1 million to Gary and me personally (with Gary's home in Little Cayman as security) as a bridging loan. Also in mid[-] 2008 GCBCR began to negotiate with Dart of Grand Cayman for acquisition of the GCBCR property, but that fell apart in the fall of 2008. Krys and Associates were then consulted regarding the possible voluntary liquidation of the Project companies.



1 23. In late 2008 GCBCR began discussions with Reginald Delapenha for
2 the purchase of the Project, which came to completion in December of
3 2009 with the closing in February of 2010. The sale price paid by Mr.
4 Delapenha and his company was \$4 million. This was applied by First
5 Caribbean to reduce the balance to approximately \$2.5 million. Mr.
6 Delapenha also took responsibility for the Scotia Bank bridge loan for
7 Phase 2 construction. The outstanding sum on this loan was interest
8 only but remained in Gary's personal name until such a time as it was
9 repaid or taken over by Mr. Delapenha".
10

11 93. It was Teresa's evidence that at no time from the inception of the Grand Caymanian
12 Project were any shareholder dividends declared or paid. The directors of the company
13 were never compensated although she states that they worked in the business continually
14 throughout the 10-year period.
15

16 94. Teresa gave evidence about the 2012 Transfer as follows:

17 *"33. I was privately examined by Don's Trustee prior to the commencement*
18 *of these proceedings. During that examination I was asked questions*
19 *about a transfer document signed in September 2012. The document*
20 *showed the project land as having been assessed for stamp duty*
21 *purposes at a value of \$6,407,360. In my examination I explained that*
22 *I had no knowledge of this document since I had left the business over*
23 *two years previously following its sale. It appeared that stamp duty*
24 *had been assessed at a valuation exceeding the \$4 million that was*
25 *paid for the Project."*

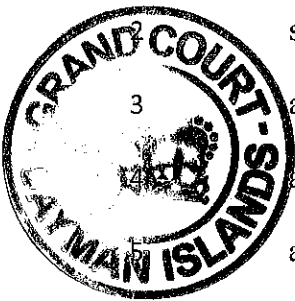
26 95. Teresa was cross-examined extensively. First she said there was a written agreement,
27 then she said there was an oral agreement, at the same time as Mr. Nixon and Mr.
28 Delapenha were appointed Directors of the Grand Caymanian companies and that it was

1 agreed that she and Gary would resign. She admitted that she was not aware of any
2 transfer of shares in the companies in 2010 when she says that Mr. Nixon and Mr.
3 Delapenha took over control of the companies, she and Gary having sold the companies
4 to them to carry on with.

5
6 96. Initially, in cross-examination Teresa said that there were no payments from GCR to
7 GKF. However, she subsequently said that amounts came into an account the account
8 number of which ends with the number 0014, which was a GKF account. However, she
9 agreed that this account was a GKF account, but she said that it was used for Grand
10 Caymanian business.

11
12 97. It was put to Teresa that how it all worked was that at the time after Captain Rudland's
13 death, GKF and the two companies were under common control, because the majority
14 shareholder was Gary. She said that she agreed with that for the most part. At first when
15 it was suggested to Teresa that GKF would borrow money from FCIB and put that money
16 in the No. 0014 account for construction purposes, Teresa disagreed. She subsequently
17 agreed.

18
19 98. It was suggested to Teresa that GKF had an agreement with the resort companies that
20 monies that arose from sales of properties in the Resort would be paid to GKF and in that
21 way GKF would recoup the funding that it had itself incurred with FCIB. At first her
22 answer was, not 100%. However, she subsequently agreed that GKF would get back the
23 money it had borrowed from FCIB from the proceeds of sale of property and time shares



1 in the Resort. She denied that because of that GKF had control over the proceeds. She
2 said that FCIB had control over the proceeds. She said that certain of the resort company
3 accounts had been blocked by them and FCIB set it up so that payments went into certain
4 accounts such as account No. 0014 and also a number of payments were made from
5 account No. 0014 to other GKF accounts.
6

7 99. There was evidence that showed that monies coming in from GCBCR and from
8 timeshare payments from Colebrook Financing were paid into GKF's account No. 0014.
9

10 100. Teresa also said that when the arrangement was entered into with Captain Charles, no one
11 thought that there would not be enough money from the Resort in order to repay the
12 advance.
13

14 101. Teresa indicated that Captain Charles would not have been prepared to offer the
15 hypothecation unless he had been offered Bloody Bay. She said that it was Captain
16 Charles who originally discussed and negotiated with management of the Bank regarding
17 the hypothecated deposits.
18

19 102. It was suggested to Teresa that none of this loan would have happened if GKF had not
20 wanted to borrow the money to finance construction. Her response was that "not a 100%,
21 no". In response to the suggestion that FCIB would not have lent the money if GKF did
22 not want to borrow it, she responded that that was true, but that it was not a standard loan.
23 It was also put to Teresa that part of the decision-making process that FCIB went through

1 when it decided to make a loan to GKF involved Captain Charles being prepared to
2 hypothecate the \$3 million. Teresa responded in the affirmative, but said that that was not
3 the whole story. She agreed however that it was material to the Bank that Captain Charles
4 would hypothecate the \$3 million cash.

5
6 103. Teresa was also cross-examined about the fact that by letter dated 29 August 2009 she
7 wrote to Don on behalf of GCR, purporting to make a call on Don's 30 shares in the
8 company at \$5,000 per share, totaling US\$150,000. When asked whether there was in
9 fact a written resolution to the effect, the purpose of which was to take the shares from
10 Don, Teresa said that actually, the purpose was to get and recover funds from Don, but
11 that he never paid and the share forfeiture never went through. She admitted however that
12 she knew that Don had inherited his shares from Rudland and that Rudland had made
13 substantial contributions to the company over the years. She said they had made this
14 demand because they were broke, and trying to recover something from Don. She said
15 that she could not produce a balance sheet to show that they were broke at this time.

16
17 104. Regarding the sale of the Resort, she agreed that the Resort was not advertised and no
18 written valuation of the Resort was obtained before the sale to Mr. Delapenha. She said
19 they did receive professional advice about how to sell it. They were given advice as to
20 how they would eventually find a purchaser and were advised that it was too large a sale
21 to spend any money on advertising.



1 **CAROLE KIRKCONNELL**

2 105. Carole Kirkconnell ("Mrs. Kirkconnell") gave evidence that she is the widow of Captain
3 Charles.

4

5 106. She stated that she was familiar with the land at Bloody Bay. Her evidence was that the
6 land was split into three parcels by the executors of Captain Charles' father's estate so
7 that each of his three children could inherit part of the land. Don and Gary inherited
8 Charles' sister Miss Alex's parcel.



10 107. Mrs. Kirkconnell then speaks of her conversations with Captain Charles about Don and
11 Gary and their attempts to sell their parcel.

12

13 108. She recalled that Captain Charles picked up the phone at some point and called Gary.
14 Gary, Teresa and Don came to their home (hers and Captain Charles') and she
15 remembers that Captain Charles offered to provide some short-term financing. In her
16 witness statement at paragraph 6, she said she recalled a period of three months being
17 discussed, and that an agreement was drawn up shortly afterwards.

18

19 109. At paragraph 7 of her witness statement, she states:

20 *"7. The agreement reached was undoubtedly at Charles' request and on*
21 *his own initiative. Don and Gary were far too embarrassed about their*
22 *financial difficulties to have approached Charles themselves. I can*
23 *confirm that the land remains in the family, which is what Charles*
24 *wanted."*

25



1 110. In cross-examination Mrs. Kirkconnell denied hearing that FCIB was willing to advance
2 \$3 million to Gary's company. She also said that although in her witness statement she
3 had said that it was three months that had been agreed, she knew it was a period of one
4 year. She states that she was nervous in the office at the time when she signed the witness
5 statement. She also indicated that she has not spent a lot of time on this matter, although
6 she knows it is important to Gary and Don. She denies that her recollection of the events,
and of telephone calls that she said her husband had, was unclear.

8
9 **VIRGINIA THOMPSON**

10 111. Virginia Thompson ("Ms. Thompson") gave evidence that she is a certified public
11 accountant and licensed auditor. She worked for some 19 years as Assistant Controller of
12 Domestic Operations of the Chiquita Banana Company in the United States. She returned
13 to Grand Cayman in around 1988 and secured a position as accountant for the Hurley's
14 Group. Approximately two years later she received an approach from Captain Rudland,
15 with whom she had been friendly.

16
17 112. Ms. Thompson's evidence is that Captain Rudland explained that he, along with other
18 family members, was involved in a time share development known as the Grand
19 Caymanian Resort. He explained also that accounting expertise was required. Ms.
20 Thompson and Captain Rudland agreed terms which led to her being engaged as the lead
21 accountant on the Project. She states that she also engaged two book keepers to work
22 under her supervision.

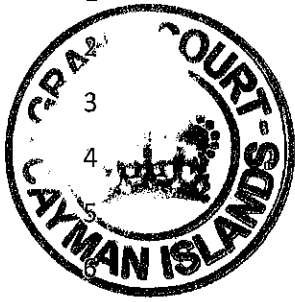
1 113. Ms. Thompson states that the principal function of the accounting team was to prepare
2 monthly profit and loss and quarterly financial statements for the business. These along
3 with other periodic reports as to the level of sales and other matters were provided to the
4 Project's lenders, who when Ms. Thompson joined were Heller, with Scotia becoming
5 involved at a later stage.
6

7 114. At paragraphs 4-6 (inclusive) of her Affidavit, Ms. Thompson states as follows:

8 *"4. In February 2004, the Heller and Scotia lending was refinanced*
9 *through First Caribbean. Lester Hulse was the manager responsible. I*
10 *became involved in the negotiations over the refinancing because I had*
11 *developed a good working relationship with Mr. Hulse whilst working for*
12 *Hurleys, for whom he was the account manager. I recall Mr. Hulse*
13 *expressing reservations about time share projects as well as the level of*
14 *costs being incurred by the project more generally. I attended several*
15 *meetings with Mr. Hulse, alongside Gary and Teresa Foster, in late 2003*
16 *and early 2004.*

17 *5. Unlike Heller, which was a specialized time share lender, Mr. Hulse*
18 *was adamant that First Caribbean would not lend to either of the project*
19 *companies, Grand Caymanian Beach Club & Resort Limited and the*
20 *Grand Caymanian Resort Limited ("the Grand Caymanian Companies").*
21 *He was extremely nervous about lending to time share. After some initial*
22 *resistance, the Fosters offered to put up Foster Bay Villas (an asset of*
23 *GKF Holdings Limited) as security. This property was valuable and also*
24 *generated income which could be used to service the loan.*

25 *6. Because of the Bank's nervousness with time share and desire to have*
26 *easily realizable security, Mr. Hulse insisted not only that Foster Bay*
27 *Villas be charged but that the loan should be taken out in the name of*
28 *GKF Holdings Limited. Having the loan in the name of GKF Holdings*
29 *Limited was purely so that the Bank was not seen to be lending to time*



1 share. The arrangement did not reflect the reality of the situation, which
2 was that the bank was lending to two time share companies. The project
3 lending was to the Grand Caymanian companies, not GKF Holdings
4 Limited. This was reflected in the accounts which I prepared. These all
5 showed the First Caribbean loan as a liability in the books of the Grand
6 Caymanian companies.”

7 (My emphasis)
8

9 115. In cross-examination, Ms. Thompson indicated that she prepared the accounts up to the
10 end of 2006. She was referred to Bundle D1, Tab 19, which showed GKF's accounts for
11 July 2005 and December 2004. Ms. Thompson agreed that three columns are shown,
12 GCR, FBV (Foster Bay Villas), and GKF. She agreed that the accounts are shown as
13 consolidated accounts. The GKF column is shown as being, for cash totalling the sum of
14 GCR and FBV. She indicated that the same is shown for the liabilities, i.e. liabilities for
15 GCR, the resort companies, shown as liabilities for GKF.
16

17 **REGINALD “CHOPPY” DELAPENHA**

18 116. During the course of the trial, Counsel for the Defendants sought and obtained the
19 Court's leave to call Mr. Delapenha as a witness. He gave evidence that he is a director
20 of Grand Caymanian Ltd. (“GCL”) and that until 31 March 2015 he was also a director of
21 GCBCR, having been appointed along with Mr. Nixon on 31 December 2009.
22

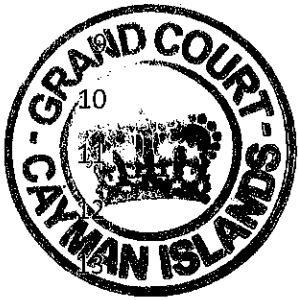
23 117. Mr. Delapenha stated that on 31 December 2009 GCL agreed to advance funds to
24 GCBCR for ongoing operations of the development on terms which were recorded in an
25 agreement of that date. Pursuant to a Business Sales Agreement concluded shortly

1 afterwards GCL acquired the entire operations of the timeshare business at the Grand
2 Caymanian Resort and unfinished buildings including the Phase II development, which at
3 the time of the Agreement was still under construction.
4

5 118. At paragraphs 3 and 4 of his witness statement, Mr. Delapenha states:

6 *"3. There was no further asset which GCL bought separately from*
7 *GCBCR. The price for the Grand Caymanian Resort paid to GCBCR was*
8 *US\$4 million. GCL also agreed to take over a loan Mr. and Mrs. Foster*
9 *had taken out from Scotiabank. Neither GCL nor I have ever separately*
10 *purchased any other asset relating to the Grand Caymanian Resort from*
11 *GCBCR, Grand Caymanian Resorts Ltd or Gary or Teresa Foster. The*
12 *transfer in 2012 records the value for stamp duty purposes which we*
13 *negotiated at the time. It is for a higher amount than US \$4 million*
14 *because it takes account of the additional cost.*

15 *4. Until the issue of strata units in September 2010, the Phase II building*
16 *was part of Parcel 17A 149. A number of Units were excluded from the*
17 *2012 Transfer. At the time of the sale a number of the Phase II Units had*
18 *been pre-sold by GCBCR. Most of these had been purchased by Esperada*
19 *Holdings at some point. In April 2010 these interests were acquired by*
20 *Alexander and Kay Lorenz. Some US\$3.1 million in stage payments had*
21 *been made. As the new buyers GCL was required to sign the new contract*
22 *with Mr. and Mrs. Lorenz. These units and the remainder of Phase II*
23 *(through the transfer of 17A 149) were a part of the entire asset GCL had*
24 *acquired from GCBCR. Having agreed to a June 2010 completion date,*
25 *Mr. and Mrs. Lorenz then obstructed progress and then immediately*
26 *sought to rescind the agreements. Proceedings were commenced by them.*
27 *We eventually settled on the basis that we took back the properties which*
28 *were registered in GCL's name in February 2015."*
29





1 119. In examination in chief, Mr. Delapenha was referred to certain emails, one of which was
2 from Mr. Obi Uche, the Senior Valuation Officer at the Land Registry. He indicated that
3 Mr. Uche's role is to assess value for stamp duty purposes. Mr. Delapenha stated that it is
4 he who was responsible for negotiating the stamp duty. He indicated that the stamp duty
5 is based on value and that the only thing that matters for stamp duty purposes is the value
6 as assessed by the Government.

7
8 120. In cross-examination, Mr. Delapenha was taken to the Transfer dated 2012. He was
9 cross-examined about the fact that he signed the transfer both as Transferor, and as
10 Transferee. In the former case, as a Director of GCBCR, and in the latter, on behalf of
11 GCL. He was also cross-examined about the fact that the figure stated as the
12 consideration was CI\$7,033,320 and the fact that the Transfer states that:

13 *"(The receipt whereof is hereby acknowledged)".*
14

15 121. Mr. Delapenha said in his evidence that he did not understand it to be referring to the
16 \$7,033,320. He said he did not understand those words to mean that the sum of
17 \$7,033,320 was received by GCBCR. What he understood it to mean was that the value,
18 was put in as indicated by the Valuer, and it mattered not that he bought the property for
19 less. He repeated that he paid only the \$4 million for the Resort and that he was subject to
20 the land transaction figure as assessed by the Land Registry. He indicated that it is rarely
21 assessed at less than the amount one paid for the property, and that it is often valued
22 higher than the contract price.
23

1 122. In response to the suggestion that there was absolutely no reason to state a false price on
2 the Transfer, Mr. Delapenha insisted that he put that figure there because Mr. Uche told
3 him to and he further told him to write that figure down even though he, Mr. Delapenha,
4 only paid \$4 million for the property. It was suggested to Mr. Delapenha that that did not
5 in fact take place. His response was that it did, and that this is quite a common
6 occurrence.

7
8 123. Mr. Delapenha was then taken to paragraph 3 of his witness statement where he had said
9 that the transfer was for a higher amount than the US\$4 million because it takes account
10 of the additional cost. Mr. Delapenha gave evidence that by that he meant the additional
11 cost that they had in the development at the time of the transfer. He said they had entered
12 into the contract in 2010 and had spent a considerable sum of money in expanding and
13 completing the project by the time that the Transfer was done. It was suggested to Mr.
14 Delapenha that he was giving the Court two completely different explanations for the
15 \$7,033,320; the first being Mr. Uche told him to write it like that, the other being that it
16 represents additional costs. His answer was that one is his explanation, the other is that of
17 the valuer.

18
19 **THE TRUSTEE'S CASE**

20 124. The Trustee seeks to recover from GKF a sum of US\$1.5 million, being part of a larger
21 sum of US\$3 million which was paid to FCIB in settlement of debt that GKF owed to
22 FCIB thus, the Trustee asserts, enriching GKF by \$3 million.





1 125. The Trustee's argument is that the ultimate source of the payment of \$3 million to FCIB
2 was a piece of land owned in equal shares by Don and Gary. That land was sold to
3 Captain Charles in return for a payment of US\$3 Million. That \$3 million was paid by
4 Captain Charles, not to Gary and Don, but to FCIB for the benefit of GKF. GKF was at
5 the time wholly owned by Gary. While Gary has seen the benefit of his half of the sale
6 price of the land by the reduction in his company's debt to FCIB by \$3 million, Don, it is
7 argued, has seen no benefit whatever from the payment. It is posited that because the
8 debt owed by the company was reduced by \$3 million, Gary has received not only his
9 own half share of the sale price of the land, he has received Don's as well.
10

11 126. It is the Trustee's case that GKF has been unjustly enriched and that GKF is liable to
12 restore that enrichment to Don, and following Don's bankruptcy, to her. The
13 arrangements under which the \$3 million payment was made for the benefit of GKF
14 involved a guarantee by Don of up to \$3 million of GKF's debt and an arrangement with
15 Captain Charles under which Don and Gary indemnified Captain Charles against his
16 liability to make the payment of \$3 million to FCIB. The Trustee therefore maintains that
17 a number of claims are available to her by operation of law: under the law of guarantee,
18 under the law of unjust enrichment and under the equitable doctrine of subrogation.
19

20 127. In the Trustee's skeleton argument, it is stated that a feature of this case is that Don, in
21 transferring his interest in the land to Captain Charles, acted in breach of an order of this
22 Court made on 27 March 2008 in Cause No. D80 of 2006 restraining him from
23 transferring or otherwise dealing with his legal or equitable interest in that or a number of



1 other properties. The obvious intention behind the Order of 27 March 2008, the argument
2 continues, was to preserve the value of Don's interest in that land for the benefit of Don's
3 creditors, the most obvious of whom would be his former wife, who was entitled to
separate amounts for maintenance for herself and their son. The Court's Order was
breached in a way that transferred the value of Don's interest in the land to Gary's
company GKF. It is said by GKF and Gary that GKF has no obligation to account for the
value it has received. The Trustee maintains otherwise. That, in a nutshell, is what this
case is all about, says the Trustee and her team of lawyers.

9
10 **THE DEFENDANTS' CASE**

11 128. The Defendants say that this case has been vastly overcomplicated by the Plaintiff's
12 wholly misconceived focus on whether Don somehow benefitted from GCR. This, it was
13 submitted, misses the point. The submission continues, that if anyone was unjustly
14 enriched at the expense of Don, (and the Plaintiff's case, it is said, has many hurdles to
15 overcome), the issue is to identify the true party enriched. This would have nothing, it is
16 argued, to do with how Don would benefit.

17
18 129. It was further argued that since it is the Plaintiff that bears the burden of proof, it is
19 noticeable that no attempt was made by the Plaintiff to call evidence from FCIB or any
20 other banker who could have spoken about the relationship with the companies. Further,
21 that if the Plaintiff had really wanted to challenge the evidence about foreclosure or the
22 manner in which the accounts were operated, it is surprising that she did not lead such
23 evidence.

1 130. The Defendants have indicated that the FCIB loans in relation to Project lending, were in
2 reality for the benefit of GCBCR, and the loans were only in the name of GKF because
3 FCIB did not want to be lending to a timeshare operation and also GKF's financial
4 position was more acceptable to FCIB. It was the Defendants' position that GKF was in
5 reality in the position of surety and/or sub-surety in relation to GCBCR's borrowings.
6

7 131. The Defendants have also argued that it was Captain Charles who approached Gary about
the \$3 million and the Bloody Bay transaction, and that it was not Gary who introduced
the idea, or induced either Captain Charles, or Don to enter into the transactions that were
concluded. It is therefore argued that there was no express or implied request of Captain
Charles or Don by GKF. Alternatively, if there was any request, it was by GCBCR and
12 not GKF. Further, that there is no basis for the Trustee to recover on the basis of the
13 restitutionary remedy of unjust enrichment. GKF also have made a counterclaim based
14 upon equitable subrogation and equitable compensation.
15
16

17 **MATTERS RAISED BUT WHICH ARE NOT PROPERLY CAPABLE OF BEING**
18 **RESOLVED IN THESE PROCEEDINGS AS FORMULATED OR PLEADED**
19

20 132. It was submitted by Mr. Lowe Q.C. that much misguided effort was devoted in the
21 opening and cross-examination of Teresa and Mr. Delapenha to the allegation that there
22 had been some kind of side-deal in the sale of the Grand Caymanian Resort, the
23 implication being that there was some sort of fraud practiced on Don or his Trustee. An
24 allegation of this sort, it was submitted, if it was a genuine issue in the case, should have
25 been pleaded. The Trustee avers that these matters were raised because of statements in



1 the Defendants' witness statements. It was indicated that the Trustee has addressed this
2 matter in cross-examination at the trial and in submissions because it appears that in her
3 Counsels' view, these matters were raised by the Defendants as a reason why it would be
4 inequitable for the Court to grant the Trustee the relief she seeks. However, I agree with
5 Mr. Lowe Q.C. that this is not a matter that can be properly addressed in this manner. In a
6 complicated case like this, the pleadings have to define the issues that the Court must
7 determine. Further I agree with Mr. Lowe that although the Trustee's opening and cross-
8 examination gave this such prominence, it really was a convoluted point, which would at
9 most amount to a credibility issue. Additionally, if it is that the Trustee, standing in Don's
10 shoes was really alleging that the Grand Caymanian was sold for much less than the
11 Trustee considers it should have been, then the proper course would have been for Don to
12 make a claim against the resort companies.

13
14 133. In addition to not being raised properly by the pleadings, there was no current valuation
15 of the Resort or what was sold to Mr. Delapenha at the time of the sale, on the basis of
16 which this Court could properly conclude that there was any sale at an undervalue or any
17 side deal. The valuations produced to make the suggestion that it was inconceivable that
18 US\$4 million could have been the price were all obtained prior to the global financial
19 crisis which had its onset in or about September 2008 and about which evidence was led
20 from the Defendants. These valuations were therefore not contemporary. The
21 Defendants' witnesses repeatedly denied the allegations that the Trustee was making. Mr.
22 Delapenha categorically denied that he paid anything other than the US\$4 million for the
23 entire Project and business, plus agreeing to take over the liability for the Scotia Bank

1 Loan. He gave his explanation as to why the Transfer had the figures which it did. I
2 found Mr. Delapenha to be a credible and convincing witness who gave his evidence in a
3 straightforward and helpful way. On the other hand, there was no evidence forthcoming
4 from the Trustee's case to contradict or offset the evidence of the Defendants' witness
5 and the Court cannot indulge in speculation. This type of issue really bore no
6 resemblance to the Trustee's case as pleaded. All that the Trustee relied upon was cross-
7 examination and submissions. The Court was not therefore in a position to make a
8 positive finding on this issue.
9

10 **SOME ADDITIONAL FEATURES OF THIS CASE**

11 134. The burden is of course on the Plaintiff to prove the case alleged on a balance of
12 probabilities. In my judgment, there are a number of ways in which the Trustee's case has
13 faced challenges. There is really no witness called on behalf of the Trustee who can, or
14 who has given first-hand evidence as to the facts, and as to the circumstances, and
15 sequence in which the relevant events occurred. Learned Queen's Counsel Mr. McMaster
16 did carry out very skillful, wide-ranging cross-examination. However, at the same time
17 on some points, where witnesses were not completely shaken in cross-examination, there
18 was no evidence forthcoming in the Trustee's case to support some of the suggestions
19 made. Indeed, as was candidly stated in the Statement of Claim, the Trustee has no
20 personal knowledge of the arrangements, but relies upon inviting a number of inferences
21 from documents or statements in documents. So too does Mr. Penner. Anne herself has
22 only been able to paint a background picture; she has not been able to give evidence as to
23 the circumstances and facts surrounding the relevant transactions.

1 135. Additionally, as Mr. Lowe Q.C. has argued, based upon the way in which the Trustee has
2 pitched her case, she stands in precisely the same position as if she was Don.
3 Importantly, it was pointed out that the Trustee is not in these proceedings pursuing any
4 fraudulent transfer. Thus the Trustee is not in any special position, and a good way of
5 testing the equities is indeed to imagine the claim is being brought by Don against, GKF,
6 his brother's company. It was submitted that it was also necessary to remember that this
7 is not a claim against GCBCR or even Gary as such, since Gary is only a nominal party
8 against whom no relief is sought. Further, in my view, the Court is not permitted to leap-
9 frog, so to speak, over a claim in the place of Don, into a claim by Anne in relation to the
10 matrimonial Consent Order. Whilst therefore, one can certainly understand, even
11 sympathize with, Anne's consternation at having a matrimonial consent order according
12 her certain rights and financial entitlements that remain largely unfulfilled by Don, a
13 claim made in Don's shoes against another party cannot, without more, secure to Anne
14 what she was entitled to from Don. Don has to have a sustainable and genuine claim
15 against the party sued in order for the Trustee to succeed and/or recover in his stead.

16
17 136. It must also be remembered that these are not contempt proceedings brought in relation to
18 breach of the Court Order made in the matrimonial proceedings. Such proceedings by
19 Anne brought against a party would, in my judgment, have a completely different
20 juridical basis than a claim by the Trustee on behalf of Don's estate. It is not permissible
21 for the Court to blur the lines of demarcation that would exist between these very
22 different types of case.
23

1 137. On the other side of the scales, the Court has to take into account and weigh, the evidence
2 given on behalf of the Defendants, in a number of ways, including its plausibility,
3 internal consistency, as well as its credibility. This exercise has to take place alongside an
4 examination and construction of the relevant events and documentation.
5

6 **THE ISSUES THAT ARISE FOR DETERMINATION**

7 138. In this case, the issues that do arise for determination can be divided into factual and legal
8 issues, although of course some aspects of the matter involve mixed questions of fact and
9 law. Broadly, they are as follows:

10 **FACTUAL:**

11 (A) Was there an express request by GKF through Gary for Captain Charles to
12 provide the US\$3 million, or for Don to make Bloody Bay available to secure
13 GKF's borrowing? Or was it Captain Charles who proposed the borrowing so that
14 the family could find a way to keep Bloody Bay in the family?

15 (B) Was FCIB in 2008 willing to lend more money, or was the situation such that
16 FCIB had been ready to call in the loan, or to "foreclose", in a non-forensic,
17 colloquial sense of the term?

18 (C) Or, was there an implied request? If there was an implied request, was it by GKF
19 or GCBCR?

20 (D) Who was really the true borrower in respect of the FCIB Loans in relation to the
21 Resort, was it GKF or GCBCR?

22 **LEGAL:**

23 (E) Does Don have rights as a guarantor or surety?

1 (F) Do Don and Gary have any rights by way of subrogation to step into Captain
2 Charles shoes and claim the US\$3 million that Captain Charles had paid, or
3 alternatively, the value of their interest in Bloody Bay, from GKF?

4 (G) Was GKF unjustly enriched, at the expense of Don? That question breaks down
5 into:

6 (i) Was GKF enriched?

7 (ii) Was such enrichment at Don's expense?

8 (iii) Was such enrichment unjust?

9 (iv) Are there any policy reasons for denying a remedy?
10



11 **RESOLUTION OF THE ISSUES**

12 **FACTUAL ISSUES**

13 (A) Was there an express request by GKF through Gary for Captain Charles to provide
14 the US\$3 million, or for Don to make Bloody Bay available to secure GKF's
15 borrowing? Or was it Captain Charles who proposed the borrowing so that the
16 family could find a way to keep Bloody Bay in the family?
17

18 139. In my view, it was quite credible, based upon the evidence of Gary, Teresa, and Mrs.
19 Kirkconnell, that it was Captain Charles who approached and contacted Gary about his
20 concern that Bloody Bay not be sold for only US\$2 million, and his desire that the land
21 remain in the family. It is undisputed that Captain Charles owned the adjacent family
22 land. In my judgment, there is nothing in the documentation, whether in the April 2008
23 Sale Agreement, or in any other document, that can support the suggestions advanced on



1 the part of the Trustee that it was Gary who on behalf of GKF instigated the whole idea
2 and the series of transactions. I find that there was no express request from Gary or GKF
3 for Captain Charles to provide a guarantee or hypothecate his funds or for Don to agree to
4 the transfer of Bloody Bay in the event that they were unable to repay the loan within a
5 year. I accept that it was Captain Charles who proposed the deal and suggested that he
6 would put up his \$3 million for the year, and if at the end of that period the money could
7 not be repaid so that he could be released from his guarantee, he would be entitled to a
8 transfer of the land. Or alternatively, that Gary and Don would agree to accept personal
9 responsibility for the outstanding balance owed to FCIB, and have FCIB extinguish
10 Captain Charles' guarantee, and return to him his cash deposits hypothecated, in which
11 case Don and Gary would retain the land.
12

13 **(B) Was FCIB in 2008 willing to lend more money or was the situation such that FCIB**
14 **had been ready to call in the loan, or to "foreclose", in a non-forensic, colloquial**
15 **sense of the term?**
16

17 140. Both Gary and Teresa gave evidence that FCIB in or about 2008 required the lending to
18 be reduced and had wanted Bloody Bay, which was an asset over which they held
19 security, to be sold. The Defendants' witnesses gave evidence that it was for that reason
20 that Gary and Don had put the land up for sale with their cousin, a realtor in Cayman
21 Brac and that as a result, they had received an offer of US\$2 million from Kent Hall, a
22 prominent Caymanian property investor.
23



1 141. Carol Kirkconnell's recollection was that she and her husband Captain Charles had heard
2 that FCIB was foreclosing on Gary and Don and that they (Gary and Don) were
3 embarrassed about that. She said they never approached her husband; it was he who
4 called them. In cross-examination she denied hearing that FCIB was willing to advance
5 US\$3 Million to Gary's Company. She said her husband called the Bank, spoke to the
6 Bank Manager and indicated he would guarantee a loan in the sum of \$3 million.

7
8 142. In cross-examination, it was suggested to Gary and Teresa that a loan from FCIB had
9 already been agreed or substantially agreed, before the discussions with Captain Charles.
10 However, this was denied, although Gary did say, at one point that he would agree "for
11 now" that in April 2008 FCIB was ready to lend another \$3 million.

12
13 143. In my view, on the preponderance of evidence, it is probable that it was Captain Charles
14 who broached the subject, and instigated the Bloody Bay transaction. Further, that this
15 was after FCIB had already indicated that the loan needed to be reduced and that Don and
16 Gary should look about selling Bloody Bay. It is in my view quite significant that in the
17 Loan Facility letter of 17 April 2008, there is a condition precedent that required "A copy
18 of the purchase and sale agreement between Gary Kirk Foster and Robert Don Foster and
19 Capt. Charles Kirkconnell". This suggests that it was Captain Charles that arranged the
20 transaction in such a way that Bloody Bay, in his own self-interest, could be kept in the
21 family. A purchase and sale agreement would not seemingly be of such significance to
22 FCIB, left to its own interests, such as to require this agreement to be a condition

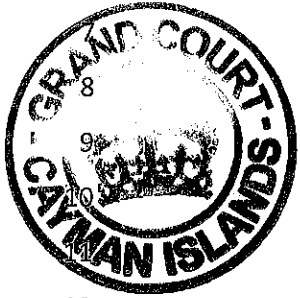
1 precedent, save that it was a requirement of the transaction in Captain Charles' interest,
2 Captain Charles being the one willing to provide the guarantee and hypothecate funds.
3

4 **(C) Or, was there an implied request? If there was an implied request, was it by GKF or**
5 **GCBCR?**

6 **(D) Who was really the true borrower in respect of the FCIB Loans in relation to the**
7 **Resort, was it GKF, or GCBCR?**
8

9 144. Issues (C) and (D) are really interrelated and can be addressed together. In the Sale
10 Agreement, Bloody Bay was referred to as being land which "currently has a collateral
11 charge held by FCIB as part of a loan to GCBCR of which Robert Don Foster and Gary
12 Kirk Foster are the sole owners". It is true that the 2004 loan and other loans from FCIB
13 stated that GKF was the borrower. However, it seems clear that the parties to the 2008
14 Sale Agreement. Don, Gary, and Captain Charles, regarded and acknowledged GCBCR
15 as the substantive borrower of the \$3 million. This is consistent with Gary, Teresa, and
16 Virginia Thompson's evidence that all along, FCIB required GKF to be the borrower of
17 record and to assume the legal liability in respect of project funding because it was not
18 willing to lend money to a timeshare operation, and because GKF had a more solid asset
19 base than did GCBCR. The evidence of these witnesses is that this is the reason why the
20 2004 Loan was made in the name of GKF.
21

22 145. The stated purposes of the 2004 loan in the 2004 Loan Agreement are set out at
23 paragraph 1.1, and 1.2, as follows:



1 "IT IS AGREED AS FOLLOWS:

2

3 1.1 Purpose

4 This Agreement sets out the terms and conditions upon and subject to
5 which the Bank agrees to make available to the Borrower the Facility
6 Amount (as hereinafter defined). Facility A (as hereinafter defined) is
7 intended to be applied in or towards the repayment of an existing debt
8 owed by the Grand Caymanian beach Club & Resort Ltd. to Heller
9 Financial Inc. Facility B is intended to be applied towards the repayment
10 of an existing debt due from Soundland to Cayman National Bank Ltd
11 and the repayment of an existing debt due from the Borrower to the
12 Scotiabank (Cayman Islands) Ltd. Facility C is to supplement the
13 working capital requirements of the Borrower and for no other purposes
14 whatsoever.

15 1.2 Definitions

16

17 "Facility A" means the sum of US\$4,200,000.00 to be made available to the
18 Borrower by the Bank;

19 "Facility B" means the sum of US\$2,000,000.00 to be made available to the
20 Borrower by the Bank";

21 "Facility C" means the overdraft facility in the sum of US\$250,000.00;"
22

23 146. On 16 January 2004 FCIB had offered to provide a three-part facility to GKF. Credit A
24 was in the sum of US\$250,000, the stated purpose being a revolving demand overdraft
25 facility to assist with the working capital requirements of GCBCR. Credit B was in the
26 sum of US\$4.2 million to refinance existing loan facilities in the name of GCBCR held
27 with Heller (by then GE Capital Real Estate). Credit C was in the sum of US\$2 Million,
28 and the stated purpose was a demand loan facility to refinance existing loan facility in the
29 name of Foster Bay Villas and personal facilities in the name of Rudland Foster.



1 147. The Plaintiff says that the funds came from account ending 0014 in 2008 and 2009. The
2 loan was cleared off with US\$1.542 million from 0014. Account ending 0014 is stated to
3 be "GKF Holdings re GC".

5 148. The Defendants' Counsel indicate that the proceeds of the loans which were used for
6 Credit A and B of the Facility letter, used for GCBCR, and the US\$2 million Ivan
7 bridging loan, the US\$1 Million 2005 loan, and the US\$3 Million loan were paid into the
8 Account ending 0014 and were eventually repaid from that account. Similarly, it was
9 suggested, GKF transferred funds from the Foster Bay Villas, account to the 0014
10 account. The Defendants submit that it is not surprising that repayment of those loans
11 would have come where possible from the 0014 account.

12
13 149. The FCIB loan that arose out of the Bloody Bay transaction between Gary, Don, and
14 Captain Charles, was expressly for purposes to do with GCBCR and not GKF. The
15 purpose stated in the Loan facility letter of 17 April 2008, was provided for as follows:

16 "Purpose

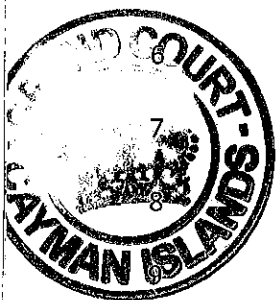
17 *Loan proceeds are to be used to fund US\$600,000 of the outstanding bills*
18 *to contractors associated with Phase 2 of the Grand Caymanian Beach*
19 *Club and Resort, Loan proceeds of US\$250,000 to be placed in an*
20 *account for debt servicing purposes. The remaining funds totaling*
21 *US\$2,150,000 will be used to continue the construction of Phase 2 of the*
22 *Grand Caymanian Beach Club and Resort".*

23
24 150. There was evidence about the different payments in and out of FCIB accounts, and there
25 was some evidence of intermingling of funds as between GKF, and GCBCR, in particular

1 the evidence about the account ending with 0014. This is particularly so with respect to
2 the fact that there were payments from Foster Bay Villas into account ending 0014.
3 There was additionally evidence which shows that GKF held a tight rein, and controlled
4 the sums coming in from GCBCR, some of which was also paid into the account ending
5 0014. However, Teresa did indicate that although this account was in the name of GKF it
6 was used for the business of the resort companies. Indeed, the account does have the
7 appellation "GKF Holdings re GC". There was also evidence about the consolidated
8 accounts of GKF and GCBCR. However, the Defendants maintained that the
9 consolidated accounts were prepared at the insistence of FCIB and that they do not
10 represent some alternative reality to that indicated by the shareholding.

11
12 151. I agree with Mr. Lowe Q.C. that it is not without significance that no attempt was made
13 by the Trustee to call evidence from FCIB in relation to how the facilities and accounts
14 were operated and as to the true substantive borrower. Though I appreciate that these
15 transactions took place some years ago, a witness from FCIB could potentially have
16 provided evidence which for present purposes would have been independent and
17 objective.

18
19 152. It is clear that the interrelationship between the resort companies and GKF was at times
20 run in a loose, ad hoc way. Particularly when it came to using the same account to receive
21 loan proceeds in, and from which to repay indebtedness. These were companies where
22 the respective shareholders were family members; in the case of GKF, Gary alone, and in
23 the case of the resort companies, Gary and Don, 70:30 % respectively. As Teresa



1 indicated in her evidence, after the death of Captain Rudland, and then Miss Alex, the
2 resort companies were under common control, notably Gary's as he was the majority
3 shareholder after that time and also the sole owner of GKF. In my judgment, looking at
4 the evidence on balance, it appears to me that the real substantive borrower were the
5 resort companies, in particular GCBCR, and that GKF did not use, for its own purposes,
6 monies intended for the Resort or loans designated for the Project. Whatever the legal
7 position may have been between FCIB and GKF, as between GKF, GCBCR, GCR, Don
8 and Gary, it was known that the resort companies were the true borrowers in reality. This
9 aspect of the borrowing is distinguishable from, for example, the borrowing by GKF in
10 Facility C of the 2004 Loan Facility which was for refinancing of a loan in the name of
11 Foster Bay Villas. I found the evidence of Virginia Thompson on this point, about
12 FCIB's insistence on GKF being the legal borrower, but the resort companies being the
13 true borrowers, quite credible and convincing. She went on to indicate that this was why
14 she showed the FCIB loans as a liability for the resort companies in the consolidated
15 accounts that she prepared. The backdrop of the Heller loan, a time-share lender's loan
16 being in the name of GCBCR and money being loaned to GKF to pay off that loan,
17 together with the continued construction and development of the Grand Caymanian
18 project after the FCIB loans are also important. It does not seem to me that the fact that
19 GKF may have controlled disposal of resort property and had the power to direct the use
20 of timeshare proceeds to FCIB, makes any difference to the question of which company
21 or companies were the real borrowers in substance. GKF was stated on the
22 documentation to be the legal borrower, so it would obviously be interested in securing
23 that funds from the time-share operation be used to reduce the indebtedness in the

1 circumstances where the resort companies were the real borrowers, but GKF was fixed
2 with legal liability as borrower.

3
4 153. Certainly, as regards the US\$3 million loan that arose after Captain Charles' intervention,
5 it is in my view plain, that the Borrower in respect of that sum was in reality GCBCR, as
6 expressly acknowledged in the April 2008 Sale Agreement, and based upon the express
7 purposes of the loan. Therefore, if there was any implied request to Captain Charles or
8 Don, I agree with the Defendants that it would have been on the part of GCBCR and not
9 GKF.

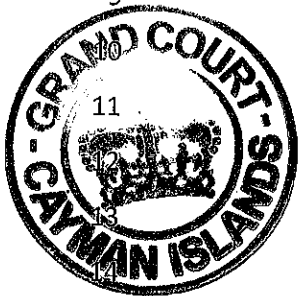
10
11 **LEGAL ISSUES**

12 **(E) Does Don have rights as guarantor or surety?**

13
14 154. It is important to really scrutinize the nature of the claims being made in this case. As the
15 Defendants' Counsel point out at paragraph 16 of their written closing submissions, the
16 Statement of Claim only advances a claim by Don "as a party providing a guarantee or
17 indemnity to Captain Charles in respect of his own liability to FCIB in respect of the debt
18 owed by GKF". In the pleaded case, it is not suggested that Don has any rights or claim
19 as a guarantor of GKF. The claim is that Don provided a guarantee or indemnity to
20 Captain Charles in respect of Captain Charles own liability to FCIB.

21 (My emphasis)
22





1 155. It is to be noted that Don did provide a guarantee to FCIB, but he plainly has no rights by
2 virtue of this guarantee because it was never called upon and he made no payment under
3 it.

4
5 156. In *In re a Debtor* [1937] Ch. 156, at page 162,-163, Greene L.J. discussed certain
6 principles relating to guarantees, as follows:

7 *"It is, in my opinion, settled beyond possibility of dispute that where "A"*
8 *at the request of "B" guarantees payment of "B's" debt to "C", the law*
9 *implies an undertaking by "B" to indemnify "A" in respect of any sums*
10 *which he properly pays to "C" under the guarantee. This is merely a*
11 *branch of a wider rule which is laid down in numerous authorities. I may*
12 *quote as examples Britain v Lloyd (1), where Pollock CB says, " It is*
13 *clear, that, if one requests another to pay money for him to a stranger,*
14 *with an express or implied undertaking to repay it, the amount, when paid,*
15 *is a debt due to the party paying from him at whose request it is paid, and*
16 *may be recovered on a count for money paid.....The request to pay, and*
17 *the payment according to it, constitute the debt; and whether the request*
18 *be direct, as where the party is expressly desired by the defendant to pay,*
19 *or indirect, where he is placed by him under a liability to pay, and does*
20 *pay, makes no difference."*

21
22 157. In *Moule v Garrett* [1872] L.R.7 Exch. 101, Cockburn C.J., quoted with approval from
23 the textbook of Leake, in his work on contracts, at page 41, and commented as follows:

24 *"Where the plaintiff has been compelled by law to pay, or, being*
25 *compellable by law, has paid money which the defendant was ultimately*
26 *liable to pay, so that the latter obtains the benefit of the payment by the*
27 *discharge of his liability; under such circumstances the defendant is held*
28 *indebted to the plaintiff in the amount.'*



Whether the liability is put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference: it is such a duty as the law will enforce."

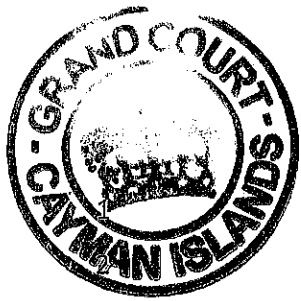
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5 158. In the instant case, it seems to me that the facts just do not fit this pleading. Don was
6 never a guarantor of Captain Charles. Captain Charles was not the principal debtor, and
7 Don did not agree with the creditor, FCIB, to answer for the debts of Captain Charles.
8 What Don agreed to was a separate contract, between himself, Gary, and Captain
9 Charles, that in consideration of Captain Charles providing a guarantee to FCIB for a
10 loan of \$3 million for a period of one year, for the use of GCBCR, and Captain Charles
11 hypothecating the sum of US\$3 million in deposits to support the loan, if at the end of
12 one year, the loan by FCIB was not repaid, title to Bloody Bay would be transferred to
13 Captain Charles for the total value of the said US\$3 million.

14

15 159. There is no evidence that Captain Charles' guarantee was called upon, indeed, what the
16 agreement dated 1 May 2009 between Captain Charles and FCIB shows is that the loan to
17 GKF would be repaid from the hypothecated funds of Captain Charles. Upon the loan
18 being repaid from the hypothecated funds, FCIB released Captain Charles from any and
19 all further or other obligations under the Guarantee and the Hypothecation and FCIB
20 immediately cancelled the Guarantee and Hypothecation. That agreement had an "entire
21 agreement" clause, which states:

22 *"(6) This Agreement sets out the entire agreement between the parties in*
23 *respect of the matters contained herein and all statements,*
24 *representations, terms and conditions, warranties, guaranties, proposals,*



communications, and understandings whenever given and whether orally or in writing shall be of no effect".

3

4 160. In addition, by virtue of Clause 17 of the Guarantee that Captain Charles signed with
5 FCIB, he postponed all liabilities which GKF might owe to him until FCIB was paid in
6 full and he assigned his rights against GKF to FCIB until the lending was repaid in full.

7

8 161. However, once FCIB and Captain Charles entered into the agreement in 2009 for the
9 release of the deposit and security over the land, that was an end of any rights against
10 GKF arising from the transaction with Captain Charles. Don's claim as guarantor or
11 surety is therefore misconceived, and cannot, in my view, be sustained.

12

13 162. In addition, even if it could be said that in transferring the land to Captain Charles, Don
14 was acting to reduce his own personal guarantee to GKF, in reality the borrowing was
15 really that of GCBCR and therefore he acted to GCBCR's benefit, not GKF.

16

17 **(F) Do Don and Gary have any rights by way of subrogation to step into Captain**
18 **Charles shoes and claim the US\$3 Million that Captain Charles had paid, or**
19 **alternatively, the value of their interest in Bloody Bay, from GKF?**

20

21 163. The basis of such a claim by way of subrogation was by way of stepping into the shoes of
22 Captain Charles, and therefore the claim must come through rights that Captain Charles
23 had. However, Captain Charles had no more rights against GKF. He had no more rights
24 of indemnity or otherwise, having agreed by way of the Agreement dated April 30 2009,
25 with Don, Gary, and GKF, that upon release of the US\$3 million of his hypothecated

1 funds effectively discharging the loan, and upon delivery to him of a valid and registrable
2 transfer of land with Title to Bloody Bay free and clear of all registered charges and
3 encumbrances, he would be "hereby released from any and all further or other obligations
4 to the Landowners in connection with the Guarantee and the Loan and the Land and the
5 Landowners shall be hereby released from any and all further or other obligations to
6 CLK in connection with the Loan and the Land."

7
8 164. That agreement, to which GKF was one of the parties, also had an entire agreement
9 clause. In my judgment, that clause also applies to all rights expressed or implied, as
10 between Don and GKF. This clause must, in my view, in addition to the circumstances of
11 the transactions and the conduct of the parties, be taken to signify that there was no
12 intention or contemplation that any rights of Captain Charles, whether of indemnity or
13 otherwise, would be kept alive for Don's benefit. In any event any rights kept alive,
14 would have been against GCBCR, not GKF. The clause states that:



15 *"(4) This Agreement sets out the entire agreement between the parties in*
16 *respect of the matters contained herein and all statements,*
17 *representations, terms and conditions, warranties, guarantees, proposals,*
18 *communications and understandings whenever given and whether orally*
19 *or in writing shall be of no effect."*

20 (My emphasis)

21
22 165. I agree with Counsel for the Defendants, that the only proper basis upon which the
23 Trustee's claim can be formulated is by way of unjust enrichment. Further, it appears that
24 the more current view is that claims by way of implied request and implied contract,
25 should instead be framed and formulated along the lines of the principles of restitution,

1 and unjust enrichment. One of the reasons is so as not to impose fictitious notions of
2 common or unilateral or presumed intentions, into the considerations for the grant of
3 restitutionary remedies.
4

5 166. In *Westdeutsche Bank v Islington* [1996] AC 669 at 710, Lord Browne-Wilkinson
6 stated:



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"Subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound. The common law restitutionary claim is not based on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay...In my judgment, your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule *Sinclair v Brougham* on this point."

I will now therefore turn to examine the claim for unjust enrichment and restitution.

(G) Was GKF unjustly enriched, at the expense of Don? That question breaks down into:

- (i) Was GKF enriched?
- (ii) Was such enrichment at Don's expense?
- (iii) Was such enrichment unjust?
- (iv) Are there any policy reasons for denying a remedy?

167. In the leading case of *Banque Financiere de la Cite v Parc (Battersea) Ltd.* [1999] 1 A.C. 221, the House of Lords dealt with a number of areas of law upon which the Trustee

1 relies, notably, restitution, unjust enrichment and subrogation. At page 231D-232 B, and
2 234 B-G, Lord Hoffman discusses the principles associated with equitable subrogation as
3 follows:

4 231D-232B:

5 *"My Lords, the subject of subrogation is bedeviled by problems of*
6 *terminology and classification which are calculated to cause confusion.*
7 *For example, it is often said that subrogation may arise either from the*
8 *express or implied agreement of the parties or by operation of law in a*
9 *number of different situations: see, for example, Lord Keith of Kinkel in*
10 *Orakpo v Manson Investments Ltd. [1978] A.C. 95, 119. As a matter of*
11 *current terminology, this is true, Lord Diplock, for example, was of the*
12 *view that the doctrine of subrogation in contracts of insurance operated*
13 *entirely by virtue of an implied term of the contract of insurance (Hobbs v*
14 *Marlowe [1978] A.C.16, 39) and although in Lord Napier and Ettrick v*
15 *Hunter [1993] A.C. 713 your Lordships rejected the exclusivity of this*
16 *claim for the common law and assigned a larger role to equitable*
17 *principles, there was no dispute that the doctrine of subrogation in*
18 *insurance rests upon the common intention of the parties and gives effect*
19 *to the principle of indemnity embodied in the contract. Furthermore, your*
20 *Lordships drew attention to the fact that it is customary for the assured, on*
21 *payment of the loss, to provide the insurer with a letter of subrogation,*
22 *being no more nor less than express assignment of his rights of recovery*
23 *against any third party. Subrogation in this sense is a contractual*
24 *arrangement for the transfer of rights against third parties and is founded*
25 *upon the common intention of the parties. But the term is also used to*
26 *describe an equitable remedy to reverse or prevent unjust enrichment*
27 *which is not based upon any agreement or common intention of the party*
28 *enriched and the party deprived. The fact that contractual subrogation*
29 *and subrogation to prevent unjust enrichment both involve transfers of*
30 *rights or something resembling transfers of rights should not be allowed*



1 to obscure the fact that one is dealing with radically different institutions.
2 One is part of the law of contract and the other part of the law of
3 restitution. Unless this distinction is borne clearly in mind, there is a
4 danger that the contractual requirement of mutual consent will be
5 imported into the conditions for the grant of the restitutionary remedy or
6 that the absence of such a requirement will be disguised by references to a
7 presumed intention which is wholly fictitious. There is an obvious parallel
8 with the confusion caused by classifying certain restitutionary remedies as
9 quasi-contractual and importing into them features of the law of contract

10
11 234 B-G:

12 "These cases seem to me to show that it is a mistake to regard the
13 availability of subrogation as a remedy to prevent unjust enrichment as
14 turning entirely upon the question of intention, whether common or
15 unilateral. Such an analysis has inevitably to be propped up by
16 presumptions which can verge upon outright fictions, more appropriate to
17 a less well developed legal system than we now have. I would venture to
18 suggest that the reason why intention has played so prominent a part in
19 the earlier cases is because of the influence of cases on contractual
20 subrogation. But I think it should be recognized that one is here concerned
21 with a restitutionary remedy and that the appropriate questions are
22 therefore, first, whether the defendant would be enriched at the plaintiff's
23 expense; secondly, whether such enrichment would be unjust; and thirdly,
24 whether there are nevertheless reasons of policy for denying a remedy.
25 This does not of course mean that questions of intention may not be highly
26 relevant to the question of whether or not enrichment has been unjust. I
27 would certainly not wish to question the proposition of Oliver J. in *Paul v*
28 *Speirway Ltd.* [1976] Ch. 220 that, as against a borrower, subrogation to
29 security will not be available where the transaction was intended merely
30 to create an unsecured loan. I do not express a view on the question of
31 where the burden of proof lies in these matters. Oliver J., following the



dictum of Lord Jenkins in *Ghana Commercial Bank v Chabdiram* [1960] A.C.732, 745 which I have quoted, held that if the plaintiff's money was used to discharge a secured liability, he was presumed to "intend that the mortgage shall be kept alive for his own benefit" and this presumption was applied by Nicholls J in *Boodle Hatfield & Co v British Films Ltd*, 1986 P.C.C. 176. However, if it is recognized that the use of the plaintiff's money to pay off a secured debt and the intentions of the parties about whether or not the plaintiff should have security are only materials upon which a court may decide that the defendant's enrichment would be unjust, it could be argued that on general principles it is for the plaintiff to make out a case of unjust enrichment."

(My emphasis)

168. In *Joint Liquidators of Simclar (Ayrshire) Ltd. v. Simclar Group Ltd.*[2011] the action came before the Lord Ordinary (Hodge) on a preliminary issue. In the course of resolving that issue, Lord Hodge stated as follows, at paragraphs [19], [20] and [27] of the judgment.

"(i) Relief among co-obligants

[19] The right of relief as between co-obligants in a joint and several contractual obligation entitles the obligant who has paid more than his pro rata share to recover the excess from his co-obligants. That right is based on an obligation to reverse unjustified enrichment, which formerly was described as an obligation of recompense. ... A similar approach is taken in relation to joint wrongdoers...The obligation to reverse unjustified enrichment is not confined to co-obligants under the same contractual obligation.

....

(ii) The entitlement to total relief of cautioners and others



1 [20] Where two people (A and B) are jointly and severally liable to
2 the creditor (C) and B is the cautioner of A, if B pays off A's debt
3 to C, he is entitled to total relief from A. In such circumstances, it
4 is the intention of the principal debtor, A, and the payer, B, that
5 A should have the ultimate responsibility for paying the creditor,
6 C.Again, the entitlement to relief arises out of the obligation
7 to reverse unjustified enrichment. But this right is not confined to
8 cautioners. In other circumstances in which the law provides that
9 one of two debtors has the ultimate responsibility for paying the
10 creditor, the entitlement of the other to total relief arises....

11 [27] In this case SGL undertook the obligation to the bank in the
12 context of a wider financial arrangement which included the
13 provision of funds to SGL and related companies and the
14 acquisition by SGL of SAL's assets from the joint administrators.
15 It was not a cautionary obligation. It was an agreement to meet
16 the shortfall to the bank on SAL's insolvency. SAL was not a
17 party to the arrangement. There was no contract between SAL
18 and SGL which determined that one party's obligation was
19 primary and the other secondary. The questions therefore are (i)
20 what was the nature of the transaction as a whole; and (ii)
21 whether SGL's liability was truly secondary and accessory to
22 that of SAL. Ultimately the question is whether SAL has been
23 unjustifiably enriched by SGL's payment. In my opinion this
24 question cannot be answered without an enquiry into the nature
25 of the transaction between SGL, its associated companies and
26 the bank. In this regard I note that SAL's debt to the bank could
27 equally have been paid off if SGL had paid a higher price for
28 acquiring SGL's assets as part of the transaction."
29



1 169. In *Menelaou v Bank of Cyprus plc* [2014] 1 W.L.R. 854, restitution, unjust enrichment
2 and subrogation are discussed. It was held that notwithstanding that the bank in question
3 had not directly provided the moneys deployed to pay for the claimant's new house and
4 had no beneficial interest or security in them, there was a sufficiently close causal
5 connection between the bank's agreement to release the two charges and the purchase of
6 a new house to justify the conclusion that there had been a transfer of value from the
7 bank to the claimant so that the claimant had been unjustly enriched at the bank's
8 expense; and that, since the bank's agreement had enabled the monies used to discharge
9 the debt to the vendors to be released, the bank was entitled to be subrogated to the
10 unpaid vendor's lien and so had an equitable charge over the claimant's house to secure
11 the outstanding indebtedness.

12
13 **The substance of the arrangement and understanding between the relevant parties**

14 170. Reference was made by the Defendants' Counsel to the fact that a Court of Equity can
15 apportion liability as between sureties or borrowers - Goff & Jones 8th Edition, page 556.

16
17 171. Further, that the Court is entitled to look at the substance of the arrangement between the
18 parties - *Erskine v Cormack* (1842) 4 D 1478, *McMurray v McFarlane* (1894) 31 SLR
19 531, *Joint Liquidators of Simclar (Ayshire) Ltd. v Simclar Group Ltd.* [2011] CSOH 54,
20 *Official Trustee v Citibank* [1999] BPIR 754, followed in *Day v Shaw* [2014] EWHC 36.
21 See also *Banque Financiere v Parc* and *AGC (Advances) Ltd. v West* [1984] 5 NSWLR
22 590, and the analysis as to which party was in substance and reality the true borrower.
23 Mr. McMaster Q.C. on the other hand, in his written submissions on behalf of the

1 Trustee, submitted that looking at the substance of the transactions, leads one straight
2 back to the borrower because it leads one to look at the shareholdings in GCBCR and the
3 fact that Gary owned more than two thirds of its shares. Further, that his other company
4 GKF Enterprises, in which he owned 98% of the shares, carried out the Phase II
5 construction work.

6
7 172. In *Official Trustee v Citibank*, Bryson J. at pages 757 F-758 D, puts the considerations
8 this way:



9 *"If consideration of the relationship among the parties were limited to the*
10 *terms of the documents which create obligations to Citibank it would be*
11 *clear that the mortgagors referred to in the deed of the supplementary*
12 *loan fell under a common liability so that there would be an entitlement to*
13 *contribution. However, their characterization as co-sureties with a*
14 *common liability is only established prima facie by the terms of the*
15 *documents, and as ever with equitable relief, relief must be based on the*
16 *substance of the transactions, which is not established solely by the terms*
17 *of those documents. It is a common-place of cases relating to contribution*
18 *that, although persons appear on the face of a document to have entered*
19 *into a liability as sureties on the same basis, agreements or*
20 *understandings among them or the circumstances in which they acted may*
21 *establish that their true relationship is otherwise. In particular, it may be*
22 *established that as between them, one has primary liability and another*
23 *has a liability to be resorted to only if resort to the first is insufficient.*

24 *The remedy sought in this case is wholly equitable. There is no express or*
25 *implied contractual undertaking that the second defendants would pay*
26 *contribution. Underlying any decision to order contribution as an*
27 *equitable remedy is a characterization by the court of the parties as in*
28 *positions of equality so that equality of outcome is appropriate. The*

1 relationship among the persons concerned may of itself show that it is just
2 that the primary liability shall fall on one of them, so that remedies
3 securing equality of outcome are not appropriate; or it may show that it is
4 just that if the liability fall wholly on one of them that person should be
5 indemnified, or it may show that he should have no remedy. The court is
6 not enforcing contractual or other legal rights of the parties, but is
7 intervening, as a court of conscience, to secure a just outcome. Ordinarily
8 equality produces a just outcome, but circumstances may show otherwise.
9 There are many authorities in which it is acknowledged that it may be
10 shown by extrinsic evidence that a person stands in a different relation to
11 other persons involved than the terms of their documents would show. In
12 most cases the true relationship is shown by some express arrangement
13 among those concerned, but there is no reason in principle why it may not
14 appear clearly from the circumstances of the parties that they did not
15 stand in an equal relationship with each other as sureties. An intention
16 which is common to them, and an intention held by one of them at the time
17 of becoming a surety, have been relied on to show that they are not in an
18 equal relationship, and in principle there is no reason why it should not be
19 held that their circumstances make their relationship sufficiently clear
20 without any arrangement or objective expression of intention. Indeed, the
21 case where it is most obvious that one is not entitled to contribution from
22 another is the case where there is least likely to be express advertence to
23 contribution."

24 (My emphasis)

25
26 173. In my judgment, it is clear that in reality, although in the documentation GKF was stated
27 to be the borrower, the true borrowers were the resort companies, i.e. specifically
28 GCBCR. This is plainly so in relation to the borrowing that accompanied and involved

1 the Bloody Bay transactions and Captain Charles. That is the substance of the situation.

2 Both Don and Gary were the shareholders in GCBCR.

3
4 174. I have already found that GKF only ended up as the legal borrower because FCIB
5 insisted, because of GKF's superior financial foundation and asset base and FCIB's
6 unwillingness to lend to Time-share companies, that GKF should assume the legal
7 responsibility for the loan needed by GCBCR for the Grand Caymanian project. In my
8 judgment, the evidence does suggest that the US\$3 million loan was taken out not for the
9 corporate purposes of GKF, but for the benefit of GCBCR. In my view, the fact that Gary
10 was the majority shareholder in the Resort companies, and was the sole shareholder in
11 GKF cannot transform the substance of the borrowing into being that of GKF. The
12 borrowing was for the purposes of, and was used, in relation to the Grand Caymanian
13 project.

14
15 175. In any event, even if GKF was also enriched along with GCBCR, it is difficult to find
16 that it was at the expense of Don. I say this for a number of reasons. Firstly, Don and
17 Gary were the sole shareholders of GCR. The businesses were run as a family concern.
18 Don and GCBCR were interrelated as shareholder, and company respectively; it could
19 not be said that Don derived no financial or other benefit from GCBCR obtaining loans
20 from FCIB, albeit the loans were in the name of GKF. Don and GCBCR had a
21 commercial relationship in addition to there being the family relationship between
22 himself and the other shareholder, his brother Gary. Further, I accept Gary's evidence
23 when he said that (paragraphs 7 and 8 of his witness statement):

1 *"7.... In reality the project companies were the borrowers. As holders of*
2 *all the shares in the project companies, Don and I both stood to profit*
3 *from the success of the project. We also appreciated that if the project*
4 *failed we could lose Bloody Bay and would be exposed on personal*
5 *guarantees we both gave to support the project lending.*

6 *8. We were committed to the project and appreciated the risks that we*
7 *were running. We never intended to make claims against each other in the*
8 *event that the project was not a success."*
9

10 176. Further, the evidence is that Don signed a document headed "Declaration Taken From
11 Those Who Decline Independent Legal Advice" in which he expressly stated that he had
12 declined the Bank's recommendation that he obtain independent legal advice as a surety
13 because "he fully understands that the Land in Little Cayman has been pledged as
14 security for loans to GKF Holdings Ltd". This suggests to me that Don was well aware
15 that the borrowing was really for the project companies, that he stood to profit from the
16 success of the Grand Caymanian project, and that he fully appreciated that, on the other
17 hand, if the project failed or the loan was not repaid, he stood to lose Bloody Bay. Don
18 was not a person inexperienced in business or unfamiliar with the operations of GKF and
19 nor was he a volunteer in relation to GCBCR. Of course, it was also the case that in any
20 event, from the moment when Don became a joint proprietor of Bloody Bay along with
21 Gary, the land was already subject to charges previously granted by Miss Alex in favour
22 of FCIB in respect of the borrowing. This also points away from a finding that anything
23 was at Don's "expense".
24





1 177. In addition, there is no proper evidence as to the real value of Bloody Bay, absent the
2 agreement with Captain Charles setting a figure of US\$3 million, as to equity of
3 redemption, or true value of the encumbered interest in Bloody Bay was. In addition to
the several charges in respect of loans in excess of \$7 million, Bloody Bay was subject to
a legal charge dated 12 July 2005 in favour of FCIB for all monies due to FCIB by GKF.
There was also Miss Alex's on demand all monies guarantee given to FCIB in respect of
all the debts of GKF to FCIB.

8
9 178. There are aspects to the Bloody Bay dealings that are perplexing. At the time when Gary
10 and Don were trying to sell it, it would seem, as I have discussed above, that Bloody Bay
11 was already charged with over US\$ 7 million in bank debt. Yet the offer from Kent Hall
12 was for US\$2 million. No evidence was presented as to the value of Bloody Bay. Captain
13 Charles was able to somehow get Bloody Bay, according to the Agreement of 30 April
14 2009, between himself and Gary, Don and GKF transferred to him "free and clear of all
15 registered charges and encumbrances", the value of Bloody Bay having been agreed at
16 US\$3 million in the April 2008 Sale Agreement. The Court has not received a full
17 description of this aspect of the matter and cannot speculate. I therefore agree with Mr.
18 Lowe Q.C. that there is no sound basis for saying that the expense suffered by Don was
19 US\$1.5 million.

20
21 179. Even if I am wrong, and GKF was enriched, and it was at Don's expense, the question
22 would then arise whether it is unjust. The further question would also arise as to whether
23 there is any other reason for refusing a remedy.

1 180. It is plain on the evidence that Gary personally was in a position to, and did put into the
2 resort companies, and the Grand Caymanian project, far more funds than did Don. There
3 was no challenge to Teresa and Gary's evidence that after the sale of the project for \$4
4 million, this left a balance of \$2,598,122 of borrowing on behalf of the Grand Caymanian
5 owing to FCIB. The evidence was that this was subsequently paid by GKF with the
6 benefit of a loan from HSBC. Gary stated that it was GKF that paid these "legacy Grand
7 Caymanian debts." Teresa also gave evidence that in April 2009, she and Gary had taken
8 out a personal loan from Scotia Bank as bridging finance in order to assist with the
9 completion of Phase 2. This was a loan that Mr. Delapenha had agreed to take over
10 responsibility for. Teresa's evidence was that this loan has still not been repaid. In all of
11 the circumstances, assuming those alternative premises, and although I bear in mind that
12 the loan was in the name of GKF as legal borrower, and therefore it was in GKF's
13 interest to clear off all indebtedness in its name, whatever the true source, in my view it
14 could not be said that GKF was unjustly enriched. Alternatively, the circumstances and
15 surrounding conditions exist that would point to the refusal of a restitutional remedy. The
16 Court would not as a Court of conscience, be intervening to assure a just outcome if it
17 were to grant a remedy in the prevailing circumstances of this case, at any rate without
18 conducting a complete and detailed equitable accounting, given the imbalance in
19 contributions and funding as between Don and Gary, and GKF's own role in repaying
20 loans that were used for the purposes of the resort companies.

21
22 181. It is to be noted, as said before, that this is not a claim by Don against GCBCR or Gary
23 per se in his personal capacity. Had it been, one could see an argument being advanced

1 that Gary and Don both in equity owning Bloody Bay 50:50, but owning shares in
2 GCBCR 70:30, then Gary should reimburse Don the difference between 50% of the
3 US\$3 million (what Don allegedly contributed), and 30% of the US\$3 million (what his
4 shareholding in equity required), which would be US\$600,000. This would be based on
5 an argument that Gary had been unjustly enriched, or that Don should in equity receive a
6 contribution from Gary in that sum, given the difference in their share ownership in
GCBCR. The premise would then be that Don would in those circumstances have
provided more than his pro-rated share in value and that contribution or compensation
from Gary would produce a just outcome. However, that is not the case made by the
Trustee, no doubt for the reasons to follow, or other good reasons. As stated in the
paragraph above, the Court would not have been able to arrive at such a conclusion
without carrying out a full and proper equitable accounting, taking into account alongside
the understanding and relationship between these two brothers and how they conducted
their business affairs, all of Gary's other payments to the account, and for the benefit of
GCBCR, including those made by GKF at Gary's direction.

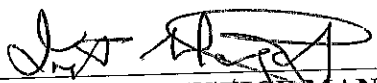
11
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15
16
17 **JUDGMENT**

18 182. There will therefore be Judgment for the 1st Defendant on the Claim. Since there was no
19 substantive claim made against Gary, he did not in his personal capacity have a large role
20 to play in the proceedings.

21 183. In all of the circumstances, I am not of the view that GKF is entitled to any remedy or
22 other relief on its Counterclaim. As Gary stated in evidence, and I accepted, I do not
23 think that either he or Don expected to make claims against each other if the Grand

1 Caymanian project failed. Nor do I find that they expected Gary's company GKF to make
2 any claim against Don either, whether for equitable compensation or otherwise. In the
3 circumstances of this case, and how Don and Gary conducted the business, to find unjust
4 enrichment would not be a just outcome. I surmise that the Counterclaim was raised more
5 in the interests of raising a shield to the Trustee's claim, and not so much as a genuine
6 sword. Thus, the emphasis was really on the set-off claimed. The Counterclaim has not
7 been proved, and there will therefore be Judgment for the Plaintiff on the First
8 Defendant's Counterclaim.

9
10 184. The question of entitlement to costs on the Claim and on the Counterclaim is reserved for
11 further submissions to be made by Counsel.

12
13
14 
15 THE HON. JUSTICE MANGATAL
16 JUDGE OF THE GRAND COURT
17

