# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**
**(COMMERCIAL COURT)**

**2022: No. 42**

**IN THE MATTER OF A FINAL ARBITRAL AWARD DATED 20 MARCH 2020 RENDERED BY A TRIBUNAL SITTING IN AN ICC ARBITRATION SEATED IN NEW YORK (CASE NO. 23149/MK)**

**AND IN THE MATTER OF SECTION 40 OF THE BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993**

**AND IN THE MATTER OF ORDER 73(10) OF THE RULES OF THE SUPREME COURT 1985**

**BETWEEN:**

**(1) TRUMP PANAMA HOTEL MANAGEMENT LLC**

**(2) TRUMP INTERNATIONAL HOTELS MANAGEMENT, LLC**

**Plaintiffs**

**-and-**

**(1) HOTEL TOC, INC.**

**(2) LUXURY HOTELS INTERNATIONAL LODGING LTD.**

**(3) HALLMARK PROPERTIES, INC.**

**(4) PLAIN PROPERTIES, INC.**

**Defendants**

**RULING**

**Date of Hearing:** **17, 18, 19 July 2023**

**Date of Ruling:** **12 October 2023**

**Appearances:** **Keith Robinson and Sam Stevens, Carey Olsen Bermuda Limited, for Plaintiffs**
**Dan Griffin, MJM Limited, for First Defendant**
**Richard Horseman, Wakefield Quin Limited, for Second Defendant**
**Warren Bank, Cox Hallett Wilkinson Limited, for the Third & Fourth Defendants**

**RULING of Mussenden J**

## Introduction

1. This matter started in Bermuda by way of an *ex parte* summons dated 1 March 2022 as an action initiated by the First Plaintiff **("Trump Panama")** and the Second Plaintiff (together the **"Trumps")** as against the First Defendant **("HTOC")** and the Second Defendant ("**Luxury Hotels**"). By way of a Consent Order dated 12 May 2023 Third and Fourth Defendants (together "**H&P**") were joined to the matter.

2. On 1 March 2022, on the Trumps' *ex parte* application, I granted orders (the "**Freezing Order**") as follows:
    a. The Trumps were granted leave to enforce the Final Award (defined in the Background section below) in the Bermuda Court and judgment was entered that HTOC pay the Trumps the principal amount of $3,380,997.53 plus interest (the "**Bermuda Judgment**").
    b. Several orders in essence restraining HTOC and Luxury Hotels from dealing with certain assets and monies connected by way of a hotel management agreement between them in relation to the JW Marriott Panama Hotel (the "**Hotel**") in Panama.

3. This matter now appears before me on several summonses as set out below.

4. The Trumps issued a Summons dated 16 August 2022 to appoint a receiver over the revenues and operating profit of the Hotel, (the "**Receivership Application**"). The purpose of the receivership is to collect amounts due and owing to the Trumps under the Bermuda Judgment.

5. HTOC issued a Summons dated 13 May 2022 seeking the setting aside of the Freezing Order of 1 March 2022 and seeking security for costs and other relief **("HTOC's Summons")**.

6. Luxury Hotels issued a Summons dated 10 May 2022 seeking the discharge of the Freezing Order as against Luxury Hotels or, in the alternative, an amendment of the Freezing Order to allow certain payments to be made from the Hotel's operating accounts, as well as security for costs, fortification for the undertaking in damages, and other relief **("Luxury Hotels' Summons")**.

7. H&P issued a Summons dated 20 April 2023 seeking: (a) security for costs in the sum of $300,000 or any amount of all; (b) a fortification of the Trump's undertaking to pay damages in the Freezing Order by extending it to H&P and increasing it to US$950,000; and (c) indemnification for all costs incurred by reason of having to make the application **("H&P's Summons")**.

8. There has been considerable affidavit evidence and exhibits filed in support of the various applications to which I refer as necessary.

**Previous Applications and Orders – Security for Costs and Fortifications**

9. After hearing parts of the various Summonses, on 7 February 2023 I made orders as follows:
    a. I dismissed HTOC's application for security for costs against the Trumps.
    b. I dismissed Luxury Hotels' application for a fortification of the Trumps' cross-undertakings in damages.
    c. I granted Luxury Hotels' application for security for costs against the Trumps in the sum of $300,000.

**The Parties and other related entities**

10. This case involves the Hotel, formerly the Trump Ocean Club International Hotel Tower – Panama, now the JW Marriott Panama Hotel. The Hotel's accommodations are made up of hotel condominium units (the "**Hotel Units**").

11. The Trumps are hotel management companies incorporated in Delaware, USA with registered addresses in New York.

12. HTOC is a corporation incorporated under Panamanian law which nominally owns the Hotel. It has no connection to Bermuda. HTOC is owned by Hotel TOC Foundation, a private interest foundation formed under the laws of Panama. The beneficiaries of Hotel TOC Foundation are the legal owners of the 369 Hotel Units in the Hotel (the **"Hotel Unit Owners"**).

13. Luxury Hotels is an exempt company domiciled in Bermuda. It is an affiliate of the Marriott Worldwide Corporation ("**MWC**"). Following various disputes between HTOC and the Trumps,

Luxury Hotels took over management of the Hotel from Trump Panama. This is why the Hotel is now known as the JW Marriott Panama.

14. H&P are Panamanian companies which own a combined total of 85 Hotel Units in the Hotel, purchased between the period August 2020 to early 2023. According to Clare 1, H&P have placed all 85 of the Hotel Units into the Hotel's rental pool pursuant to agreements (rental and maintenance) with Hotel Owner Inc. Mr. Bank submitted that H&P had no idea of the other Summonses before the Court until 8 February 2023 when a draft receivership order was sent to Mr. Clare by Mr. Fintiklis in his capacity as a representative.

15. Hotel Owner Inc. is a Panamanian company which by way of an Omnibus Amendment Agreement dated 1 October 2021 was added as an owner of the Hotel.

**Background**

16. The underlying dispute between the Trumps and HTOC concerned a mixed-use property in Panama City, which is one of the largest in Latin America and began operating in 2011. It is comprised of Hotel Units, restaurants, and residential condominium apartments, among other facilities (the "**Property**"). Upon opening, the Property was known as the Trump Ocean Club International Hotel and Tower. The Hotel Unit portion of the Property is the Hotel.

17. The Hotel was operated by Trump Panama pursuant to a management agreement with HTOC and certain related parties (the **"TMA"**). A dispute subsequently arose in relation to a notice of termination of the agreement by HTOC. HTOC initiated arbitration proceedings and the matter was subsequently referred to arbitration seated in New York, although the evidentiary hearing took place in Panama.

18. On 20 March 2020, the ICC Tribunal issued its final award (the "**Final Award**") and on 17 June 2020 the ICC Tribunal issued an addendum to the Final Award concerning payment of costs. The ICC Tribunal found that the termination of the TMA by HTOC was a breach of the Trumps' fundamental contractual rights under the TMA. In the Final Award, the ICC Tribunal ordered HTOC to pay the Trumps the sum of USD$3,380,997.53, representing the lost profits that Trump Panama was entitled to recover as damages following HTOC's termination of the TMA in breach of contract, offset by a credit to HTOC for certain marketing costs that it incurred, plus interest running from the date of the Final Award. The ICC denied other claims by the parties.

19. The Final Award was recognized and confirmed in New York as the seat of arbitration. On 8 October 2020, a money judgment was entered in favour of the Trumps in the amount of USD$3,549,949 against HTOC (which represents the amount in the Final Award plus interest) (the "**NY Judgment**"). The NY Judgment was served on HTOC, which has not made any payment in satisfaction of the debt.

20. The Trumps also tried to enforce the NY Judgment in New York against Luxury Hotels which is the second manager of the Hotel and against Luxury Hotels' indirect parent, Marriott International Inc. ("**Marriott**"). In those proceedings, Marriott indicated that it was not a proper target for the Trumps' enforcement efforts because Luxury Hotels, not Marriott, controlled the Hotel's operating accounts pursuant to its management agreement with the HTOC (the "**HMA**"). On 30 September 2021, the New York Court issued an order dismissing the Trumps' application to enforce the restraining notices and subpoena for various reasons. No further steps have been taken in the New York action, and the Trumps have not taken steps to enforce the Final Award in Panama for various reasons.

21. The Trumps have taken the view that the Final Award can be enforced in Bermuda under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **"NY Convention"**) in the same manner as a judgment of the Bermuda Court. The Trumps rely on section 40 of the Bermuda International Conciliation and Arbitration Act 1993 (the **"1993 Act"**) which gives effect to the NY Convention in Bermuda. The enforcement procedure for arbitral awards set out in Order 73, Rule 10 of the RSC does not mention section 40 of the 1993 Act, but the Bermuda Courts have acknowledged that this was an inadvertent omission.

22. A Convention Award is defined in section 2 of the 1993 Act as "*an award made in pursuance of an arbitration agreement in a State or territory other than Bermuda, which is a party to the New York Convention.*" The USA is a Member State of the NY Convention having acceded to it on 30 September 1970.

23. The Trumps sought leave to enforce the Final Award in Bermuda against HTOC and Luxury Hotels for various reasons.

24. HTOC has been pursuing a civil claim since 2018 for damages against the Trump Panama in Panama. Trump Panama is subject to a freezing order in those proceedings in the amount of $5,531,150 and the Panamanian Court has appointed a receiver over Trump Panama.

**The Receivership Application**

The Law

25. The Court's power to appoint a receiver is derived from section 19(c) of the Supreme Court Act 1905. The fundamental test the Court will apply is whether the appointment is "*just and convenient*". A receivership order can either be made unconditionally, or upon such terms as the Court thinks just. Where a third party is likely to be impacted by the appointment of a receiver, the Court can include protections within the order to mitigate the impact on those third parties effected.

26. In *Munib Masri v Consolidated Contractors International Company SAL and Teyseer Contracting Company WLL* [2010] Bda LR 21 at [52] ("***Masri Bermuda***") Kawaley J (as he then was), concerning the scope of the Court's power to appoint receivers by the way of equitable execution, stated that section 19(c) of the Supreme Court Act 1905 is:

> *"substantially the same as the more abbreviated modern provisions of section 37 of the United Kingdom Senior Courts Act 1981…* [and] *English judicial or text authorities on the scope of the English courts' jurisdiction to appoint receivers by way of interim order are accordingly highly persuasive."*.

27. Kawaley J also stated at paragraph 53:

> "*Decisions on other cases where receivers have been appointed in aid of execution will likely not be dispositive; rather illustrative of the circumstances in which receivers have been appointed and serve as a useful guide to the proper exercise of a broad statutory discretionary power.*"

28. Order 51 of the Rules of the Supreme Court 1985 ("**RSC"**) sets out the domestic procedural rules relevant to the appointment of a receiver by way of equitable execution. Order 51 rule 1 states as follows:

> "*Where an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that the appointment should be made shall have regard to the amount claimed by the judgment creditor, to the amount likely to be obtained by the receiver and to the probable costs of his appointment and may direct an enquiry on any of these matters or on any other matter before making the appointment.*"

29. The equitable discretion to appoint a receiver over a judgment debtor's assets in order to facilitate the enforcement of the judgment creditor's rights arises where the execution of a judgment at common law (Writs of Fi Fa, garnishee orders, etc.) is either prevented or impractical. This type of equitable relief is often seen in modern cases where, as in this case, assets are located abroad and therefore outside the direct reach of legal execution (*Kerr and Hunter on Receivers and Administrators*, 21st Edition, paragraph 1-4). Such hurdles may be legal or practical ones, and the Court will take all of the circumstances of the case into account.

30. A receiver can be appointed to collect, protect and receive the assets of a judgment debtor. It is an interim measure and operates as an *in personam* remedy by way of injunction. It is an injunction that operates both negatively and positively: negatively in that it restrains the respondents from dealing with the assets in question, and positively by authorizing the receiver in respect of those same assets (*Kerr* at paragraph 2-50). A receiver appointed by the Court:

> "*…is not an agent for any of the parties but is an officer of the court, so that the court "in effect assumes the management into its own hands."* [The receiver] *has no estate or interest in the property, but recovers the income from it as an officer of the court and upon the title of those who are parties to the action. The mere appointment of a receiver operates as a general injunction restraining any interference with him in the performance of his duties; and any such interference may be punished as a contempt and further restrained by injunction specifically addressed to the person interfering.*" [emphasis added] (*Snell's Equity, 34th Edition* at 19-007).

31. The demands of justice are always the overriding consideration when the Court is asked to exercise its equitable jurisdiction in aid of the enforcement of its judgments (*Masri v Consolidated Contractors International UK Ltd (No. 2)* [2008] EWCA Civ 303) ("***Masri UK***"). The demands of justice include the policy of the law that the judgments of the Court should be complied with and, if necessary, enforced (*Cruz City 1 Mauritius Holdings v Unitech Ltd (No 2)* [2014] EWHC 3131 (Comm) per Males J at [21] and [47(a)] and *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm) per Butcher QC at [53]). It is a well-established policy of the law that the Courts will do their upmost to assist judgment creditors to realise the fruits of the judgment. The appointment of a receiver by way of equitable execution is now widely recognized as one of the most powerful tools available to the Courts to ensure its judgments are enforced. As stated by Kawaley J in *Masri Bermuda* at [1]:

> "*The walls of the legal temple are shaken but not shattered when recalcitrant judgment debtors launch a concerted attack on the judgment enforcement armoury of the courts. The challenge is for the courts and judgment creditors to devise effective enforcement techniques which neither unduly prejudice innocent third parties nor undermine the moral fabric of the law.*"

32. When requested to appoint a receiver by way of equitable execution of a judgment debt, the Court is "*unconstrained by rigid expressions of principle and is responsive to the demands of justice in the contemporary context*" *(Cruz City 1 Mauritius Holdings* at [47(b)]). If the judgment creditor can show that there is a "*reasonable prospect that the appointment will assist in the enforcement of a judgment or award*" the Court will likely be persuaded to make the appointment (Males J in *Cruz City 1 Mauritius Holdings* at [47e]):

> "*It is unnecessary, and will generally be pointless, for the court to attempt to decide hypothetical questions as to the likely effectiveness of any order. That applies with even greater force where such questions involve disputed issues of foreign law. <u>It is sufficient that there is a real prospect that the appointment of receivers will serve a useful purpose</u>.*" [emphasis added]

33. A receiver may be appointed over any assets of a judgment debtor, including assets that are considered in equity to be its assets (*Kerr* at paragraph 2-46). That the courts will now look, in accordance with established principles, to take as broad a view as possible of what should be regarded in equity as judgment debtor's asset is shown by the Privy Council's decision in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd and other* [2011] UKPC 17. In that case, the ratio of which has binding effect in Bermuda, the Board held that a judgment debtor's power under a trust deed to revoke the settlement of a discretionary trust should be regarded as an asset of the judgment debtor over which a receiver by way of equitable execution could be appointed.

34. Per the English Court of Appeal in the landmark *Masri* decision ([2009] QB 450) ("***Masri UK CA***")(which was approved by the Privy Council in *Tasarruf*) there is also no rule of law that the receiver by way of equitable execution can only be appointed over assets that are amenable to execution at common law (such as a Writ of Fieri Facias or a garnishee order) (at [56]). Further, unlike a garnishee order against a third party (which requires *inter alia* a third party debt to be due or accruing due to the judgment debtor from the third party when the order is made) a receiver by way of equitable execution can be appointed to collect current and *future* debts from third parties. This was confirmed by Colman K in *Soinco S.A.C.I and another v Novokuznetsk Aluminium Plant and others* [1998] QB 406 at [422H]) and in *Masri UK CA* at [172] and [184] per Lawrence Collins JL:

> "*In my judgment there is no reason why in 2008 the court should not exercise a power to appoint a receiver by way of equitable execution <u>over future receipts from a defined asset</u>. There is no longer a rule, if there ever was one, that an order can only be made in relation to property which is presently amenable to legal execution. There is no firm foundation in authority for a rule that the remedy is not available in relation to future debts.*" [Emphasis added]

35. A receiver by way of equitable execution can be appointed over assets located outside the territorial jurisdiction of the Court which are owned by a party to the proceedings (per Kawaley J in *Masri Bermuda* at [85] and [87]). This is the case even if: (i) the relevant party is not located within the territorial jurisdiction of the Court; and (ii) the courts of the jurisdiction in which the foreign party is located would not enforce the receivership order (per Lord Donaldson MR in *Derby & Co Ltd v Weldon* at [86B]). This is because a receivership order operates on the basis of the *in personam* jurisdiction of the Court over the relevant party, not the location of the assets owned by that party (see *Kerr* at paragraph 33-1 and 3-32). As stated by Males J in *Cruz City 1* at [35]:

> "*There needs to be sufficient connection with the English jurisdiction to justify the making of such an order and to satisfy the requirements of comity, but the fact that the order is made with a view to the enforcement of an English judgment or award provides that connection.*"

36. In respect of piercing the corporate veil and obtaining an order to appoint a receiver against third parties, in the Privy Council case of *Dave Persad v Anirudh Singh (Trinidad and Tobago)* [2017] UKPC 32 it was stated as follows:

> "*17. As the Court of Appeal rightly acknowledged, piercing the veil is only justified in very rare circumstances, a point which was implied in the UK Supreme Court's decision in VTB Capital Plc v Nutritek International Corpn [2013] 2 AC 337, paras 127, 128 and 147, and was expressed in terms in its subsequent decision in Prest v Petrodel Resources Ltd [2013] 2 AC 415, paras 35, 81-82, 99-100 and 106. As Lord Sumption explained in Prest at para 35, piercing the veil can be justified only where "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."*

The Trumps' Submissions

37. Mr. Robinson submits that the Receivership Application should be granted for several reasons as set out below.

Terms of the HMA

38. Mr. Robinson highlighted various key terms of the HMA, of which some are set out as follows:
    a. Trump Panama was replaced as manager of the Hotel by Luxury Hotels. The HMA is dated 22 June 2018 and it has an initial term of 20 years from the opening date under the management of Luxury Hotels. The HMA states that it is to be construed under and governed by the laws of the State of New York. Mr. Robinson submits that as no party has applied for leave to adduce expert evidence as to how the HMA should be construed under New York law, then the Court is entitled to construe the HMA as if it were governed by

Bermuda law, including any relevant principles of contractual construction that apply under Bermuda law.

b. "Owner" is described on the front page of the HMA as HTOC, Ithaca 1 and Ithaca 2. The evidence showed that Ithaca 1 and Ithaca 2 (together the "**Ithacas**") were special purpose investment vehicles established by Mr. Fintiklis to buy certain Hotel Units from Newland, the original developer and promoter of the Property. There are certain provisions in relation to when Owner consists of more than one entity ("**Owner Entities**"). An Omnibus Agreement dated 1 October 2021 added another Panamanian company Hotel Owner Inc. as a joint and several Owner. For the avoidance of doubt, where the term "Owner" is used in this judgment it collectively refers to all of the above parties, thus: HTOC, Ithaca 1, Ithaca 2, and Hotel Owner Inc.

c. Mr. Robinson submitted that the HMA describes how the revenues and profits of the Hotel are to be managed. The HMA provides for the payment of various management and royalty fees to Luxury Hotels and its ultimate parent company, MWC. The "Operating Profit" of the Hotel is distributed according to a defined waterfall (the "**Payment Waterfall**"). In the event the Hotel makes an Operating Profit, Luxury Hotels is required to make a distribution as follows:

    i. first, to reserve in an amount which must be equivalent to 5% of the Hotel's gross revenue for each accounting period (the "**Reserve**");

    ii. second, to Owner "of an amount equal to Owner's Priority, less payments to the Reserve…"; Owner's Priority is specifically defined in the HMA as an "annual hurdle amount" to be paid to the Owner by Luxury Hotels out of Operating Profit in each fiscal year;

    iii. third and fourth, to MWC for payment of various royalties (if applicable); and

    iv. fifth, to Owner of any balance of Operating Profit.

d. Luxury Hotels is required to prepare a preliminary budget for each fiscal year to be reviewed and approved by Owner. Luxury Hotels also had to provide to Owner an Annual Operating Statement summarizing the Hotel's performance over the previous fiscal year.

e. In the event the Hotel made an Operating Loss, it is Owner's obligation to cover the loss, by way of a direct payment, or by Luxury Hotels deducting the relevant amount from any amounts due to be distributed to Owner.

f. Luxury Hotels is obliged to cause all revenues generated by the Hotel to be deposited into accounts established by Owner but exclusively controlled by Luxury Hotels (the "**Operating Accounts**"). Luxury Hotels' evidence is that the hotel license has been

transferred from HTOC to Hotel Owner Inc., the effect being that the Operating Accounts of the Hotel, into which the operating revenues of the Hotel are paid, are no longer in the name of HTOC but are in the name of Hotel Owner Inc. The reason put forward by HTOC for the change in the holder of the hotel license is because the Panama Ministry of Commerce may have been seeking to cancel HTOC's hotel operating license, thus another entity had to be formed to hold the license. The Trumps dispute this reasoning as they assert there is no evidence to support it and the likely reason is that Mr. Fintiklis was attempting to undermine the efforts of the Trumps to enforce the Final Award against HTOC.

Appointment of Receiver by way of equitable execution

39. Mr. Robinson submitted that it would be just and convenient in all the circumstances to grant an order appointing a receiver by way of equitable execution over the assets identified in the Plaintiffs' Summons and thereby compelling Luxury Hotels, a Bermuda entity to which HTOC has delegated exclusive control of those assets, to pay to the receiver such sums as are necessary to discharge the Bermuda Judgment sum.

40. Mr. Robinson submitted that HTOC is in breach of an order of this Court to pay money to the Trumps despite the fact that HTOC is not impecunious as it is paying lawyers to appear in this matter and the Panama civil proceedings. Also, there is evidence from which the Court can draw a reasonable inference that Owner has been injecting substantial capital into the Hotel's Operating Accounts in order to fund both shortfalls in working capital and in the management/royalty fees owed to Luxury Hotels and various affiliated Marriott entities (the "**Marriott Parties**") under the HMA as follows:

    a. He referred to an agreement recorded in a letter dated 17 November 2020 between Luxury Hotels and the Owner Entities that was exhibited to Fernandez 1. The letter was signed by Mr. Fernandez on behalf of Luxury Hotels and by Mr. Fintiklis on behalf of the HTOC and the Ithacas. The letter stated that the Hotel had a negative working capital balance of $1,438,737 and required Owner to fund the shortfall. Such a call was presumably made pursuant to Article 4.05 the HMA. Thus, although there was no evidence as to whether Owner did fund the shortfall, as the Hotel remains in operation by Luxury Hotels, Mr. Robinson submitted that the Court could conclude that Owner must have done so.

    b. Fernandez 1 exhibited a Payment Plan Agreement dated 27 June 2020 (later amended on 17 November 2020) between Luxury Hotels, various affiliated Marriott Parties and each Owner Entity, including HTOC (the "**PPA**"). It stated that Owner owed the Marriott Parties

US$1,413,099 under the various "Hotel Agreements", which definition includes the HMA. It then set out a timetable of payments. Thus, although the Trumps do not know what proportion of the $1.4 million was owed by Owner to Luxury Hotels specifically, Fernandez 1 confirms that as of the date of his affidavit of 5 March 2022, Owner only then owed Luxury Hotels a total of $29,106.

41. Mr. Robinson submitted that the Court could infer that Owner has been making payments to Luxury Hotels (and no doubt to other Marriott Parties) in order to fulfill its obligations under the HMA. This was in stark contrast to the conduct of HTOC, which is ultimately controlled by Mr. Fintiklis, the same individual who controls all three of the other Owner Entities, with respect to the debt owed to the Trumps. Thus, the Court can infer that HTOC has either sufficient assets or the means of obtaining sufficient assets to satisfy the Bermuda Judgment debt.

42. Mr. Robinson submitted that the Receivership Application invited the Court to (i) appoint a receiver by way of equitable execution over both the revenues and Operating Profit of the Hotel; (ii) to compel the Hotel Manager to disclose all relevant financial information concerning the performance of the Hotel to the receiver on an ongoing basis; and (iii) to empower the receiver to compel the Hotel Manager to make payments to the receiver out of revenue and Operating Profit in satisfaction of the Bermuda Judgment debt. According to the HMA, Luxury Hotels has exclusive control over the revenues and Operating Accounts, thus it controls Owner's money. Along with other responsibilities, Luxury Hotels is required to pay all creditors on behalf of Owner. Thus, the Trumps are in no different a position to any other unsecured creditor and Luxury Hotels has the power under the HMA to make payments towards the Bermuda Judgment sum.

HTOC's Submissions

Balance of Convenience against the Appointment

43. Mr. Griffin submitted that there were multiple factors which demonstrate that it is neither just nor convenient for a receiver to be appointed as follows:
    a. The amounts claimed of over $4 million are disproportionate in comparison to the amount likely to be obtained by a receiver as Fernandez 1 states that there is only around $40,000 in HTOC's accounts, far less than already spent by the parties in this litigation and less than would be incurred by a receiver.

b. The Receivership Application is an attempt to subvert the jurisdiction of the Panama Courts where proceedings are ongoing between HTOC and Trump Panama and where the Panama Courts have already made an order appointing a receiver over Trump Panama. He argued that for anything the Trumps' receiver requires to take effect, action will be required in Panama but no person in Panama (when presented with an order from Bermuda for the appointment of a receiver over the Defendants' accounts which is contradicted by the Panama Court order for the appointment of a receiver over Trump Panama) will comply with the Bermuda order. Thus, this makes enforcement of an order from Bermuda impractical and sets the Bermuda Court directly against the Panama Court.

c. There is a requirement to show some basis to anticipate a judgment will be made against a party. He relied on the case of *Broad Idea International Ltd v Convoy Collateral Ltd (British Virgin Islands); Convoy Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy) (British Virgin Islands)* [2021] UKPC 24. He argued that Hotel Owner Inc. and Luxury Hotels are not a party to the arbitral award or any other proceedings with the Trumps. He asserted that the only basis of a connection is the wilful misreading of a defined term in the HMA by which the Trumps say HTOC is an 'Owner' and therefore entitled to sums held by Hotel Owner Inc. on trust as a consequence of the arbitral award. He described this as a flimsy premise, noting that the Trumps did not add Hotel Owner Inc. or Luxury Hotels as a defendant to their application to enforce the arbitral award and therefore have not obtained judgment against them in Bermuda.

d. The diversion of Luxury Hotels' accounts to the Trumps could effectively cease the Hotel from trading, causing massive and disproportionate loss to multiple third parties. Also, the Trumps are a direct competitor to Luxury Hotels and the Marriott brand and have a wider commercial incentive in damaging their business which goes far beyond merely satisfying judgment against HTOC.

Cancellation of the Hotel Operating License

44. Mr. Griffin denied the Trumps' suggestion that Hotel Owner Inc. was established by HTOC to avoid liability. He relied on *Dave Persad* at paragraphs 20 and 21. He submitted that HTOC lost its hotel operating license and ceased to trade as a result of the actions of the Trumps in Panama, so it was not avoiding judgment. Therefore, HTOC has no assets, no income and no hope for further income, which is why Hotel Owner Inc. is now involved in operating the Hotel. He argued that the Trumps were changing their position in that in Flores 1 they were claiming the licence cancellation was carried out by HTOC. Their new position now was that, as they are not aware of who cancelled

the licence, it can be inferred that it must have been done by HTOC. However, Mr. Griffin stated that the text of the license cancellation document states that the licence was cancelled for failing to comply with its terms during the period when HTOC was controlled by the Trumps.

45. Mr. Griffin submitted that the ICC Tribunal has already made findings of fact contrary to the allegations the Trumps have made in these proceedings. As a result, it is not open to them to seek to retry their claims of fraud and dishonesty against Mr. Fintiklis which have been rejected and are *res judicata,* and to do so is an abuse of process.

The Appointment of a Receiver and *Masri v Consolidated Contractors*

46. Mr. Griffin submitted that although the Trumps rely on *Masri Bermuda* in support of their application to appoint a receiver, the facts of that case are vastly different and can easily be distinguished. In *Masri Bermuda,* Mr. Griffin submitted,the defendant deferred its entitlement to revenues over which the receiver sought control in order to evade the purpose of the receiver. Here, Mr. Griffin argued, the only reason HTOC no longer receives revenues is because it lost the right to operate the Hotel due to the Trumps' wrongdoing. The order for the appointment of a receiver in *Masri Bermuda* included a *Babanaft* clause – effectively rendering the receivership order subject to local jurisdiction. Here, there are local proceedings in Panama which means enforcement in Bermuda will cut across those, subverting ongoing orders of the Panama Courts. *Masri Bermuda,* at paragraph 96, placed considerable importance on three factors, all of which, Mr. Griffin, submitted are at odds with the current situation:

    a. The existence of undertakings by the receiver in *Masri Bermuda*– here the receiver has not been appointed, but in any case, cannot give such undertakings, and if appointed, would effectively be in control of the subject matter of ongoing proceedings between Trump Panama and HTOC in Panama. This will prejudice the outcome of those proceedings.
    b. The judgment debtor did not contest the appointment in *Masri Bermuda* – here HTOC and Luxury Hotels absolutely are contesting the appointment as would Hotel Owner Inc. against which, somewhat obliquely, the Trumps appear to claim.
    c. The existence of the order for a receiver would not harm third parties in *Masri Bermuda* – whereas here, the very fact of the receiver having been appointed will absolutely harm Luxury Hotels along with many other innocent third parties. The Marriott group is a direct competitor of the Trumps, and the order will have the extraordinary effect of giving a competitor direct control over the hotel – potentially causing mischief to Luxury Hotels far in excess of the value of the judgment debt. Effectively, Mr. Griffin argued, the Court

would be appointing an inside man with a wider interest in obtaining confidential information, trade secrets and subverting the whole Marriott group's brand of which Luxury Hotels forms part.

The appointment of a receiver and freezing orders are equitable remedies and therefore subject to equitable maxims

47. Mr. Griffin submitted that in considering the Trumps' applications for both the Freezing Order and the appointment of a receiver, the Court must consider the Trumps' conduct which includes the following:
    a. The Trumps failed to disclose the material fact of the Panama proceedings;
    b. Mr. Reidy is assistant general counsel for the Trump Organization, thus this Court must take into account the Trump Organization's conduct in determining whether it is just and convenient to appoint a receiver;
    c. The Trumps are subject to a finding of the Panama authorities that while in control of HTOC they failed to pay tax (per Guerra 1). Entities forming part of the Trump Organization have been convicted of criminal tax fraud in New York State. It is notable that Alan Weisselberg, the Trumps' legal representative in Panama, pleaded guilty to tax offences and has received a prison sentence;
    d. Via their attorneys in Panama, the Trumps have sought to impose improper pressure on the Panama Courts and Judiciary (per Guerra 1).
    e. The Trumps made contradictory statements about their availability for the hearing of the application to discharge the freezing order, thereby obtaining an unfair advantage over the Defendants.

Luxury Hotels' submissions

48. Mr. Horseman submitted a number of concerns and reasons in respect of the application for an appointment of a receiver as follows:
    a. The receivership order will make Luxury Hotels subject to significant obligations.
    b. Luxury Hotels was opposed to the appointment of Trump Panama as a receiver over the revenues as Trump Panama was the previous hotel manager and the Trumps and Luxury Hotels and/or MWC are competitors in the same industry. However, having reviewed the newly proposed draft receivership order, Luxury has no objection to the alternate suggested receiver, Mr. Charles Thresh.

c. The Trumps request the appointment of a receiver over the revenues as opposed to over any Operating Profit. However, Luxury Hotels, having reviewed the draft receivership order, objects to any order over the revenues generally. He accepted that the Court has jurisdiction to make a receivership order but submits that the scope of any order should be limited to any payment of the operating profit that may be distributed to HTOC or any other Owner if the Court so directs.

d. If it is intended for a receiver to collect the gross revenues received by the Hotel without Luxury Hotels being permitted to discharge the operational expenses and pay its own fees, including MWC's licensing fee, then Luxury Hotels and other third parties will be significantly impacted.

e. The draft receivership order purports to include the *Angel Bell* exception but makes it subject to paragraphs 7(b) and 12 of the Order; and

f. The costs of the receiver.

49. Mr. Horseman also distinguished the case of *Masri UK* from the present case. He referred to the findings by Tomlinson J as follows:

a. At paragraph 5, that "*the circumstances and history of this case call for an unusual order.*";

b. At paragraph 16, where he described the efforts to enforce the judgment stating "*This is not litigation in which stones are left unturned.*";

c. At paragraph 31, where he stated:

> "*1. It would require a truly exceptional case to justify the court in granting a receivership order over the foreign assets of a foreign judgment debtor;*
> *2. A receivership order by way of equitable execution should not invite or require the judgment debtor to break pre-existing contractual commitments;*
> *3. A receivership by way of equitable execution should not be granted if its effect would be seriously to interfere with the interest of third parties; and*
> *4. The dictates of comity must be observed.*"

50. Mr. Horseman also referred to the case of *Cruz City 1 Mauritius Holdings* where Males J stated as follows:

> "*44. Finally, in the later application in the Masri case itself referred to at [39] above, Tomlinson J rejected a submission that an order can only be made if legal, as opposed to equitable, enforcement is impossible, or there exist some special circumstances which practically render it very difficult, if not impossible, for the judgment creditor to obtain the fruits of his judgment by other means. He held at [17] that:*
>
> > *"Execution of an English judgment overseas, particularly in countries outside the European Community, is always relatively speaking a difficult exercise. In the present case I am satisfied that it will indeed be practically very difficult for Mr Masri to enforce his judgment by conventional means of attachment against the Defendants' assets abroad.*

*However I am far from satisfied that the jurisdiction has ever been regarded as rigidly circumscribed.*"

*45. After reviewing some of the same cases as relied on by the defendants in the present application, Tomlinson J concluded:*

*"Since the source of the jurisdiction is section 37(1) of the Supreme Court Act 1981, it is to my mind clear that the Court of Appeal in this case regarded the modern jurisdiction as unconstrained by rigid expressions of principle and responsive to the demands of justice in the contemporary context. In these circumstances it is unrealistic to expect this court to reach a conclusion as to the availability of the remedy different from that reached by the Court of Appeal. However in case it be said that I have failed to exercise my own discretion, I record my own finding that the practical difficulty which Mr Masri will encounter in pursing conventional means of attachment overseas, and the difficulties which the Defendants will seek to put in his way, amply justify the making of a receivership order."*

*47. In the light of these and other statements cited, I would summarise the position so far as relevant to the present application as follows:*

*a) The overriding consideration determining the scope of the court's jurisdiction is the demands of justice. Those demands include the promotion of the policy of English law that judgments of the English court and English arbitration awards should be complied with and, if necessary, enforced.*

*b) Nevertheless the jurisdictions is not unfettered. It must be exercised in accordance with established principles, though it is capable of being developed incrementally. It is not limited to situations where equity would have appointed a receiver before the fusion of law and equity pursuant to the 1873 Judicature Acts. Specifically, in modern conditions where business is increasingly global in nature, the jurisdiction is "unconstrained by rigid expressions of principle and responsive to the demands of justice in the contemporary context".*

*c) The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by dicta which speak of the need for "special circumstances": see in particular the decision of Tomlinson J in Masri cited above and also the decision of Arnold J in UCB Home Loans Corporation Limited v Grace [2011] EWHC 851 (Ch), holding that there were sufficient "special circumstances" rendering it just and convenient to appoint a receiver by way of equitable execution when it would be "difficult for the claimant to enforce its judgment by other means" and that the appointment of a receiver was the only realistic prospect available to the judgment creditor to enforce its judgment in the short term.*

*d) As the statutory source of the court's power to appoint a receiver speaks of what is "just and convenient", it is impossible to say that convenience is not at least a relevant consideration (albeit not the only one).*

*e) A receiver will not be appointed if the court is satisfied that the appointment would be fruitless, for example because there is no property which can be reached either in law or equity. That is an aspect of the maxim that equity does not act in vain. However, a receiver may be appointed if there is a reasonable prospect that the appointment will assist in the enforcement of a judgment or award. It is unnecessary, and will generally be pointless, for the court to attempt to decide hypothetical questions as to the likely effectiveness of any order. That applies with even greater force where such questions involve disputed issues of foreign law. It is sufficient that there is a real prospect that the appointment of receivers will serve a useful purpose."*

51. Thus Mr. Horseman argued that a receiver should not be appointed unless there was some difficulty in using the normal process of execution. He also argued that there should be some special circumstances rendering it just as convenient to appoint a receiver where it was possible for the Trumps to enforce their judgment by other means and where the appointment of a receiver was the only realistic prospect available for the judgement creditor to enforce its judgment in the short term. He pointed to the evidence of Reidy and De Castro, that there was no impediment to enforcing the judgment in Panama.

52. Further, he noted that the Court has to decide whether the Ithacas, Hotel Owner Inc. or any other Owner Entity would be subject to any order made by the Court.

H&P's Submissions

53. Mr. Bank submitted that H&P align themselves with HTOC and Luxury Hotels that no receiver be appointed at all, but if one is appointed then the receivers' powers be strictly limited so as to completely exclude revenues due and owing to H&P and other third-party owners.

54. Mr. Bank submitted that the HMA is an agreement between HTOC and Luxury Hotels to the exclusion of the Trumps. Any disputes arising out of the HMA are governed by New York law and subject to binding arbitration in New York. Thus, it is not for the Trumps to argue the interpretation of the HMA to this Court, not least because the Trumps are not parties to the HMA, nor have they any interest in it. Therefore, they should not be able to seek and obtain the assistance of this Court in interfering with the operation of the HMA. Further, the Trumps' interpretation or views regarding the payment mechanisms of the HMA are entirely irrelevant.

55. Mr. Bank pointed to Clare 1 where an explanation was provided about the Rental Agreements that H&P have with Hotel Owner Inc. In essence, Hotel Owner Inc. pays net rental income to each company pursuant to a payment waterfall set out in the Rental Agreements. Thus, when Hotel Owner Inc. pays rental payments to Hotel Unit Owners, these are expenses of Hotel Owner Inc. but the gross revenues are not part of HTOC's assets at all, the point being that they are not assets capable of attachment under the Freezing Order.

56. Mr. Bank submitted that the evidence of Clare 1 provided ample grounds why the appointment of a receiver would have severely detrimental effects on the daily operation of the Hotel and result in damages suffered by not only Luxury Hotels, but also by H&P and other innocent third parties. The

potential disruption of the Hotel's operations, including payment of staff salaries and other expenses, would lead to a significant loss of revenue for all parties involved. Also, according to Clare 1, the appointment of a receiver with enormously wide powers to dictate how the Hotel operation should be run and the Operating Profits utilised would be unworkable as the massive costs of such an arrangement may well exceed the Trumps' judgment debt by a significant factor, affecting guest occupancy and revenues to all interested parties. Further, if a receiver is appointed, each individual Hotel Unit Owner would suffer substantial damages, which will in turn result in diminution in the value of their assets, heavily impact the resale value of the Hotel Units, causing financial hardship for many innocent third parties who have relied on rental revenues to finance loans or mortgages and who would be unable to litigate in a foreign territory such as Bermuda. Thus, the Court was obliged to take into account the rights and interests of innocent third parties that will be directly affected by any judgment or receivership order granted, but who are not themselves before the Court.

57. Mr. Bank submitted that the Court should not allow untrammeled interference with contractual relationships between innocent third parties, and the Court's equitable powers should not prejudice such parties. If the Court was minded to appoint a receiver, then the receiver's powers should be strictly limited, so as to ensure they do not affect the revenues that rightfully belong to H&P and other third-party owners.

Analysis

58. In my view, I should grant the application for a receiver over the Operating Profit on a limited basis for several reasons.

Compliance with Judgments of the Court and pro-enforcement policy of the Courts

59. In my view, judgments of the Court should be complied with and if necessary, enforced per the case of *Cruz City 1 Mauritius Holdings* and the case of *JSC VTB Bank* as set out above. I agree with Mr. Robinson that the starting point for the Court is that pursuant to the Freezing Order, the Trumps have the benefit of a final money judgment of this Court against HTOC which can be enforced in Bermuda in the same manner as a judgment which originated in this Court. The leave to enforce the Final Award in the same manner as a judgment or order of this Court to the same effect was granted pursuant to section 40 of the 1993 Act which provides for the enforcement of Convention awards in Bermuda. The decision to grant leave was consistent with "the pro-enforcement policy".

60. The Court should follow the pro-enforcement policy underlying the New York Convention and the 1993 Act as per Hargun CJ in *CAT.SA v Priosma* [2019] Bda LR 69 at [42]. The Bermuda Court is being asked to enforce a Bermuda judgment, which was entered pursuant to this jurisdiction's international obligations. It is the policy of the Court to ensure that its judgments are complied with. As the assets of HTOC cannot be reached by execution at common law and/or it is not practicable to do so in Bermuda, then it is just and convenient to appoint a receiver to collect those assets, particularly as Luxury Hotels which exclusively controls the assets is incorporated in this jurisdiction.

The Trumps' decision not to seek enforcement in Panama

61. HTOC and Luxury Hotels complain that the Trumps could have chosen to enforce their Final Award in Panama but have not done so as they are "forum shopping" in Bermuda, because the Trumps know that enforcement would be extremely challenging in Panama because of their own misconduct in Panama. The evidence of the Trumps is that once they had obtained the Final Award and HTOC had refused to comply with it, they then considered their enforcement options internationally. They decided to not pursue enforcement in Panama because they were concerned about the time and costs associated with enforcing a foreign arbitral award there. Also, I have given careful consideration to the arguments of Mr. Horseman that there should be "special circumstances" as set out in *Cruz City 1 Mauritius Holdings* to warrant appointing a receiver. Further, I note the opinion of Ms. Lippman that the appointment of a receiver would be disfavoured under New York law in the Bermuda proceedings. To that point, I must disregard her opinion as to what a New York Court would do under New York law. I rely on *Cruz City 1 Mauritius Holdings* where it was held that a receiver by way of equitable execution may be appointed regardless of whether there would be recognition of the appointment by a foreign court under a foreign law. Thus, I am bound to apply Bermuda law to the issues.

62. In my view, the New York Convention was specifically designed to facilitate enforcement wherever the award creditor is able. I note here that there are more than 160 countries that have ratified the New York Convention in which awards can be recognized and enforced. Thus, I refer to *Redfern & Hunter* at 11.40 where leading arbitration practitioners and academics stated that the New York Convention "*has rightly been eulogized as 'the single most important pillar on which the edifice of international arbitration rests' and as a convention that 'perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law'*".

Further, I take the view that the assistance of this Court is mandatory in enforcing arbitral awards as in *International Commercial Arbitration, Third Edition,* (at chapter 26.03B[2]), it was stated that "*It is clear that the Convention imposes a mandatory rule, requiring Convention States to recognize and enforce foreign and non-domestic awards, save where one of Article V's exceptions apply*." I accept the Trumps' position that a garnishee order was not available but that a receivership order is available. Therefore, in my view, whether the Trumps could have or should have pursued enforcement of the Final Award in Panama is irrelevant to the Receivership Application.

63. Also, I give considerable weight to the position that the Trumps have considered the appointment of a receiver to be convenient to them per *Cruz City 1 Mauritius Holdings* paragraph 47(d).

Assets not located in Bermuda

64. I have considered that the assets of HTOC and Luxury Hotels are not located in Bermuda. To that point, the authors of *Redfern & Hunter* state at 11.29 that the location of the assets within the jurisdiction is generally not a condition precedent to enforcement under the New York Convention as follows:

> "*If, as often happens in international commerce, assets are located in different parts of the world, the party seeking enforcement of the award has a choice of country in which to proceed – a chance to go 'forum shopping', as it is sometimes expressed. In looking for the appropriate forum, not merely the location of assets, but also the other factors mentioned (such as the attitude of the local courts, the adherence of the target country to the New York Convention, and so on), must be taken into account."* [emphasis added]

65. To that point, the appointment of a receiver by way of equitable execution over foreign assets is an *in personam* remedy. Thus, the Court exercised *in personam* jurisdiction over HTOC because it submitted to the jurisdiction and it has *in personam* jurisdiction over Luxury Hotels because it is incorporated in Bermuda. Further, the fact that HTOC was not incorporated in Bermuda and the assets sought to be collected are outside of the territorial jurisdiction is irrelevant in the context of the Receivership Application as the Court assumed both personal and subject-matter jurisdiction over HTOC in relation to the claims upon which the judgment is founded. I rely on *Masri Bermuda* at [85], where Kawaley J stated, in relation to section 3 of the Judgments (Reciprocal Enforcement) Act 1958 (the "**1958 Act**") (which section contains similar provisions to section 40 of the 1993 Act and concerns the Court's power to enforce a foreign judgment as if the judgment originated in Bermuda):

> "*So in terms of looking at whether this Court is exercising an exorbitant jurisdiction by appointing a Receiver to collect an asset which is now admitted to be located outside of Bermuda, the analysis necessarily begins with the assumption that the Judgment Creditor obtained his judgment originally in this Court…An application to appoint a receiver by way*

*of enforcement of a [foreign judgment registered under the 1958 Act] proceeds on the assumed basis that this Court has both personal and subject-matter jurisdiction over [the judgment debtor] in relation to the claims upon which the [registered judgment] is founded.*"

Nature of the Assets

66. I have considered the nature of the assets that the Trumps seek to have a receiver collect, namely the revenue of the Hotel as deposited in the Operating Accounts, and generally after expenses have been paid, the Operating Profits of the Hotel which, subject to terms of the HMA and the Waterfall Arrangement, are paid by Luxury Hotels to the Owners of the Hotel. I will return to the issue of "Owner" later. However, in my view, in following *Masri UK CA* as approved by the Privy Council in *Tasarruf*, a receiver by way of equitable execution can be appointed to collect the current and further debts from third parties, in this case monies in the form of Operating Profits due to Owner from Luxury Hotels' operation of the Hotel on an ongoing basis.

Definition of "the Owner"

67. I have considered the claim by the Trumps that "the Owner" includes HTOC. Mr. Robinson submitted as follows: (a) the HMA is a contract for services with Luxury Hotels performing the agreed services for the Owner of the Hotel as an independent contractor; (b) "Owner" includes HTOC as one of the four Owner Entities that own the Hotel jointly and severally; (c) the HMA confirmed that the funds in the Hotel's Operating Accounts are "Owner's" funds; (d) Therefore, express references in the HMA to "Owner's Funds" can only be construed as references to funds which belong to HTOC. In respect of HTOC being an "Owner", Mr. Griffin asserted that the only basis of a connection is the wilful misreading of a defined term in the HMA by which the Trumps say HTOC is an 'Owner' and therefore entitled to sums held by Hotel Owner Inc. on trust as a consequence of the arbitral award. I disagree with Mr. Griffin on this point. Mr. Robinson highlighted various terms of the HMA, in particular that "Owner" was described on the front page of the HMA as HTOC, the Ithacas, and later on by way of the Omnibus Amendment Agreement, Hotel Owner Inc. was added. Further, the HMA set out that their ownership is joint and several. In my view, upon a proper consideration of the HMA, it is clear that HTOC is included in the ownership group. Further, it is also clear that reference to the funds in the Operating Accounts are funds which belong to the Owner, which includes HTOC. Thus, in my view, I agree with Mr. Robinson that HTOC is one of the Owners and the funds in the Operating Accounts belong to HTOC and the other Owners.

Ownership of the Hotel's Revenues

68. Mr. Robinson made submissions about HTOC's case concerning the ownership of the revenues that HTOC's position was that it does not own the Hotel, and neither does it own the revenues that the Hotel generates. The legal arguments for those positions were set out in Guerra 1. In response to that position, Mr. Robinson submitted that HTOC's argument contradicts fundamental principles of company law, in particular the doctrine of legal personality, and this must be rejected. He developed those arguments in full. Mr. Robinson also made submissions about Luxury Hotels' contrary position to HTOC's, in that Luxury Hotels asserted that the revenues of the Hotel are beneficially owned by Luxury Hotels or held on constructive trust for Luxury Hotels to meet its contractual obligations under the HMA. In response to that position, Mr. Robinson submitted that Luxury Hotels' position is unsustainable and is not supported by the language of the HMA nor by authority. In essence as an independent contractor Luxury Hotels has, by contract, been delegated the exclusive control of Owner funds and such a delegation does not give rise to any form of trust arrangement as between Owner and Luxury Hotels or between any one of the Owner Entities and Luxury Hotels. In effect, on the clear language of the HMA, Luxury Hotels merely controls and manages the revenues on behalf of Owner as an independent contractor. In my view, I agree with Mr. Robinson's reasoning on this point, and I find that Luxury Hotels in an independent contractor that controls and manages the revenues on behalf of the Owners.

Lack of entitlement by HTOC to the funds belonging to the Owner or Hotel Unit Owners

69. I have considered the submissions of Mr. Griffin that there is a lack of entitlement by HTOC to the funds belonging to the Owner or Hotel Unit Owners. Mr. Griffin submitted that the Trumps' objective appears to be to step into the shoes of Luxury Hotels by appointing a receiver whom they think will be able to rely on the HMA to call on Unit Owners, including the Ithacas, to supply working capital in order to pay the judgment debt of HTOC. If the Ithacas do not pay, then they can deduct funds from the Operating Accounts distributable to Hotel Owner Inc (that would otherwise be paid to Hotel Unit Owners under the unit rental agreement) to pay the judgment debt. He pointed to Reidy 3 where he states that this is possible because Mr. Fintiklis is a director of some of the Hotel Unit Owners. Thus, the Trumps are relying on this, saying in essence that anything that Mr. Fintiklis is connected to is available to satisfy their judgment. However, Mr. Griffin argued that this was fundamentally flawed for a number of reasons as follows:

    a. Luxury Hotels has no liability under the HMA to pay judgment debts of HTOC, it can only call on funds from Hotel Owner Inc. and the Ithacas to meet debts and liabilities it incurs in managing the Hotel;

b. There is no judgment debt in managing the Hotel. Payment of the debt to the Trumps pursuant to a different agreement is not in the scope of demands for working capital under the HMA;
c. There is nothing in the HMA which allows HTOC to receive funds properly paid to Hotel Owner Inc. or the Ithacas to pay a judgment debt; and
d. HTOC has no assets to pay with, even if a receiver made a demand. The final balance of accounts must always be zero because any remaining funds after expenses are remitted to Hotel Unit Owners and now HTOC only holds a minimal residual balance.

70. Mr. Griffin continued his argument that the Trumps thus have no hope of making a successful demand from Hotel Owner Inc. for working capital. They appear to be trying to sabotage the continued operation of the Hotel by refusing to give security for costs or to fortify their undertaking, to subtract as much as they can from the Hotel accounts, deplete its cash flow and leave innocent Hotel Unit Owners, suppliers, staff and guests out of pocket, worse still, to engineer an event of default. Mr. Griffin submitted that Hotel Owner Inc. does not even belong to all Hotel Unit Owners through Hotel TOC Foundation. It is independent of HTOC and its relationship with each Hotel Unit Owner is a separate contractual arrangement. They are paid rent by Hotel Owner Inc. for its use of their unit and agree to delegate the operation of the Hotel pursuant to a Hotel Maintenance Agreement and Hotel Rental Agreement.

71. In my view, the funds in the Operating Accounts should be used for the purposes set out in the HMA pursuant to the Payment Waterfall, except that the Operating Profit should be subject to the receivership order. To that point, it would be exceedingly unfair for the Trumps to make a claim over and lay siege to all of the funds in the Operating Accounts as being available to satisfy the judgment. Thus, the scenarios as set out above by Mr. Griffin whereby funds made available pursuant to a call for working capital can be used to satisfy the judgment would not be permissible in any form of a receivership order. In other words, in the circumstances of this case, there must be protection for the variety of third parties involved in this matter, in particular, those Hotel Unit Owners that expect to receive rental income and those that provide the working capital.

Protection of Third Parties

72. I have considered the position of various third parties in this case and the submissions of Mr. Griffin on this point. He submitted that no arbitral award or judgment of any Court in any jurisdiction has been entered against Mr. Fintiklis, Hotel Owner Inc. or the Hotel Unit Owners by the Trumps.

Thus, to obtain the Freezing Order and appoint a receiver they need to pierce a number of corporate veils which is not like the ordinary scenario where a reluctant debtor incorporates a company and transfers assets to it to put them out of reach of judgment creditors. Consequently, for the judgment to get off the ground, the Court is invited to ignore the fact that the judgment is against HTOC only and treat HTOC and Mr. Fintiklis as one and the same, effectively saying that they have judgment against Mr. Fintiklis merely because he is its representative. Thus, without that wilful suspension of disbelief the application to appoint a receiver ends there, at the first leap. Mr. Griffin submitted that the second leap is where the Trumps invite the Court to go further and accept that Hotel Owner Inc. is really just Mr. Fintiklis. The track continues because HTOC and Hotel Owner Inc. having no prospect of paying the Bermuda Judgment, for there to be any hope of recovery the Trumps must undertake a third leap to pursue the Ithacas, which as innocent third parties must somehow be brought into the picture and obliged to pay along with a number of other innocent third-party Hotel Unit Owners.

73. Mr. Griffin submitted that unlike the ordinary situation where the receiver would simply pay assets usually due to the judgment debtor to the judgment creditor, here the Court must wrest control of an actively trading business from an innocent third-party, Luxury Hotels, who will be forced to subject its closely guarded trade secrets, knowhow and carefully developed, yet inherently fragile, brand to the mercy of the Trumps' now toxic reputation.

74. Mr. Griffin relied on the Privy Council case of *Dave Persad v Anirudh Singh* to submit that there is a high bar to reach to obtain an order to appoint a receiver against third-parties. He stressed that there is no judgment against Mr. Fintiklis, Hotel Owner Inc. or Luxury Hotels and therefore no existing obligation which has been evaded. It follows that a receiver would not only be appointed over third-parties but assuming it takes funds from the Operating Account of the Hotel, it would also be depriving those third-parties of their funds. I recognize that Mr. Fintiklis is the President and Managing Director of HTOC, Hotel Owner Inc. and the Ithacas. Whilst there have been arguments about piercing the corporate veil to establish the links of Mr. Fintiklis to various entities, in my view, that is not necessary in this case. The reason is because the HMA has set out who are the Owner Entities. Further, as stated before, the Owner Entities own the funds jointly and severally.

75. Also, I have given consideration to the arguments of both Mr. Horseman and Mr. Bank about the protection of the rights of third-parties. Mr. Bank outlined the damage that could be caused to H&P and other Hotel Unit Owners who have invested in the Hotel. Mr. Horseman outlined the difficulties

that can be caused to Luxury Hotels in managing and operating the Hotel. In my view, it would be extremely unfair and unjust for the Trumps to use the funds in the Operating Account to satisfy their judgment to the detriment of the third-parties. It appears to me that any use of the funds in the Operating Accounts should be in accordance with the HMA except the Operating Profit which should be the subject of the receivership order.

76. I also find that it would be unfair to MWC and Luxury Hotels to have a receiver having control over the Operating Funds and having any involvement in the operations of the Hotel. In my view, this would greatly increase the costs of a receiver when it appears that the aims of the Trumps can be achieved by having a receiver appointed over the Operating Profit only.

Cancellation of the Hotel License

77. I have not found it necessary to resolve this issue of why the hotel license was cancelled for HTOC and why Hotel Owner Inc. was formed and is holding the hotel license. The significant point is both entities are Owner Entities.

Receivership over Operating Accounts v Operating Profits
Amount claimed and amount likely to be obtained

78. I have given consideration to the issues of the Hotel Unit Owners, in particular those who are enrolled in the Hotel Rental Programme. I have reviewed the HMA (Articles 1 and 4), Exhibit J 'Rental Programme', Clare 1 Exhibit Rental Agreement in respect of the Hotel between Hotel Owner Inc. and H&P (H&P have similar agreements). I accept that the Rental Agreement at Section 7(a) sets out that all Gross Rental Program Revenue will be pooled, commingled and deposited into the Hotel's Operating Accounts and will be applied to the payment of costs related to the operation and maintenance of the Hotel as further described in Section 7. It appears to me then that pursuant to Section 7(H)(iv) and (v) after the deduction of rental expenses, Hotel expenses, Owner's costs and expenses and any working capital call contribution, it results in a figure termed Owners Net Payment, to be paid by Hotel Owner Inc to the Hotel Unit Owners. I am satisfied on the submissions and evidence that the Owner's Net Payment is an expense of the Hotel that is due to be paid out of the revenues. As such, it is not a part of the Operating Profit. Thus, it appears just to me that payments due to over 350 Hotel Unit Owners – or to H&P in respect of 85 Hotel Unit Owners - participating in the Rental Programme should not be diverted to or included in any payment to the Trumps. The reason I take this position is because the Rental Agreements are between Hotel Owner

Inc and the Hotel Unit Owners, in some cases H&P on behalf of some Hotel Unit Owners. Thus, I agree with the submissions of Mr. Bank that they may have had other obligations in respect of rental incomes, mortgages and other commitments. Further, funds from a working capital call to meet operational losses should also not be paid to the Trumps.

79. I have considered the issue of the application for a receiver to be appointed over the revenues in the Operating Accounts. Mr. Horseman pointed to the difficulties that would be placed on Luxury Hotels in running the Hotel, in particular dealing with the revenues, payment of the expenses and general administration. Mr. Bank pointed to the negative impact on H&P and other Hotel Unit Owners. Mr. Griffin pointed to the issue that HTOC has minimal funds and in essence was not expecting more from the operation of the Hotel. The thrust of the arguments was that any receivership order should not be cast over the revenues and bank accounts of Luxury Hotels but more pointedly over any Operating Profits due to the Owner. There was an argument that any receivership order be more narrowly confined to HTOC.

80. I am greatly attracted to the argument that a receivership order be made in respect of the Operating Profit. Primarily, it seems to me that Luxury Hotels, which holds itself out as an innocent third-party, has every interest in operating and managing the Hotel in the most effective and profitable manner, thus realizing profitable returns to it and MWC. Simply put, the question begs as to the purpose of having a receiver oversee the revenues and bank accounts of Luxury Hotels. To my mind, appointing a receiver to oversee the revenues will be fraught with difficulty and serve no effective purpose other than to smother, if not suffocate, the administration and management efforts of Luxury Hotels along with excessive costs. In some cited cases, it was necessary to appoint a receiver over the revenues because the judgment creditor would not have had access to financial information and would not know with accuracy whether there was indeed a profit. In this case, I consider that Luxury Hotels is an innocent third-party which is obliged to provide accurate financial information, including about operating losses and revenues. Therefore, to my mind, there is no need to appoint a receiver to perform the tasks that are already being performed by Luxury Hotels. It seems more commonsensical to insert the receiver at the point where Luxury Hotels produces legitimate financial information and Operating Profit.

81. Thus, in my view, the aim should be focused on the Operating Profit that is due to the Owner, meaning the Owner Entities. In general, the Receiver would receive the appropriate financial information about the Operating Profit from Luxury Hotels and then, in accordance with the HMA,

take control and possession of the Operating Profit for distribution to the Owner Entities, some of which in turn can be used to satisfy the judgment. I have considered that the evidence shows that Ithaca 1 has been appointed to receive the distributions of all the Owner Entities. Thus, the Order of this Court will have to direct that the receiver make a determination of what proportion of the Operating Profit is due to the respective Owner Entities, taking into account any relevant agreements between them on how the Operating Profit is to be divided. In my view, this is a just way of resolving the issue of revenues as against Operating Profits, respecting and balancing the interests of the various third parties who should, notwithstanding some payment to the Trumps, still benefit from the Operating Profit also.

82. In respect of the amount claimed and the amount to be recovered, I have considered Mr. Griffin's submissions that HTOC is not due to receive any payments from Hotel Owner Inc. and that it holds accounts, currently with minimal funds, to receive outstanding amounts due to it while it was managing the Hotel. In my view, whilst HTOC may not be expecting any share of the Operating Profit from Luxury Hotels, I rely on my earlier findings that HTOC is an Owner Entity and the funds are held jointly and severally amongst them. Thus, to my mind, the Operating Profit is due to the Owner and a receiver should be able to direct a reasonable proportion of that to the Trumps.

Receiver appointed in Panama already against the Trumps

83. I have considered that a Panamanian Court-appointed receiver has been put in place in Panama over Trump Panama. I have attached little weight to Mr. Griffin's argument that entities in Panama would not respect the directions of a Bermuda Court appointed receiver over Luxury Hotels. I prefer the view that the Court must assist parties in the satisfaction and enforcement of judgments and thus, the existence of a Panamanian appointed receiver is not a reason to not appoint a receiver in this case. It seems reasonable to me that in the likelihood of interacting with each other the receivers will be guided by their professional duties to the courts.

The Test of Just and Convenient

84. In light of the reasons set out above, and in light of the reasoning set out in *Cruz City 1 Mauritius Holdings* I am of the view that it is just and convenient in all the circumstances to grant the application for a receivership order. In doing so, I have taken into account the overriding factor of the demands of justice that judgments of the Court should be complied with and enforced. I have taken into account the evidence of the Trumps of the practical difficulties in respect of the time and

costs of pursuing enforcement in Panama and I have taken into account that the Trumps have found it convenient to seek enforcement by way of a receivership order and I am satisfied that there is a reasonable prospect that the receivership order will assist in the enforcement of a judgment once an Operating Profit has been determined by Luxury Hotels.

Summary

85. In summary, I have found that it is just and convenient to appoint a receiver by way of equitable execution over the Operating Profit subject to the following clarifications and/or conditions:
    a. The Receivership Order should not be placed over the revenues or Operating Accounts.
    b. The Receivership Order should make provision for the Receiver to receive from Luxury Hotels, all relevant financial statements, in particular as to whether there is an Operating Profit.
    c. In light of appointing a Receiver over the Operating Profit, there is no need to provide for an *Angel Bell* exception as expenses will be paid in the normal course of business of Luxury Hotels.
    d. The Receivership Order will not extend over any working capital funds provided by Hotel Unit Owners in response to a call to Hotel Unit Owners for working capital.
    e. The Receivership Order will not extend over any Net Rental Payment derived from rental income and due as an expense to Hotel Unit Owners, including H&P, under the Rental Agreements.
    f. Further conditions can be considered on perfecting the Order before the Court.

**HTOC's and Luxury Hotels' Applications to set aside the Freezing Order**

The Law

Test for Obtaining a Freezing Order

86. The Court of Appeal in *Locabail International Finance Ltd v Manios and Transways (Chartering) SA* [1988] Bda LR 26 summarized the test for a freezing order which the Plaintiffs must meet. They are required to show:

    "*1. a good arguable case against the defendant;*
    *2. the presence within the jurisdiction of assets belonging to the defendant; and*
    *3. a real risk the unless the injunction is granted judgment will go unsatisfied.*"

87. With regard to the *'presence within the jurisdiction of assets belonging to the defendant'* in *Locabail* it was held:

"*A court will normally apply ordinary principles of English private international law to ascertain the location of assets; and Bank accounts will be regarded as situated at the branch where the relevant account is kept.*"

HTOC's Submissions

88. HTOC submit that the Freezing Order should be set aside on various grounds as follows:
    a. The Trumps do not have a good arguable case;
    b. The unlikelihood of the Trumps obtaining an appointment of a receiver over the assets of HTOC and Luxury Hotels;
    c. HTOC holds no assets in Bermuda;
    d. There is no risk of dissipation of the HTOC's funds; and
    e. There was material non-disclosure by the Trumps regarding ongoing proceeding in Panama and the court appointment of a receiver over the Trumps in Panama.

Luxury Hotels' Submissions

89. Mr. Horseman submitted that Luxury Hotels has no interest in this case other than to protect its contractual rights and business interests. He stressed that the reasons for Luxury Hotels having to contest the Freezing Order and the appointment of a receiver lies at the doorstep of the Trumps for applying to appoint a receiver over all revenues, without limitation. Such an order would effectively permit the Trumps, being competitors of Luxury Hotels, to run the operations of the Hotel and would represent a significant interference in Luxury Hotels' business operations, which is designed to promote the Trumps' interest over the interest of Luxury Hotels – an innocent third-party.

90. Mr. Horseman submitted that Luxury Hotels would abide by any order the Court makes and, in particular, any orders made restricting any payments to any of the Owner Entities.

91. Mr. Horseman submitted that the Freezing Order should be set aside on various grounds including: (i) that the proceedings should never have been brought in Bermuda with Luxury Hotels as a defendant; (ii) that the Trumps have not attempted to enforce their judgment in Panama and there is no impediment preventing it from doing so; and (iii) there was material non-disclosure by the Trumps.

H&P's submissions

92. Mr. Bank submitted that H&P align themselves with HTOC and Luxury Hotels to set aside the Freezing Order, alternatively they seek an amendment/or clarification of the Freezing Order so that it specifically excludes any revenues attributed to H&P and other third parties.

93. Mr. Bank submitted that neither of H&P are owned or controlled by any party involved in the substantive applications presently before the Court, Bermuda legal proceedings or by any entities mentioned in the receivership order sought by the Trumps.

94. Mr. Bank submitted that H&P have placed all 85 of their Hotel Units into the Hotel's rental pool through rental agreements and maintenance agreements signed with Hotel Owner Inc. The rental agreements outline the payment waterfall, which determines the distribution of net rental income after deducting operating expenses among various parties, including H&P.

95. Mr. Bank submitted that H&P's position is that the ambit of the extent of the Freezing Order clearly strayed onto the rights of the innocent third-parties not involved in the dispute between the Trumps and HTOC. The Freezing Order is draconian in its effect and absent any concession on the part of the Trumps to carve out an *Angel Bell* exception, it falls to be discharged.

The Trumps' Submissions

96. Mr. Robinson submitted that the main purpose of the Freezing Order was to preserve assets belonging to HTOC pending the commencement by the Trumps of a process of execution to collect the Bermuda judgment. Thus, if the Court is persuaded to grant an order appointing a receiver in the terms sought by the Trumps, then the Freezing Order can be discharged in any event because it will have served its purpose.

97. Mr. Robinson anticipated that Luxury Hotels would object to the terms of the paragraph 6 of the Freezing Order on the basis that it does not allow the Hotel Manager to make payments in the ordinary course of business and thus interferes excessively with its business relationship and contractual rights under the HMA. Mr. Robinson submitted that Luxury Hotels has never complied with paragraph 6 of the Freezing Order because of its misconceived view that the revenues of the Hotel are not the assets of HTOC. He states that that position has also caused it to breach paragraph 9(iii), in that it has failed to disclose details of bank accounts in the name of Hotel Owner Inc. in which the bulk of the Hotel's operating revenue are now paid. He noted that it is the Trumps' position that, pursuant to the HMA, these revenues are jointly and severally owed by each Owner Entity, and it is immaterial where these revenues are paid for operational purposes.

98. Mr. Robinson submitted that Luxury Hotels has been disingenuous in its evidence of Fernandez 1 by stating that Luxury Hotels does not distribute proceeds in the Hotel's Operating Account to

HTOC or otherwise make payments to HTOC. He stressed this could not be correct as under the HMA, each Owner Entity has appointed Ithaca 1 as an agent to receive any and all distributions or other payments to which the Owner is entitled.

Analysis

99. In my view, I should grant the applications to discharge the Freezing Order.

Good arguable case

100. Mr. Griffin has submitted that the Trumps do not have a good arguable case in respect for their application for a receivership order. However, for the reasons as set out above, I have granted the application for a receivership order in part. Thus, it follows that the Trumps have a good arguable case in this matter as a ground for maintaining the Freezing Order.

Presence of assets within the jurisdiction

101. Mr. Griffin submitted that HTOC holds no assets in Bermuda as it carried out its activities in Panama. The Hotel is in Panama and all the bank accounts belonging to HTOC are in Panama as are the signatories to those accounts. He noted that the evidentiary hearings of the New York arbitration proceedings were held in Panama. Thus, the only nexus with Bermuda is that Luxury Hotels is registered in Bermuda and so the Trumps are seeking to forum shop.

102. Mr. Horseman submitted that there are no amounts due or accruing from Luxury Hotels to HTOC which previously held the operating license for the Hotel which was terminated in August 2021. Luxury Hotels does not distribute funds to HTOC but it does manage a few bank accounts which are simply maintained to collect certain residual payments which emanate from when HTOC held the operating accounts and controlled bank accounts of the Hotel's operation, which are now in the name of Hotel Owner Inc. Luxury Hotels discharges Hotel operating expenses from the operating accounts which it is contractually obligated to meet in order to run the Hotel which includes items such as cost of sales, utilities, salaries and wages, taxes and general expenses. Thereafter, all distributions are made to the "Owner Representative", which is not HTOC.

103. Mr. Robinson submitted that Luxury Hotels has not complied with the Freezing Order to disclose the details of bank accounts controlled and/or operated by Luxury Hotels which contain money belonging to HTOC.

104. In my view, on the evidence, it is clear that HTOC holds no assets in Bermuda. On the basis that Hotel Owner Inc. took over HTOC's bank accounts, then it follows that Hotel Owner Inc. holds no assets in Bermuda. On those facts, in respect of Luxury Hotels, I am not satisfied that any bank accounts controlled or operated by Luxury Hotels in respect of the Hotel are present in Bermuda. I do not recall any other evidence of the presence of assets belonging to Luxury Hotels in Bermuda.

A real risk that unless the injunction is granted judgment will go unsatisfied (dissipation)

105. Mr. Griffin submitted that there is no risk of dissipation as HTOC has held for some years now only minimal funds and the bank accounts are only used to receive legacy payments from when it managed the Hotel. Although Luxury Hotels has access to HTOC's bank accounts, such sums are not being paid out. Mr. Griffin also dismissed the Trumps' allegations that there was a risk that the assets could be dissipated because of dishonesty by Mr. Fintiklis. He pointed to the findings of the New York Court and arbitration proceedings.

106. In *Locabail* da Costa J.A. stated:

> "*The test therefore is whether in the whole of the evidence there is a real risk that judgment or an award in favour of the plaintiff would remain unsatisfied. … the burden is on the plaintiff to adduce 'solid evidence' to support his assertion that there is a great risk of the judgment or award going unsatisfied. It is not possible to lay down any general guidelines as to how and when this evidential burden will be satisfied, since each case depends on its own facts."* [page 12 – 13]

107. Da Costa J.A. went on to cite *Andrews and Gee* on *Mareva* injunctions where relevant factors may be used as a guide, including: the nature of the assets; the nature and financial standings of the defendant's business and the domicile of the defendants. Another relevant factor was if the defendant was a foreign company and the availability or non-availability of any machinery for reciprocal enforcements of English judgments or arbitration awards in that country. If such machinery does exist, the length of time which it would take to implement it may be an important factor. (see *Montecchi v Shimco (U.K.) Ltd.* (1979) 2 W.L.R. 1180 per Bridge L.J. [page 13-14]

108. In *Les Ambassadeurs Club Ltd v Songbo Yu* [2021] EWCA Civ 1310 it was made clear that a defendant is entitled to require the plaintiff to enforce a judgment or award and that failure to pay a judgment is not a risk of dissipation.

109. In my view, there is no risk of dissipation. It appears to me that the Trumps are embroiled in litigation with HTOC in Panama and hold various reasons why they will not pay the judgment. Also, I accept Mr. Griffin's submissions that the evidence shows that there are minimal funds in

HTOC's accounts that have been there for several years and the accounts now exist to accept legacy payments from when HTOC held a management agreement. I have balanced this evidence against the evidence that shows the HMA sets out that HTOC is an Owner Entity and thus is a joint and several owner of the assets in the relevant bank accounts.

Material Non-Disclosure

110. Mr. Griffin submitted that the Trumps deliberately withheld material information from the Court in order to obtain the Freezing Order as follows:
    a. They failed to inform the Court when obtaining the *ex parte* injunction that there are ongoing proceedings brought by the HTOC against them in Panama concerning the Hotel.
    b. They failed to inform the Court that the Panama Court has made an order appointing a receiver over Trump Panama's assets in March 2018 and Trump Panama is still in breach of that order by failing to post the required collateral. They failed to mention that the claim is in the region of $10 million.
    c. They failed to mention the proceedings in the oral submissions.
    d. They only informed the Court in December 2022, six months after the grant of the Freezing Order and only after the Defendants has raised the issue, of the existence of the Panama proceedings.

111. Mr. Griffin submitted that non-disclosure was a clear and deliberate attempt to conceal material facts from the Court which justifies setting aside the Freezing Order.

112. Mr. Horseman submitted that the Trumps failed to bring various significant matters to the attention of the Court, thus it was a serious breach of the Trumps' duty of full and frank disclosure to put all the relevant facts before the Court, including:
    a. Failure to inform the Court of the ongoing litigation in Panama.
    b. Failure to inform the Court that Trump Panama is the subject of a freezing order in Panama.
    c. Failure to inform the Court that a receiver had been appointed over Trump Panama in Panama, without the involvement or knowledge of Luxury Hotels.
    d. Failure to inform the Court that the Panamanian Court has made a freezing order in the amount of $5,531,150.00, without the involvement or knowledge of Luxury Hotels.
    e. Failure to bring to the attention of the Court that the Freezing Order would not include the usual undertaking to indemnify any third party, including Luxury Hotels, as to any costs incurred in complying with the order or any liabilities arising out of the Order.

f. Failure to properly inform the Court that the Freezing Order was intended to prevent Luxury Hotels, an innocent third-party, from being able to discharge its existing financial obligations.

g. Failure to put before the Court the relevant case law governing interference with third-party's contracts and protection of third-party interests.

113. Mr. Horseman submitted that any one of the cited non-disclosures is sufficiently serious to make a compelling case to discharge the Freezing Order and that cumulatively, it is beyond argument that the Freezing Order must be discharged.

114. In *Locabail* da Costa J.A. stated as follows:

a. "*On an ex parte application for Mareva injunction, the plaintiff has a duty to make full and frank disclosure. The duty is an onerous one."* [page 14]

*b.* Citing Donaldson L.J. in *Bank Mellot v Nikpour* (1985) F.S.R. 87, *"This principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law. But happily, we have been referred to a dictum of Warrington L.J. in R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac (1917) 1 K.B. 486 at 509. He said:*

> *'It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.* '" [page 15]

*c. "As to the non-disclosure: the learned judge found there was insufficient disclosure. And in so finding, he was in my judgment, with respect clearly right. On this aspect of the matter Ward J. observed:*

> *"On consideration of the degree of non-disclosure, I am led to conclude that the passing mention of the Greek proceedings was insufficient. Thus applying the above legal principle the injunction should be discharged."* [page 28]

115. In my view there has clearly been material non-disclosure to such a degree that the Freezing Order should not be allowed to continue on the basis that the Trumps did not inform the Court of the list of facts as identified by Mr. Griffin and Mr. Horseman as set out above. Simply put, following *Locabail,* as set out above, the Trumps had a duty both in affidavit evidence and oral submissions to inform the Court about the Panama proceedings and all the various aspects of it at the time of the application for the Freezing Order. The duty is an onerous one and the Court should have been apprised of the fullest possible disclosure of all material facts within the knowledge of the Trumps.

Summary

116. I have given consideration to Mr. Robinson's submission that if a receivership order was granted then the Freezing Order can be discharged in any event because it will have served its purpose. In *Locabail*, citing *Warrington L.J. in R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* it set out that a person who obtains an injunction by not making the fullest possible disclosure cannot expect to obtain or retain any advantage gained as a result of the non-disclosure. Consequently, rather than discharging the Freezing Order because I have granted the application for a Receivership Order, I am obliged to determine the applications to set aside the Freezing Order.

117. In light of the material non-disclosure, I will set aside the Freezing Order per HTOC's Summons and Luxury Hotels' Summons.

118. In light of the test set out in *Locabail* about granting a freezing order, I find that there is a good arguable case for the Freezing Order, but I also found that there are no assets in the jurisdiction and that there is no risk of dissipation. In light of these reasons, I also set aside the Freezing Order.

**H&P's applications for security costs, fortification and indemnification**

H&P's Submissions

119. Mr. Bank submitted that although granted leave to file evidence in response to that of H&P, the Trumps have not filed any evidence. Further, at no stage have the Trumps approached H&P suggesting a practical method by which certain revenues might be released in order to allow Luxury Hotels to continue to run the Hotel or to allow Hotel Unit Owners such as H&P to receive the income to which they are lawfully and contractually entitled.

120. Mr. Bank relied on Clare 1 to set out the following:

    a. H&P are not direct parties to the HMA. However, the Rental and Maintenance Agreements are very much linked thereto and arise out of the HMA.
    b. The definition of "Owner" does not include H&P or any other individual Hotel Unit Owner.
    c. Joint and several liability does not extend to parties not covered by the definition of Owner.
    d. The HMA outlines the distribution of Operating Profit per the Payment Waterfall.
    e. Hotel Owner Inc. derives its entitlement to manage the Hotel Units solely from the HMA and the Rental Agreements, which do not permit the withholding of funds from H&P to satisfy judgments or arbitration awards against Hotel Owner Inc. Thus, Hotel Owner Inc. acts only as custodian or trustee of funds belonging to the Hotel Unit Owners, including H&P.

121. Mr. Bank submitted that there is no contractual or other nexus between H&P and HTOC. Therefore, H&P have no liability to the Trumps under the HMA and are not jointly and severally liable to any creditors of HTOC or any other debtor under the HMA. The Hotel Unit Owners have a contract with Hotel Owner Inc., not HTOC. Thus, H&P have a legitimate claim to the income derived from the revenues, representing approximately 23% of the total income generated by the Hotel Units owned by them. Mr. Bank submitted that H&P's rights to their rental income ought not to be subject to the Freezing Order or any similar measures taken by the Trumps against HTOC.

122. Mr. Bank submitted that H&P seek security for costs and fortification of the Trumps' undertaking in damages. Their position is aligned with that of Luxury Hotels' which has already successfully argued for and obtained such security before this Court, the quantum largely based on expert evidence regarding the estimated cost of enforcing an adverse order against the Trumps, which are domiciled in Delaware (ie between $350,000 to $450,000). H&P will face similar costs of enforcement should they be successful. Thus, they are in an analogous position to that of Luxury Hotels and not to that of HTOC. H&P are innocent parties and should be entitled to security for costs.

123. Mr. Bank submitted that H&P seek that the Trumps' undertaking to pay damages included in the recitals to the Freezing Order be amended and extended so as to include H&P's own costs, expenses, and liabilities on the same principles as Luxury Hotels submissions as the principle underlying the requirement for the Trumps to bear the reasonable legal costs of successful third-party applicants.

124. Mr. Bank submitted that H&P further request fortification of the undertaking or security in the event a receiver is appointed. They seek that the fortification amount be calculated based on their proportionate ownership of Hotel Units (23% of the judgment debt sought to be enforced by the Trumps), considering the potential control the Receiver would have on their revenues.

Trumps' Submissions

Security for costs

125. The Trumps oppose H&P's application for security for costs. They submit that the issue whether a voluntary intervenor who had not had proceedings issued against it by the Trumps (and therefore has no cause of action to defend) is entitled to security for costs does not appear to have been settled by the Bermuda Courts. They referred to *Masri Bermuda* where Teyseer was granted leave to intervene in the creditor's reciprocal enforcement of judgment action. Teyseer sought security for costs under RSC Order 23 rule 1(1)(a). The judgment creditor argued that Teyseer was not a "defendant" for the purpose of the rule. The Court did not decide who constitutes a "defendant" for the purposes of the rule, but Kawaley J stated in essence that in the post-overriding objective era who qualifies as a defendant under the rule was subject to more fluidity than before. However, the dominant rule as then drafted required foreign plaintiffs who have issued contentious proceedings against defendants to provide security to such defendants for their costs. The rationale being that where a foreign plaintiff who has no assets in the jurisdiction compels a party to defend proceedings, the defendant should not be put to undue inconvenience enforcing any costs orders he may eventually obtain.

126. Mr. Stevens submitted that the Trumps claims are against HTOC and Luxury Hotels and that H&P are not in an analogous position as they have intervened voluntarily, at their own risk, and convenience, in circumstances where no cause of action is being asserted against them by the Trumps. Thus, H&P should not be regarded as "a defendant to an action or other proceedings" under Order 23 rule 1(1)(a). Mr. Stevens submitted that the Supreme Court Practice 1999 (the "**White Book**") did not contain any relevant commentary on the issue. However, he noted that the Trumps' position was consistent with the position in England and Wales under the equivalent Civil Procedure Rule 25.12. The commentary in the 2023 White Book concerning CPR r.25.13 states as follows:

> *"Rule 25.12 provides for applications by a "defendant to any claim", as to the meaning of which, see para 25.12.4. A marginal note to the rule confirms that it also covers applications by persons served with "Part 20 claims", i.e. counterclaims and other additional claims. Thus,*

*a claimant may apply for security for costs of a counterclaim against the defendant who brought their counterclaim and, similarly, a third party may apply for security for costs of the third party proceedings against the defendant who commenced those proceedings. However, save under r.3.1(5) or r.25.15, a third party cannot obtain an order for security for costs against the claimant whose claim lies solely against the defendant". [emphasis added]*

127. Mr. Stevens submitted that r.3.1(5) and r.25.15 are not relevant as they deal with appeals. Further, he submitted that there is no reason in principle why the Court should deviate from the clear position that exists in England and Wales under the equivalent procedure rules governing the award of security for costs. In any event, for the Court to determine how H&P may be regarded as "defendants" for the purposes of RSC Order 23, it would need to look at the precise status of each intervening party in the claim and reach a conclusion as to whether the intervening party is, in substance, the defendant. However, it is not possible to reach that conclusion because there is a dispute between the parties as to H&P's interest in the assets and whether H&P had a legitimate interest in choosing to intervene. The Trumps position is that H&P have no legitimate interest, as the assets over which the Trumps seek to have a receiver appointed do not belong, legally or beneficially, to H&P.

Fortification

128. Mr. Stevens submitted that H&P have failed to show a good arguable case in support of its application for fortification. First, he asserted that the evidence does not include an intelligent estimate of the likely amount of any loss that H&P have or may suffer as a result of the Freezing Order. Second, H&P have not shown a sufficient level of risk of loss to require fortification as they have provided no substantive explanation as to how they will suffer any loss as a result of the Freezing Order, which restricts particular actions by HTOC and Luxury Hotels in respect of assets which are not owned by H&P but are owned jointly and severally by HTOC and three other Panamanian corporate vehicles which own the Hotel. They are not named in the Freezing Order and are not subject to any restrictions under it.

Analysis

129. In light of my decision to set aside the Freezing Order, it is not necessary for me to determine H&P's application for security for costs and fortification in respect of the Freezing Order.

130. In light of my reasons and decision to appoint a receiver over the Operating Profit rather than the revenues of the Hotel then I decline H&P's application for security for costs or fortification in respect of the Receivership Order. As stated above, the Owners' Net Payment is a sum to be paid

by Luxury Hotels to the Hotel Unit Owners before arriving at the Operating Profit. Therefore, in my view, the Hotel Unit Owners and H&P have protections as sought. For clarity, I have relied on the submissions of H&P, as well as the other parties, to arrive at my conclusion that the Receivership Order be in respect of the Operating Profit only and not over the revenues and Operating Accounts of the Hotel.

**Conclusion**

Receivership Application

131. In respect of the Receivership Application, I grant the application for a Receivership Order over the Operating Profit of the Hotel as determined according to the HMA.

132. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that in respect of the Receivership Application, there shall be no order as to costs on the basis that the Trumps were successful in obtaining a Receivership Order over the Operating Profit and the Defendants were successful is resisting a Receivership Order over the revenues and Operating Accounts.

HTOC's Summons and Luxury Hotels' Summons

133. In respect of HTOC's Summons and Luxury Hotels' Summons, I grant their applications to set aside the Freezing Order.

134. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of HTOC and Luxury Hotels against the Trumps on a standard basis, to be taxed by the Registrar if not agreed.

H&P's Summons

135. In respect of H&P's Summons, I did not have to determine the application in respect of the Freezing Order. In respect of the Receivership Order, on the basis of the Receivership Order only applying to the Operating Profit, I declined the applications for security for costs, fortification and indemnification.

136. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that there shall be no order as to costs.

Dated 12 October 2023


**HON. MR. JUSTICE LARRY MUSSENDEN**