IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C. L. T 005 OF 2002

BETWEEN	JOHN THOMPSON	FIRST CLAIMANT
AND	JANET THOMPSON	SECOND CLAIMANT
AND	GOBLIN HILL HOTELS LTD	FIRST DEFENDANT
AND	MIES INVESTMENT LTD	SECOND DEFENDANT
AND	MERVIN GOODMAN	THIRD DEFENDANT
AND	ROSALIE GOODMAN	FOURTH DEFENDANT

Roderick Gordon instructed by Audrey Mcleod of Alton Morgan and Company for the claimants

Lloyd Barnett instructed by Watson and Watson for the first defendant

Marina Sakhno instructed by Cowan, Dunkley, Cowan for the second, third and fourth defendants

November 22, 24, 25, 28, 29, December 5, 6, 7, 2005, July 17, 18, 19, 20, 21, 25, and November 6, 2006

DIRECTORS' DUTY OF DISCLOSURE OF INTEREST, BREACH OF FIDUCIARY DUTY, ABUSE OF POWER AMOUNTING TO EQUITABLE FRAUD, COVENANT IN LEASE, ARTICLES OF ASSOCIATION, COMPANIES ACT

SYKES J

The location

1. On the north eastern shores of Jamaica lies the most idyllic of places - the parish of Portland. As one heads eastward from the

sleepy parish capital, Port Antonio, towards the home of the famous Boston jerk pork, there is a bit of land, now known as Goblin Hill. It overlooks the sea and faces the incoming breeze of the North East Trade Winds. These qualities apparently commended themselves to the developers who decided to establish a vacation resort/second holiday home on the site. This decision was made in the 1960's. Visitors were coming to the island in their hundreds, thousands and tens of thousands. The government encouraged hotel building and investment in the hospitality industry. It did this by enacting the Hotel (Incentive) Act. The legislation provided a tax holiday for investors. This case is about one of those hotels.

2. These are the litigants. Mr. John Thompson and Mrs. Janet Thompson, the claimants, are husband and wife ("the Thompsons"). Mr. Marvin Goodman, the third defendant, and Mrs. Rosalie Goodman, the fourth defendant, are husband and wife ("the Goodmans"). They are the only share holders of Mies Investment Limited ("Mies"), the second defendant. They are officers of Goblin Hill Hotels Limited ("GHHL"), the first defendant. Mr. Goodman is chairman of the board of directors/managing director and his wife is a director/company secretary. GHHL has five directors. Goblin Hill Villas of San San ("GHVSS") is not a party to the claim. I do not therefore see any basis to grant the relief sought at paragraph 4 (d) below.

3. This litigation arose because of assessments and special assessments levied by GHHL on its share holders/lease holders. Some of them declined to pay the assessments. One of those declining to pay the increased assessments was the Thompsons. GHHL responded by forfeiting the lease and shares. The Thompsons say that this is unlawful.

4. The claimants have brought suit against all the defendants. Against GHHL they are seeking:

   a. a declaration that the assessments and special assessments levied by GHHL on the claimants in the years 1994 - 2001 were unlawful and excessive;

b. a declaration that GHHL improperly forfeited the lease with and shares in GHHL;
c. a declaration that the occupancy charges levied by GHHL against the claimants in respect of the occupancy of the claimants' villa are unlawful and not permitted by the claimants' lease or the articles of association;
d. a declaration that the debiting of the claimants' accounts with booking charges or commission payable to Goblin Hill Villa of San San Ltd were wrongful
e. an injunction restraining GHHL whether by itself, its servants or its agents from forfeiting or purporting to forfeit or taking any steps to exercise the forfeiture of shares in GHHL;
f. an injunction restraining GHHL, its servants or agents from taking any steps to exercise the purported forfeiture of the claimants' lease and/or taking any steps to occupy the leased premises to the exclusion of the claimants pursuant to any purported exercise of a right of forfeiture under the claimants' lease with the Mies;
g. damages for breach of duty owed to the claimants;
h. damages for breach of lease agreement by the wrongful forfeiture of the said lease;
i. a proper account of sums expended by all the defendants or any of them forming the basis of the assessments and special assessments levied and which the defendants claim the claimants are in arrears of payment;
j. an order that a receiver of GHHL be appointed for such period and on such terms as the court thinks fit

and against all the defendants

k. a declaration that the mortgages purportedly granted by the GHHL to Mies over its fixed assets including the lands are void, or alternatively void against the claimants and other lessees of villas on the mortgaged property;
l. an injunction restraining the defendants and each of them by themselves, their servants, agents or otherwise from taking steps to enforce or procure the enforcement of the mortgages registered in favour of the Mies or otherwise, or

from transferring or disposing of the said mortgage and debenture to third parties except on terms which preserve the claimants' lease and in the case of the Goodmans from using their voting or management power in Mies to achieve the said enforcement or transfer of the said mortgage or debenture;

m. damages for conspiracy to injure the claimants in respect of their leased villa.

and against the Goodmans:

n. damages for breach of fiduciary duty;

o. damages for interference with contractual relations between the claimants and GHHL;

p. damages for unjust enrichments and an order that the defendants refund the claimants any sums found due in a proper financial accounting together with any interest or profit unlawfully earned by the defendants on the said sums;

q. aggravated and/or exemplary damages;

r. interest at 1% above the commercial banks prime lending rate for such period as the court thinks.

History of the hotel

(a) Incentive period

5. In this section of the judgment I shall give a broad overview of the matter and shall give more details where necessary in order to resolve the issues of fact and law. For digestibility I shall divide the narrative into the incentive and post-incentive periods. The incentive period refers to that period of time when GHHL would enjoy tax free status.

6. There is some uncertainty regarding the length of the incentive period. Mrs. Goodman in said that the incentive period was to last twenty years (1971-91) (see paras. 5 and 26 of Mrs. Goodman's witness statement). In cross examination she said that the incentive period was fifteen years ending in 1986. According to her the documents were originally prepared with a fifteen year incentive period in mind. There was evidence that the incentive

period ended in 1989. Regardless of the duration of the incentive period it is common ground that in the incentive period the investors would have access to the property by way of a licence agreement entered into between the investor and GHHL.

7. The idea for the development was sparked by the rapid expansion of tourism in Jamaica during the late 1950s and the decade of the 1960s. The developers of the project in the instant case sought to take advantage of the Hotel (Incentive) Act and came up with the proposal to purchase the 11 $\frac{1}{2}$ acre site in order to develop a unique type of resort. The developers' blueprint for prosperity involved providing a rustic ambience with sufficient privacy allied to first class services. Open spaces, manicured lawns and trees providing coverage from the heat of the sun were to be a feature of the property. The athletically inclined would have tennis courts and swimming pools available to them.

8. GHHL was incorporated in 1969 with Messieurs Marvin Goodman, Anthony Alberga and Douglas Graham as the first directors. These men were identified, in the evidence, as the original developers. The relevant directors for the purposes of this claim are Mr. and Mrs. Goodman, Mr. Douglas Graham, Mr. A. Moodie and Mr. Don Phillips.

9. The capital to purchase the property came from the father in law (who has not been identified by name) of Mr. Anthony Alberga. The father in law lent money to the three developers through a corporate vehicle known as San San Investments Ltd ("SSIL"). SSIL was a company incorporated in the Cayman Island and "held by the father in law of Mr. Anthony Alberga" (see para. 11 of Mrs. Goodman's witness statement).

10. GHHL had a share capital of $54,000 representing 54,000 shares at $1.00 each. There were three classes of shares: classes A, B and C. More will be said about the rights of each class of shares. Article 3 says that the authorised share capital of GHHL is $54,000.00 (54,000 shares at $1.00 each) divided into 30, 600 class A ordinary shares; 15,300 class B ordinary shares; and 8,100 class C ordinary shares. The article also has these words *"[s]ave as*

in these Articles (sic) expressly provided the rights of the holders of the Class A ordinary, Class B ordinary and Class C ordinary shares shall be in all respects identical."

11. Article 4 (1) makes it plain that blocks of shares were to be allocated to each of the villa units in phase 1 of the development of the project. Shares numbered A1 to A 19,976 were to be allocated to the twenty eight units which comprised forty four apartments. The shares numbered A19,977 to A30,600 were to be allocated to the remaining twenty six bedrooms. In this phase 908 class A shares were allocated to a two apartment bedroom villa unit and 454 to one apartment bedroom villa unit. On completion, phase one would have seventy rooms.

12. Article 4 (1) also provided that holders of shares numbered A1 to A19, 976 entitled them to "participate in the earnings of the Company as from the date of completion of construction of the villa units relating to such shares". Similarly the holders of shares numbered A19, 777 to A30, 600 entitled the holders to "participate in the earnings of the Company as from the date of completion of construction of the villa units relating to such shares."

13. Article 4 (2) which dealt with class B shares proceeded on the same principle as outlined in respect of class A shares, namely, the shares were to be allocated to villas and the share holders were entitled to participate in earnings of the company as from the date the villas to which these shares were to attach were completed. These class B shares represent phase two of the project which would consist of thirty rooms. The number of shares to attach to each villa was to be determined by the directors.

14. Article 4 (3) deals with shares numbered C1 to C3,564 which had this feature. The holders of these shares were to participate in the earnings of GHHL as from the completion of the villa units to which shares A1 to A19,976 were to attach, that is to say, the first twenty eight units comprising forty four apartments. The holders of class C shares numbered C3,565 to C8,100 were entitled to participate in the earnings of the company on completion of (a) the

villas to which class A shares numbered A19,977 to A30,600, that is the remaining twenty six room to complete phase one and (b) the villas to which the class B shares were to attach. The basis of the class C shares numbered C3,565 to C8,100 participation in the way contemplated by the article would be "81 shares for each apartment bedroom in such villa units." There was no indication of how the class C shares numbered C1 to C3,564 would be allocated to the units.

15. Finally, article 5 stated that none of the shares could be transferred individually. They had to be transferred with all the other shares of the same class that made up the particular block of shares.

16. So far as I have been able to tell, there is no provision in the articles of association that prohibits the issuing of the shares until the villas were built.

17. There were three documents that were to be executed by all persons who invested in the project during the incentive period. These documents are described below. When the documents were executed the investors would acquire two options and a licence. The options were (a) an option to purchase shares and (b) an option to take out a lease. The documents are headed *Agreement for Sale of Options for purchase of Shares and Grant of lease; Goblin Hill San San Licence Agreement* and *Goblin Hill San San Collective Agreement* respectively. All three documents were put before me as agreed documents. The actual set of three relevant to this case which would have been executed by the predecessors of the Thompsons in respect of their particular villa was not exhibited but it is agreed that all the documents were the same and there was no alteration of the contents. I will particularise each document as necessary. Mrs. Goodman's evidence is that SSIL was the intended vendor of the options

18. The first document, *Agreement for Sale of Options for purchase of Shares and Grant of lease*, states that it is an agreement between SSIL (called "the Vendor"), GHHL (called "the hotel

company") and "the purchaser". There is a space for insertion of the name of the purchaser. This would be the purchaser of the options. The recital tells us that SSIL and GHHL have agreed with each other that GHHL

a. owns approximately 11 ½ acres of land at San San in Portland and has undertaken to build thirty three villa units in phase one of the development with construction of the first sixteen units and hotel facilities to commence on December 31, 1970 and the remaining seventeen villas to commence by December 31, 1972;

b. undertakes to operate the property as a first class resort hotel for transient guests;

c. contemplates further development by the erection of a hotel or apartment scheme of not more than thirty bedrooms (hereafter known as phase 2 development); and

d. [after noting the share capital and the amount of the various class of shares] has sold to SSIL 5,925 class A ordinary shares, 5,400 class C ordinary share and granted SSIL an option to take the remaining 24,675 class A ordinary shares and to acquire leases of the villa units on terms set out in schedule one. GHHL also granted to SSIL a further option to take up 2,700 class C ordinary shares and all class B ordinary shares and to acquire leases of the unites comprised in phase 2.

19. There are two schedules to this document. The first schedule one has the share and lease options. The second schedule has the proposed form of the lease. The printed portion of the share option states that SSIL has until December 31 1972 to subscribe for and be allotted the relevant shares. The printed portion of the lease option states that SSIL's window to exercise the option was the period January 1, 1982 and December 31, 1986.

20. Clause one of the operative part of the document expressly states "*the Vendor agrees to sell and the Purchaser agrees to buy the Share Option and Lease Option described in schedule 1 hereof*".

21. Also in the operative part of the document there is a clause (clause 5) which states that *[t]he parties hereto acknowledge that the terms and conditions and representations herein contained form the sole contract between them with respect to the subject matter of the agreement and there are no terms conditions or representations other than those set forth in this agreement.* Clause 6 provides that *any notice under this agreement shall be in writing*. The share and lease options explicitly state that options are exercisable by the option holder by a notice in writing. Since clause 5 says, in effect, that no terms conditions or representations other than those set out in the agreement are valid it follows that the parties intended that the formalities should be strictly complied with. This can only mean that the parties do not wish any person to rely on any representation that was not captured by the document.

22. It should be noted that this first document evidently contemplated that the lease option might be exercised during the incentive period. If exercised there was the risk that the lessee would not make his villa available to GHHL unless there was some provision postponing the right of exclusive possession. This risk was managed by clause 4B of the proposed lease which provides that the lessee and other lessees agree to permit the leased villa to be operated by GHHL as part of the hotel and that the lessee would forego his rights as a lessee (the main one being the right of exclusive possession) during the incentive period except for a period not exceeding in aggregate in any one calendar year forty two days in the summer season (16th April to 14th December) or twenty one days in the winter season (15th December to 15th April) or any combination of both with two days in the summer season counting as one day in the winter season (see clause 4B (i), (ii)).

23. The second document, *Goblin Hill San San Licence Agreement*, is an agreement concluded between GHHL and licensees. The licensee in this document would necessarily be the purchaser of the share and lease options. This agreement was felt to be necessary to ensure that GHHL, during the incentive period, would have immediate, undelayed and unrestricted access to the all the rooms -

a factor vital to the operation of a hotel. The licence was said to be from the date specified that the property was approved under the Hotel (Incentives) Act to December 31, 1986.

24. Clause 1 of this document says that in consideration of the premium and periodical payment hereafter agreed to be paid by the licensee and other licensees undertakings set out GHHL licences and authorises the licensee, his invitees, servants or agents and all persons authorised by the licensee to enter as a guest of GHHL for such periods as shall not in any calendar year exceed in the aggregate forty two days in the summer season (16th April to 14th December) or twenty one days in the winter season (15th December to 15th April) or any combination of both on the basis that two days in summer season are the equivalent of one day in the winter season. This clause is identical to the sub-clause in clause 4B of the proposed lease referred to above.

25. Clause 3 states the obligations of the licensee. He is to pay the premium within seven days of the delivery of the licence and was enjoined to behave as a model licensee and not to engage in any disreputable conduct while on the property. Clause 4 states the obligations of GHHL. It was obliged to (a) provide fully and adequately furnished rooms as well as to equip the villa unit to the standard of a first class hotel for transient guests; (b) operate the property as a first-class resort hotel providing meal and all other facilities; (c) allow the licensee a 20% discount off applicable room rates in respect of any period of occupation of any villa unit beyond the maximum periods in clause 1.

26. The third document, *Goblin Hill San San Collective Agreement*, describes itself as a deed. All the parties agreed that they would do nothing to terminate, alter or vary or amend the licence unless there is a breach and 90% of the members of GHHL by resolution at an extraordinary general meeting convened for that purpose vote in favour of such action.

27. None of these documents includes a power to raise assessments during the incentive period on the purchasers of the options or on

any purchaser who exercised any of the options. Clause 5 of the proposed lease refers to a power to raise assessments on the lease holder but this power could only be exercised at the end of the incentive period.

28. As I understand the evidence, anyone who purchased the options during the incentive period was obliged to agree the three documents to which reference has been made. Mrs. Goodman confirmed this by saying in cross examination that all original purchasers of the options signed all three documents. In fact she stated that there were twenty eight original share holders who executed the licence agreement and the collective licence agreement.

29. In the first phase thirty three units were built (see para. 12 of Mrs. Goodman's witness statement). These units would be the ones to which the class A shares would be attached. By 1972 not all the class A shares were attached to villas. The share options relating to twenty eight villas were sold and the shares issued. A number of class C shares were issued. It is convenient to state at this point what happened to the shares even though I am spilling over into the post-incentive period.

30. During the trial share registers were produced and from those records we now know definitively that class A shares numbered A1 to A19,976 class A shares were issued in 1972. This left 10,624. The share registers revealed that as of May 30, 1994 the remaining 10,624 class A shares were allotted in this way: 3,542 to Mrs. Goodman, 3,541 to Mr. Graham and Melanie Graham and 3,541 to a company known as Trans Atlantic Holdings. This is a company controlled by Mr. Anthony Alberga, one of the original developers. The class B shares were allotted as follows: 5,100 to Mrs. Goodman; 5,100 to Mr. Douglas Graham and Melanie Graham and 5,100 to Trans Atlantic Holdings. Nine hundred class C shares were allotted to Mrs. Goodman, Mr. Graham and Melanie Graham and Trans Atlantic Holdings. From this evidence, all the 54,000 shares would have been issued before the Thompsons bought the shares and were assigned the lease.

31. From the testimony of Mrs. Goodman and the share register 5,391 class C shares were issued to SSIL. There is no evidence of what has happened to these share issued to SSIL. Mrs. Goodman said that the company was dissolved in 1994 after the previously unissued class A, B and C shares were issued. There is no evidence indicating the fate of the 5,391 class C shares in GHHL that were issued to SSIL. Neither do we know what has happened to the 5,925 class A shares issued to SSIL.

32. Things did not go according to plan. According to Mrs. Goodman it was expected that the whole development would have been completed in 1984. Phase two of the development has not been built and it is uncertain whether it will ever materialise. Mrs. Goodman stated that the share options would have expired by 1984 but because of the delay in completion the options were renewed (no evidence as to whether it was annually or simply one renewal with an expiry date in 1994) until 1994. The inability to complete the planned development has been attributed to what Mrs. Goodman called the difficult political, social and economic environment that prevailed in the 1970s and 1980s.

33. It is fair to say that the development was plagued with problems of one sort or another. The expected levels of occupancy never materialised. Serious efforts were made to make the project viable but to no avail. Between 1979 - 1989, there were four lessees of the entire property who had a go at making the property viable but things did not improve significantly. By 1984 things got to the point where GHHL reconsidered the operation of the property. They considered ending the incentive period prematurely by as much as seven years. On May 21, 1984, the company considered and passed a resolution which outlined the following three options for dealing with the property: (a) sale of the property; (b) finding another lessee after the first two lessees had given up the property and (c) operating the property as an apartment complex without restaurant or bar, without restriction on use, but with a maintenance fee payable. There is evidence to suggest that a buyer was found around 1988/89 but the sale was not consummated.

34. Mrs. Goodman said that as conceived GHHL would raise money from share holders during the incentive period in order to off set losses. The expectation of the developers was that the "annual out-goings and all expenses in relation to the management, operation and maintenance of the villa units as a hotel and the operating costs of the company would be met by means of income derived from the operation of the said hotel during the incentive period and, to the extent that such income should not be sufficient, by the share holders of the 1st defendant company" (see para. 27 of witness statement of Mrs. Goodman). The documents put before me do not indicate how this could or would be done. Mrs. Goodman formed the view that there was power to raise assessments during the incentive period and the source of that power was the proposed lease in the second schedule of the document headed *Agreement for Sale of Options for Purchase of Share and Grant of Lease*. As stated earlier even if the lease option were exercised during the incentive period, the lease in clause 4 specifically dealt with the relationship between the parties as far as the lease was concerned during the incentive period and there is no provision in that clause to levy assessments against lease holders during the incentive period. The power to levy assessments is to be found in clause 5 and that clause applies only to the post incentive period.

35. Article 91 of the articles of association is only too plain that assessments or special assessments could only be levied on the share holders *after the twentieth anniversary of the date specified for the commencement of Goblin Hill San San as an approved hotel enterprise under the Hotel (Incentives) Act, 1968*. This article does not use the expression *incentive period*. It measures time by reference to the twentieth anniversary of the date that the property became an approved hotel under the Act of 1968. That time period is not necessarily the same as the incentive period. Thus during the incentive period unless the share holders agreed to provide money other than by way of paying fully for the shares and paying the premium under the licence agreement it is not immediately obvious that GHHL would have any power to compel them to pay any further sums of money. It is therefore not

surprising that only two share holders paid the assessments Mrs. Goodman said were levied during the incentive period.

36. I summarise the effect of the documents executed by those who purchased the share and lease options. The relationship between them and GHHL in respect of the villas was regulated by the licence agreements. The purchasers of the options were granted licences to come to the property at very specific times of the year and when they came on the property they had access to the facilities. The purchasers were not the tenants of GHHL and could not become tenants unless and until they exercised the lease option. Even if the lease option was exercised during the incentive period clause 4B of the intended lease would have postponed the benefits of the lease until the end of the incentive period, that is to say, the person would be treated like licensee. It follows from this that the person would not be subject to the power of assessment exercisable by the landlord until the end of the incentive period. To my mind, the consequence of this type of arrangement was that GHHL would suffer serious cash flow problems if the intended inflow of revenue did not materialise. Additionally unless and until the share option was exercised the purchaser of the options was not a member of GHHL and so was not subject to and bound by the articles of association. Specifically, article 91 empowering the company to raise assessment on share holders could not be relied on as a source of funds for GHHL until the twentieth anniversary of the date as an approved hotel. The main source of revenue for the GHHL would be the premiums paid by the investors and income generated from the hotel operations.

(b) Post - incentive period

37. The incentive period, as noted, was brought to an end in 1989. The evidence does not make whether this was a unilateral act by GHHL or it involved some input from a government agency. It will be recalled that under the licence agreement GHHL was obliged to operate the property as a first class resort hotel providing accommodation and meals for transient guests. There is evidence that demonstrates that the property had a high land to building ratio with large numbers of trees, huge green areas, a tennis court

and swimming pool. These features have the potential to generate high maintenance costs. It is a notorious fact that Portland at the time had a high rainfall average which translated into more than ordinary attention to the green areas to keep them well groomed.

38. The question of how the property should be operated continued to exercise the minds of the board and members of the company. The minutes of the annual general meeting held on August 24, 1989, the board meeting held on September 26, 1989 and an extraordinary general meeting held on December 18, 1989 all show discussions relating to the cost of operation; whether the property should be converted to a strata operation or whether it should be sold. The cost of converting to a strata operation was explored at all these meeting but abandoned because it was felt that cost of making the conversion was prohibitive. The management of the company extended an invitation at the December 18 meeting to share holders to sit on a maintenance committee and only one share holder volunteered to do so.

39. By 1992, having been in operation for twenty years the property was in need of repair and refurbishing. Two loans were taken from the then Mutual Security Bank ("MSB") in 1992 totalling US$296,000 at 11%. In order to raise this money a prior loan from Jamaica Development Bank ("JDB") had to be repaid. The JDB loan was lent to GHHL who lent it to person who in turn used it to purchase the options. The JBD loan was taken out in 1972. That loan was repaid. The MSB loan was used to carry out repairs and refurbishing which were completed in 1993. The MSB loans were taken over by National Commercial Bank ("NCB") when it acquired MSB. In 1994 GHHL also operated an overdraft with MSB which was also taken over by NCB.

40. Two other loans were taken out in 1997 and 1998 from NCB. I shall call these loans the refurbishment and repair loans to distinguish from the overdraft which GHHL had with NCB. The loans were in the sums of US$125,000 and JA$3.5m respectively. They were to effect repairs to the property precipitated by heavy rains in July 1997 which resulted in land slippage on the property in the

vicinity of the tennis courts. There was also a problem with the sewage system. The land slide necessitated the construction of a wall. Part of these loans was used to pay off the overdraft that had existed upto the loan disbursement. It is these loans that were eventually taken over by the Financial Sector Adjustment Company ("FINSAC"). FINSAC was company formed by the Government of Jamaica to take over the bad debt from local commercial banks that found themselves in serious financial difficulties in the late 1980s and 1990s. When I come to deal with the loan from Mies I shall deal with the FINSAC debt in more detail.

41. GHHL also experience difficulties in collecting assessments and special assessments levied in on the lease holders. Many of them did not pay and in order to carry out its obligations under the lease agreement in the post incentive period GHHL operated the overdraft facility, referred to above, first with MSC then with NCB. This stage was now set for further deterioration in GHHL's fortunes. In addition to non-payment or late payment of assessments and special assessments there were law suits.

42. In 1997, Mr. Anthony Alberga sued GHHL who had to retain counsel and incur other costs connected to litigation. This law suit came to an end in 1998. It did not go to trial. The costs awarded to GHHL are still outstanding. There was another law suit filed by Gordon Stewart against all four defendants in this case (suit no. C.L. **S 112 of 2001**). These law suits necessitated expenditure by GHHL of scarce resources on legal costs to defend against the suit.

43. The minority share holder took their complaint to the Minister of Commerce and Technology who has responsibility for matters relating to the administration of the Companies Act. He appointed an inspector under section 157 and 158b of the Companies Act 1967. The enquiry was abandoned after submissions were made to him by counsel on behalf of GHHL.

44. The post incentive period was characterised by constant internecine struggles with some of the share holders/lease holders;

law suits; overdrafts and loans to refurbish the property. This is the back ground to the current dispute to which I now turn.

The claimants' purchase of shares and lease

45. This is how the Thompsons became share holders in GHHL and a lessee of the said company. Among the original share holders/licensees were Messieurs Richard Jones and Robert Randall. The evidence is that these two gentlemen had purchased the share and lease options in 1972 (see para. 55 of Mrs. Goodman's witness statement). She testified that the share option was exercised before December 31, 1972 (see para. 55 of Mrs. Goodman's witness statement). They held 908 class A shares numbered A 12713 and A 13620 in GHHL which they transferred to the Thompsons in 1994 by instrument of transfer dated July 1, 1994 for JA$2.7m. The transfer stated that the Thompsons were to hold the same absolutely but subject to the same conditions on which the transferors held them. The share certificate given to the Thompsons is dated February 14, 1996. There is no evidence showing when the Thompsons were entered on the register of GHHL as members. The share certificate was given to the Thompson after they wrote a letter dated February 15, 1996, to Mr. Goodman, in his capacity as chairman of GHHL complaining that they had not been issued the share certificate although the shares were paid for over eighteen months before.

46. The lease option she said was exercised y Messrs. Jones and Randall on July 1, 1994 (see para. 56 of Mrs. Goodman's witness statement).There is a lease between GHHL and Messrs. Jones and Randall which was assigned to the Thompsons by deed of assignment dated July 1, 1994. The lease itself has August 2, 1994 as the date of execution between GHHL and Messrs. Jones and Randall.

47. Mrs. Goodman said in cross examination that from either December 31, 1986 or January 1, 1987, the share holders were treated as if they were lease holders. She also said that with regard to Messrs. Jones and Randall the licence agreement expired in December 1986 and was replaced by a lease on January 1, 1987 (see para. 60 of Mrs. Goodman's witness statement). In any event at

the trial all proceeded on the basis that the Thompsons were lease holders. The evidence from Mrs. Goodman is that Messrs. Jones and Randall owed no money or if they did it was a very miniscule amount that was not passed on to the Thompsons. There is however a letter dated October 24, 1994, signed by Mr. Richard Jones addressed to GHHL in which he encloses a cheque for JA$298,495.07. The letter indicates that this cheque was to cover all outstanding amounts due from Messrs. Jones and Randall. The second paragraph of the letter asked that the share certificate be transferred to the Thompsons. This may in part account for the delay in issuing the share certificate to the Thompsons. As far as the Thompsons were concerned their assessment for the two bedroom villas was JA$13,495.

The last straw and the collapse of the proverbial camel

48. The acrimonious straw was a letter dated February 26, 1996, from GHHL to its lease holders/share holders informing that there would be an increase in the maintenance and occupancy charges. The February 26 letter to the share holders indicated that the existing rates were set over eighteen months before the letter and since that time there had been a 20% devaluation of the Jamaican currency which affected all costs but specifically wages, utilities and insurance. The letter stated that the new maintenance fee would be JA$17,718 per one bedroom unit plus loan repayment of JA$6,972 which would give a total of JA$24,690. In respect of two bedroom units the maintenance fee would be JA$35,436 plus loan repayment of JA$13,944 yielding a total of JA$49,380. The justification for the loan component was said to arise from the fact that GHHL was carrying a substantial overdraft from NCB because the share holders did not make their payments on time. It is to be noted that the loan component is attributed to the overdraft and not the 1992 loan. It would seem to me that the overdraft incurred since the Thompsons became lessees and share holders would be recoverable from them under the assessments provided that the overdraft was used for the maintenance and upkeep of the villas and grounds. The occupancy charges were increased to JA$600 per night for a one bedroom villa and JA$900 per night for a two bedroom villa. This was the local rate occupancy charges. For

overseas visitors the charges were JA$850 and JA$1,100. The letter indicated that total sums due from share holders/lease holders was JA$3,608,608.63. The share holders were told that the proposed budget was available.

49. The Thompsons' camel could bear no more. Mrs. Thompson wrote a defiant letter dated April 10, 1996. The letter stated, in part, "[w]hile I am aware that devaluations of the Jamaican dollar and inflation are realities which will affect costs, I will not accept being told that I have to pay a 263% increase in maintenance charges without the following". She laid down her conditions and concluded with the indisputably militant and stentorian declaration that she will not be paying any more than JA$13,485 per month maintenance fee and JA$595 per night occupancy charges.

50. Mr. Goodman replied by letter dated April 22, 1996, in which he pointed out that when the previous charges were fixed on July 1, 1993, the exchange between the Jamaican and United States of America dollar was JA$24:US$1 and that had moved to JA$40:US$1. He added that there was inflation of 30.1% in 1993, 26.9% in 1994 and 25.5% in 1995. This did not pacify the Thompsons. They continued to pay the maintenance fee of JA$13,495. When claim and counterclaim were filed the sum allegedly owed by the Thompsons up to December 22, 2001 when the lease and shares were forfeited was JA$3,658,375.05.

51. There is so much evidence about the devaluations, increase in costs of operations and inflation that no reasonable person could possibly contend that the maintenance fee should not be increased.

The lease and article 91

52. One of the hotly contested issues in this case is the method of calculating the assessments levied. It is agreed by all parties that GHHL had the power under article 91 to levy assessments on share holders in proportion to their share holding. It is agreed that GHHL had power under the lease to levy assessments on lease holders in proportion to their share holdings. The claimants say that all share

holders should bear the burden under article 91. The defendants disagree.

53. The contentious clause 5 of the lease reads:

Provided always and it is hereby mutually agreed and declared as follows:

(a)...

(b) ***After the end of the Incentive Period*** *as hereinbefore defined the Company shall at the beginning of each financial year thereafter or as soon thereof as possible estimate the total sum of money required for the maintenance of the Villa Units as a first class resort hotel for the accommodation of transient guests and the cost of carrying on the operation and performing the obligations of the Company with regard to the Villa Units and the grounds thereof for the ensuing year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoings and the cost of repairs and replacements and the necessary expenses of upkeep maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes aforesaid and such amounts as will meet any deficit incurred in any previous year of operation and the said total sum of money shall be borne by each lessee of a villa unit in proportion to his share holding in the Company and the proportion of the annual cost estimated as aforesaid payable by each lessee shall be called "the Assessment".* (My emphasis)

(c) Subject to the provision of clause 4 (C) (iii) of this lease if the Company shall at any time or from time to time during any year declare that funds in addition to the estimated total sum referred to in paragraph (b) of this clause are required for the continued operation and maintenance as aforesaid of the Villa units and the grounds thereof, the Company shall estimate the additional amounts required and this amount to be called "the Special Assessment" shall be paid by each lessee of a villa unit in proportion to his share holding in the Company.

54. Clause 5 (d) of the lease makes provision for forfeiture of the lease if the lessee is in arrears of any rental, assessment or special assessment for more than sixty days. Clause 5 (e) states that before the company exercises its right of re-entry it shall give the lessee forty five days to remedy the breach. There is no issue joined in respect of these clauses except to the extent that the claimants say the right of re-entry had not arisen because the assessments levied on them were unlawful.

55. Contrary to what the opening words of clause 5(b) indicates, the incentive period is not defined in the lease but that does not matter since it is agreed that we are in the post incentive period.

56. It is convenient to set out article 91 of the articles of association of GHHL. It reads:

*(1) **After the twentieth anniversary of the date specified for the commencement of Goblin Hill San San as an approved hotel enterprise under the Hotel (Incentives) Act, 1968** the Directors shall at the beginning of each financial year or as soon thereafter as possible estimate the total sum of money required for the maintenance of the Company and the cost of carrying on the operation and performing the obligations of the Company with regard to the villa units or apartments at Goblin Hill San San and the grounds used therewith for the ensuing year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoings and the cost of repairs and replacements and the necessary expenses of upkeep maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes aforesaid and such amount as will meet any deficit incurred in any previous year of operation and the said total sum of money shall be borne by each member in proportion to his share holding in the Company and the proportion of the annual cost estimated as aforesaid payable by each member shall be called "an Assessment". Each member shall pay the amount of the Assessment so made on him to the person and at the times and places and in the manner appointed by the Directors. An*

Assessment shall be deemed to be made when a resolution authorizing such Assessment is passed.

(2) The Directors may from time to time make such further assessments upon the members as the Directors may deem necessary to meet any additional or unforeseen expenses of operating and/or maintaining the villa units or apartments and grounds as aforesaid and the said further sum of many shall be borne by each member in proportion to his share holding in the Company and the proportion of the annual costs made as aforesaid payable by each member shall be called "a Special Assessment". …

(3) Any member who fails to pay in full any sum due from him in respect of an Assessment or Special Assessment pursuant to subsection (1) and (2) of Article 91 hereof shall be liable to pay interest to the Company on any balance outstanding in respect of such Assessment or Special Assessment at a rate to be determined by the Board of Directors from time to time until payment of the Assessment or Special Assessment in full together with the interest payable thereon. The Board shall have the right to determine whether interest shall be compounded or not and if compounded the time or times shall be compounded. (My emphasis)

The interpretation

57. I begin by construction of the documents by setting out what I accept to be the law in this area. The principles I shall set out are nothing more than elegant judicial language of common sense propositions that ordinary persons have been doing even if they were not aware of it. Lord Hoffman, sitting as member of the Court of Final Appeal of the Hong Kong Special Administrative Region in ***Jumbo King Ltd v Faithful Properties*** [1999] 2 HKCFAR 279, said:

The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. ***And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal***

background against which it was concluded and the practical objects which it was intended to achieve. *Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, mean something different from what they obviously intended. In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant.* ***Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other.*** *The court is not privy to the negotiation of the agreement - evidence of such negotiations is inadmissible - and has no way of knowing whether a clause which appears to have an onerous effect was a quid pro quo for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined.* ***But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean.*** *Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.* (My emphasis)

58. Two years earlier Lord Hoffman said in ***Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd*** [1997] A.C. 749, 774:

It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. ***We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their***

utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying. *No one, for example, has any difficulty in understanding Mrs. Malaprop. When she says 'She is as obstinate as an allegory on the banks of the Nile,' we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like 'allegory.'*

Mrs. Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustment when people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says 'And how is Mary?' it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer 'Very well, thank you' without drawing attention to his mistake. The message has been unambiguously received and understood. (My emphasis)

59. Lord Bingham in ***B.C.C.I. v Ali*** [2002] 1 A.C. 251, 259 paragraph 8 said:

I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society

[1998] 1 WLR 896, 912- 913 apply in a case such as this.

60. What is patent from these passages is this: when interpreting a written contract such as a lease, the courts give effect to the meaning reasonable men armed with the background and circumstances in which the lease was drafted would give to the document and not the meaning of hair-splitting lawyers. The approach to construction of documents is objective. We are not looking the subjective intention of the parties. The courts do not readily assume that the contracting parties have made errors in expression. Nor do the courts readily assume that the parties have departed from the ordinary conventional meaning conveyed by the words used. The primary source of understanding, even with regard to background and circumstances in which the contract was made, is the document itself "interpreted in accordance with conventional usage" (see Lord Hoffman ***B.C.C.I. v Ali*** at page 269, paragraph 39). It is only if the conventional meaning is inapplicable that we look for some other meaning. However, we are not to strive to find that the conventional meaning is inapplicable merely because such a meaning produces a hard result for one side. It is only if the conventional meaning would not give effect to the practical objective hoped for that another meaning should be used. The more formal the document the less likely are the courts to refuse to give the words their conventional usage. The input of lawyers and the care usually put into such a document reduces the likelihood of a ready conclusion that something has gone wrong with the language of the parties.

61. In looking at the lease, I observe that it contains provisions for the incentive period and the post incentive period. A reading of the whole document suggests that it was contemplated that the lease option might have been exercised during the incentive period but the rights due under the lease, if executed during the incentive period, would be postponed to the end of the incentive period (see clause 4B(i), (ii)). When clause 4C(iii) is examined one sees that during the incentive period when the villa is being operated as part of the hotel then the associated costs are to be borne by the company. Clause 4C (iii) holds out the possibility of a distribution of

net income after costs and a reserve amount are taken out of the anticipated revenue. The agreement was drafted in this way because it could hardly be expected that any one who executed the lease and agreed to postpone the rights for many years, suffer restrictions on access and use the property and then subject themselves to assessments to cover losses.

62. In the post incentive period clause 5 of the lease is the relevant clause. The only part of clause 4 that is relevant to this period is clause 4C (iii) which has already been looked at. In clause 5(b) the opening words of the clause make it clear that it applies after the incentive period has ended. Giving the words their conventional meaning, the first few lines are placing an obligation on GHHL to estimate the **total** sum of money required to maintain the villa units as a first class resort hotel for the accommodation of transient guests. The expression *first class resort hotel* speaks to the standard of maintenance and cannot be ignored as suggested by the claimants. The company is also obliged to estimate the costs of carrying on the operation and performing the company's obligation **with regard to the villa units and grounds**. It is to be observed that the phrase *cost of carrying on the operation and performing the obligations of the company* does not stand alone. It is immediately followed by the qualifying phrase *with regard to the villa units and grounds*. There is no room here for the submission that this clause authorises the levying of assessments for the costs of operations of the company unconnected with the villa units and grounds. That is to say there is no power to levy assessments for paying filing fees at the companies' registry, paying legal fees and the like. The assessments here are restricted to maintenance, upkeep and repairs of the villas, the grounds and the property. This is reinforced by the fact that the clause goes on to say that the assessments are levied on lessees of the villas. No one else is mentioned in the clause. Thus a share holder who is not a lessee is not subject to any assessment under this clause. This construction also applies to clause 5 (c) which deals with special assessments, that is to say, that the power to raise special assessments under the lease is restricted to the maintenance of the villas and the grounds.

63. Turning now to article 91 (1). The wording is similar to clause 5 (b) of the lease but not identical. It requires GHHL to, *estimate the total sum of money required for the [a] maintenance of the Company and the cost of carrying on the operation and [b] performing the obligations of the Company with regard to the villa units or apartments at Goblin Hill San San and the grounds used therewith.* There are clearly two estimates in view here. The first is the total sum required to maintain the company. The second is the cost of the company's obligations with regard to the villas or apartments and the grounds used therewith. Logically the power to levy assessments for the maintenance of the company could hardly be found anywhere else but in the articles of association. This is the document that spells out the obligations of the share holders qua share holders.

64. In looking at article 91 (2), there is absolutely no power to raise special assessments for the maintenance of the company. The power there is restricted to raising special assessments for the *additional or unforeseen expenses of operating or maintaining* the villa or apartments and grounds.

65. Article 91 only gives power to assess if and only if the twentieth anniversary of the property operating as an approved hotel under the Hotel (Incentives) Act. Thus it is not true to say that article 91 as a matter of construction operates in the post incentive period. If, as a practical matter, that turns out to be the case so be it but the trigger for the article to operate is not the end of the incentive period per se but the twentieth anniversary after the property was approved under the Act. The assessment powers apply to share holders qua share holders and not share holders qua lease holders.

66. If one takes into account the commercial background and practical objective the clear intention of the parties was that the company, all things being equal, should have been able to fund its operations and have sufficient funds to maintain the villas and grounds at the standard of a first class resort hotel during the

incentive period. Should this not happen then the company would necessarily have to find money from elsewhere. Borrowing was one option.

67. The difference in wording between clause 5(b) of the lease and article 91 (1) is too stark to be attributed to careless use of language. This puts an end to the submission by Dr. Barnett and Miss Sakhno that the two provisions have the same meaning in all respects. What I would agree with is that where article 91 (1) deals with the assessments in respect of maintaining the villas the meaning is the same as under the lease. But article 91(1) goes further to deal with assessments for maintaining the company as a company and unconnected to the actual maintenance of villas.

68. There is a further question that arises and it is whether there can be two assessments with regard to the lessees who are also share holders, that is to say, an assessment under clause 5 (b) of the lease and under article 91 of the articles of association. This question is not academic because article 91 (3) authorises the board to charge interest on assessments levied under article 91 (1) or (2) while no such power exists with regard to assessments made under the lease.

69. The defendants submit that to impose assessments and special assessment on share holders who are not lease holders would be unfair because those persons are not benefiting from the lease and that is why the assessments ought not to be spread over the whole 54,000 shares but restricted to just those shares that are in fact attached to the built villa units. I don't agree. If this result was to be avoided the simple solution would be not to issue the shares that were not attached to a villa. Any potential subscriber would need to decide whether he would take the shares knowing that the villas to which they should attach were not built. As this case shows, the class B share holders, whomever, they are have participated in the operations of the company. Based on the documents in the case these share holders have voted at meetings. They knew that the villas were not built for their class. They are not certain when or if they will be constructed. These share holders cannot argue that

they are immune from assessment for maintaining the company. The articles of association do conceive of the possibility of shares being issued without the villas to which they would attach being built. It may be hard to say that one does not have the benefit of a lease but is liable to assessment but that is the result of the construction I have placed on the documents.

70. I do not see any exemption of any category of share holders from the power of assessment under article 91. In the absence of such a specific exemption then I conclude that it was contemplated that all share holders regardless of class would be subject to the assessments. The fact that one person or a small group of person may happen to own the shares at any point in time is not a material consideration. That is just an accident of history that may not hold true for the future.

71. I conclude that all share holders are liable to be assessed under article 91 of the articles of association but those share holders who are also lease holders cannot be assessed under both the lease and the article in respect of that part of the assessment that is intended for the maintenance of the villas and grounds. What was clearly intended was that there should be one assessment and where necessary one special assessment per year on persons who are share holders and also lease holders. It would not make sense to subject the same person to the identical assessment under different documents.

72. In respect of that part of the assessment that relates to the maintenance of the company that can only be made under article 91 and only share holders are subject to this assessment. Neither Dr. Barnett nor Miss Sakhno was able to point to any article that expressly exempted share holders of any class from assessments levied under article 91. I have not found any such article. Articles 3 to 5 do not provide for any such exemption. Indeed the main difference between class A, class B shares on the one hand and class C shares on the other is that the holders of class A and class B shares are not entitled to share in the earnings of the company unless and until the villas to which those share are to attach are

built. Thus class B share holders cannot participate in the earnings of the company unless the villas to which class B shares are to attach have been built. Class A share holders can only participate in the earnings of the company after the villas to which class A shares are to attach have been completed. Class C share holders on the other hand are entitled to participate in the earnings of the company as soon as the villas to which the class A and class B shares have been built.

73. As a practical matter when the assessments are made the company needs to clearly state whether it is acting under the lease or under the articles in respect of those lease holders who are share holders. When assessments are made under the articles, the assessment must delineate which portion of the assessment is for the maintenance of the company and which is for the maintenance of the villas and grounds bearing in mind that there is no power to raise special assessments for the maintenance of the company under article 91 (2).

74. When assessments are being made under either the lease or the articles the proportion has to be calculated using the total number of shares issued, that is to say, all 54,000 shares.

75. The claimants have, in my view, made good their claim that Mr. and Mrs. Goodmans' interpretation of article 91 was incorrect and to the extent that they proceeded on that incorrect interpretation the assessments and special assessments that were levied against Mr. and Mrs. Thompson were flawed and should be set aside.

76. In light of my conclusion on this matter I need not address in detail the expert evidence from either Mr. Jackson or Mr. Mullings other than that part of the testimony that was directed at demonstrating that the estimates were incorrect. The claimants sought to establish that the calculations involved in arriving at the estimate were flawed. It will be appreciated that the global figure (the dividend) may be correct but the actual quotient which would be the actual assessment levied depends on the size of the divisor. I have rejected the evidence of Mr. Jackson as unreliable. Mr.

Jackson endeavoured to demonstrate that GHHL's assessments were excessive. He sought to do this by comparing GHHL and strata corporations with which he was familiar. Regrettably, for the claimants, this comparison did not sustain the weight of Dr. Barnett's cross examination. Mr. Jackson produced the financial statements for Sand Castle Strata Corporation for the years 2002/2004 inclusive (exhibits 22a, 22b and 22c respectively). Exhibit 22a showed that Sand Castle was carrying a loan which ought to have been repaid some time ago but was not. When Mr. Jackson was taken through exhibits 22a and 22b he agreed that the members of the strata corporation were in arrears to the extent that by 2003 the corporation had to make provision for bad debt to the tune of JA$2.7m. When cross examined about exhibit 22c he agreed that the management fees were $370,668 and the cost of managing the property was $3.7m. These fees were paid to the managers of the complex despite the debt burden. He also accepted that the effective rate of interest for the loan that was not repaid was 23% and not 18% because there was a 5% penalty for late payment. The burden of Dr. Barnett was to show that one cannot simply look at figure and then conclude without adequate and thorough analysis that the expenditure is excessive. This point was indeed well made because it turned out that Mr. Jackson was not familiar with the actual costs of operating the property.

77. The next strata corporation examined was that of Point Village. The financial reports for the years 2001, 2003 and 2005 (exhibits 23a, 23b and 23 c respectively) were produced by Mr. Jackson. He did say that the 2005 report had not yet been presented to a general meeting of the corporation. He was directed to the penultimate paragraph of the auditors' letter dated September 20, 2001. The paragraph indicates that the auditors were unable to "satisfy [themselves] as to the valuation placed on balances due from owners totalling $35, 294,741 (see note 6) included in these financial statements as part of accounts receivables". Mr. Jackson accepted that the auditors were saying that they could not say that the sum stated as owing was true and accurate. He also agreed that it was the duty of the directors and managers to supply all records to the auditors to enable them to do a proper audit. Inspite of this

inability to verify the true value of the receivables, this strata corporation paid management fees of $2.4m; insurance of $2.5m up from $1.2m in 2001. It also had to expend $1.2m in legal fees because of legal battles. When we get to exhibit 23b we see the auditors complaining that they were not able to say that the receivables due from owners were $46,322,521. It was revealed that Point Village borrowed $6.7m to carry out painting. Again Dr. Barnett was demonstrating the need to know that about which you speak before you condemn. The cumulative effect of this type of cross examination was beginning to take its toll.

78. At this point Dr. Barnett confronted Mr. Jackson with the loan GHHL took out in 1997 to carry out refurbishing. He agreed that to operate as a first class resort repairs and refurbishing had to be done from time to time. It appeared that Mr. Jackson did not even know that GHHL in 1997 had sufferer land slippage that necessitated the construction of a wall. Mr. Jackson was blissfully unaware of the legal challenges mounted by Mr. Anthony Alberga and Mr. Gordon Stewart which meant that he was unaware of the fees expended. It necessarily follows that he would not be aware of the costs involved in responding to these claims.

79. However under cross examination he conceded that all the strata corporations he examined were carrying a high debt burden and the maintenance fees were not high enough if the debt was to be cleared. To put it another way, the strata corporations could keep a relatively low maintenance despite having a high debt burden fee because no attempt was being made to clear the debt by way of the maintenance fees. This to my mind undermines the comparison because in GHHL's case the fees included a component to reduce or eliminate debt incurred by GHHL given that the assessments were either not paid or paid late. Mr. Jackson's calculations did not take account of what the fees for the strata corporations would be had they wanted to clear the debt they had. GHHL wanted to liquidate its debts.

80. In my opinion Mr. Jackson did not give sufficient weight to the type of property that GHHL managed. This was a property with

large open green areas in a parish with known high rainfall which means that greater effort and expense would need to be expended in manicuring the property. The difference between the property in question and those used by Mr. Jackson was so glaring that any attempt at comparison was meaningless.

81. Mr. Jackson attempted to pour scorn on the management of GHHL. He said that "[b]ased on the sparseness of minutes of directors (sic) meeting in the pleading I have come to the conclusion that the practice of holding director's meeting was not a normal practice" (see page 3 para. 4 of report dated November 21, 2005). When cross examined it turned that he knew that a company ought to keep a minute book but he did not ask for the minute book and did not examine it. This suggests to me that he was prepared to commit himself to firm positions without adequate exploration of the evidence or even without asking whether the evidence exists.

82. Mr. Jackson suggested that there was no regular communication between the share holders and the company since 1994. An examination of the bundles does not bear out this assertion. Mr. Jackson agreed that there was high inflation for the years 1990, 1991 and 1992. He accepted that costs of operating hotels would be affected by inflation. There was an acceptance that insurance premiums would be affected by devaluation.

83. The final point I shall make in relation to Mr. Jackson is that he developed a set of figures in relation to the property which he said represented reasonable maintenance for the year 2002. This is found at page eight of his November 21, 2005, report under the heading *Pro Forma Maintenance Budget 2002 - Goblin Hill.* The most astounding thing happened when he was taxed about this. He admitted that the figures were not based on the actual cost of maintaining the property. He simply came up with the figures without any regard for actual costs involved. He admitted that his conjured costs did not take account of maid service and room taxes. While there may be dispute about the latter charge even Mr. Jackson would agree that a first class resort hotel would have maid service. This is yet another example of Mr. Jackson's tendency to

come to conclusion without adequate examination of available evidence which was worse in this case because he simply conjured the figures. Mr. Jackson was unable to produce any reliable evidence from which it could be said that the estimates were excessive.

84. Sensing that annihilation was near, Dr. Barnett extracted from Mr. Jackson, inspite of his resistance, agreement that a first class hotel would have, in addition to a front desk, tennis courts, swimming pool, well kept grounds, good entertainment, adequate security, courteous and intelligent staff. He agreed that in a first class hotel there would be regular maintenance and refurbishing. He acknowledged that maintenance costs would increase if the property is twenty to twenty five years old. This was the witness in whom the claimants placed their trust. He was to establish that GHHL over charged by using an incorrect estimate.

85. The claimants have failed to show that the estimated cost of operating and maintaining the villas and grounds for to the standard of first class resort hotel for the years 1994 - 2001 were excessive. What they have shown is that GHHL used the wrong divisor and so would end with a higher quotient and to that extent and that extent alone the assessments and special assessments levied against the claimants were excessive and should be set aside.

86. There are two remaining subsidiary points on the question of estimates. These are the occupancy charges and the standard of maintenance. The claimants have taken issue with GHHL levying an occupancy charge. They allege that neither the lease nor the articles refer to such a charge by name and so cannot be charged. The argument I believe is based on a fallacy. The issue is not the name of the charge but whether it can be said to be based on the estimate as required by the lease or the articles. Both sides accept that the estimate has two basic components: a fixed charge and a variable charge. The occupancy charge is said by Mrs. Goodman to cover the additional costs incurred when the villa is occupied. On the face of it I do not think that that is unreasonable. I therefore

do not agree that there is no basis for an occupancy charge and so the claimants fail on this issue.

87. Another contentious issue between the parties is the standard at which the property is to be maintained. Both parties accept that during the incentive period the standard was that of a first class hotel for transient guests. The expression *first class hotel* is not defined in the lease or the articles of association. I am not sure what the claimants are saying on this but it appears to me that they were suggesting that they could decide what facilities they wish to use and consequently their assessments or special assessments if and when levied under the lease or under the articles of association would be reduced accordingly. This position is untenable. The villa they leased is part of a larger property that has certain amenities that contribute to the property being attractive to the lease holders. GHHL under the lease agreement is obliged to manage and maintain the villas and the grounds as well the facilities that would go to making the property the standard of a first class hotel. If I understand the claimants' position they could decide, for example, not to walk along the open areas of the property but go through the bushes and then say, "We are not obliged to contribute to the upkeep of the open areas because we walk through the bushes." There can be no doubt in my mind that the claimants and all lease holders must contribute to the cost of maintaining the common areas and facilities such as the pool and tennis courts. The proper maintenance of these areas and the grounds do add value to the lease holding.

88. An examination of the documentation points to the undeniable conclusion that GHHL was managing the property for the benefit of the lease holders and share holders. It is not now operating as a hotel but it still has obligations under the lease that it must meet. The company is obliged to pay water rate, taxes, insurance and such like. The company is bound contractually to keep the grounds and exterior of the villas in good repair and to the standard of a first class hotel.

89. The question is what is a first class hotel? I do not propose to define the term because it can differ according to context. Much depends on the precise kind of product being offered. What is first class for the Ritz Carlton in Montego Bay may not be the same for a property offering a bucolic environment. I will proceed by description of what one would expect of a first class hotel in any environment. I would think that a fist class hotel would have well maintained buildings, that is, buildings painted, no cracked floors, walls or ceilings. A courteous and efficient staff. No pests or rodents competing with guests for use of the property. Well groomed lawns and an absence of breeding places for mosquitoes. Where there are recreational facilities such as a swimming pool or tennis court, then they would be properly maintained.

90. This is a convenient point to deal with GHHL's counterclaim. The counterclaim is predicated on sustaining the interpretation put forward by Mrs. Goodman. I have rejected Mrs. Goodman's interpretation. It follows that the counterclaim is not sustainable and is therefore dismissed.

Whether mortgage can be set aside on the basis that directors breached duty to disclose interest in the mortgage

91. The claimant's are asking that a mortgage contract entered into between GHHL (mortgagor) and Mies (mortgagee) be set aside on the basis that Mr. and Mrs. Goodman who were directors of GHHL failed to disclose their interest in Mies in accordance with article 87 of the articles of association of GHHL. I have examined the amended statement of case of the claimants and I must say that there is no explicit statement raising the issue of a breach of article 87. Paragraphs 19A, 20, 21, 22, 23, 24 and 25 are the paragraphs in which the claim deals with the mortgage and set out the facts on which it is being said that one of the remedies the court ought to grant is a declaration that the mortgage is void. It is true that the claim mentions breaches of articles of the association but the specific breach mentioned was in relation to article 91 which deals with assessments and special assessments that the company may levy on its share holders. I have also examined the witness statement of Mrs. Thompson and the claimant's opening

submission and there is no reference to a breach of article 87. I have grave doubts whether this point should have been argued but since I allowed Mr. Gordon to raise the matter I shall fully address the point.

92. Before addressing the relevant articles I need to take notice of the circumstance that led to the loan being made to GHHL by Mies as recorded in the minutes of the board. I will also look at the evidence of disclosure in the minutes. It is not denied that GHHL owed money to FINSAC which had taken over the loan portfolio of NCB. The minutes record that on August 30, 1999, a Mr. Lloyd Black of FINSAC spoke to Mr. Goodman about the debt. The minutes also record that Mr. Black said that if the GHHL did not clear the debt within thirty days the property would be put for sale. The debt owed to FINSAC is recorded in the minutes as JA$23m. GHHL's attorneys, Myers, Fletcher and Gordon (MFG) were contacted to deal with the matter. MFG told that FINSAC was one of its largest client. However, if the matter could be resolved without acrimony then MFG could represent GHHL but if it became contentious then MFG would have to withdraw from representing GHHL. The minutes of a board meeting held on September 3, 1999, showed that the board of GHHL considered the FINSAC debt.

93. Another board meeting was held on September 28, 1999. All five directors were present including the Goodmans. No mention is made of any interest in any lender. What the minutes record is that Mr. Goodman informed the meeting that he had not received any response from the share holders to give money to meet the debt. He added that he would try to raise the money from "friends and family abroad to refinance the debt with Finsac" (see page 1 of minutes). The minutes of this meeting show that the directors decided to retain the services of Mr. Hugh Small Q.C. to negotiate with FINSAC. The minutes also say that a resolution was to be drafted and circulated to all the board members. The resolution that was eventually passed said that GHHL wishes to accept a loan from a Florida corporation to pay off FINSAC and in return a mortgage will be granted to that corporation. The resolution goes on to say that the Goodmans are members of the Florida corporation

and have declared their interest in that regard. The resolution ends by saying that in view of the conflict of interest expressed by MFG, Mr. Hugh Small Q.C. would be asked to negotiate on behalf of GHHL. This resolution was said to be passed at a meeting held on September 28, 1999.

94. The minutes of GHHL's board meeting of January 26, 2000, record that FINSAC by letter dated January 21, 2000, required GHHL to settle all indebtedness by January 28, 2000. This meeting was said to be held by round robin. The minutes say that Mies agreed to lend GHHL US$678,252.05 for twelve months. The minutes also say that the Goodmans "referred to the minutes of the last two board meeting in which they declared their personal interest in the proposed arrangements as they were the majority share holders in the Company and the majority share holders in Mies and confirmed that their interest had not changed". The January 26 minutes have three directors signing on January 27, 2000 and two on January 31, 2000.

95. The next relevant minutes are those of March 15, 2000. At that meeting the board is brought up to date with regard to the FINSAC matter by Mr. Small. The board is told that initially FINSAC accepted that errors were made in calculating the indebtedness. At the end of the meeting with FINSAC it was agreed that GHHL would pay JA$22m. The debt before the acknowledged errors was JA$28m. The deadline set for payment was November 8, 1999. FINSAC then asked a most curious question, namely, whether Mr. Small represented the minority share holders. Queen's Counsel replied, quite appropriately, that he was retained by the company acting through the board. The result of this was that FINSAC, on November 19, 1999, told GHHL that it was demanding the sum of JA$25m. When the unreasonableness of FINSAC's position was pointed out to them FINSAC's response was to say, on January 10, 2000, that unless the agreement in writing of the minority share holders was presented GHHL was to repay the entire amount in fourteen days. Learned Queen's Counsel indicated to FINSAC, quite correctly, that its position was contrary to company law. A cheque in the sum of JA$22m was sent to FINSAC pursuant to the

agreement earlier arrived at. On January 21, 2000, FINSAC demanded JA$28m within seven days (see letter dated January 21, 2000 ex. RG 14). Queen's Counsel advised that if the position of FINSAC was challenged there was the risk of drawn out litigation and during that time interest would be mounting and the legal costs would be significant. The decision was made that a Florida corporation would lend the money. The money was lent and FINSAC was paid off on January 28, 2000. The minutes record these words: *Mr. Goodman stated that he had a substantial interest in that Florida Corporation.*

96. The closest that one comes to any kind of disclosure, prior to the January 26, 2000 meeting, by either of the Goodmans is a statement in which Mr. Goodman said that he "would try to obtain financing to either repay Finsac on security of the mortgage or possibly make an offer for the Company if no suitable offers were forthcoming before Finsac's deadline" (see paragraph 4 on page 3 of minutes of board meeting held September 3, 1999). Mr. Phillips, a director, asked if that would not be a conflict of interest. Mr. Goodman replied that "it would not be a conflict of interest if Mr. Goodman declares it as had just been done" (see paragraph 4 on page 3 of minutes of board meeting held September 3, 1999). No specific mention of Mies was made. Mrs. Goodman said that Mies did not exist in September 1999. If this is so then clearly Mr. Goodman could not refer to Mies specifically.

97. In none of the exhibited minutes of board meetings held between September 3, 1999 and March 15, 2000, is the name of Mies mentioned. Neither is there any mention in any of the minutes that the Goodmans were the only share holders in Mies.

98. I now look at the evidence of Mrs. Goodman on this issue. We now know that Mies, the company which provided the loan to GHHL, had only two share holders who were Mr. and Mrs. Goodman. The company was formed in late 1999 for the specific purpose of lending money to GHHL. It was incorporated in the United States of America. Mrs. Goodman said that at a meeting held either in late 1999 or early 2000 her interest and that of her husband were

disclosed to the board. She said that her husband did not give a written notice as required by article 87 but he gave notice verbally. She disagreed that she did not comply with article 87. Even though Mrs. Goodman said she complied with article 87 I have not seen in the mass of documents any notice in writing as required by the article. All this was the grist for Mr. Gordon's mill.

99. The terms of article 87 so far as is relevant are:

(1) A Director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the Company shall declare the nature and extent of his interest at a meeting of the Directors in accordance with this Article.

(2) In the case of a proposed contract the declaration required by this Article to be made by a Director shall be made at the meeting of the Directors at which the question of entering into the contract is first taken into consideration, or, if the Director was not at the date of that meeting interested in the proposed contract, at the next meeting of the Directors held after he became interested, and in a case where the Directors becomes interested in a contract after it is made, the said declaration shall be made at the first meeting of the Directors held after the Director becomes so interested.

(3) For the purposes of this Article, a general notice given to the Directors of the Company by a Director to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made if the following conditions are satisfied, that is to say, that -

> *(a) there are stated in the said notice the nature and extent of the interest of the said Director in such company or firm; and*
>
> *(b) at the time the question of confirming or entering into any contract is first taken into consideration the extent of his interest in such company or firm is not greater than is stated in the notice; and*

(c) either the notice is given at a meeting of the Directors or the Director takes all reasonable steps to secure that it is brought up and read at the next meeting of the Directors after it is given.

100. There are other paragraphs in the article but none states the consequences of a breach of the articles and neither does section 188 of the Companies Act 1965 (dealing with disclosure by directors of interest of contract with or pending contract with company of which they are directors) which was the relevant statute at the time these articles were made.

101. In resolving the dispute on this point it is important to define what is meant by disclosure. The case of ***The Liquidators of the Imperial Mercantile Credit Association v. Edward John Coleman and John Watson Knight*** (1873) LR 6 HL 189 provides an answer. The relevant article was worded differently from that in the instant case but that does not detract from the idea expressed by Lord Cairns. Lord Cairns said, in response to the proposition that the requirement in the article to disclose "his interest" was met if the director simply states that he has *an* interest, at page 205:

Did he "declare," or, as that word implies, shew clearly his interest? His interest might be anything, from the absolute ownership of the property sold, down to a right of a nominal charge on or payment out of it. Did he, then, "declare" what his intention was? Certainly he did not. A man declares his opinion or his intentions when he states what his opinion is, or what his intentions are, not that he has an opinion or that he has intentions; and so, in my opinion, a man declares his interest, not when he states that he has an interest, but when he states what his interest is.

102. Lord Chelmsford in the same case observed that "*that the words of the article are not "to declare that he has an interest," but to "declare his interest," which seem to involve not merely the declaration of the existence of an interest but the nature of that interest. For surely when the directors are to determine whether they will enter into any contract, or order any work to be done for the company in which a brother director is interested, it may be a*

most important element in their consideration what the nature of the interest is which is required to be declared" (see page 200).

103. Mrs. Goodman accepted that her husband did not make the disclosure in writing. I have not seen any evidence of a declaration in writing by the Goodmans as required by article 87. It can be argued that the minutes of the board meetings of September 3 and 28, 1999, do not show Lord Cairns' standard was met. The extracts of from the minutes of the January 26, 2000 meeting do not show that a declaration in writing was made by the Goodmans. However the January 26 minutes do show that the terms of the loans were disclosed to the other directors and that the Goodmans were the majority share holders of the lender. Mr. Gordon has not suggested to me what the written declaration would have added to the knowledge of the board of directors. It is true that the minutes do not say that the Goodmans were the sole share holders as opposed to only share holders. Let me refer to the law on this point further before coming to my final conclusion on this aspect of the case.

104. This breach, so far as I have been able to research, does not lead to the conclusion that the contract is void as suggested by the claimants. For me to arrive at this conclusion Mr. Gordon needed to demonstrate that the cases to which I am about to refer were either wrongly decided or have no application to the facts before me - a formidable task.

105. It is desirable to trace the history of the development of the law as it relates to directors being in a fiduciary relationship with their companies in order to determine whether the failure by the third and fourth defendants to declare their interest in accordance with the articles was a breach of their fiduciary duty and then go on to consider the appropriate remedy, if any, in the circumstances of this case.

106. In the great case of ***Aberdeen Rly Co v Blakie Bros*** (1854) 1 Macq 461, Blakie Brothers agreed to make iron chairs for Aberdeen Railway. Blakie sued to enforce the contract. Aberdeen successfully resisted the action by pleading that the chairman of

its board of directors was a managing partner of Blakie. Lord Cranworth L.C. said this at page 471 - 472:

> *The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strict in this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person - they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.*

107. Such a contract is voidable in equity on the application of the company. This was an application in the company law context of the principles laid down in ***Keech v Sandford*** (1726) Sel Cas Ch 61 and ***Whelpdale v Cookson*** (1747) 1 Ves Sen 9. The escape route for the fiduciary was to make full disclosure to the person to whom the duty was owed.

108. Throughout the latter half of the nineteenth century, before the changes in the law effected by statute as well as by articles of association, the view was that disclosure had to be made to the share holders. Disclosure by the director to his fellow directors was insufficient (see ***North-West Transportation Co. Ltd v Beatty*** (1887) 12 App Cas 589). The traditional understanding

has been altered in Jamaica by section 188 of the Companies Act 1965, (now section 193, the Companies Act 2004 and article 90(1) of Table A of the Act). Article 87, in the case before me, is directed to the same issue, that is, to permit directors who would, without the statutory provision and article would be in breach of their fiduciary duties to the company. The effect of the change in the law is that directors, who would otherwise be in breach of their fiduciary duties to the company, would not be in breach once they made disclosure in the manner prescribed by statute and relevant articles of association. It must no be understood, however, that failure to disclose in the manner prescribed by the statute and articles of association meant that the contract was voidable.

109. The real problem for the claimants in this case, I fear, is that the case law indicates that usually the proper claimant to challenge a contract on the grounds indicated by the claimants is the company itself and not individual share holders. Ever since ***Foss v Harbottle*** 67 ER 189 the courts have not displayed great enthusiasm for interfering in the internal operations of a company when a breach of articles has arisen in these circumstances. A survey of the cases reveals that the approach to this issue has been pragmatic rather than doctrinaire. If the breach can be approved by the majority of the share holders then the courts do not interfere. The rationale for this as explained by Vice Chancellor Wigram in ***Foss v Harbottle*** is that it may happen that while the courts are busy declaring invalid the action taken in breach of articles the share holders might approve the action taken.

110. In order to escape from the consequences of what has just been stated Mr. Gordon submitted that the articles of association operate as a contract between the share holders and each share holder has a right to enforce the contract. I agree that it is well established that a share holder can take steps to enforce the observance of the terms of articles. If he acts in time the share holder may even obtain an injunction against the company restraining it from breaching its articles (see ***Wood v Odessa Waterworks Company*** (1889) 42 Ch. D. 636). One member of the company may even sue another based on the contract created by the

articles without the company being a party to the action (see ***Rayfield v Hands*** [1960] Ch 1). Mr. Gordon's proposition is true as a very broad statement of principle but as with all overbroad statements is apt to mislead. I shall examine his proposition further.

111. In ***Hely-Hutchinson v Brayhead*** [1968] 1 Q.B. 549 a director of a company failed to declare his interest in a contract in accordance with the then extant provisions of the Companies Act 1948 (section 199) and article 99 of the articles of association. Lord Denning M.R. held that the contract was voidable and not void. This is what Lord Denning said at page 585.

> *It seems to me that when a director fails to disclose his interest, the effect is the same as non-disclosure in contracts uberrimae fidei, or non-disclosure by a promoter who sells to the company property in which he is interested: see Re Cape Breton Co.; Burland v. Earle. Non-disclosure does not render the contract void or a nullity. It renders the contract voidable at the instance of the company and makes the director accountable for any secret profit which he has made.*

112. Lord Denning also dealt with the wording of the particular article in the case before him and concluded that despite its wording it was not accurate to say that following the article is a condition precedent to contract formation. He said at pages 585 - 586:

> *On the wording it might be suggested that there is no contract unless the director discloses his interest. In other words, that disclosure is a condition precedent to the formation of a contract. But I do not think that is correct. All that article 99 does is to validate every contract when the director makes proper disclosure. If he discloses his interest, the contract is not voidable, nor is he accountable for profits. But if he does not disclose his interest, the effect of the non-disclosure is as before: the contract is voidable and he is accountable for secret profits.*
>
> *In this case, therefore, the effect of the non-disclosure by Lord Suirdale was not to make the contract void or unenforceable. It*

only made the contract voidable. Once that is held, everyone agrees that it is far too late to avoid it. It is impossible to put the parties back in the same position, or anything like it. The contracts are, therefore, valid and, I would add, enforceable. So Lord Suirdale can sue upon them.

113. The passage also contains another salvo that is fatal to the claimants in the case before me. The Master of Rolls indicated that it must be possible to restore the parties to the position that they were in before the contract if a voidable contract is to be set aside. There is no evidence that that is possible in this case.

114. Lord Pearson in ***Hely-Hutchinson*** stated at page 594:

The second main question is: How, if at all, are the contracts affected by Lord Suirdale's failure to disclose his interests? Section 199 of the Companies Act, 1948, and article 99 of Brayhead's articles of association contain the provisions relied on by Brayhead. It is not contended that section 199 in itself affects the contract. The section merely creates a statutory duty of disclosure and imposes a fine for non-compliance. But it has to be read in conjunction with article 99. The first sentence of that article is obscure. If a director makes or is interested in a contract with the company, but fails duly to declare his interest, what happens to the contract? Is it void, or is it voidable at the option of the company, or is it still binding on both parties, or what? The article supplies no answer to these questions. I think the answer must be supplied by the general law, and the answer is that the contract is voidable at the option of the company, so that the company has a choice whether to affirm or avoid the contract, but the contract must be either totally affirmed or totally avoided and the right of avoidance will be lost if such time elapses or such events occur as to prevent rescission of the contract: Great Luxembourg Railway Co. v. Magnay; In re Cape Breton Co.; <u>Kaye v. Croydon Tramways Co.</u> *;* <u>Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co.</u>*; and* <u>Cook v. Deeks.</u>

115. ***Hely-Hutchinson*** on this point was referred to by the House of Lords in ***Guinness plc v Saunders*** [1990] 2 A.C. 663. This decision of the House is vital because the judgment of Lord Goff confronts head on submissions identical to that made by Mr. Gordon this case. If there was any case in which the opportunity to accept submissions indistinguishable to that made by Mr. Gordon, ***Guinness plc*** was that case. Yet in the end the House declined to accept that proposition even when Lord Templeman's judgment raised expectations that might have happened. In the ***Guinness*** case, the company sought to recover £5.2m from Mr. Ward on the basis that he failed to disclose his interest in a contract to which the company was a party. The money was paid to Mr. Ward arising out of a decision by a committee of the directors of Guinness to pay him the money for his assistance in successful take over bid launched by Guinness for another company. At all material times Mr. Ward was a director of Guinness. The board had authorised a subcommittee of three to conclude the take over bid and execute all documents necessary but there was no authorisation to pay Mr. Ward any fees for his role in the transaction. At no time was this payment approved or authorised by the board. It as approved by the same sub-committee of the board.

116. The relevant provision of the Companies Act 1985, section 317, had the same effect as section 199 of the Companies Act 1948 which was considered in ***Hely-Hutchinson***. Before the Vice Chancellor and the Court of Appeal Guinness succeeded on the breach of section 317. Thus when the case arrived in the House, the position was that breach of disclosure, without more, enabled the contract to be set aside. The decisions in the courts below were capable of suggesting that the contract was void and not merely voidable. Counsel for Ward advanced the alternative argument that if he failed in his other submission then ***Hely-Hutchinson*** was wrongly decided and should be overruled. In the House two major speeches were delivered by Lords Templeman and Goff. Neither speech accepted the argument that the failure to disclose interest by a director, by itself, was sufficient to have the contract set aside.

117. Lord Templeman referred to the speech of Lord Goff but did not dissent from Lord Goff's analysis of ***Hely-Hutchinson***. Lord Goff said at pages 696 - 698:

What course has the action taken? Before the Vice-Chancellor, judgment was given against Mr. Ward on admissions, on the basis that he had received the money in breach of his fiduciary duty as a director of Guinness, by reason of his failure to disclose his interest in the agreement under which he performed the services, as required by section 317(1) of the Companies Act 1985. In the Court of Appeal [1988] 1 W.L.R. 863, Mr. Ward's appeal against that decision was dismissed. It was said of him, at pp. 870-871, that he had ' succeeded in getting his hands on the company's money,' and that the company had never ceased to own the money which he had been paid. Accordingly Mr. Ward was constructive trustee of the money which he had received, and must pay it back. If he wished to make a claim for remuneration in respect of the services which he claimed to have rendered to Guinness, he must bring a separate action.

The matter then came before your Lordships' House, by leave of the House. Mr. Ward's submissions were presented to the Appellate Committee, in an argument conspicuous for its moderation as well as for its skill, by junior counsel, Mr. Crow. It gradually became clear that Mr. Crow's criticisms of the decisions of the courts below were well founded, and that (quite apart from very serious difficulties arising upon the construction of section 317) they were inconsistent with Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549, a decision of an exceptional Court of Appeal consisting of Lord Denning M.R., Lord Wilberforce and Lord Pearson. The decision in that case proceeded on the basis that the statutory duty of disclosure (then embodied in section 199 of the Companies Act 1948) did not of itself affect the validity of a contract. The section had however to be read with provisions in the articles imposing a duty of disclosure upon directors of the company. If a director enters into, or is interested in, a contract with the company, but fails to declare his interest, the effect is that, under the ordinary principles of law and equity, the contract may be voidable at the instance of the company, and in certain cases a

director may be called upon to account for profits made from the transaction: see per Lord Wilberforce, at p. 589, and Lord Pearson, at p. 594. Perhaps the matter is put most clearly by Lord Pearson, who said:

> *'It is not contended that section 199 in itself affects the contract. The section merely creates a statutory duty of disclosure and imposes a fine for non-compliance. But it has to be read in conjunction with article 99. The first sentence of that article is obscure. If a director makes or is interested in a contract with the company, but fails duly to declare his interest, what happens to the contract? Is it void, or is it voidable at the option of the company, or is it still binding on both parties, or what? The article supplies no answer to these questions. I think the answer must be supplied by the general law, and the answer is that the contract is voidable at the option of the company, so that the company has a choice whether to affirm or avoid the contract, but the contract must be either totally affirmed or totally avoided and the right of avoidance will be lost if such time elapses or such events occur as to prevent rescission of the contract . . .'*

On this basis I cannot see that a breach of section 317, which is not for present purposes significantly different from section 199 of the Act of 1948, had itself any effect upon the contract between Mr. Ward and Guinness. As a matter of general law, to the extent that there was failure by Mr. Ward to comply with his duty of disclosure under the relevant article of Guinness (article 100(A)), the contract (if any) between him and Guinness was no doubt voidable under the ordinary principles of the general law to which Lord Pearson refers. But it has long been the law that, as a condition of rescission of a voidable contract, the parties must be put in status quo; for this purpose a court of equity can do what is practically just, even though it cannot restore the parties precisely to the state they were in before the contract. The most familiar statement of the law is perhaps that of Lord Blackburn in Erlanger v. New Sombrero Phosphate Co. (1878) 3 App.Cas. 1218, when he said, at p. 1278:

> *'It is, I think, clear on principles of general justice,*

that as a condition to a rescission there must be a restitutio in integrum. The parties must be put in status quo. . . . It is a doctrine which has often been acted upon both at law and in equity.'

However on that basis Guinness could not simply claim to be entitled to the £ 5.2m. received by Mr. Ward. The contract had to be rescinded, and as a condition of the rescission Mr. Ward had to be placed in statu quo. No doubt this could be done by a court of equity making a just allowance for the services he had rendered; but no such allowance has been considered, let alone made, in the present case.

Faced with these problems, Mr. Oliver was driven, in the last resort, to submit that Hely-Hutchinson v. Brayhead Ltd. was wrongly decided. I have to confess that I would hesitate long before holding that a decision of such a court was erroneous. Careful study of the decision, with the assistance of counsel, merely served to reinforce my natural expectation that the case was rightly decided.

118. Lord Goff therefore accepted that ***Hely-Hutchinson*** was still good law. I cannot state the position more affirmatively but it does seem that Lord Templeman did not find this analysis and conclusion objectionable. I appreciate of course that in the final analysis, the House was able to overturn the contract on the basis that the contract was actually concluded by a committee of the company and not by the directors as required by the articles of association.

119. Cases subsequent to ***Guinness*** have borne out the view expressed earlier that the approach of the courts in this area has been one of pragmatism instead of legalism. In ***Lee Panavision Ltd v Lee Lighting Ltd*** [1992] BCLC 22 the Court of Appeal said that would hesitate before declaring that failure to formally disclose an interest at a board meant that a contract was void in circumstances where all the directors were possessed of the information. In ***Runciman v Walter Runciman plc*** [1992] BCLC 1084, Simon Brown J. was prepared to assume that there was non-disclosure but in the circumstance of the case the strictly formal approach would not add

to the pool of knowledge available to the directors. In ***MacPherson v European Strategic Bureau Ltd*** [1999] 2 BCLC 203, the three directors were also the only share holders. Ferris J. held that the share holders qua share holders all knew the interests of the directors since the share holders and directors were the same persons and so the failure to disclose their interests formally as required by the Companies Act merely made the contract voidable and not void. Finally, ***Colin Gwyer & Associates Ltd and others v Palmer and others*** [2003] 2 BCLC 153, a case cited by Mr. Gordon to support his proposition that breach of the disclosure rule meant that the contract was void. This case provides no such support because at paragraph 67 the judge notes that the only other director at the meeting had the information that was said ought to have been disclosed.

120. My conclusion is that the law does not require Pharisaic observance without any consideration of the spirit behind it. The law looks at the matter teleologically and examines the purpose of the disclosure rule. The purpose of the rule is to see that the board knows all the relevant facts at the time the decision is made even if there is a breach in the manner the disclosure is to be made. Thus the issue, in the instant case, becomes, not whether there was a failure to disclose in accordance with the statute and the articles, but whether the persons or body to whom the disclosure should have been made had all the relevant information. I exclude from this statement of principle the case of one-man companies because these require separate consideration which does not arise here. If it can be established that the relevant information was in the knowledge of the body to whom disclosure should be made, it may be difficult to convince a court that the contract should be avoided.

121. The extracts of the minutes of January 26, 2000, have the Goodmans declaring that they were the majority share holders in Mies. The other three directors signed the extracts following day. The Goodmans signed on January 31. As in ***Runciman*** and ***Colin Gwyer*** the evidence suggests that the directors had the information about the Goodman's interest in Mies and the absence

of a formal declaration in writing as required by the articles would have been unnecessary.

122. My conclusion on this issue is that although there was a technical breach of article 87 (failure to disclose in writing), it could not be said that the board of GHHL did not know of the Goodmans' interest in Mies at the time of the January 26, 2000 meeting. According to the minutes signed by the directors, they knew, before the execution of the mortgage and debenture that (a) Mies existed and was about to lend money to GHHL; (b) the Goodmans were majority share holders and that interest had not changed. I am not convinced in the context of this case that the failure to say, "We are the only share holders in Mies" is significantly different from saying, "We are the majority share holders in Mies". What the directors knew was that Mies was under the control of the Goodmans because they were majority share holders. If I am wrong on this then the breach is technical and the contract is at best voidable at the instance of the company. In any event the claim would fail because there is no evidence that GHHL is able to restore Mies to the position it was in before it lent the money, that is to say, make full restitution of the money borrowed. There is no evidence that the money borrowed under the mortgage was not used to repay the debt owed to FINSAC. Consequently this aspect of the claimant's case fails.

123. As a final attempt to ground liability Mr. Gordon argued that Mr. and Mrs. Goodman were in fiduciary relationship with the claimants in addition to that owed to the company. I shall deal with this submission quite briefly. The general principle is that directors do not owe a fiduciary duty towards individual share holders (see ***Percival v Wright*** [1902] 2 Ch 421). However there are times when the law recognises such a duty to individual share holders (see ***Coleman v Myers*** [1977] 2 NZLR 225; ***Platt v Platt*** [1999] 2 B.C.L.C. 745 and ***Peskin v Anderson*** [2001] 1 B.C.L.C. 372). For this duty to arise there must be some conduct on the part of the directors towards those specific share holders who allege that such a duty is owed to them from which it can be deduced that the directors assumed a fiduciary duty to the share holders or

alternatively, facts from which the court will impose such a duty on the directors. No such special facts have been adduced before me and so this contention by the claimants is not acceptable.

Abuse of power

124. Under this head of complaint, the claimants have sought to weave together disparate strands of evidence in order to produce a strong rope to lash the defendant to the altar of liability. The claimants have argued from the facts surrounding the mortgage and from other facts that the Goodmans abused their power. These allegations of abuse were no doubt founded on the cases of ***Daniels and Others v. Daniels and Others*** [1978] Ch 406 and ***Estmanco (Kilner House) Ltd. v. Greater London Council*** [1982] 1 W.L.R. 2 where it was held that minority share holders may have a cause of action where there is a fraud on the minority. In the latter case Megarry V.C. suggested that fraud in this context was wider than common law fraud and includes equitable fraud. According to the claimants by operating in the way that they did, the Goodmans consistently trampled on the rights of the minority, ignored concerns the minority had, behaved in a high handed manner and imposed improper assessments with a view to driving out the minority lessees so that they could seize full control of the company. The cases show that in order to sustain this challenge more than mere disagreement between the parties is required - equitable fraud is required.

125. I am not sure what I am to understand from the claimants' particulars of statement of case at paragraphs 19, 19A and 20. They allege that the directors and in particular Mr. and Mrs. Goodman continued to operate GHHL when they knew that the company was insolvent and unable to pay its debts. It is also alleged that the directors granted a mortgage when they knew of the insolvency and the only persons who would benefit from the granting of the mortgage would be Mr. and Mrs. Goodman who would now be able to acquire at very low prices the remaining share holdings since the share holders were unable to pay the unlawful assessments and special assessments. The particulars allege that the directors failed to discharge their fiduciary duties to the share holders when

they (directors) omitted to advise of the company's insolvency. According to the claimants the company should have ceased operations and proceed to voluntary winding up instead of incurring addition expenses by continuing operations. This part of the pleadings closes with an allegation that neither NCB nor MSB ever asked GHHL or its directors or share holders whether the loans benefited GHHL or whether the mortgages were ratified by the share holders. From all this, it is pleaded that the mortgages are void and of no effect; this conduct demonstrates abuse of power to such an extent that the Goodmans were in breach of their fiduciary duty to GHHL and the claimants.

126. I am not aware of any legal obligation on the part of lenders to enquire whether the loan benefited the borrower. Neither am I aware of any duty on lenders to enquire whether the share holders had ratified the mortgage in circumstances where the memorandum and articles of association authorise the company to borrow money.

127. The allegation of the claimants is that this decision by the directors to grant a mortgage over the property is evidence of abuse of power and a lack of bona fides on the part of the directors. They allege that all that was being done to set the stage for the coup de grace which would eliminate the minority share holders. The claimants have spun a conspiracy theory that would be the envy of that Hollywood director Oliver Stone, a master of the conspiracy tale if his efforts in the movie ***JFK*** is anything to go buy. According to the claimants the Goodmans would then enforce the mortgage and then take over the property.

128. I shall give further detail here of evidence regarding the indebtedness of GHHL and what was told to the share holders. In a letter dated September 6, 1999, GHHL wrote to all share holders. The first line read *[a]s you are aware the loans and overdrafts formerly held by NCB were taken over by FINSAC. FINSAC is now owed $23,000,000.* The letter goes on to note that despite several requests a number of share holders have refused to settle their debt. The share holders were also informed of FINSAC's intention

to put up the hotel for sale. It ends with a plea to the share holders to settle the debt or pay a substantial part of the debt. The share holders were even asked in the letter to identify a buyer who would be willing to pay a reasonable price for the property.

129. Prior to the September 1999 letter there was another letter date September 9, 1997, from GHHL addressed to all share holders. The letter begins *[t]he operating costs are similar to previous years. There is, however, a substantial increase in Financial and Administrative (sic) costs due mainly to interest charges payable as a result of arrears on assessments by the share holders of six villas.* The letter noted that two villa owners had paid. The share holders were told that PriceWaterhouse, a firm of accountants, were completing schedule to show losses for each individual villa for the years 1991 - 1994 and that a similar computation was being done for the years 1995 and 1996.

130. The exhibits in the case show that an annual general meeting held on May 10, 2000, the 1997 accounts were presented. Mr. John Thompson, one of the claimants, arrived late and asked about the large administrative and financial charges of JA$6.9m. Mr. Goodman replied that they were occasioned by legal costs incurred by the share holders' suit, interest occasioned by share holders' arrears and secretarial costs in preparing the information for the suit which was later withdrawn. At that meeting Mr. Thompson threatened to sue the directors individually and jointly. Mr. Thompson complained about the lateness of the accounts. Mr. Goodman replied by pointing out that GHHL could not hire auditors unless the share holders paid their maintenance charges. It was further indicated to Mr. Thompson that the law suit, negotiations with NCB and FINSAC as well as an investigation initiated by some share holders including Mr. Thompson required that a substantial time be spent on auditors and lawyers.

131. In 2001 the share holders received another letter from the company summarising the affairs of the company and highlighting major expenses for the years 1998 and 1999.

132. There is evidence before indicating that in 1989 the exchange rate between the Jamaican currency and the United States currency was JA$5.75:UA$1.00 and by 2000 it had declined to JA$43.22.

133. The documents show that the Goodmans made unsecured loans to GHHL in the period 1991 - 96. So too had a company owned by the Goodmans, GHVSS. The sums lent by the Goodmans and GHVSS exceed JA$13m.

134. There are correspondence, minutes and other documents showing that the board of GHHL considered proposals made by Mr. Alberga and rejected them.

135. I shall abridge very briefly the rest of the evidence adduced by the claimants. Complaint was made that the annual account were late and at times several years late. That complaint is factually true but it would be misleading to say that there was a lack of information given to the share holders. The bundles reveal extensive communication between the company and the share holders. Many issues relating to the operation of the company were discussed. The assessments were levied, albeit on an incorrect basis, and the share holders informed. Meetings were held. There is even documentation of a minority share holders meeting in which they were plotting (I used the expression deliberately) to exacerbate the financial difficulties of the company. I shall quote from the document shortly. My review of the documents show that GHHL sought and obtained advice from eminent practitioners ranging from silks of long standing and much experience in commercial matters such as Mrs. Angella Hudson-Phillips Q.C., Mr. Hugh Small Q.C. to a very able junior, Miss Michelle Henry. The company even brought in a consultant from the United States of America to advise on the best way forward. They had the advice of reputable accountants.

136. I now quote from the minority share holders meeting held on August 20, 1998 at which Mr. John Thompson was present. The relevant portions read:

It was stated that NCB would no longer issue credit to the Goodmans, and they might seek a loan from NIBJ. The meeting felt that if the minority share holders wrote the bank advising them of the problems between the directors and themselves, it would prejudice the loan. This letter would be drafted by John Graham and Taynia Nethersole.

The minutes continue:
It was suggested that the Press would be pleased to print stories directly attributed to past/present owners that would show the strong-arm tactics used by the Goodmans to acquire units to achieve majority shares under the "A" Class (Villas only). These would be prepared by various parties within a week and sent to John Thompson to be vetted for libelous (sic) content before being released to the Press.

137. These extracts speak plainly of an agreement by some minority share holders to derail attempts by GHHL to raise money. It also shows that they knew of the credit facility that GHHL had with NCB. Indeed one Mr. Lynch is recorded as saying that overseas investors should be invited to contact the Goodmans with a view to purchasing GHHL. This plan "would force the Goodmans to show their hand". The John Thompson in the minutes is the very John Thompson who is suing as one of the claimants in this case.

138. The submissions also raise issues relating to the management of companies which I shall address. Before I do so I shall summarise an important clause from the memorandum of association and two significant articles in the article of association. Clause 3 (e) of the memorandum of association and article 79 of the articles of association clearly confer the power on the company and directors respectively to borrow money and issue debentures. Article 82 states that the business of the company shall be managed by the directors who may, inter alia, exercise all such powers of the company as are not by the Act or the articles required to be exercised by the company in general meeting. There is no indication that the borrowing powers of the company can only be exercised or ratified by the company in general meeting. At

best, the claimants are alleging managerial incompetence that is not a ground to set aside a mortgage. The unchallenged evidence shows that between 1979 and 1989 the directors sought and secured three lessees of the property and one of them (Norwegian Cruise Lines) had a lease and an option to purchase.

139. In dealing with these submissions two concepts are to be distinguished not for the purpose of separating them to show how they relate to and reinforce each other to defeat the claimants' submissions. The first is the one that says that where management of the company is conferred by the articles of association on the director any decision they make will not be lightly disturbed. The second is that the courts do not readily impugn decisions of directors provided that they are made bona fide and for a proper purpose.

140. In support of the first principle is the seminal case of ***Automatic Self-Cleansing v Cuninghame*** [1906] 2 Ch. 34, the Court of Appeal had to contend with a provision in articles of association similar to article 82 in the instant case. The issue arose in an acute way. In that case the majority of share holders at a general meeting passed a resolution that the company should sell certain property it had. The directors refused to do so because they felt that the sale was not in the best interest of the company. The company and a share holder brought an action against the directors in order to compel them to affix the company's seal to the documents that were drawn up. The Court held that under the article the powers of management of the company were vested in the director and unless there was some misconduct or fraud to justify the interference of the court no interference would be forthcoming. In the words of Lord Justice Cozens-Hardy (as he was at the time) at page 44:

> *We must therefore consider what is the relevant contract which these share holders have entered into, and that contract, of course, is to be found in the memorandum and articles. I will not again read articles 96 and 97, but it seems to me that the share holders have by their express contract mutually stipulated that their common affairs should be managed by certain directors to be appointed by the share holders in the manner described by*

other articles, such directors being liable to be removed only by special resolution. If you once get a stipulation of that kind in a contract made between the parties, what right is there to interfere with the contract, apart, of course, from any misconduct on the part of the directors? There is no such misconduct in the present case. Is there any analogy which supports the case of the plaintiffs? I think not. It seems to me the analogy is all the other way. Take the case of an ordinary partnership. If in an ordinary partnership there is a stipulation in the partnership deed that the partnership business shall be managed by one of the partners, it would be plain that in the absence of misconduct, or in the absence of circumstances involving the total dissolution of the partnership, the majority of the partners would have no right to apply to the Court to restrain him or to interfere with the management of the partnership business.

141. The status of this decision was in doubt for some time because it represented a clean break with the lingering nineteenth century idea that directors are agents of the company for all purposes and once the majority of share holders in general meeting made a decision then the directors were bound to act in accordance with the resolution.

142. The break with the past was confirmed by ***John Shaw and Sons v Peter Shaw*** [1935] 2 K.B. 113. There an article of association distinguishable in wording but not in meaning to article 82 of GHHL's articles came before the courts. Lord Justice Greer said at page 134:

A company is an entity distinct alike from its share holders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the share holders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the share holders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of share holders.

143. These decisions are high obstacles in the path of the claimants. There is no way round, under or over them unless fraud or some misconduct can be established.

144. The authority for the second proposition is ***Howard Smith Ltd v Ampol Petroleum Ltd*** [1974] A.C. 821, 832). The words of Lord Wilberforce bear citation. He said:

> *Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.*
>
> *But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.*

145. This case indicates the magnitude of the claimants' task. They have failed to discharge their burden of proof and the claim fails. I have concluded that there is not a shred of evidence of equitable fraud or common law fraud. All we have is directors exercising bona fide powers vested in them by the internal constitution of the company. It has not even been suggested that

any exercise of the powers vested in the directors was not directed to a purpose allowed in the memorandum of association.

146. I have set out the evidence and the law relating to abuse amount to equitable fraud in order to demonstrate that the claimants have utterly failed in this effort to show abuse of position by the directors. The only conspiracy revealed was that of a group of minority share holders who agreed on a deliberate and intentional course of action to harm GHHL. On the other hand the evidence is replete with instances of GHHL trying to the best it could in difficult economic circumstances which could only have been exacerbated by hostile share holders, some of whom refuse to pay the assessment or paid late while the company had to meet its obligations under the lease.

147. Lest it be thought that I have forgotten that the claimants were trying to raise equitable fraud let me say that I have seen no evidence of equitable fraud. There is no need for the claimant to prove an intent to deceive or to cheat (see Viscount Haldane LC in ***Nocton v Lord Ashburton*** [1914] A.C. 932, 954). I aware that the epithet equitable fraud may be applied to a person who acts innocently because of ignorance and there is no conscious deception, sharp practice or intentional wrongdoing. However managerial incompetence alone, since that is what the submissions amount to, cannot establish equitable fraud.

148. The claimants then sought to attack the mortgages from another angle. In paragraph 24 of the particulars of claim the claimants alleged that the mortgage and debentures are void or alternatively void against the claimants or alternatively, subject to the claimants' interest under the lease. The grounds are first, that Mies knew that the claimants had a lease and all that GHHL could mortgage is the reversion. Second, on a proper construction of clause 8.1(g) of the mortgage instrument the mortgagee takes subject to the lease hold interest of the claimant and other lease holders. Third, under clause 13 of the mortgage instrument whatever estate and interest GHHL is entitled to transfer or dispose of does not include the claimants' lease hold interest.

Fourth, Mies knew that GHHL "had no power to enlarge, by mortgaging or otherwise, charging the premises, the circumstances in which the claimants' lease might be defeated beyond the specific circumstances identified in the claimants' lease whereby the claimants' interest might be forfeited for default in paying assessments or special assessments." I need not examine these allegations in detail because as far as I am aware they cannot make a mortgage void.

Conclusion

149. The claimants are entitled to the declarations that the assessments and special assessments for years 1994 to 2001 were excessive. There is no evidence that the estimates required under the lease or the articles of association were excessive. What made the assessment and special assessments excessive in respect of the claimant is that GHHL did not use the entire 54,000 shares as the basis for the calculation of the individual share holders contribution. They are entitled to the declaration that the assessments and special assessments for the years 1994 to 2000 be set aside and that GHHL render assessments and special assessments under the lease and articles of association in accordance with this judgment. I order that any excess over what was properly payable be returned to the claimants after a proper assessment is done. I do not order any interest on the excess, if any, because there was no evidence of what the commercial rates are or was. It follows that the forfeiture of the lease and shares were unlawful. There was insufficient evidence from the claimants for there to be any calculation of damages suffered by the claimants for the wrongful forfeiture of the lease or the shares. There was no evidence of rental value of the villa and therefore no basis for calculating the value of the unexpired term of the lease. Neither was there evidence of the value of the shares other than what was paid for them by the Thompsons. The appointment of a receiver is out of the question.

150. The mortgage and debentures are not void and were within the power of the GHHL to grant to Mies. There is no basis for me to grant the injunction restraining Mies from enforcing the

mortgage. There is no evidence that any of the defendants is planning or about to do so. The issue is academic at this stage.

151. The claimant abandoned his claim for damages for conspiracy to injure the claimants in respect of the lease. The case against Mies has not been established and are dismissed with costs to Mies.

152. The claimants have failed in the claim against the Goodmans. The claim is dismissed with costs to the Goodmans.

153. The occupancy charge is legitimate provided that it is arrived at as a result of the estimate required to be made under clause 5(b) or article 91.

154. GHHL is entitled to recover the loans, interests on the loans and costs of acquiring the loan that were used to maintain the property since these obligations were incurred to enable GHHL to fulfil its responsibilities under the lease, that is, to maintain the property at the standard of a first class hotel.

155. Under article 91 GHHL is entitled to recover expenses related to the operation of the company. These include professional fees occasioned by law suits, filing documents, expenses associated with getting professional advice from accountants, attorneys at law and corporate secretarial services.

156. There is no need at this point to decide on whether Mies is bound by the lease holders not in good standing and by extension I need not decide on the meaning and effect of clause 8.1 (g) of the mortgage instrument.

157. The counterclaim of GHHL is dismissed in its entirety.