IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 204 of 2016 (IMJ)

BETWEEN

STEVEN GOODMAN

Plaintiff

AND

(1) DAWN CUMMINGS
(2) DMS GOVERNANCE LIMITED

Defendants

TANGERINE INVESTMENT MANAGEMENT LIMITED
(In Official Liquidation)

Third Party

IN CHAMBERS

Appearances: **Mr. H Rees QC instructed by Mr. B Hobden of Conyers Dill & Pearman for the Plaintiff**
Mr. B Valentin QC instructed by Mr. M Goodman and Ms. K Houghton of Campbells for the Defendants
Mr. M Goucke and Mr. P Kendall of Walkers on behalf of the Third Party (appearing only briefly at the Court's request)

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **14, 15, 16 November 2017**

Draft Judgment Circulated: **6 September 2018**

Judgment Delivered: **13 September 2018**

HEADNOTE

Company Law - Articles of Association - Indemnity provisions - Whether Articles incorporated into the terms of director's appointment - Whether the provisions of the Articles extend to former directors - Whether director entitled to rely on particular Article in circumstances - Whether director entitled to rely on particular Article as against Company in respect of expenses incurred in defending this action - Section 27 Companies Law (2011 Revision)

JUDGMENT

Introduction

1. In December 2016 the Plaintiff Mr. Steven Goodman (**"Mr. Goodman"**) brought proceedings against (i) the first-named Defendant Ms. Dawn Cummings (**"Ms. Cummings"**) for breach of common law director duties and/or breach of fiduciary duties; and (ii) the second-named Defendant DMS Governance Limited (previously DMS Offshore Investment Services Limited (**"DMS"**) as being vicariously liable for the acts of Ms. Cummings and/or for breach of contract. Mr. Goodman brought the proceedings by way of assignment to him of certain causes of action of Tangerine Investment Management Limited (In Official Liquidation) (**"Tangerine"**).

2. The assignment took place pursuant to a Deed of Assignment dated 18 March 2014 (**"the Deed"**). Mr. Goodman's claim was brought against the Defendants after the Deed was sanctioned by the Grand Court, Foster J, in May 2015.

3. Mr. Goodman asserts that Ms. Cummings was a director of Tangerine, whose principal business was to act as Investment Manager to funds established by Axiom for the purpose of providing loans to English law firms, from 19 December 2011 until her resignation on 17 October 2012. In broad summary, it is alleged that, during that time, she: (i) caused Tangerine to enter into panel law firm agreements with unsuitable firms, without due diligence and outside the agreed investment criteria; (ii) caused Tangerine to pay out, or failed to challenge the payment of approximately £15 million of Tangerine's money to entities owned or controlled by Timothy Schools (**"Mr. Schools"**), the sole owner and a director of Tangerine; and (iii) failed to take any or any adequate steps to scrutinize Mr. Schools.

4. The allegation of vicarious liability against DMS is made on the basis that the acts and omissions of Ms. Cummings were carried out in the course of Ms. Cummings' employment and/or agency. It is further alleged that DMS breached its contract with Tangerine by failing to ensure that Tangerine met its obligations pursuant to the relevant

investment management agreement and by failing to monitor Ms. Cummings' performance.

5. It is further alleged that these breaches on the part of Ms. Cummings and /or DMS caused the termination of the investment management agreement. The loss in facilitation fees to Tangerine have been alleged to be in the region of £55 million over a four year period.

6. Ms. Cummings, in a Defence filed 30 March 2017, denies the allegations made by Mr. Goodman and denies that her conduct caused the alleged or any loss and/or damage. She also contends that she is entitled to rely on the terms of various indemnity provisions in the Company's Articles of Association ("**the Articles**"), which she avers, provide her with defences to Mr. Goodman's claims, and to rights of action against Tangerine.

7. Pursuant to the Grand Court Rules 1995 (Revised Edition) ("**the GCR**"), GCR Order 16 Rule 1, and an order of the Court dated 28 June 2017, Ms. Cummings filed a Third Party Notice against Tangerine. By that Third Party Notice, Ms. Cummings claims against Tangerine as follows:

> "*(1) A declaration that* [Tangerine] *is obliged to indemnify* [Ms. Cummings], *out of its assets, in respect of all liabilities, loss, damage, cost or expense (including but not limited to liabilities under tort, and statute) and all reasonable legal and other costs and expenses on a full indemnity basis properly payable incurred by or on her behalf in providing assistance to* [Tangerine] *and to its liquidators in the course of the liquidation of* [Tangerine], *and in defending the Main Action and in respect of any actions relating thereto.*
>
> *(2) An order that* [Tangerine] *pays to* [Ms. Cummings] *amounts representing such legal fees, costs and expenses, in advance of the final disposition of the Main Action,* [Ms. Cummings] *having undertaken to repay such amount if it is ultimately determined that* [Ms. Cummings] *is not entitled to be indemnified by* [Tangerine].

(3) *Alternatively, damages for breach of* [Tangerine's] *obligation to indemnify* [Ms. Cummings], *such damages to be assessed.*

(4) *Interest pursuant to s. 34 of the Judicature Law (2013 Revision) on such amount (s) which* [Tangerine] *is ordered to pay to* [Ms. Cummings], *from the date the relevant liability was incurred until the date of payment, at such rate as the Court shall deem appropriate.*

(5) *An order that [Tangerine] shall indemnify [Ms. Cummings] in respect of the legal fees, costs and expenses she has incurred in defending the Main Action and in respect of any actions relating thereto, save insofar as* [Mr. Goodman] *has paid those costs, and in respect of the costs of her claim against* [Tangerine] *by this Third Party Notice.*

(6) *A declaration that all amounts payable by the Company to* [Ms. Cummings] *pursuant to the indemnity are liquidation expenses in the liquidation of* [Tangerine].

....."

8. Mr. Goodman, on behalf of and as assignee of Tangerine, filed a Defence to the Third Party Notice on 1 September 2017.

9. Tangerine's Liquidator also on 1 September 2017 filed a Defence to the Third Party Notice. This Defence adopts the Defence filed by Mr. Goodman. The Liquidator in addition pleads that if it is ultimately determined that Ms. Cummings is entitled to any of the substantive relief sought in the Third Party Notice, such that the Indemnity Provisions are deemed to be enforceable as against Tangerine, Tangerine seeks a declaration that it shall be indemnified by Mr. Goodman in respect of any liability incurred as a result of an Order made by the Court, and in respect of all and any liability incurred.

10. Replies were filed on behalf of Ms. Cummings to the Third Party Defences, on 15 September 2017.

11. This hearing was convened to hear issues that all the parties agreed should be determined preliminarily. By a Consent Order made on 21 August 2017, it was agreed by Counsel for Mr. Goodman, Ms. Cummings and Tangerine, that the Third Party Proceedings should be listed for 3 days, for the determination of the following Preliminary Issues:

(1) Whether the Articles were incorporated into the terms of Ms. Cummings's appointment as a director.

(2) Whether the provisions of the Articles extend to former directors.

(3) Whether Ms. Cummings is entitled to rely on Article 154 of the Articles in circumstances where she seeks to rely on indemnification pursuant to an implied contract as opposed to indemnification pursuant to the Articles as per the wording of Article 154.

(4) Whether Ms. Cummings is entitled to rely on Article 154 of the Articles as against the Third Party in respect of the expenses incurred in defending this action; and

(5) On the assumption that the above issues are determined in the affirmative, whether Mr. Goodman is obliged to provide a "*back to back*" indemnity in favour of Tangerine pursuant to the terms of the Deed of Assignment entered into between (1) Tangerine, (2) Mr. Goodman and (3) Ian Stokoe (in his capacity as one of the former Joint Official Liquidators of Tangerine) on 18 March 2014.

12. The hearing of the Preliminary Issues was set down for 14, 15 and 16 November 2017.

13. A summons to amend the Statement of Claim was filed on 27 June, and was amended on 23 October 2017 to seek leave to make some consequential amendments to the Reply to Ms. Cummings' Defence. However, after argument on the first day of the Hearing, it was ultimately agreed that the applications to amend should abide the outcome and determination by the Court of the Preliminary Issues. This was because the amendments

seek leave to introduce the same points involved in the Preliminary Issues. Mr. Valentin QC appeared for the Defendants. He made the, in my view, sound argument that if the Court is persuaded that the Defendants' position is correct on Preliminary Issues 1-4 then, in addition to so determining on a final basis, it follows that it should also decline leave to amend to introduce the same points into Mr. Goodman's Statement of Claim and Reply, and dismiss the Amended Summons of 23 October 2017. During the course of argument, the validity of this position was conceded by Mr. Rees QC, who appeared for Mr. Goodman.

14. Therefore, if Mr. Goodman loses on these Preliminary Issues, or any of them, then leave to amend to raise the same points that would already have been ventilated and determined against him would be refused. On the other hand, if Mr. Goodman is successful on the Preliminary Issues, or any of them, then it would of course be in order for the proposed amendments that correspond to the points upon which he has succeeded, to be allowed.

15. In addition, and after much argument, on application made on behalf of Mr. Goodman, the trial of Issue 5 was adjourned to the first open date convenient to the parties after the ruling on Preliminary Issues 1-4 has been handed down. Counsel from Walkers, who represent Tangerine, attended the hearing briefly and indicated that they joined in the application by Mr. Goodman that there be an adjournment of Preliminary Issue 5.

16. Accordingly, this ruling concerns only Issues 1- 4.

17. Tangerine's position is that it does not intend to take any part in this aspect of the matter.

The Articles

18. Articles 2 and 149 - 154 are the Articles that arise for consideration. These Articles provide as follows:

"INTERPRETATION

...

2. *In these Articles, the following terms shall have the following meanings unless the context otherwise requires:*

...

*"**Directors**" means the Directors for the time being of the Company;*

...

*"**Indemnified Person**" means any Director, officer or member of a committee duly constituted under these Articles and any liquidator, manager or trustee for the time being acting in relation to the affairs of the Company, and his heirs, executors, administrators, personal representatives or successors or assigns"*

...

INDEMNITY

149. Every Indemnified Person shall, in the absence of wilful neglect or default, be indemnified and held harmless out of the Assets of the Company against all liabilities, loss, damage, cost or expense (including but not limited to liabilities under contract, tort and statute or any applicable foreign law or regulation and all reasonable legal and other costs and expenses on a full indemnity basis properly payable) incurred or suffered by him or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties and the indemnity contained in this Article shall extend to any Indemnified Person acting in any office or trust in the reasonable belief that he has been appointed or elected to such office or trust notwithstanding any defect in such appointment or election.

150. No Indemnified Person shall be liable to the Company for acts, defaults or omissions of any other Indemnified Person.

151. Every Indemnified Person shall be indemnified out of the funds of the Company against all liabilities incurred by him by or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties in defending any proceedings, whether civil or criminal, in which judgment is given in his favour, or in which he is acquitted, or in connection

with any application in which relief from liability is granted to him by the court.

152. *To the extent that any Indemnified Person is entitled to claim an indemnity pursuant to these Articles in respect of amounts paid and discharged by him, the relative indemnity shall take effect as an obligation of the Company to reimburse the person making such payment or effecting such discharge.*

153. *Each member and the Company agree to waive any claim or right of action he or it may at any time have, whether individually or by or in the right of the Company, against any Indemnified Person on account of any act or omission of such Indemnified Person in the performance of his duties for the Company; provided however, that such waiver shall not apply to any claims or rights of action arising out of the wilful neglect or default of such Indemnified Person or to recover any gain, personal profit or advantage to which such Indemnified Person is legally entitled.*

154. *Expenses incurred in defending any civil or criminal action or proceeding for which indemnification is required pursuant to these Articles shall be paid by the Company in advance of the final disposition of such action or proceeding upon receipt of an undertaking by or on behalf of the Indemnified Person to repay such amount if it shall ultimately be determined that the Indemnified Person is not entitled to be indemnified pursuant to these Articles. Each member of the Company shall be deemed to have acknowledged and agreed that the advances of funds may be made by the Company as aforesaid, and when made by the Company under this Article are made to meet expenditures incurred for the purpose of enabling such Indemnified Person to properly perform his or her duties to the Company."*

The Arguments advanced on behalf of the Defendants - Ms. Cummings and DMS

19. Mr. Valentin commenced his attack by arguing that Mr. Goodman's position on Preliminary Issues 1-4 is an after-thought. Whilst accepting that Mr. Goodman has filed an application to amend the pleadings, the point made is that none of the points now being taken were previously taken in the pre-action correspondence or in the main pleadings.

20. In summary, the Defendants' position is that Ms. Cummings is entitled to rely on the indemnity provisions in the Articles, including Article 154, because:

(1) her affidavit evidence and the contemporaneous documents establish that she agreed to be a director of Tangerine on the footing that the Articles would be applicable to her appointment and therefore, on established legal principles, the indemnity provisions in Articles 149-154 (among other provisions) form part of her director's contract with Tangerine;

(2) although a former director, she remains an "*Indemnified Person*" (as defined in Article 2) in respect of any civil action that relates to her conduct as a director (such as the present action), because any other interpretation of the indemnity provisions in the Articles would be bizarre and plainly not what was intended; and

(3) Article 154, which is just as applicable as any of the other indemnity provisions, expressly requires that "*expenses incurred in defending any civil ... action for which indemnification is required pursuant to these Articles shall be paid by the Company*" and to do so "*in advance of the final disposition of such action*". On a plain reading of those words, Tangerine is required to pay her legal expenses as they are incurred. The provision therefore gives practical effect to the general principle that "*Indemnity requires that the party to be indemnified shall never be called upon to pay*" - Per Lord Goff in ***Firma C-Trade S.A. v. Newcastle P. & I. Association*** ("***The Fanti***") [1991] 2 A.C.1, at 36 B-C.

Factual Background which Defendants consider Relevant to the Preliminary Issues

21. Ms. Cummings qualified as a Certified Public Accountant in Illinois, and has had extensive experience of acting as a director. She was at the time of the hearing currently employed by DMS, in the role of Executive Director. In 2011, she was employed by DMS Organization Limited ("**DMSOL**"), the parent company of DMS Governance.

22. On 28 November 2011, an initial enquiry was made by Appleby in London to DMS Management Limited, the DMS company responsible for fund governance, as to the availability of a director to serve on the Board of Tangerine, an exempt company which Appleby's client was seeking to incorporate to act as investment manager to two new funds, the Axiom Funds.

23. By email of 9 December 2011 it was indicated that Ms. Cummings would be willing to serve on the Board of Tangerine.

24. Later on the same day, 9 December 2011, Ms. Cummings provided Appleby with further information about Offshore Business Solutions ("**OBS**"), the DMS affiliate of which she was the Managing Director, which she described as "*the largest service provider in the Cayman Islands focuses on the unique needs of investment managers*". She set out the annual fees chargeable by OBS for her services as an independent director. Ms. Cummings wrote as follows:

> "*The fees are fixed and no hourly charges would apply, except in extraordinary circumstances, such as the reorganization of the company and/or relevant structure.* ***Our quote assumes that the director(s) will be indemnified under the Memorandum and Articles of Association of the Company (ies)****, and that investment management decisions will be advised by a suitable party and disclosed as such in the offering materials to be distributed.*"
>
> (Mr. Valentin's emphasis)

25. Learned Counsel submits that it was therefore clear to all parties, from the outset, that the terms on which Ms. Cummings would accept appointment as a director of Tangerine were that she would be indemnified as a director under the Articles.

26. In an email on 15 December 2011 to Appleby, Ms. Cummings noted that Appleby's client seemed to have accepted her quote, which Appleby then confirmed by reply email in which it was confirmed that the client *"has agreed to accept your services to act as director"*.

27. On Sunday, 18 December 2011, Ms. Cummings informed Appleby that she would be out of office on vacation from the evening of Tuesday, 20 December 2011, returning on 2 January 2012, again referring in her email to the Articles by noting that:

> *"Presumably, the Articles provide for Alternate Directors, in which case either Blair [Miller] or my colleague Scott Aitken will be able to act in my stead."*

28. Tangerine's Certificate of Incorporation indicates that it was incorporated on Monday, 19 December 2011. Tangerine's date of incorporation is also apparent from the fact that the Memorandum and Articles of Association were stamped in various places by the Assistant Registrar of Companies on that date.

29. Under section 27(3) of the ***Companies Law (2011 Revision)*** (***"the Law"***), which was the applicable Revision at the time, the Certificate of Incorporation is *"conclusive evidence that compliance has been made with all the requirements of this Law in respect of incorporation and registration."*

30. Section 27 (4) provides:

> *"Every copy of a memorandum or articles of association filed and registered in accordance with this Law or any extract thereof certified under the hand and seal of the office of the Registrar as a true copy shall be received in evidence in any Court of the Islands without any further proof."*

31. On Tuesday, 20 December 2011, Appleby in an email noted that the incorporation documents had been submitted on the previous day (i.e. on 19 December 2011).

32. On the same day, i.e. 20 December 2011, Ms. Cummings signed an Alternate Director Form appointing Mr. Aitkin as her alternate.

33. On Wednesday, 21 December 2011, Oboshie Torgbor-Mensah of Appleby, wrote in an email that was copied to Ms. Cummings, amongst others, as follows:

> "*...I am pleased to confirm that Tangerine Investment Management Limited was incorporated on 19 December 2011. I attach for your records the Certificate of Incorporation and standard Memorandum and Articles of Association of the Company.*
>
> *I also attach for signature directors consent to act letters. Could Tim, Nathan and Dawn please sign the relevant consent letters and each return a signed copy to us.*
>
> *Also, attached is a written resolution of the directors to approve the organization of the Company, which must be signed by each of Tim, Nathan and Dawn (I note the resolution can be signed in counterparts). Please note that we have inserted 31 December as the financial year (first such year ending on 31 December 2012). Kindly confirm if this is acceptable.*
>
> *A copy of our corporate services agreement in relation to the provision of registered office services to the Company is also attached for signature.*
>
> ...."

34. However, a number of emails exchanged between the parties suggest that there were difficulties in receiving the attachments, due to their size. Mr. Valentin submits that it was also apparent that OBS required sight of the Articles. This is made plain, he asserts, by Mr. Miller's email to Appleby, copied to Ms. Cummings, of 21 December 2011.

35. As part of an effort to resolve these difficulties regarding the attachments, on Thursday 22 December 2011, Appleby sent Mr. Miller and Ms. Cummings the Memorandum and Articles as a compressed .rar file, which Mr. Miller received, but was still unable to open.

Mr. Miller then contacted Mr. Nathan Bloch to request a .pdf copy of the Memorandum and Articles. It bears emphasis, Learned Counsel submits, that, in all of this, Mr. Miller clearly wished OBS to have sight of these core documents before providing Appleby with the signed version of the first directors' resolution.

36. At 10:13 a.m. on 22 December 2011, Mr. Bloch sent an email to Mr. Miller, copied to Ms. Cummings, a .pdf section of pages 32-36 of the Articles, which contained the indemnity provisions (Articles 149-154).

37. It would appear that that attachment was capable of being opened and was read, because at 10:36 a.m. on 22 December 2011, Mr. Miller wrote to Ms. Oboshie Torgbor-Mensah of Appleby (this was also copied to Ms. Cummings), as follows:

> *"Good Afternoon Oboshie,*
>
> *We were unable to open this attachment, but Nathan is sending through a pdf version. We will forward an executed copy of the resolution shortly in the interest of accommodating deadlines, but wish to request a revision be made to the M & A in the near future. Specifically, we would request the indemnity exclusions outlined in article 149 be changed from "wilful neglect or default" to "fraud or wilful default"."*

38. At 4:01 p.m. on Thursday, 22 December 2011, Melanie Lewis (a Senior Associate at OBS) sent an email to Appleby attaching a copy of the signed launch resolution and director consent letter for Ms. Cummings.

39. The signed launch resolution noted that the Resolutions were passed "*Pursuant to the Articles of Association of the Company*".

40. At paragraphs 16-18 of her Second Affidavit, Ms. Cummings gives evidence in relation to these documents as follows:

> *"16. Whilst I cannot now specifically recall whether or not I did so, I would have been able to follow this correspondence by email on*

my smart phone, and it is likely that I would have done so. ***The signature on the consent to act document is my e-signature. In order to apply that signature, I would have signed in remotely to a proprietary system called "Document Execution Workflow", in order to sign electronically the .pdf version created by Ms. Lewis,*** *once it had been reviewed either by me or, because I was on vacation, by relevant support staff (i.e. Mr. Miller and/or Mr. Aitken).*

17. *Ms. Lewis finally sent a .pdf version of the consent letter (and the launch resolutions, containing Mr. Aitken's e-signature) to Ms. Torgbor-Mensah at 4:01 p.m. on 22 December 2011(page 37). Regrettably, no one picked up at the time that the dates on the document were incorrect (they should each have been dated 22 December 2011, the date of release, but were in fact still dated 19 December 2011 (in the case of the launch minutes-per the draft sent by Ms. Torghor-Mensah) and 21 December 2011(in the case of the consent letter- as edited by Ms. Lewis).* ***However, as is apparent from the sequence of events that is reflected in the emails, these documents were released only after we were satisfied that the Articles contained an appropriate indemnity. If my team had not been satisfied concerning the terms of the indemnity, the consent to act letter and the executed launch minutes would not have been released to Appleby.***

18. *In these circumstances, I disagree with the conclusions drawn in paragraph 19 of the Plaintiff's affidavit.* ***Based on my usual working practices, and the matters I have referred to above which indicate that the terms of the indemnification provisions were regarded as important at the time, I am as certain as I can be at this distance in time that I would have considered the Articles (and the indemnity provisions, in particular) before my***

consent to act letter and the executed launch resolutions were released."

(Counsel's emphasis)

41. Ms. Cummings served as a Director of Tangerine until her resignation on 17 October 2012. She did not have a separate director's service contract with Tangerine. It is her case that she believed that her appointment was made solely pursuant to the Articles and that the protections afforded by the Articles, including the indemnity provisions, would continue to apply to her, in respect of her conduct as a Director, even after she had ceased to be a Director.

The Claim and the Evolution of Mr. Goodman's Pleaded Case

42. The claim against Ms. Cummings involves a number of allegations of breach of her duties as a director. In this hearing, Mr. Goodman contends that Ms. Cummings is not an "*Indemnified Person*". However, if he is unsuccessful on this issue it will be necessary for him to establish at trial that Ms. Cummings acted in "*wilful neglect or default*" of her duties as a director and that the indemnity is unavailable to her for that reason.

43. In their written skeleton arguments (at paragraph 39), the Defendants discuss "*the evolution*" of Mr. Goodman's pleaded case on the issue of whether Ms. Cummings is an "*Indemnified Person*". Whilst of course, Mr. Goodman is not bound by the fact that originally there was no suggestion that Ms. Cummings was not an "*Indemnified Person*", I do think that it is interesting to examine the course of the pleadings on this issue, as the Defendants suggest. At paragraph 39, the evolution is detailed as follows:

"39....

(1) In the Statement of Claim, filed on 6 December 2016, ... There was no suggestion.... That Ms. Cummings is not an "Indemnified Person".

(2) In Ms. Cummings' Defence filed on 30 March 2017, it was pleaded (at [34]) that Ms. Cummings "was at all times, and she remains, an "Indemnified Person" within the definition of Article 2 of the Articles" and the bare allegations in the Statement of Claim are denied (at [49] and [188])..

(3) *In his Reply to Ms. Cummings' Defence, filed on 18 May 2017, the Plaintiff expressly "accepted that Ms. Cummings satisfies the definition of an "Indemnified Person" under Article 2 of the Articles, as she was a Director of Tangerine from December 2011 until October 2012" (at [21(1)]), but advanced various reasons as to why particular provisions relating to the indemnity were inapplicable ... Among other points, it was contended (at [21(6)]) that Article 154 could not be enforced against the Plaintiff because the burden of that provision had not passed to the Plaintiff pursuant to the Deed."*

(4) *The position adopted in the Reply prompted Ms. Cummings to issue a Third Party Notice against Tangerine, dated 4 July 2017, claiming declaratory and other relief requiring Tangerine to meet its obligations under the indemnity provisions.*

(5) *The Plaintiff served a Defence to the Third Party Claim "on behalf of and as assignee of the Third Party" in which it advanced, for the first time, the various arguments (now advanced) as to why the indemnity provisions are inapplicable to Ms. Cummings.*

(6) *In its Defence to the Third Party Claim, filed on 1 September 2017, Tangerine simply adopted the Plaintiff's position, but made its own Third Party Claim against the Plaintiff, seeking to enforce the indemnity in clause 4.1.4 of the Deed.*

(7) *For reasons that have not been explained, two weeks later on 15 September 2017, Tangerine discontinued its Third Party Claim against the Plaintiff "upon the Plaintiff acknowledging that [Tangerine] shall be at liberty to reinstate the Third Party Claim....at any time hereafter should it deem it appropriate to do so".*

(8) *On 27 September 2017, the Plaintiff issued a Summons seeking leave to amend the Statement of Claim to introduce his new points as to why the indemnity provisions are inapplicable:*

(9) *In her Reply to the Defence to the Third Party Notice, filed on 15 September 2017, Ms. Cummings took issue with the contention that she was not an "Indemnified Person"*

(10) *On 23 October 2017, the Plaintiff issued an Amended Summons seeking leave additionally to amend the Reply, to remove the earlier concession (in [21(1)]) that Ms. Cummings is an "Indemnified Person".*

The First Preliminary Issue - Whether the Articles were incorporated into the terms of Ms. Cummings' appointment as a Director.

44. Mr. Valentin referred to the following authorities as providing guidance on this Issue: ***In re New British Iron Company ex p. Beckwith*** [1898] 1 Ch. 324, per Wright J, at 326, ***John v Price Waterhouse*** [2002] 1 WLR 953, per Ferris J, at [26]-[27], ***Globalink Telecommunications Limited v Wilmbury Limited*** [2003] 1 BCLC 145, per Stanley Burnton J, at [30]; ***Peiris v Daniels*** [2015] SC (Bda) 13 Civ (4 March 2015), per Hellman J, at [41], ***In re City Equitable Fire Insurance Co Ltd*** [1925] Ch. 407, per Warrington LJ at 520-521, and ***Company Directors*** (3rd Ed., 2017), edited by Simon Mortimer QC, at 20.09.

45. The Defendants submitted that, in the present case, the evidence, including the chronological background and circumstances referred to above, clearly establishes that Ms. Cummings accepted her appointment as a director of Tangerine on the footing that the indemnity provisions in the Articles would be applicable to her appointment.

The Second Preliminary Issue - Whether the provisions of the Articles extend to former directors.

46. Essentially, Mr. Goodman now contends that Ms. Cummings is not an *"Indemnified Person"* within the definition in Article 2, because that designation is limited to *"any Director...for the time being"* and this therefore excludes former directors of Tangerine, such as Ms. Cummings. Mr. Goodman puts it this way, at paragraph 26 of his First Affidavit:

> *"The Plaintiff's position is that under the terms of the Articles, a director of Tangerine is only indemnified for the duration of her tenure as a director, and loses her right to indemnification upon ceasing to be a director (whether through resignation or otherwise)."*

47. Mr. Valentin submits that if that were correct, this would create a *"highly improbable indemnity regime for directors and officers of the company"*. It is common ground that Ms. Cummings enjoyed protection as an *"Indemnified Person"* (as defined in Article 2), during her term of office, in respect of her conduct whilst in office.

48. Learned Counsel points out that, the definition of *"Indemnified Person"* demonstrates that the protection lasted long after a director left office (again, in respect of conduct whilst in office). The definition, for purposes of Mr. Valentin's emphasis, bears repeating, and is:

> *"any Director, officer or member of a committee duly constituted under these Articles and any liquidator, officer or member of a committee duly constituted under these Articles and any liquidator, manager or trustee for the time being acting in relation to the affairs of the Company,* ***and his heirs, executors, administrators, personal representatives or successors or assigns****".*

49. It was argued that the words emphasised make clear that, even after death (by which point obviously and necessarily the director's term of office will have come to an end), a director's heirs and executors are nonetheless still protected by the indemnity provisions in respect of civil actions concerning the director's conduct whilst in office.

50. Learned Counsel says that accordingly, if the arguments advanced on behalf of Mr. Goodman were correct, this would involve the director being an *"Indemnified Person"* whilst in office and after death, but not in any intervening hiatus.

51. Reference was made to the decision of the Board of the Judicial Committee of the Privy Council in ***Viscount of the Royal Court of Jersey v Shelton*** [1986] 1 W.L.R. 985, per Lord Brightman at 991G-992A.

52. It was further put forward on behalf of the Defendants that Mr. Goodman's suggested interpretation would effectively render the indemnity provisions worthless, because a company could simply terminate a director's appointment in order to escape the engagement of the indemnity. It was articulated that that would mean that no meaningful protection would be provided to a director, and would turn on its head the market for Cayman funds and investment managers, which depends on professionals being prepared to act as independent directors in respect of very sizeable financial undertakings, in exchange for a relatively small fee. This, on the basis that they will be fully protected

against civil action, save in situations where they act in wilful neglect or default of their duties (or with equivalent serious misconduct).

53. In respect of this Second Preliminary Issue, Mr. Goodman has referred to the Articles of Association of some other Cayman Islands Companies. In regard thereto, Mr. Valentin submits that these Articles of Association are obviously inadmissible as an aid to interpreting the Articles and any contract between Tangerine and Ms. Cummings.

54. Learned Counsel further submits that, in any event, all that the survey might show is that, in some cases, the relevant indemnity provision spells out expressly that the indemnity applies to both existing and former directors. However, it was submitted that none of the examples cited draw any operative distinction between these two categories of director: in all cases, both existing and former are protected (Mr. Valentin's emphasis) in precisely the same way in respect of civil action concerning their conduct whilst in office.

55. It is trite that a compulsory winding-up order has the effect of terminating a director's appointment. If authority is needed, reference was made to ***Measures Brothers Ltd. v Measures*** [1910] 2 Ch. 248, at 254, 256 and 259, and ***Re Ebsworth & Tidy's Contract*** (1889) 42 Ch. D. 23, at 43.

56. It is suggested by the Defendants' Counsel that if the Court is minded to consider examples from other cases, the better guide is to have regard to recent leading cases involving the invocation of indemnity provisions in Cayman Articles of Association in that (1) they each concerned directors (or others) who had left office, usually following the onset of liquidation, (2) So far as one can tell from the report of the decisions, no express mention was made as to the relevant indemnity provisions applying to a "*former*" director or officer, and (3) it was not suggested that for that reason (or any other), the indemnity provision was inapplicable to the defendant director or officer. The cases referred to by the Defendants are ***Primeo Fund (In Official Liquidation) v Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA*** (Grand Court, FSD, 23 August 2017) (involving a former custodian); ***Peterson v Weavering Macro Fixed Income Fund Limited (in Liquidation)*** [2015] (1) CILR 45] (involving

former directors), and ***Re Bristol Fund Limited*** [2008 CILR 317] (involving former auditors).

The Third Preliminary Issue - Is Ms. Cummings entitled to rely on Article 154 in circumstances where she seeks to rely on indemnification pursuant to an implied contract as opposed to indemnification pursuant to the Articles as per the wording of Article 154?

57. In both the Defence and Ms. Cummings' First Affidavit, it is indicated that Ms. Cummings has given the relevant repayment undertaking.

58. It was submitted that if Article 154 formed part of the contract between Tangerine and Ms. Cummings, then any claim that she might have invoking Article 154 necessarily involves a claim for indemnification pursuant to the Articles.

59. Mr. Valentin also referred to the alternative pleaded point that Mr. Goodman makes in his Defence to the Third Party Notice, at paragraph 5(4) as follows, that:

"any advance of funds under Article 154 is only available to current directors (and not former directors such as the First Defendant), as the express purpose of the Article is 'to meet expenditures incurred for the purpose of enabling such Indemnified Person to properly perform his or her duties to the Company."

60. It was submitted that it was something of an overstatement to seek to elevate the second sentence of Article 154 into a statement of the *"express purpose of the Article"*. The purpose of the Article is readily apparent from the first sentence, that purpose being to ensure that Tangerine is obliged to pay the expenses incurred by an Indemnified Person in defending any civil (or other) action on a rolling basis as the action progresses (rather than only after the final disposition of the action). The argument continues that, the provision is in this sense consistent with, and gives practical effect to, the function of indemnity provisions generally, which is to ensure that the indemnified party *"shall never be called upon to pay"*.

61. By contrast, the second sentence of Article 154 was characterised by the Defendants' Counsel as being no more than a deeming provision that pre-approval is deemed to have been given by Tangerine's members for any advance (or loan) of company money that may be required to be made to the company's directors by Tangerine pursuant to Article 154. Accordingly, it was argued, the final words of the second sentence do not, therefore, limit the right to invoke Article 154 only to existing directors. Further, that if that were the case, the provision would be at odds with the definition of *"Indemnified Person"* which, as previously submitted, applies to both existing and former directors.

The Fourth Preliminary Issue - Is Ms. Cummings entitled to rely on Article 154 in respect of expenses incurred in defending this action?

62. Reference was made to paragraph 5(4) of Mr. Goodman's Defence to the Third Party Notice, which states as follows:

> *"...In any event, Article 154 is not an indemnity clause; it is a 'hold harmless' clause, the breach of which would give rise to a claim for damages. The onus would be on the First Defendant to establish any loss and to mitigate any such loss. For example, the First Defendant would not be entitled to recover any loss which she has avoided from a separate indemnity under an arrangement with her employer or an affiliated company or D&O cover, or which she would have avoided."*

63. The Defendants strongly deny the correctness of such a position. They say that if this were the correct characterisation of Article 154, it would render it "*a singularly pointless provision*" (see paragraph 75 of the written skeleton argument), because it would add nothing to the indemnity provisions in Article 149 (which, by contrast with Article 154, actually uses the words *"hold harmless"*) and Article 151 (which does not). The Defendants maintain that Article 154 clearly serves a different purpose, namely to ensure that "*Expenses...shall be paid by the Company in advance of the final disposition of such action....*"

The arguments advanced on behalf of Mr. Goodman

64. In summary, Mr. Rees QC puts forward the following position on behalf of Mr. Goodman:

(1) The Articles were not incorporated, whether expressly or impliedly, into the terms of Ms. Cummings' appointment. Provisions in a company's articles of association are not, without more, incorporated into a contract between the company and a director. Ms. Cummings has failed to identify any legal basis for incorporating the Articles into her terms of appointment. The evidence overwhelmingly shows that Ms. Cummings had not seen or considered the Articles before her appointment, much less relied upon them in accepting the appointment or accepted the appointment "*on the footing*" of the Articles. It is, in any event, untenable to suggest that implying the term of indemnity is necessary to give business efficacy to the contract or so obvious as to go without saying.

(2) Further or in the alternative, Ms. Cummings is not an "*Indemnified Person*" within the definition of Article 2 in the Articles. That designation is expressly limited to "*the directors, for the time being of the Company*" [emphasis added] and thereby excludes former directors of Tangerine such as Ms. Cummings. This interpretation is consistent with the natural meaning of the words, the other provisions of the Articles, the case law and the practice of other Cayman Islands companies.

(3) Further or in the alternative, Ms. Cummings is unable to rely on Article 154 because that Article is confined to "*expenses incurred in defending any civil or criminal action or proceeding for which indemnification is required pursuant to these Articles*" [emphasis added] and does not extend to claims for indemnity pursuant to an implied contract incorporating the Articles.

(4) Further or in the alternative, Ms. Cummings is not entitled to rely on Article 154 as against Tangerine in respect of the expenses incurred in defending this action because Article 154 is not an indemnity clause, but

rather a "*hold harmless*" clause, the breach of which gives rise to a claim for damages, and the onus would be on Ms. Cummings to establish any loss and to mitigate any such loss.

The First Preliminary Issue – Whether the Articles were incorporated into the terms of Ms. Cummings' appointment as a Director.

65. It was submitted that the Articles were not incorporated, whether expressly or impliedly, into the terms of Ms. Cummings' appointment.

66. It was argued that it is trite law that the implication of a term into a contract is a matter of law for the Court. Reference was made to the decisions in ***Re Comptoir Commercial Anversois and Power, Son & Co*** [1920] 1 K.B. 868, 899, ***O'Brien v Associated Fire Alarms Ltd.*** [1968] 1 W.L.R. 1916, 1923, 1925, and ***The "Zenovia"*** [2009] EWHC 739 (Comm) at [22].

67. Further, that there is no question of the Articles being implied into Ms. Cummings' contract in law (for example under statute). Rather, it was submitted, that Ms. Cummings seeks to imply the relevant terms in fact. Reference was made to paragraph 14-004 of the 32nd Edition of ***Chitty on Contracts*** as setting out the essential test that *"the term sought to be implied is a necessary one which gives to the contract the meaning which the particular parties to the contract intended"*. Reference was also made to paragraph 14-005.

68. Mr. Rees QC cited a number of authorities, as demonstrating the core principles to be that the term must satisfy the test of business necessity, and that reasonableness is not enough - see ***Liverpool CC v Irwin*** [1977] A.C. 239, 266 (House of Lords), ***Philips Electronic Grand Public SA v British Sky Broadcasting Limited*** [1995] EMLR 472, at [482], ***Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.*** [2015] UKSC 72 (UK Supreme Court) and ***Rosenblatt (A Firm) v Man Oil Group SA*** [2016] EWHC 1382 at [59] (QB), and ***Hallman Holding Limited v. Webster*** [2016] UKPC 3 at [14] (JCPC).

69. The principles, as set out in the ***Marks & Spencer*** decision, and in ***Philips Electronic*** were endorsed in the recent decision in ***Primeo Fund (In Official Liquidation) v. Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA***, delivered 23 August 2017, where Jones J at paragraph 211, stated as follows:

> *"211. The applicable principles relating to the implication of contractual terms were recently restated by the UK Supreme Court in* ***Marks & Spencer plc. v. BNP Paribas Securities Services Trust Co (Jersey) Ltd.*** [2016] AC 742. *For a term to be implied, it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that 'it goes without saying'; it must be capable of clear expression; and it must not contradict any express term of the contract. In the circumstances of this case it is important to bear in mind the passage cited from Lord Bingham's judgment in* ***Philips Electronique Grand Public SA v. British Broadcasting Ltd.*** *[1995] EMLR 472 at page 482 -*
>
> > *'The question of whether terms should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which reflect the merits of the situation as they then appear. Tempting, but wrong... it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred...'"*

70. Reference was also made to the Grand Court's decision in ***Cesar Hotelco v Ryan*** [2012 92) CILR 164] at [74], [77] – [78].

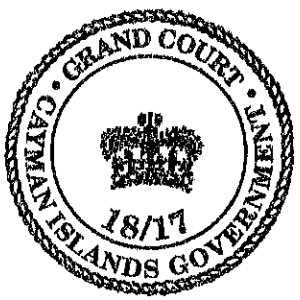
71. It was submitted that the question of whether the indemnity clause has been expressly or impliedly incorporated into the service agreement or terms of appointment is necessarily fact-sensitive. Whilst Mr. Goodman accepts that, as found in ***John v Price Waterhouse*** *"comparatively little will be required"* to incorporate an indemnity provision into Ms. Cummings contract, it was nevertheless submitted that Ms. Cummings is on the facts of this case, unable to overcome this relatively low threshold.

72. Mr. Rees draws attention to paragraph 3.2 of Ms. Cummings' Reply to the Defences to the Third Party Notice, in which she alleges that the incorporation of the relevant provisions of the Articles into her Director's contract is evidenced by four documents or facts. Mr. Goodman addresses each of these documents or facts as follows (paragraph 69 of Mr. Goodman's Skeleton Argument):

(1) First, Ms. Cummings observes that the unanimous written resolution of the Directors dated 19 December 2011 (**"the Written Resolution"**) which appointed her as one of the first directors of Tangerine, was *"passed pursuant to the articles."* On a careful analysis, this document does not assist Ms. Cummings. It is accepted that there may have been a hard-copy version of the Articles presented to the registrar of companies on 19 December 2011 and that there is a generic reference to the Articles in the Written Resolution. However, it was submitted, all of the evidence (including email correspondence and attorneys' invoices) strongly supports the contention that the First Defendant could not have, and did not in fact, see or consider the Articles, whether in draft or final form, prior to her becoming a Director of Tangerine or prior to the Written Resolution being signed on her behalf. As set out in paragraphs 11 and 12 of Mr. Goodman's affidavit, the metadata reveals that the earliest electronic version of the Articles was created on 20 December at 16:09, after Ms. Cummings' appointment as Director and after the Written Resolution on 19 December 2011. It was argued that the best evidence, in the form of Appleby's invoices, is that Ms. Cummings first saw the Articles in February/March 2012. Mr. Rees

argues that it is significant that Ms. Cummings has never asserted that she had in fact seen or considered the Articles before her appointment; she can only speculate as to whether she would have done so. The argument continues, that given that Ms. Cummings' pleaded case is that her implied contract was "*entered into on her appointment*", and given that the earliest electronic version of the Articles had not even been created at that time, there is simply no basis for asserting that the Articles, and in particular the indemnity/reimbursement/waiver of liability, were incorporated into the terms of the First Defendant's appointment. Ms. Cummings therefore cannot have accepted her appointment *"on the footing"* of Articles she had never seen, much less have relied on such Articles.

(2) Ms. Cummings relies on the Consent to Act as Director Form signed on 21 December 2011 (**"the Letter of Consent"**). Whilst this may also formulaically refer to *"the Articles of Association"*, it suffers from precisely the same fatal shortcomings, as the argument above, declares Mr. Rees. Ms. Cummings, by her own admission and as reflected in the Company's Register of Directors, was appointed a Director on 19 December 2011. Therefore, the content of the Letter of Consent is not a requirement under the Articles and is not determinative of the date of Ms. Cummings' appointment. The relevant document is the Board Resolution, it was submitted, that was passed by Reid Services immediately after incorporation, on the understanding that Ms. Cummings had already consented to be a Director.

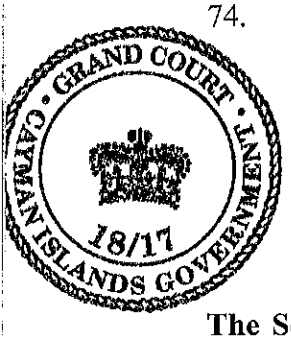


(3) Ms. Cummings points to the absence of any contractual document which might be said to have excluded or precluded the incorporation of the Articles. By the same token, there is no written agreement recording that the Articles, or any part of them, were incorporated. It was suggested that it would plainly have been open to Ms. Cummings to

request a written agreement in order to protect her position, but she failed to do so.

(4) Ms. Cummings argues that the extensive provisions contained in the Articles in respect of the conduct of Directors of Tangerine would be inapplicable if the Articles were not incorporated. It was submitted that this is a shallow and over simplistic argument. It is not alleged on the part of Mr. Goodman that Ms. Cummings was not a Director of Tangerine or that she did not owe common law director duties or fiduciary duties. In fact, the Statement of Claim against her specifically alleges breaches of common law director duties and/ or breach of fiduciary duties. It was submitted that, however, it is for Ms. Cummings to establish that the specific indemnity/reimbursement/waiver of liability provisions (which, as set out in paragraph 31(2) of Mr. Goodman's Affidavit, were not standard or universal) were, in fact/law, incorporated into *her* terms of appointment. Plainly those provisions would still protect other Directors (whether appointed at the same time or subsequently) who had in fact seen the Articles before their appointment. Moreover, the indemnity/reimbursement/waiver of liability provisions are supplemental provisions: they do not go to the heart of her duties as a director *qua* director.

73. Mr. Rees asks the Court to approach this Issue on the basis that what matters is the snapshot of Ms. Cummings' knowledge as at the moment she became a Director of Tangerine on 19 December 2011. Learned Counsel argues that the evidence is clear that Ms. Cummings had not, and could not have, seen the Articles as at that time; indeed, she does not positively contend otherwise. It was submitted that Ms. Cummings' Second Affidavit seeks to muddy the waters and distract from the central question of what Ms. Cummings actually knew and relied upon when she entered into her appointment as a Director.



74. Mr. Rees posits that the instant case is therefore most closely comparable to ***Globalink Telecommunications Ltd. v Wilmbury***, where the Judge found that there was a real issue as to the incorporation of an indemnity in the articles of association where there was no evidence as to the basis on which the director accepted his appointment and nothing to suggest that he knew of the particular provision.

The Second Preliminary Issue - Whether the provisions of the Articles extend to former directors.

75. Mr. Goodman's position is that in the alternative, even if, which he denies, the Articles were incorporated, Ms. Cummings is not an *"Indemnified Person"* within the definition of Article 2 of the Articles.

76. In this regard, Mr. Goodman (obviously) accepts that Ms. Cummings was a Director of Tangerine, and that the claim against her concerns her actions in relation to the affairs of Tangerine. The key question is, therefore, whether the phrase *"for the time being"* in the definitions of both "*Indemnified Person*" and *"Director"* means that a Director of Tangerine is only indemnified for the duration of her tenure as a Director, and loses her right to indemnification upon ceasing to be a Director (whether through resignation or otherwise).

77. Mr. Rees indicates that he does not know of any Cayman Islands authority in which the meaning of the phrase *"for the time being*" in such indemnity provisions has been discussed or analysed. However, he submits that this precise question has been considered at the highest level in the English jurisdiction.

78. In ***Department for Environment, Food and Rural Affairs v. Asda Stores Ltd.*** [2003] UKHL 71, the House of Lords had for consideration a question of statutory interpretation, namely whether the power to make regulations designating and defining grade of quality of horticultural produce in s. 11 of the Agriculture and Horticulture Act 1964, as amended by the Grading of Horticultural Produce (Amendment) Regulations 1973, was confined to produce falling within Community grading rules which already existed in 1972. The applicability of the exclusionary provision was dependent upon the content of the Community grading rules at any given point in the future.

79. Learned Counsel referred to paragraphs 16-18 of the judgment, where Lord Nicholls, with whom Lords Hoffman, Hobhouse, Millett and Walker, agreed as follows:

> *"16. With all respect to those who have considered otherwise, to my mind it is abundantly plain that the scope of the new regulation-making power was co-extensive with the types of produce falling within Community grading rules existing in 1972.*
>
> *17. Let me take this in stages. The first is to note the scope of the new regulation-making power was co-extensive with the types of produce excluded from the definition of "regulated produce". The scope of the new regulation-making power marched hand-in-hand with the scope of the disapplication provision in the opening words of the new sub-section (3). This is clear as a matter of both language and context. This is clear as a matter of language, because the new power applied to "such produce" which is a reference back to the produce mentioned in the opening words ("produce of any description"). This is as one would expect. One would expect to find that, subsection (3) having excluded certain produce from the scope of section 11(1), the new power would enable the ministers to make alternative provision regarding the self-same horticultural produce. One would expect to find that the new regulation-making power would fill the gap created by the exclusionary provision. So language and context were in harmony.*
>
> *18. The second step is to note the language used to define the scope of these two matching provisions. The new subsection 11(3) of the 1964 Act excluded from the scope of regulated produce "product of any description* ***for the time being*** *subject to Community grading rules." (My emphasis). The ambulatory words I have emphasized can only have been intended to indicate that this exclusionary provision was not confined to produce which was subject to Community grading rules at the time this provision in the European Communities Act 1972 came into force. Rather, the*

applicability of the exclusionary provision was to depend upon the content of Community grading rules at any given time in the future. The phrase "for the time being" envisages, and is intended to encompass, a changing state of affairs. This, again, is what one would expect, in relation to both the disapplication provision and the new regulation-making power. One would expect to find that the new power would extend to produce which, for the time being, was subject to Community grading rules."

80. Reference was also made to the recent decision in ***Dickinson v Casillas*** [2017] EWCA Civ 1254, where the phrase *"on buildings for the time being erected on property transferred"* was considered. Applying Lord Nicholls' analysis in the ***DoE v. Asda*** case, Longmore LJ and David Richards LJ held at [27]-[30] that the words *"for the time being" "normally refer to the state of facts which may exist in the future as well as the state of facts at the present time"* and that strong contextual support would be required to conclude that a more restrictive interpretation should be adopted.

81. Learned Counsel cited ***Patersons of Greenoakhill v The Commissioners for Her Majesty's Revenue and Customs*** [2016] EWCA Civ 1250, where the English Court of Appeal had to determine what the relevant date was for determining whether a landfill site operator disposed of material as waste for the purposes of the Finance Act 1996 s.40(2)(a) and s. 64(1). In the course of her analysis of the statutory provisions, Arden LJ, at paragraph 44, noted as follows:

> *"When Parliament wants to be sure that a word will not have a static meaning, and will have a meaning at a particular point in time in the future, it can specifically adopt the words 'for the time being' or words to that effect."*

It was construed that, the absence of such wording in this case, meant that the word "*material*" could not be regarded as connoting a moving group of items.

82. Mr. Rees submits that the definitions of *"Director"* and *"Indemnified Person"* in the Articles recognise that the universe of individuals captured is evolving rather than permanent. Further, that the only rational basis for the inclusion of the phrase *"for the time being"* is to limit who can avail themselves of, amongst other matters, the indemnity provisions in the Articles. In particular, it was posited, the only people who can claim such protection are, so far as material, the Directors of the Company at any given moment, as recorded in the Register of Directors and Officers.

83. To bolster the argument, it was highlighted that the articles of association are intended primarily for the benefit of the companies, not the directors. Therefore, that Tangerine would have no incentive to continue to protect a Director that has resigned or been dismissed, particularly where the protection relates to everything but wilful neglect or default.

84. Reference was also made to other provisions of the Articles in order to make the point that nothing in the Articles requires that former directors be indemnified, and that the Articles recognise the distinction between Directors and former Directors. Reference was made as follows:

(1) Article 92.1 provides that *"*[t]*he office of a Director shall be ipso facto vacated if the Director resigns his office by notice in writing to the Company"*;

(2) Article 105 expressly refers to *"Director or former Director"*, including that the former does not encompass the latter;

(3) Article 106 provides that a document signed by a Director remains valid even if delivered only after he ceases to hold office;

(4) Article 113 provides that a Director who ceases to be a Director during a board meeting may continue to be counted in the quorum until the end of the meeting;

(5) Article 122 suggests that a Director is not an officer merely by being a Director, but needs to be additionally appointed to the relevant office. The

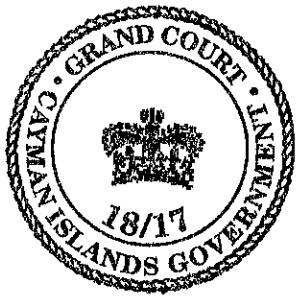
language also uses the phrase *"from time to time"*, so *"officer"* would not include a former officer, and

(6) Article 154 provides that the Members agree that the advances of funds for defence costs *"are made to meet expenditures incurred for the purpose of enabling such Indemnified Person to properly perform his or her duties to the Company"*. The use of present tense indicates that this applies only in relation to current Directors still performing their duties.

85. It was further submitted that Mr. Goodman's interpretation is also entirely consistent with the practice of Cayman Islands companies to expressly protect former directors in their articles of association when they wish to extend such protection to persons who are no longer directors. According to Mr. Goodman's legal team, they have undertaken a review of some publicly available articles of association of Cayman Islands companies to determine whether they expressly protect former directors. They say that this research revealed that a large majority of the Articles reviewed did not contain protection for former directors. Where the company wished to extend protection to former directors, it did so expressly, by using clear and unambiguous language.

86. Mr. Rees asks the Court to find the Articles of Cayman Finance Limited to be of particular note, because it appears to be a DMS entity. The definition of *"Officer"* in Article 1.1 includes a director but, conspicuously, Learned Counsel proffers, (and in contrast to Tangerine's Articles), is not qualified by the words *"for the time being"*. Further, it was submitted that the indemnity provisions (Article 20.1) and the release language and insurance provisions (Articles 20.3 and 20.4(a)) expressly distinguish between existing and former directors. This it was argued, suggests that DMS, as well as unrelated senior professionals and executives, were aware of the need to expressly protect former directors if so advised.

87. It is Mr. Goodman's position that additional support for his interpretation can be found in the default articles of association under the English Companies Act 1985. Article 118 (Indemnity) of the now superseded Table A prescribed format for articles of association provides as follows:



"Subject to the provisions of the Act but without prejudice to any indemnity to which a director may otherwise be entitled, every director or other officer or auditor of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in which relief is granted to him by the court from liability for negligence, default, breach of duty or breach of trust in relation to the affairs of the company."

88. By contrast, the Model Articles, which replaced Table A from 1 October 2009, expressly extended the scope of indemnified persons to include former directors. Specifically, article 52 defined '*a relevant director*' as *"any director or former director of the company or an associated company."* (Emphasis added)

89. Learned Counsel concludes this section by submitting that, had the draftsmen of Tangerine's Articles intended to include former directors in the definition of *"Indemnified Person"*, it would have been very simple to do so. However, they did not, and instead used the phrase "*Director for the time being*", to make abundantly clear that the indemnity/reimbursement/waiver of liability provisions did not apply to former directors such as Ms. Cummings.

The Third Preliminary Issue - Is Ms. Cummings entitled to rely on Article 154 in circumstances where she seeks to rely on indemnification pursuant to an implied contract as opposed to indemnification pursuant to the Articles as per the wording of Article 154?

90. In relation to this issue, Mr. Goodman takes the position that, even if the Articles were incorporated and Ms. Cummings is an *"Indemnified Person"*, which is denied, Ms. Cummings is unable to rely on Article 154 because that Article is confined to *"expenses incurred in defending any civil or criminal action or proceeding for which indemnification is required pursuant to these Articles."* (emphasis added), and does not extend to claims for indemnity pursuant to an implied contract incorporating the Articles.

91. The argument continues, that members could, of course, rely on Article 154 directly because it is a contract between them and the company. But, says Learned Counsel, Ms. Cummings is in a different position. Reference was made to ***Cesar Hotelco v Ryan***, where at paragraph 74, it is stated: *"The mere existence in the articles of a provision to benefit an officer (here indemnification) does not, without more, mean that the provision was incorporated into any contract between the company and that officer."* It was submitted that, on a proper reading of Article 154, it is not possible to rely, as Ms. Cummings does, on indemnification not pursuant to the Articles, but pursuant to an implied contract incorporating at least part of the Articles.

92. It was suggested that what Ms. Cummings in effect asks is that the Court read into Article 154, words, (as underlined), which do not feature there:

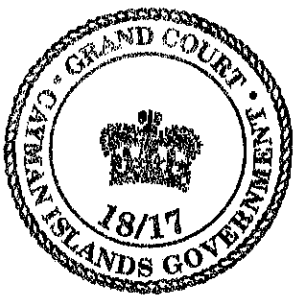
> *"...for which indemnification is required pursuant to these Articles or any contract between the Indemnified Person and the Company".*

93. It was argued that as a non-party, it is not open to Ms. Cummings to seek to vary or alter by implication the terms of the Articles. Whilst it would have been open to her to have made an express reservation of rights similar to that contained in Article 154 upon appointment, this, it was observed, was not done.

94. It was Mr. Rees' parting shot on this Issue, that there is in any event no basis for implying such a term because it does not satisfy the test of being *"necessary to give business efficacy"* to the Articles. Further, that the Articles function perfectly well without the proposed expansion of Article 154.

The Fourth Preliminary Issue - Is Ms. Cummings entitled to rely on Article 154 in respect of expenses incurred in defending this action?

95. It was submitted, that even if the Court is not persuaded by the arguments in relation to the First and Second Preliminary Issues, Article 154 specifically is limited to current directors. Reference was made to the last sentence of Article 154, which provides that:



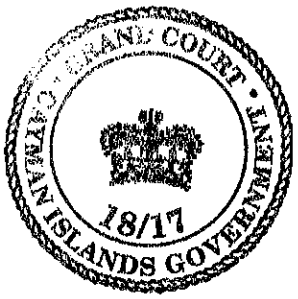
"Each Member of the Company shall be deemed to have acknowledged and agreed that the advances of funds may be made by the Company as aforesaid, and when made by the Company under this Article are made to meet expenditures incurred for the purpose of enabling such Indemnified Person to properly perform his or her duties in the Company."

96. It was submitted that the use of the present tense and the reference to performing duties in the Company can only properly be read as applying to current Directors, and not to those who have resigned, like Ms. Cummings.

97. It was further argued that, in any event, Article 154 is not an indemnity clause. Notably, it does not even use the word *"indemnify"*. Thus, it cannot give rise to a claim in debt. Rather, it is a *"hold harmless"* clause, the breach of which gives rise to a claim for damages.

98. Mr. Rees refers to the decision of the House of Lords in ***Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)*** [1991] 2 A.C.1, where Lord Goff said at [35]:

> *"... I am unable to accept his submission that a condition of prior payment is, at common law, implicit in a contract of indemnity. I accept that, at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party. I also accept that, at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss: see Collinge v Heywood (1839) 9 AD. & e. 633. This is, as I understand it, because a promise of indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred; however, once the loss is suffered or the expense incurred, the indemnifier is in breach of contract for having*



failed to hold the indemnified person harmless against the relevant loss or expense. There is no condition of prior payment; but the remedies available at law (assumpsit for damages, or possibly in certain circumstances the common count for money paid) were not efficacious to give full effect to the contract of indemnity. It is for this reason that equity felt that it could, and should, intervene. If there had been a clear implied condition of prior payment, operable in the relevant circumstances, equity would not have intervened to enforce the contract in a manner inconsistent with that term. Equity does not mend men's bargains; but it may grant specific performance of a contract, consistently with its terms, where the remedies at law are inadequate. This is what has happened in the case of contracts of indemnity. As a general rule, 'Indemnity requires that the party to be indemnified shall never be called upon to pay' (see In re Richardson [1911] 2 K.B. 705, 716 per Buckley L.J.): and it is to give effect to that underlying purpose of the contract that equity intervenes, the common law remedies being incapable of achieving that result."

99. It was submitted that the onus would be on Ms. Cummings to establish any loss and to mitigate any such loss.

100. Further, if Ms. Cummings' legal fees are being borne by DMS and/or D&O cover, then she has suffered no loss. In this context, it is important to note that Clause 24 of Ms. Cummings' undated contract of employment with DMS Organization/OBS includes a widely drafted indemnity covering costs, charges and expenses.

101. On the other hand, suggests Mr. Rees, if Ms. Cummings' fees are not so covered, her loss in the period prior to disposal of the action must still be mitigated. Ms. Cummings has undertaken to repay the amounts that would be advanced if the claim is determined against her, thereby representing that she has the funds to do so. Her only loss, it was submitted, would therefore be the interest that she would have otherwise accrued on the funds used to pay her fees. If, in fact, Ms. Cummings is unable to afford to pay the fees

herself, then the loss would be limited to the borrowing costs (i.e. interest plus arrangement fees) of borrowing funds.

102. In addition, it was argued that Ms. Cummings would not be entitled to recover any loss which she has avoided (for example, from a separate indemnity under a contract of employment or D&O cover: see clause 24 of the undated contract of employment between DMS Organization/OBS and Ms. Cummings) or which she should have avoided.

103. Lastly on this Issue, Mr. Goodman asserts that if, contrary to his primary position, Article 154 were to be construed as an indemnity clause, Article 152 would then take effect as converting the indemnity into an obligation on Tangerine to reimburse and would again be subject to Ms. Cummings establishing loss and mitigating such loss.

DISCUSSION AND ANALYSIS

The First Preliminary Issue - Whether Tangerine's Articles were incorporated into the terms of Ms. Cummings' appointment as a Director.

104. It seems clear to me that the case law which was cited on behalf of Mr. Goodman regarding implying terms into a written contract, and having to do with necessity for business efficacy, and such considerations, are irrelevant to the task which the Court has to engage in in the instant case. The Court's task is to decide whether the provisions of the Articles are incorporated into the terms of Ms. Cummings' appointment, in circumstances where there was no written contract. In any event, the issue here is somewhat different to those dealt with in these cases.

105. In my judgment, the cases which are relevant to the First Preliminary Issue are those cited by the Defendants, being : ***In re New British Iron Company ex p. Beckwith*** [1898] 1 Ch. 324, per Wright J, at 326, ***John v Price Waterhouse*** [2002] 1 WLR 953, per Ferris J, at [26]-[27], ***Globalink Telecommunications Limited v Wilmbury Limited*** [2003] 1 BCLC 145, per Stanley Burnton J, at [30]; ***Peiris v Daniels*** [2015] SC (Bda) 13 Civ (4 March 2015), per Hellman J, at [41], ***In re City Equitable Fire Insurance Co Ltd*** [1925] Ch. 407, per Warrington LJ at 520-521, and ***Company Directors*** (3rd Ed., 2017), edited by Simon Mortimer QC, at 20.09.

106. From those cases cited, the following legal principles emerge as being applicable to this Issue:

(1) Articles of Association are not, in themselves, a contract between the company and its directors.

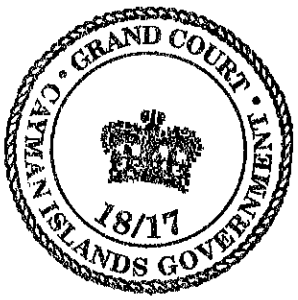
(2) However, if a director is appointed or employed *"on the footing"* of the Articles (or particular provisions in the Articles), their terms are embodied in and form part of the contract between the company and the director.

(3) Where a director is engaged without any separate or special terms of engagement (i.e. in the form of a separate employment or service contract), the Court will more readily conclude that the Articles contain terms on which the director accepts appointment.

(4) Comparatively little is required to satisfy the Court that, in a particular case, an indemnity provision is incorporated in the contract which is made when the company appoints a director.

107. In the ***City Equitable Fire Insurance Co*** case, Warrington LJ, helpfully discussed the relevant company's Article 150, which contained an indemnity provision, as follows (at pages 520-521):

> *"...In the first place, I think that that article, as the learned judge has held expressly in the case of the directors and impliedly, if not expressly, in the case of the auditors, does in such a case as the present form part of the contract between the company and the auditors, and for the reason that auditors are engaged without any special terms of engagement.* ***When that is the case, then if the articles contain provisions relating to the performance by them of their duties and to the obligations imposed upon them by the acceptance of the office, I think it is quite plain that the articles must be taken to express the terms upon which the auditors accept their position. Of course, if the terms of their employment are expressed in a separate document, then that document must be taken to***



define the conditions of their engagement, and it would not be proper to assume any implied terms either from the provisions of the articles or elsewhere. But in the present case I think it is quite plain that the terms of art. 150 do, according to their proper construction, whatever that may be, effect a modification in what would prima facie be, but for that article, the obligation and liability of the auditors...."

(My emphasis)

108. In ***John v Pricewaterhouse***, at paragraph 26, Ferris J analysed the situation as follows:

> *"26..... The articles of a company constitute a contract between the members of the company inter se and between each of them and the company but they do not, without more, constitute a contract between the company and its directors or auditors. Nevertheless the terms of regulations 136 and 118 appear clearly to contemplate that directors and auditors (amongst others) will have a right, which could only be a contractual right, to be indemnified as there mentioned.* ***It seems to me that comparatively little will be required to satisfy the court that, in particular cases, the indemnity provided for by regulations 136 and 118 is incorporated in the contract when the company appoints a director or an auditor.***"
>
> (My emphasis)

109. In ***Globalink v Wilmbury***, at paragraphs [30] and [31], Stanley Burnton J, also provided useful guidance as follows:

> *"[30] The articles of association of a company are as a result of statute a contract between the members of a company and the company in relation to their membership. The articles are not automatically binding as between a company and its officers as such. In so far as the articles are applicable to the relationship between a company and its officers, the articles may be expressly or impliedly incorporated in the contract*

between the company and a director. They will be so incorporated if the director accepts appointment 'on the footing of the articles,' and relatively little may be required to incorporate the articles by implication: per Ferris J at paragraph [26] of his judgment.

[31] In the present case I have no evidence as to the basis on which Mr. Hall accepted his appointment as director of the company. Neither the articles of association of the company in general nor art 18 in particular are referred to in his witness statements. As far as I can see from the notes of the hearing before Master Foster, art 18 was not referred to, let alone relied upon. There is nothing to suggest that Mr. Hall knew of art 18, or indeed that there might be relevant provisions in the constitution of the company, when he accepted his appointment , and given his total lack of experience or knowledge as to commercial matters he may have been ignorant of their existence. There is, it seems to me therefore, a real issue as to the incorporation of art 18 into any contract between Mr. Hall and the company."

110. It is common ground that Ms. Cummings served as a Director of Tangerine until her resignation on 17 October 2012. She did not have a separate director's service contract with Tangerine.

111. In my judgment, the email correspondence between Appleby and OBS, and in particular the email from Ms. Cummings to Appleby on 9 December 2011, in which she stated that the quote *"assumes that the director(s) will be indemnified under the Memorandum and Articles of Association of the Company (ies)"* demonstrate that it was clear to all parties, from the outset, that the terms on which Ms. Cummings would accept appointment as a director of Tangerine were that she would be indemnified as a director under the Articles.

112. In my view, the evidence clearly establishes that Ms. Cummings accepted her appointment as a director of Tangerine on the footing that the indemnity provisions in the Articles would be applicable to her appointment. When one has regard to the chronology

and sequence of communications and events, this is made demonstrably clear. This can be seen from the following circumstances in particular:

113. At the outset, Ms. Cummings herself made it clear that the OBS quote for her services as a director was conditional on the Articles containing indemnity provisions. Appleby wrote her back accepting her quote. Nothing was said to suggest that her assumption that she would be indemnified was wrong or inapplicable. In my view, it must surely have been reasonable for Ms. Cummings to come away with the view that her assumption about indemnity would blossom into fruition. Thus, even if Mr. Rees is correct that the Court must freeze the frame at the snapshot of what was known to Ms. Cummings on 19 December 2011, it seems to me that what she knew was that it had been agreed that she would become a Director of Tangerine entitled to indemnification.

114. The email traffic cited from December 2011 (to which Ms. Cummings was almost always a copy recipient) shows that Ms. Cummings did not sign her director's consent to act until after a copy of the indemnity provisions had been received and reviewed by those acting on her behalf at OBS.

115. A point was sought to be made by Mr. Rees about the Alternate Director Form, in furtherance of the argument as to the snapshot date and that that was the 19th December. It is plain that the earlier emails determine and flesh out the terms of Ms. Cummings' engagement. However, in any event, it is obvious that this Form was filled out because Ms. Cummings was going to be on leave on Christmas holidays and it was filled out in case needed. In my view, it really tells me little about the terms of Ms. Cummings' contract with Tangerine.

116. On 22 December 2011, Mr. Miller (at OBS) raised a specific query about the terms of the indemnity provision in an email to which Ms. Cummings was a copy recipient, further highlighting the importance of the provisions from Ms. Cummings' perspective. Whilst the suggestion as to changes in Article 149 was not accepted, the point is that the email and contents reinforce the place of prominence that the indemnity provisions held for Ms. Cummings and those acting on her behalf.

117. Ms. Cummings' own evidence, given on affidavit, is that she accepted appointment on the basis that the indemnity provisions in the Articles were applicable to her appointment. I find that evidence incapable of serious challenge. She had made her position clear from the beginning. She was an experienced director who expected to see such indemnity provisions, which are standard provisions, in the Articles. In that regard, the case is very different from the ***Globalink*** case, where there was no evidence as to the basis on which the director accepted his appointment. Here, there is an abundance of evidence.

118. Thus, whether she did in fact sign the Consent-to-act Form before she had seen the extract from the Articles or after, in my judgment, it is clear that that document and the launch resolution were not released until either she herself, or those on her behalf at OBS had seen and reviewed the indemnity provisions.

119. Much of Mr. Goodman's case on this issue takes no account of the chronology outlined, and is constructed instead by piecing together inferences from the billing records of Appleby and metadata and various versions of the Articles within the files of Appleby.

120. However, in my judgment the evidence is conclusive that the Articles were created on or before 19 December 2011, because otherwise Tangerine could not have been duly incorporated on that date.

121. There is more than ample evidence to clear the comparatively low bar of satisfying the Court that, in this case, the indemnity provisions in the Articles were incorporated in the contract which was made when Ms. Cummings was appointed as a Director of Tangerine.

122. It follows therefore, that the Court's finding on the First Preliminary Issue is that the Articles (at least the indemnity provisions in Articles 149-154) were incorporated into the terms of Ms. Cummings' appointment as a director of Tangerine. Leave to amend to introduce this point at paragraph 54A.1 of the draft Amended Statement of Claim is therefore refused.

The Second Preliminary Issue - Whether the provisions of the Articles extend to former directors.

123. It is common ground that Ms. Cummings enjoyed protection as an "*Indemnified Person*" (as defined in Article 2), during her term of office, in respect of her conduct whilst in office.

124. If the arguments advanced on behalf of Mr. Goodman were correct, this would involve the director being an "*Indemnified Person*" whilst in office and after death, but not in any intervening hiatus, for example, retirement, between leaving office and death. This would in my view be a bizarre result, and was plainly not what was intended.

125. Further, if Mr. Goodman's interpretation of the Articles were correct, the applicability of the indemnity provisions would turn in every case on the "*arbitrary touchstone*" (as described at paragraph 55 of the Defendants' written skeleton argument) of whether or not a civil action against the director in respect of his/her conduct whilst in office had been brought (and presumably concluded) before the director had left office.

126. In ***City Equitable Fire Insurance*** the Court had for consideration an Article which contained indemnity provisions. The Article in question (Article 150) was held to apply to directors and auditors, even though there was a winding up and they were therefore former directors and were former auditors. It may be useful to look at the terms of Article 150. It provided as follows:

> "*Art. 150. "The directors, auditors, secretary and other officers for the time being of the company , and the trustees (if any) for the time being acting in relation to any of the affairs of the company, and every of them, and every of their heirs, executors and administrators, shall be indemnified and secured harmless out of the assets and profits of the company from and against all actions, costs, charges, losses, damages and expenses which they or any of them their or any of their heirs, executors or administrators shall or may incur or sustain by or by reason of any act done, concurred in or omitted in or about the execution of their duty duty, or supposed duty, in their respective offices or trusts, except such (if any) as they shall*

incur or sustain by or through their own wilful neglect or default respectively, and none of them shall be answerable for any acts, receipts, neglects or defaults of the other or others of them, or for joining in any receipts for the sake of conformity, of for any bankers or other persons with whom any moneys or effects belonging to the company shall or may be lodged or deposited for safe custody, or for insufficiency or deficiency of any security upon which any moneys of or belonging to the company shall be placed out or invested, or for any other loss, misfortune or damage which may happen in their respective offices or trusts, or in relation thereto, unless the same shall happen through their own wilful neglect or default respectively."

(My emphasis)

127. In ***Arnold v Britton*** [2015] A.C. 1619, cited by the Defendants, at paragraph 15, Lord Neuberger provided further guidance in relation to the construction of contracts, a topic that has been ventilated frequently over the last few decades in the highest Courts in England. He stated:

"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote from Lord Hoffman in ***Chartbrook Ltd. v Persimmon Homes*** *[2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of the lease, (iii) the overall purpose of the lease,(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common*

sense, but (vi) disregarding subjective evidence of any party's intentions..."

128. The decision of the Board of the Judicial Committee of the Privy Council in ***Viscount of the Royal Court of Jersey v Shelton*** [1986] 1 W.L.R. 985, per Lord Brightman at 991G-992A is also useful. This case demonstrates that where the result that would be produced by one party's suggested interpretation of Articles of Association would be odd or unreasonable, clear wording is required to persuade the Court that the odd or unreasonable result was intended. There is no such clear wording to support the meaning contended for by Mr. Goodman.

129. I also accept the position articulated by Mr. Valentin, that Mr. Goodman's suggested interpretation would effectively render the indemnity provisions worthless, because a company could simply terminate a director's appointment in order to escape the engagement of the indemnity. This would mean that no meaningful protection would be provided to a director, and could turn on its head the market for Cayman funds and investment managers, which depends on professionals being prepared to act as independent directors in respect of very sizeable financial undertakings, in exchange for a relatively small fee. This on the basis that they will be fully protected against civil action save in situations where they act fraudulently or in wilful neglect or default of their duties (or with equivalent serious misconduct).

130. In respect of this Second Preliminary Issue, Mr. Goodman has referred to the Articles of Association of some other Cayman Islands Companies. In my judgment, these Articles of Association are inadmissible as an aid to interpreting the Articles and any contract between Tangerine and Ms. Cummings.

131. Even if I am wrong on the question of admissibility, I accept the Defendants' submission that, in any event, all that the survey might show is that, in some cases, the relevant indemnity provision spells out expressly that the indemnity applies to both existing and former directors. Therefore, the language of *"former director"* included in some of these other Articles is therefore only included in order to spell out, for the avoidance of doubt,

something that was already obvious. In none of the cases such as ***City Equitable Fire Insurance Co***, or the Cayman Islands cases discussed at paragraph 59 was the point taken by Mr. Goodman in relation to Issue 2, raised or canvassed. It seems doubtful to me that if it had any validity it would have been overlooked by so many well-informed and interested litigants, lawyers, and judges.

132. This point is indeed novel; but only, as Mr. Valentin commented, because it is thoroughly misconceived. It seems quite pedantic and unrealistic and is certainly not Mr. Goodman's best point.

133. It is in my view quite plain that a reasonable person having all the background knowledge available to the parties, would have understood the relevant provision to mean that as a director Ms. Cummings would be provided with indemnity in relation to her activities and conduct whilst she was a director, irrespective of when the indemnity is invoked. In terms of the dimension of time, this would be applicable whilst she was a director in office, after leaving office, or after death.

134. All that the phrase "*for the time being*" signifies, in my judgment, is that there may be different persons occupying the position of "*director*" over time. The phrase *"for the time being*" envisages, and is intended to encompass, a changing state of affairs, which is that there may be persons occupying the position of director in the future who are different persons than the persons occupying the position at the date of the Articles and incorporation of the company. It does not at all mean that a director is only covered with indemnity whilst in office and loses the right to indemnity as to matters done as director after ceasing to be a director. That defies commercial common sense and reasonableness. Indeed, the construction contended for by Mr. Goodman would have arbitrary, bizarre, and alarming consequences, especially for those professionals who engage in the business of acting as independent directors in respect of companies with sizeable financial undertakings. Thus, the phrase "*for the time being*" refers to the period of tenure as a director, and does not govern the period of indemnity.

135. Where there are Articles that refer to *"former director"* as well as "*director"* in a similar context in relation to indemnity provisions, it would seem to me that this amounts to simply making express that which is plainly contemplated and intended.

136. In relation to the Second Preliminary Issue I therefore hold that the definition of *"Indemnified Person"* (in Article 2) and the indemnity provisions (in Articles 149-152) extend to former directors, notably Ms. Cummings. I accordingly also refuse leave to amend to introduce this point at paragraph 54A.2 as sought by Mr. Goodman.

The Third Preliminary Issue - Is Ms. Cummings entitled to rely on Article 154 in circumstances where she seeks to rely on indemnification pursuant to an implied contract as opposed to indemnification pursuant to the Articles as per the wording of Article 154?

137. It does seem clear to me that if Article 154 formed part of the contract between Tangerine and Ms. Cummings, which I have held that it did, then any claim that she might have invoking Article 154 necessarily involves a claim for indemnification "*pursuant to the Articles"*.

138. I cannot see what rational basis there could be for confining Article 154 only to claims for indemnification by those directors who might also happen to be members of Tangerine. If this were the intention, the provision would have stated expressly that it was unavailable to a director unless also a member of Tangerine.

139. I now turn to consider the alternative point pleaded on behalf of Mr. Goodman that any advance of funds under Article 154 is only available to current directors (and not former directors such as Ms. Cummings), as the express purpose of the Article is '*to meet expenditures incurred for the purpose of enabling such Indemnified Person to properly perform his or her duties to the Company"*.

140. In my view, the plain purpose of the Article is to ensure that Tangerine is obliged to pay the expenses incurred by an Indemnified Person in defending any civil (or other) action on a rolling basis as the action progresses (rather than only after the final disposition of the action).The provision is in this sense consistent with, and gives practical effect to, the function of indemnity provisions generally, which is to ensure that the indemnified party

"shall never be called upon to pay". ***Firma C-Trade S.A. v. Newcastle P. & I. Association*** (***"The Fanti"***)

141. This argument by Mr. Goodman also fails. In my judgment, the answer to the Third Preliminary Issue is that in the circumstances, Ms. Cummings is entitled to rely on Article 154. Leave to amend to introduce this point at paragraph 54A.3 of the draft Amended Statement of Claim is therefore refused.

The Fourth Preliminary Issue - Is Ms. Cummings entitled to rely on Article 154 in respect of expenses incurred in defending this action?

142. In my judgment, Article 154 is plainly not a *"hold harmless clause"*.

143. I accept as logical and persuasive Mr. Valentin's argument that if this were the correct characterisation of Article 154, it would render it "*a singularly pointless provision*" (see paragraph 75 of the written skeleton argument), because it would add nothing to the indemnity provisions in Article 149 (which, by contrast with Article 154, actually uses the words *"hold harmless"*) and Article 151 (which does not).

144. It is plain that that Article 154 clearly serves a different purpose, namely to ensure that "*Expenses...shall be paid by the Company in advance of the final disposition of such action...."*

145. It was also correctly contended on behalf of the Defendants that this is not the language of a *"hold harmless"* clause, or a provision which requires that a damages claim be pursued to its conclusion before any payment in respect of the Indemnified Person's expenses is required. On the contrary, by its express terms, Tangerine's payment obligation under Article 154, is predicated only on (i) relevant expenses having been incurred by the Indemnified Person (which they have), and (ii) receipt of an undertaking to repay such amount as it shall "*ultimately*" be determined the Indemnified Person is not entitled to retain (which it has). The language used is mandatory and otherwise unconditional: *"shall be paid"*, with payment to be made "*in advance of the final disposition of such action."*

146. In my judgment, accordingly, I find in respect of the Fourth Preliminary Issue, that Ms. Cummings is entitled to rely on Article 154 as against Tangerine in respect of the expenses that she has incurred in defending this action.

Disposition

147. It follows therefore that the Preliminary Issues have been resolved in the manner outlined above, and that the Defendants have succeeded on all of them. Costs are therefore awarded to the Defendants against the Plaintiff, to be taxed if not agreed. The Amended Summons of 23 October 2017 is also dismissed, with costs to the Defendants against the Plaintiff, to be taxed if not agreed.

148. It remains for me to just thank the parties for their patience in awaiting this decision. Accordingly, trial of Issue 5 may, if necessary, now be fixed for the first open date convenient to the parties and the Court.

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT