

Judgment 18/2013

**Perpetual Media Capital Limited
and Enevoldsen et al
Royal Court
26th June, 2013**

Application for determination of preliminary issues as to whether the Defendants are entitled to invoke indemnity or exemption provisions from which they benefitted as directors.

**Approved Text
26.06.2013**

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:	PERPETUAL MEDIA CAPITAL LIMITED	Plaintiff
	-and-	
	DAVID ENEVOLDSEN	First Defendant
	NICHOLAS HANNAH	Second Defendant
	ADRIAN HOWE	Third Defendant
	BENJAMIN TUSTIN	Fourth Defendant
	MARLBOROUGH TRUST COMPANY LIMITED	Fifth Defendant

Hearing date: Thursday 28 February 2013

Judgment handed down: 26th June 2013

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiff: Advocate A C Williams

Advocate for the Defendants: Advocate I C Swan

Cases & legislation referred to:

The Royal Court Civil Rules, 2007

The Companies (Guernsey) Law, 2008

The Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2008

The Companies (Guernsey) Law, 1994

John v Price Waterhouse [2002] 1 WLR 953

In re New British Iron Company, ex parte Beckwith [1898] 1 Ch 324

Globalink Telecommunications Ltd v Wilbury Ltd [2002] B.C.C. 958

Hickman v Kent or Romney March Sheep-Breeders' Association [1915] 1 Ch 881

In re Anglo-Austrian Printing and Publishing Union (Isaacs' Case) [1892] 2 Ch 158

Molineaux v The London, Birmingham and Manchester Insurance Company Limited [1902] 2 KB 589

In re Brazilian Rubber Plantations and Estates Limited [1911] 1 Ch 425

In re City Equitable Fire Insurance Company Limited [1925] 1 Ch 407

Gibson v Barton (1874-75) LR 10 QB 329

Registrar of Restrictive Trading Agreement v W.H. Smith & Son Ltd [1969] 1 WLR 1460

Viscount of the Royal Court of Jersey v Shelton [1986] 1 WLR 985

The Reform (Guernsey) Law, 1948

The Companies (Transitional Provisions) Regulations, 2008

The Companies (Transitional Provisions) (Amendment) Regulations, 2009

Bennion on Statutory Interpretation (5th ed.)

Vinos v Marks & Spencer plc [2001] 3 All ER 784

Effort Shipping Co Ltd v Linden Management SA [1998] 1 All ER 495

British and Beningtons Limited v North Western Cachar Tea Company Limited [1923] AC 48

Chitty on Contracts (30th ed.)

The Mayor and Commonalty and Citizens of the City of London v Reeve and Company Limited (unreported, 25 February 2000)

Bosma v Larsen [1966] 1 Lloyd's Rep. 22

Telfair Shipping Corporation v Innersea Carriers SA [1985] 1 WLR 553

Introduction

1. By a Cause tabled on 21 April 2011, the Plaintiff claims £5,536,403 and US\$17,077,353 from the Defendants in respect of their alleged breaches of duty. Those allegations of breach of duty arise out of film funding arrangements made by the Plaintiff in respect of three films with the titles "Ironclad", "Game of Death" and "Machete", which, it is said, involved the Defendants causing the Plaintiff to enter into loan agreements under which the Plaintiff has not been repaid in full and does not now expect that the sums still due to it will be forthcoming. The sums claimed in the Cause represent the aggregate of the shortfalls on the three funding arrangements. At the material times, the First to Fourth Defendants were directors of the Plaintiff and were, or controlled, the shareholders of the Plaintiff. They were also directors of the Fifth Defendant. At para. 37 of its Cause, the Plaintiff pleads that the Fifth Defendant "provided, at all material times, the Directors, administration, management and fiduciary services to" the Plaintiff.
2. The Defendants' Defences were lodged on 22 July 2011 and thereafter procedural steps relating to disclosure were underway. On 29 June 2012, the Court made a Consent Order giving the Defendants leave, pursuant to rule 59 of the Royal Court Civil Rules, 2007, to amend their Defences. One of the amendments made was to plead a new paragraph 52B in the following terms, in which the Plaintiff is abbreviated as "PMCL" and the Fifth Defendant as "Marlborough":

“Further, Article 172 of PMCL’s Articles of Association provides:

“The Directors Managing Directors managers agents Auditors Secretary and other officers or servants for the time being of the Company shall be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they ... may incur by reason ... of any contract entered into or any act in or about the execution of their respective offices except such (if any) as they shall incur by or through their own wilful act neglect or default respectively and none of them shall be answerable for the acts receipts neglects or defaults of the others of them ... or for any loss misfortune damage resulting from any such cause aforesaid or which may happen in or about the execution of their respective offices ... except the same shall happen by or through their own wilful act neglect or default.”

If, which is denied, the First to Fourth Defendants, or any of them, breached their duties in the manner alleged by PMCL and PMCL has, as a consequence of any such alleged breach, suffered any loss or damage then by reason of Article 172:-

- i) The First to Fourth Defendants were and are not answerable for any loss or damage suffered by PMCL as a result of any contract which PMCL entered into or for any other loss or damage which PMCL has suffered in or about the execution by the Defendants of their respective offices;*
- ii) The First to Fourth Defendants are not answerable for the acts and defaults of each other; and/or*
- iii) The First to Fourth Defendants are or are entitled to be fully indemnified out of the assets and profits of PMCL for any liability which they have incurred or may incur in the future (including any liability for interest and/or legal costs) as a result of any contract PMCL entered into or any act undertaken by those Defendants in or about the execution of their respective offices; and/or*
- iv) If, contrary to the Defences pleaded herein, the First to Fourth Defendants, or any of them, are held to be liable to PMCL, the liability of PMCL to indemnify the First to Fourth Defendants is set-off pro tanto against any liability to PMCL, thereby extinguishing it. Accordingly PMCL’s claim should be struck out against the First to Fourth Defendants on the grounds of circularity.*

Further if, which is denied, Marlborough owed the duties alleged by PMCL and breached them in the manner alleged, Marlborough is entitled to the same exemptions and protections under Article 172 as the First to Fourth Defendants by reason of the fact that Marlborough, on PMCL’s case, was a manager, agent, officer or servant of PMCL.”

3. The parties agreed that this line of defence, if raised successfully, would amount to a complete answer to the Plaintiff’s claim. Accordingly, after some discussion between their respective Advocates at an interlocutory hearing, they identified some matters to be resolved as preliminary issues, which were set out in a Consent Order dated 14 December 2012 as follows:

- “1.1 whether the Plaintiff’s Articles of Association provide the Defendants, or any of them, with an exemption from and/or an indemnity against any liability that would otherwise attach to them as pleaded in the Plaintiff’s Cause;*
- 1.2 if the answer to 1.1 (above) is yes, whether such exemption and/or indemnity is void pursuant to section 157 of the Companies (Guernsey) Law 2008 (as amended) or remains valid as regards the liabilities pleaded in the Plaintiff’s Cause by reason of Regulation 10 of the Companies (Transitional Provisions) Regulations 2008;*
- 1.3 whether in consequence of the answers to 1.1 and 1.2 (above) paragraph 52B of the Defendants’ Amended Defences dated 22 June 2012 provides the Defendants, or any of them, with a complete defence to the Plaintiff’s Cause dated 18 April 2011.”*

The issues raised turn principally on questions of law and the parties lodged Skeleton Arguments in support of their competing contentions in the run-up to the hearing, which took place on 28 February 2013 against a background of a small bundle of agreed documents.

Summary of relevant facts

4. I should preface this summary with the following clarification. As Advocate Swan correctly pointed out, this was the trial of these preliminary issues; they will not be addressed again even if the Court finds in favour of the Plaintiff and, to the extent that it finds in favour of any Defendant, that will conclude matters in dispute between that Defendant and the Plaintiff. The issues are to be determined on the basis of combining the admitted facts, and for these purposes the Defendants take the case pleaded against them on liability as having been established, and inferences that can properly be drawn from the documents.
5. The Plaintiff was incorporated as Perpetual Film Holdings Limited on 16 October 2007. Its Memorandum and Articles of Association of that date included Article 153, headed "INDEMNITY". The subscribers were Marlborough Trust Company Limited, the Fifth Defendant, and Marlborough Nominees Limited. Those two companies were appointed as the Plaintiff's first directors. The two shares to which they subscribed were transferred on or about 4 March 2008 to the Second and Fourth Defendants.
6. The Plaintiff changed its name to Perpetual Media Capital Limited on 17 February 2009. On or about 17 March 2009, the Fourth Defendant's share in the Plaintiff was transferred to Perpetual Media Holdings Limited. On or about 20 March 2009, the Second Defendant transferred his share in the Plaintiff to Perpetual Media Holdings Limited and the Plaintiff issued three shares to Rockmount Media Holdings Limited. On 20 March 2009, the two corporate directors resigned and were replaced as directors by the First to Fourth Defendants. By written resolution on 23 March 2009, Rockmount Media Services Limited and Perpetual Media Holdings Limited, as the members of the Plaintiff, resolved to adopt replacement Articles of Association, which included Article 172, to which reference is made in paragraph 52B of the Defendant's Amended Defences. The decisions to enter the film funding arrangements that form the basis of the Plaintiff's claim were taken in July and August 2009.
7. The position of the Fifth Defendant was described in an e-mail dated 19 March 2009 sent by the Fourth Defendant to three gentlemen associated with the structure of which Rockmount Media Holdings Limited forms a part:

"This is not an ordinary client relationship. [The Plaintiff] is managed and controlled entirely in Guernsey and we are not simply a rubber stamping operation. The reasons for this are as follows:

1. *We are shareholders in the business and therefore it is in our vested interests to ensure its success.*
2. *We have been working in film finance for 6 years now and been bridging for 4 therefore our knowledge and expertise in this area is far greater than most people in the industry. We utilise this expertise to make informed decisions and add value to the business.*
3. *We wish to protect the interests of the shareholders and therefore must be involved in all transactions from start to finish and have a complete understanding of the business.*
4. *Clearly it is required from a tax position to be fully managed from Guernsey.*

In terms of the resources we are providing to [the Plaintiff] this will consist of one full time member of staff (with associated overhead costs), support and cover for that person from an administration team, time from me as the principal director in charge of [the Plaintiff] assessing each deal and managing the company as a stand alone business, and other director input in each decision being made for the business and ensuring their knowledge of the business is maintained.

These are some of the activities that we will be undertaking:

1. *Bookkeeping all transactions and reporting P&L and balance sheet on a regular basis.*
2. *Assessing each deal from the outset for commercial viability.*
3. *Undertaking due diligence on all parties to each deal.*
4. *Producing continual cash flow projections for each deal and the company as a whole.*
5. *Managing deal flow/cash flow to ensure funds are utilised as much as possible and that sufficient cash is available for deals in the pipeline. This requires an understanding of each film's financial closure and any likelihood of delays or early repayment.*
6. *Reviewing all security and deal documentation.*
7. *Holding several investment committee meetings for each deal.*
8. *Liaising with third party lenders to ensure cash availability matches deal flow.*
9. *Producing loan agreements with lenders, managing their expectations, accounting for their returns and maintaining those relationships for future lending.*
10. *Very regular meetings with PMCA to discuss business plan, recent performance and current deal position.*
11. *Managing alternative film finance structures whereby [the Plaintiff] can earn from advisory fees and commissions.*
12. *Assessing and negotiating potential joint ventures with film financiers, eg Prescience.*

In terms of our profitability from providing these services as a trust company we are working at an almost cost level. To supply one dedicated member of staff and a large chunk of my time if we were to charge on our normal basis then a ball park figure would be £200k. We are taking the view that our profits will come from dividend payouts and value within the company.

We have considered the possibility of outsourcing some or all of the admin function however the knowledge level required to be able to run such a company is substantial and very hard to come by. The element of control that we maintain by dealing with this in-house is invaluable for the company and the shareholders.

To summarise we treat this company as a standalone business where we provide both an in depth administrative function and also a highly knowledgeable management control with a vested interest."

Summary of parties' submissions

8. On behalf of the Defendants, Advocate Swan submitted that the predecessor to Article 172 of the Plaintiff's Articles of Association, Article 153, was perfectly valid in Guernsey law when the Plaintiff was incorporated. The exemption element provides a stronger basis for defeating the Plaintiff's claim but the indemnity element assists all five Defendants in any case. When the Articles of Association were replaced in 2009, no modification was made to Article 153, save that it was re-numbered as Article 172. Accordingly, he suggested that the answer to issue 1.1 had to be "yes". The issue, therefore, was not about the validity of the provision made by the Plaintiff for its officers, but the effect of section 157 of the Companies (Guernsey) Law, 2008 (hereafter referred to as "the 2008 Law") and, in particular, the effect of the transitional arrangements extending the time during which provisions such as Article 172 (as it became) could be relied upon. He argued that the wording was clear and meant that any director for the time being of a company was permitted to rely on such an exemption or indemnity provision until such time as the legislature terminated the director's ability to rely on it. For those reasons, in respect of issue 1.2, the exemption or indemnity remained valid

and was not void. He further noted that the position of the Fifth Defendant was better than the position of the First to Fourth Defendants, because the limitations on exemptions and indemnities for directors introduced into Guernsey law by section 157 did not affect the more liberal position in relation to a company's managers. Accordingly, the answer to issue 1.3 was also yes and the Plaintiff's claims against all five of the Defendants should be dismissed.

9. In response, on behalf of the Plaintiff, Advocate Williams submitted that the Defendants were labouring under an incorrect basic premise. Because they were not privy to the contract between the members of the Plaintiff inter se and between each of them and the Plaintiff company, they could not rely directly on the terms of Article 172 (or its predecessor, Article 153), meaning that issue 1.3 had to be answered "no". In the absence of any evidence that the Defendants accepted their appointments with provision being made including the exemption or indemnity contained in Article 153 or 172, there were no grounds for implying that this was the case, meaning that issue 1.1 should first be answered "no". In particular, the basis on which the Fifth Defendant was appointed to act in respect of the Plaintiff involved the resolution of a complex factual question which was not suitable for determination at a preliminary hearing. However, if that issue were to be resolved against the Plaintiff in respect of the First to the Fourth Defendants, the chronology showed that they did not assume their positions as directors of the Plaintiff until after the commencement of the 2008 Law, meaning that the exemption and indemnity provision could not be applied to them under the extension offered by the transitional arrangements. Accordingly, issue 1.2 should be answered "no".

Existence of exemption/indemnity

Construction of clause

10. Original Article 153 of the Articles of Association of the Plaintiff provided:

"The Directors Managing Directors managers agents Auditors Secretary and other officers or servants 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 their respective heirs and executors shall be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they or their respective heirs or executors may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts except such (if any) as they shall incur by or through their own wilful act neglect or default respectively and none of them shall be answerable for the acts receipts neglects or defaults of the others of them or for joining in any receipt for the sake of conformity or for any bankers or other person with whom any moneys or assets of the Company may be lodged or deposited for safe custody or for any bankers or other persons into whose hands any money or assets of the Company may come or for any defects of title of the Company to any property purchased or for insufficiency or deficiency of or defect in title of the Company to any security upon which any moneys of the Company shall be placed out or invested or for any loss misfortune or damage resulting from any such cause as aforesaid or which may happen in or about the execution of their respective offices or trusts except the same shall happen by or through their own wilful act neglect or default."

When the Plaintiff resolved on 23 March 2009 that it "*shall adopt the attached articles of association from the date upon which this special resolution becomes effective*", Article 172 contained identical wording.

11. I have set the Article out in full to show that the wording is not precisely the same as quoted in paragraph 52B of the Defendants' Amended Defences and also to show the breadth of its coverage. The Article falls into three parts. The opening words explain who can benefit from what follows. The next part provides that those persons "*shall be fully indemnified*", albeit not in respect of any expenses or liability incurred "*by or through their own wilful act neglect or default*". This part amounts to an indemnity provision attaching to such of their personal defaults as are covered. The final part provides that "*none of them shall be answerable*" for

the defaults of the others, once again subject to an exception for those occurring “*by or through their own wilful act neglect or default*”. Because they are “*not answerable*”, this is treated as an exemption provision.

Article for benefit of directors – implied incorporation

12. By section 20(3) of the 2008 Law, which was inserted by section 3 of the Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2008:

“Subject to the provisions of this Law, the memorandum and articles of a company are, from the time of incorporation, binding on the company and its members in all respects as if the memorandum and articles –

- (a) were comprised in an agreement duly executed by the company and each member, and*
- (b) contained covenants on the part of the company and each member to observe all provisions thereof.”*

Very similar provision was made by section 6(3) of the Companies (Guernsey) Law, 1994. There is no real issue between the parties that the effect of such statutory provisions was accurately described by Ferris J in *John v Price Waterhouse* [2002] 1 WLR 953, 960:

“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.”

13. The indemnity and exemption provision made in Article 153 or 172 of the Plaintiff’s Articles of Association is relied on by the First to Fourth Defendants as a result of them holding office as directors rather than as members. As it happens, the Second and Fourth Defendants were for just over one year also members of the Plaintiff, but no reliance is placed by them on that status as making them different from the First and Third Defendants, who were never members. Similarly, the Fifth Defendant relies on Article 153 or 172 in response to the way that the Plaintiff’s Cause pleads at paragraph 37 that it “*provided, at all material times, the Directors, administration, management and fiduciary services to*” the Plaintiff and not as a result of it having been a subscribing member of the Plaintiff until it transferred its share to the Second Defendant. Accordingly, the privity of contract point advanced by the Plaintiff has been acknowledged on behalf of the Defendants because their approach is that provision was made for them in terms of Article 153 or 172 by virtue of the manner in which they accepted office or were appointed rather than through anything express.
14. Both Advocates took the Court to various passages in case law from England and Wales referring to the approach to be taken to incorporation into a contract of a term contained in the Articles of Association. By reference to *In re New British Iron Company, ex parte Beckwith* [1898] 1 Ch 324 and *John v Price Waterhouse* (*supra*), Advocate Williams submitted that the court will not, without more, imply a term and that it was, therefore, necessary to determine this factual issue after hearing evidence. Although he acknowledged that the threshold for incorporation is a low one, because the Defendants had chosen not to submit any evidence, relying solely on the documents placed before the Court, which included four “standard” letters from the First to Fourth Defendants dated 20 March 2009 in which that confirmed without any elaboration that they accepted appointment as directors of the Plaintiff, he argued that they had failed to pass the evidential threshold required. He relied, in particular, on the approach taken by Stanley Burnton J in *Globalink Telecommunications Ltd v Wilmbury Ltd* [2002] B.C.C. 958, in which (at para. [31]) His Lordship commented about a standard form indemnity provision:

“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.”

15. Advocate Swan referred to this passage as being the “*high point*” of the Plaintiff’s submissions on this issue and proceeded to demonstrate why that conclusion was distinguishable in the present case. He noted that the *Globalink* case related to a question of costs and was an appeal from the Master, before whom the issue had not been dealt with in this way. Unlike the Mr Hall to whom reference is made, the First to Fourth Defendants were all more clearly involved with the affairs of the Plaintiff, as explained in the Fourth Defendant’s message of 19 March 2008. The Fifth Defendant, which the other Defendants controlled, was a subscriber when the Plaintiff was incorporated and one of its first directors. Their level of knowledge and understanding of how the company intended to approach Article 153 or 172 was as great as it could be and an appropriate inference about their experience and knowledge of relevant commercial matters can properly be drawn. He further suggested that the other case on which the Plaintiff relied for the privity argument advanced by Advocate Williams, *Hickman v Kent or Romney March Sheep-Breeders’ Association* [1915] 1 Ch 881, may be *per incuriam* because earlier decisions of higher courts had not been cited to the court. It is beyond the scope of this judgment to reach such a conclusion, but I have some sympathy with that contention.

16. Advocate Swan also referred to the line of authority showing that directors frequently accept office on the footing of the Articles of Association, which starts with *In re Anglo-Austrian Printing and Publishing Union (Isaacs’ Case)* [1892] 2 Ch 158, in which Stirling J stated (at page 164):

“... where a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration, and all the benefits which those articles provide for directors.”

When the case reached the Court of Appeal, Bowen LJ clarified the position further (at page 167):

“What is the effect of the signature of the articles of association by this gentleman? At all events, as soon as he acts as a director of the company, and places himself in the position for which the articles provide, these articles shew the terms of the implied contract which thereupon arises between himself and the company. That is the effect of these articles – they amount to an offer put forward by the company to persons intending to become directors of the terms on which the directors are to act. It is perfectly true that the offer is contained in articles, which are not drawn up as between the company and its directors, but nevertheless the company puts forward the terms of the articles as the terms by which it will be bound; and the director by becoming and acting as director of the company accepts that position.”

A similar statement of the law was given by Cozens-Hardy MR in *Molineaux v The London, Birmingham and Manchester Insurance Company Limited* [1902] 2 KB 589, 596, to which reference was made by Romer J in *In re Brazilian Rubber Plantations and Estates Limited* [1911] 1 Ch 425 in relation to an exculpatory provision in the Articles of the company, before adding (at page 440):

“I think upon its construction this article is intended to relieve directors who act honestly from liability for damages occasioned even by their negligence, where such negligence is not dishonest. And, having regard to the above decision, I do not see

how to escape from the conclusion that this immunity was one of the terms upon which the directors held office in this company. I do not think it is illegal for a company to engage its directors upon such terms. I do not think, therefore, that an action by this company against its directors for negligence, where no dishonesty was alleged, could have succeeded.”

17. Although the position in England and Wales changed through primary legislation enacted in 1929, following in the wake of later cases such as *In re City Equitable Fire Insurance Company Limited* [1925] 1 Ch 407, the common law position remained as set out in these cases and the effect of them has, I understand, been treated as applying throughout many common law jurisdictions where the legislature has chosen not to intervene. I am, therefore, satisfied that the approach set out in these cases is the approach that should be taken in Guernsey law, subject only to situations where legislation dictates otherwise, which is now the case by virtue of section 157 of the 2008 Law making void provisions exempting or indemnifying directors from liability. Indeed, the reference in section 157(3) to such provisions being “*contained in a company’s memorandum or articles*” further confirms that the source of a director’s exemption or indemnity might be solely from the company’s constitutional documents.
18. The comments of Stanley Burnton J in the *Globalink* case are, in my view, not of assistance to the Plaintiff. The circumstances in that case were, of course, quite different from the present case and are, in my view, specific to the factual situation rather than of more general application, unlike the ruling given by Bowen LJ, which I found particularly helpful. Whilst there may be no evidence from any of the First to Fourth Defendants setting out in any detail the basis on which they understood they were taking office, I consider that it is a proper inference for me to draw that they were all sufficiently involved in the establishment of the Plaintiff the previous year and, as directors of the Fifth Defendant, had approved the subscription by that company to the Plaintiff’s constitutional documents, meaning that they were accepting the offer of the Plaintiff to act as its directors on the terms set out in the Articles of Association, including, and most importantly, original Article 153. They have passed the low threshold for incorporation of this implied term.
19. Advocate Williams advanced a further argument based on timing. The question of indemnity or exemption was only raised quite late in the day when the Defendants sought agreement to the proposed amendment to include what is now paragraph 52B of its Amended Defences. This late development pointed to the Defendants not having been aware of the existence of the provision at the time of their appointments. Although I carefully weighed in the balance whether this factor affected the conclusion I have reached, I decided that it did not. I regard it as reasonable for me to bear in mind that the involvement of the First to Fourth Defendants in the Fifth Defendant is such that they are not inexperienced or only occasional directors of companies. Indeed, they run a licensed fiduciary operation. Accordingly, whilst their first thought may not have been to plead the benefit of the indemnity or exemption provision in the Plaintiff’s Articles of Association, I do not regard that initial oversight as displacing the general approach articulated by Bowen LJ. In my judgment, therefore, in principle the First to Fourth Defendants take the benefit of the indemnity or exemption provided by Article 153 or 172 of the Plaintiff’s Articles of Association.

The Fifth Defendant

20. As Advocate Swan acknowledged, the position of the Fifth Defendant is “*more complex*”. In his submissions, Advocate Williams highlighted the definition of “*manager*” given in *Gibson v Barton* (1874-75) LR 10 QB 329, 336:

“A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is intrusted with power to transact the whole of the affairs of the company.”

This passage was cited with approval by Lord Denning MR in *Registrar of Restrictive Trading Agreement v W.H. Smith & Son Ltd* [1969] 1 WLR 1460, 1467, where His Lordship continued:

“That passage was no doubt in the mind of Jenkins L.J. in In re Johnson & Co. (Builders) Ltd. [1955] Ch. 634, 661, where he said:

“the phrase ‘manager of the company’ prima facie, according to the ordinary meaning of the words, connotes a person holding, whether de jure or de facto, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company’s benefit”.

That is the meaning of the word “manager” in the Companies Acts 1862-1967 and we should apply it here also. The word “manager” means a person who is managing the affairs of the company as a whole.

The word “officer” has a similar connotation. “Officer” may include, of course, a person who is not a manager. It includes a secretary. It would also include an auditor, and some others. But the only relevant “officer” here is an officer who is a “manager”. In this context it means a person who is managing in a governing role the affairs of the company itself.”

21. It is acknowledged that a different company performed the role as secretary to the Plaintiff. Advocate Williams suggests that there are factual questions that need to be resolved as to whether the Fifth Defendant performed the roles suggested by the Plaintiff and so owed the duties alleged and that such a question is not suitable for determination at a preliminary hearing. In response, Advocate Swan points to the way in which the Fifth Defendant’s role has been pleaded in the Plaintiff’s Cause, in particular at paragraphs 37 and 38. In my view, he is entitled to submit that, on the Plaintiff’s own case, it has pleaded that the Fifth Defendant *“provided, at all material times, the ... management ... to [the Plaintiff]”*. On the basis that the resolution of these preliminary issues accepts the Plaintiff’s pleaded case, I consider that I cannot go behind the way the Plaintiff’s case is put against the Fifth Defendant. Accordingly, I am satisfied that the Fifth Defendant can properly be regarded as a “manager” of the Plaintiff and so, in principle, entitled to invoke the benefit of Article 153 or 172 of the Plaintiff’s Articles of Association.
22. I further find that there is, in any event, support for that conclusion in the material placed before the Court. The e-mail of 19 March 2008 sent by the Fourth Defendant to the three gentlemen associated with the Rockmount structure makes it quite clear that the role performed by the Fifth Defendant, primarily through the Fourth Defendant, but with appropriate involvement from the First to Third Defendants and actual work being undertaken by one or more employees of the Fifth Defendant, was to ensure that the entirety of the Plaintiff’s management was undertaken in Guernsey by them. Whilst there may not have been any formal agreement appointing the Fifth Defendant to that role, that was the de facto position. Although Advocate Williams accurately noted that no mention is made of the Articles of Association in the Fourth Defendant’s e-mail, there is no real suggestion other than that the management function was undertaken by them and, in similar fashion to the incorporation of Article 153 or 172 for the First to Fourth Defendants, the Fifth Defendant is also, in my judgment, in principle entitled to take the benefit of the indemnity or exemption provided in that manner.

Conclusion on issue 1.1

23. For these reasons, the answer I give to the first of the preliminary issues is “yes”. The Plaintiff’s Articles of Association provide all five of the Defendants with an exemption from and/or an indemnity against any liability that would otherwise attach to them as pleaded in the Plaintiff’s Cause. I will, therefore, move on to consider issue 1.2.
24. Before doing so, I should add that I am also satisfied, as a result of the Jersey Privy Council decision in *Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985, that no difficulty arises because the Defendants seek to invoke the indemnity provision afforded to

them from the Plaintiff's Articles of Association against a claim made by the company itself. The exculpatory provision in that case was substantively similar to Article 153 or 172 in the present case and, in the opinion given by Lord Brightman (at page 991), it was stated that the article:

"... is worded in a manner which is apt to exonerate a director who has innocently participated in an act which is ultra vires the company and to excuse him from the obligation which would otherwise have lain upon him to reimburse the company for any loss thereby occasioned. ... The directors are prima facie liable to the company for the loss. But the liability was incurred "in the conduct of the company's business". The directors are therefore entitled to be indemnified against such liability. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him. ... The plain purpose of article 46 was to give a blanket exoneration to a director for any mistake that he has made which is not tainted with dishonesty."

Although that case related to the commission of an act which was ultra vires the company, I regard the principle established by it as equally applicable where the allegation by the company against a director, or a former director, is of breach of duty.

Effect of transitional arrangements

25. Issue 1.2 involves a question of statutory interpretation. Section 157 of the 2008 Law provides:

- "(1) Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.*
- (2) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as is permitted by section 158 or 159.*
- (3) This section applies to any provision, whether contained in a company's memorandum or articles or in any contract with the company or otherwise."*

Section 158 enables a company to purchase and maintain insurance for a director of the company and section 159 makes provision for qualifying third party indemnities for directors, which is not relevant to the issue to be determined in this case. The Companies (Guernsey) Law, 2008 (Commencement) Ordinance, 2008 was made by the States Legislation Select Committee on 19 May 2008 under the relevant provisions of the 2008 Law and the powers conferred on it by Article 66(3) of the Reform (Guernsey) Law, 1948 and brought these provisions into force with effect from 1 July 2008.

26. Between the making of the Commencement Ordinance and the date the provisions of the 2008 Law came into force, the Commerce and Employment Department of the States of Guernsey made the Companies (Transitional Provisions) Regulations, 2008 (hereafter referred to as "the 2008 Regulations"). Regulation 10 provides:

- "(1) Section 157(1) and (2) of the new Law does not apply to an exemption from liability or indemnity provided before the date of commencement of the new Law until the 1st January, 2010.*
- (2) Accordingly –*
 - (a) the validity and enforceability of any such exemption from liability or indemnity shall continue to be governed, until the 31st December, 2009, by the provisions of the 1994 Law and the other relevant principles of law in force immediately prior to the date of commencement of the new Law, and*
 - (b) any such exemption from liability or indemnity –*

- (i) *shall, after that date, be deemed to be void only to the extent necessary to ensure compliance with section 157(1) or (2), as the case may be, and*
- (ii) *subject to that, may be read as if it were lawful to the fullest extent permitted by the new Law.”*

Whether or not the First to Fourth Defendants are able to rely on the exemption or indemnity given by Article 153 or 172 of the Plaintiff's Articles of Association turns on whether this transitional provision preserves the exemption or indemnity in their favour or whether the benefit of it was lost to them because they only took office on 20 March 2009, that date being after the commencement of “*the new Law*”, which is defined in regulation 24(1) as the 2008 Law. In particular, the parties' submissions concentrated on the meaning of the word “*provided*” in regulation 10(1).

27. In construing regulation 10 of the 2008 Regulations, the Court can, and should, have regard to the entirety of the measure. I regard it as significant that a series of specific transitional provisions was thought necessary to manage the transition from the regime under the 1994 Law to the new regime under the 2008 Law. There were, without doubt, significant changes being made by the 2008 Law. It was understandable that those changes should not happen overnight. It was, therefore, thought appropriate to allow a period of grace for persons and companies affected to enable them to adjust. The Plaintiff fell within the definition of “*existing company*” in regulation 24(1) and so took the benefit of the various extended dates before compliance with the new regime was mandatory.
28. Having regard to the other provisions in the 2008 Regulations, I can see that different periods of grace for adjustment were conferred depending on the subject-matter. Regulation 3 addressed section 16 of the 2008 Law dealing with company's articles of incorporation. The date chosen for the new regime to apply was also 1 January 2010. Insofar as an exemption or indemnity was provided through the medium of a company's articles of association, rather than being contained in some separate contract, this coincidence of dates appears at that time to have been a deliberate choice, creating a consistent approach by allowing an 18-month lead-in period before exemptions and indemnities provided to directors of companies in existence on 1 July 2008 were rendered invalid.
29. That impression, however, is less forceful when one has regard to the amendment of the date in regulation 3(2) of the 2008 Regulations by the Companies (Transitional Provisions) (Amendment) Regulations, 2009, which were made by the Department on 10 March 2009 to enter into force 20 days thereafter. Those Amendment Regulations further extended the period during which a company's Articles of Association were valid and enforceable to 1 July 2010. There was no corresponding amendment of regulation 10 and so no extension of the period of grace relating to section 157 of the 2008 Law. This change of date, which was subsequently further extended, does not, however, affect the way in which I have construed regulation 10 of the 2008 Regulations.

Significance of new regime

30. Making such exemptions and indemnities void was, I believe, a significant change in Guernsey. Whilst I understand it reflects developments in other jurisdictions, it will potentially have produced some impact on corporate service providers in the Island. At section 3.4 of the supplementary States Report from the Commerce and Employment Department leading to the enactment of the 2008 Law, it was stated that:

“The Law contains provisions ensuring appropriate standards of corporate governance from Guernsey company directors. Directors must act diligently, in good faith and in the best interests of the company. With respect to directors' civil liability, a company will be unable to indemnify its directors who have acted negligently or breached their duty to the company. However, the company may purchase professional indemnity insurance for the directors. The Law will permit the Royal

Court to excuse a director from civil liability to the company where it is satisfied that the director has acted honestly and reasonably, and should fairly be excused. This matches equivalent relieving provisions available to trustees.”

The reference to excusing a director from liability was given effect by section 522 of the 2008 Law. I regard the fact that the change relating to indemnifying directors was sufficiently noteworthy to warrant explicit reference in the States Reports as being support for my view that what became section 157 marked a significant departure from the previous position, justifying there being a period of grace under the transitional arrangements to facilitate adjustment by all those affected by it.

31. I further note that the wording in regulation 10(1) refers to such indemnities and exemptions being void “*only to the extent necessary to ensure compliance with section 157*” and being capable of being treated as lawful “*to the fullest extent permitted by the new Law*”. I consider that these clarifications indicate that the legislative intent was to retain the availability of exemptions and indemnities for existing companies, save only to the extent that would be required when section 157 finally entered into force.
32. The exemption from liability or indemnity in this case was provided by the Plaintiff through its Articles of Association. Following the analysis of the incorporation point I have already undertaken, through this medium, the company offered the exemption and indemnity in this form to any of its directors for the time being and did so on this basis from the date of its existence without distinguishing between them. Accordingly, I treat Article 153 as having amounted to an open offer of an exemption from liability and an indemnity to any person who assumed office as a director because, in the words of Bowen LJ in *Isaac’s Case*, “*the company puts forward the terms of the articles as the terms by which it will be bound*”.

Meaning of “provided”

33. On behalf of the Plaintiff, Advocate Williams submitted that, on the date of appointment of the First to Fourth Defendants as directors of the Plaintiff, section 157 of the 2008 Law already had effect and so precluded the Plaintiff from providing the exemption or indemnity on which those Defendants purport to rely. This was because the first time at which those particular directors could claim the benefit of any exemption or indemnity would be on that date. Accordingly, the exemption or indemnity in question could only have been provided to them on 20 March 2009 and section 157 of the 2008 Law renders such provision void. Conversely, Advocate Swan submitted that the correct approach was to consider the way in which the exemption and indemnity was provided by the company to any holder of the office for the time being. (I can also mention, almost in passing, that Advocate Williams’ suggestion that the fact that the Plaintiff had been dormant from incorporation until after the changes made to its officers and the Articles of Association in March 2009 meant this was a new undertaking at that time overlooks the effect of section 1 of the 2008 Law. The Plaintiff was given life on its incorporation and will remain in existence until it is dissolved. As with natural persons, some companies are more active than others, but inactivity does not equate to non-existence. The arrangements made between a company and its officers continue even during periods of dormancy.)
34. Whilst I acknowledge that Advocate Williams’ contentions about how to interpret “*provided*” are certainly arguable, based as they are on looking at the issue from the individual’s standpoint, paying particular regard to the words of Bowen LJ repeated just now, I have reached the conclusion that the correct interpretation of regulation 10 is that advanced by Advocate Swan. In the context of section 157, I note that subsection (4) states:

“Nothing in this section prevents a company’s memorandum or articles from making such provision as was, before the commencement of this Law, lawful for dealing with conflicts of interest.”

I take the view that the use of the word “*provision*” in this subsection can be taken to inform the way in which “*provided*” in regulation 10 is to be construed. The focus is on what the company provides rather than being on the recipient, ie, “*provided by*” is, in my view, the correct approach rather than “*provided to*”.

35. Further, in reaching the conclusion I have, I have paid particular attention to the position of the First to Fourth Defendants in the context of this case. They were already acting as de facto officers of the Plaintiff company from the date of its incorporation by virtue of being directors of its two corporate directors. They were, in reality, the humans who decided to establish the Plaintiff and chose the terms on which it was created, including Article 153. I regard it as a reasonable inference that they did so knowing that the directors would, for the time being, take the benefit of the exemption and indemnity so provided, unless a decision were to be reached not to extend such protection to any director (or indeed other officer or manager, etc.). There has been no suggestion that any of them took the deliberate decision to dispense with that level of protection when they took steps for the corporate directors to resign and be replaced with them in their individual capacities on 20 March 2009. The Plaintiff conceded that the Fifth Defendant, as a director of the Plaintiff, benefited from the exemption and indemnity offered by Article 153 after 1 July 2008. Accordingly, for a company such as the Plaintiff, I take the view that the transitional arrangements afforded by the 2008 Regulations were predicated on continuing the existing corporate arrangements in relation to exemptions and indemnities for up to 18 months.
36. Both Advocates offered examples of how their contentions would have operated in respect of a hypothetical company changing its directors after the 2008 Law commenced. Advocate Williams suggested that the position of a new director appointed without further ado should be no different from a director appointed pursuant to a specific agreement. In the case of the second-mentioned director, the attempt to confer on him or her an exemption or indemnity would be rendered void by section 157 of the Law. Accordingly, the same consequence should befall the first-mentioned director appointed at the same time. Advocate Swan, however, pointed out that if the change of directors during the 18-month transitional period were on the same basis, with no specific agreement, but in reliance on the incorporation route, the situation would be that the longer serving directors benefited from the exemption and indemnity whereas the new appointees would not. That would, he suggested, have created an unwarranted discriminatory regime, whereas by giving all directors the same position arising from the same set of circumstances, save in a case where the company exercised its right to make a deliberate choice to appoint on different bases, it was much more in keeping with the underlying intent.
37. I was not persuaded by Advocate Williams’ use of his examples. He has overlooked the fact that a company has never been obliged to give its directors any exemption from liability or indemnity. It may have been the practice in many cases to do so but, prior to the enactment of the 2008 Law, a company had contractual freedom in this regard. If appointments were made without specifying the terms of appointment, then the implication was that the terms of the company’s Articles of Association were the basis of that appointment and it would, in my judgment, have produced an unacceptably complicated regime during the 18-month transitional period if a director’s exoneration from liability depended purely on the date of appointment.

Relevance of regulation 3

38. In the context of this case, I am also conscious of the effect of regulation 3 dealing generally with a company’s Articles of Association. Advocate Williams suggested that his argument was supported by reference to the approach explained on page 1164 of *Bennion on Statutory Interpretation* (5th ed.):

“Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision.”

The authority given for that proposition is *Vinos v Marks & Spencer plc* [2001] 3 All ER 784 at [27]. Consequently, he submitted that regulation 10, being specific to exemptions and indemnities, should be treated as a specific, or special, provision, overriding the generality of regulation 3. The other principles set out on the same page in the work reinforce this approach: *generalia specialibus non derogant* (general provisions do not override special ones, which was said to amount to no more than “*common sense and ordinary usage*” by Lord Cooke of Thorndon in *Effort Shipping Co Ltd v Linden Management SA* [1998] 1 All ER 495, 513) and *clausula generalis non referta ad expressa* (general words are taken not to be intended to disturb express stipulations).

39. Applying those principles, however, does not take matters forward. This is because, on the construction I have given to regulation 10 of the 2008 Regulations, there is no incompatibility between regulation 3, being of general application, and regulation 10. Any such incompatibility would only have arisen if I had preferred Advocate Williams’ suggested construction of regulation 10. In that case, the generality of regulation 3, preserving the validity and enforceability of the Plaintiff’s Articles of Association, including regulation 153 or 172, would have needed to give way to the specific provision relating to exemptions and indemnities dealt with in regulation 10. I certainly would not have been minded to regard regulation 3 as somehow overriding regulation 10. In such a case, it might have been helpful if the draftsman had clarified that regulation 3 did not apply to an exemption or indemnity given through the medium of the articles of association, but such clarification is not necessary as a matter of law for these principles to lead to that conclusion. However, as I have just said, these arguments are academic because of the conclusion I have reached on the proper construction of regulation 10. Indeed, the fact that the interpretation I have given to these provisions does not create any internal tension within the 2008 Regulations may lend further support to the conclusion I have reached.

Effect of resolution relating to 2009 Articles

40. A further complication for the First to Fourth Defendants arises from the decision of the members of the Plaintiff to adopt replacement articles of association on 23 March 2009 under which original Article 153 became Article 172, which was then operative at the time of the alleged breaches of duty in the summer of that year. I have some sympathy with Advocate Williams’ submission that Article 172 is entirely irrelevant, because of the need to focus on the relevant article only at the time of appointment as director but, in fairness to Advocate Swan’s submissions, will deal with this point briefly as follows.
41. Section 42(1) of the 2008 Law permits a company to alter its articles by special resolution. The extent of that power is further explained in subsection (3):

“The power of a company under this section to alter its articles includes power to add to them, modify any of them, rescind them in whole or in part and substitute other articles.”

Section 42(2) also provides that:

“An alteration so made in respect of a company’s articles shall, subject to the provisions of this Law, have the same effect as if originally contained therein and shall be subject in the like manner to alteration by special resolution.”

42. Advocate Swan undertook an exercise in comparing and contrasting the Plaintiff’s original 2007 Articles of Association with the replacement 2009 version. Suffice it to say, in keeping with section 42, there was a choice between making some additions and substitutions, which would have meant Article 153 remaining exactly as it was, or making those changes and then re-numbering the resultant modified articles through a complete replacement of them. Because the wording of Article 153 was unchanged when it was adopted as Article 172 on 23 March 2009, I am satisfied that there are no adverse consequences for the First to Fourth

Defendants arising from this step having been taken shortly after their appointments as directors and before the events of the summer that year forming the basis of the Plaintiff's claim against them. In any event, whilst being critical about Advocate Swan's submissions in this regard, particularly in relation to whether there was rescission of the original articles by reference to Lord Sumner's speech in *British and Beningtons Limited v North Western Cachar Tea Company Limited* [1923] AC 48, none of which I find to be in point, the Plaintiff has not argued that the adoption of the 2009 Articles of Association amounted to a fresh provision of the indemnity and so fell foul outside the transitional arrangements effected by regulation 10 of the 2008 Regulations. Advocate Swan has, perhaps out of an abundance of caution, raised the possibility that this argument exists in order to explain why it fails and I agree with his submissions that the effect of section 42 of the 2008 Law is such that Article 172 falls to be treated as if it were the article from the outset, which it was, albeit numbered "152" at that time.

Conclusion on issue 1.2

43. Issue 1.2 turns on the meaning to be given to "provided" in regulation 10 of the 2008 Regulations. Having regard to the context in which that regulation is placed and the overall tenor of these provisions seeking to preserve indemnities save to the extent that section 157 of the 2008 Law now treats them as void, I take the view that the additional 18 months to adjust was given to companies such as the Plaintiff company to enable them to continue to provide to any of its directors such exemptions and indemnities as it had done previously. Because the exemption and indemnity was provided through the medium of Article 153, subsequently re-numbered as Article 172, of the Plaintiff's Articles of Association, the 2008 Regulations had the effect of preserving the validity of Article 153 or 172 for the benefit of any director for the time being who was not expressly being appointed on any different basis. Accordingly, the answer to issue 1.2 is that the exemption and/or indemnity is not void pursuant to section 157 of the 2008 Law and remained valid by reason of regulation 10 of the 2008 Regulations and I now move on to issue 1.3.

Operative date for relying on Article 153 or 172

44. A further issue addressed principally by Advocate Swan relates to the date on which the indemnity or exemption takes effect. Advocate Williams did not concentrate on this issue because the Plaintiff's case was simply that the Defendants, most particularly the First to Fourth Defendants, could not take any benefit from the provision made through the Articles of Association by the time the breaches alleged against them occurred. Although the Plaintiff's position may be that the Defendants do not need to persuade the Court on the issues raised in Advocate Swan's Skeleton Argument because, if issues 1.1 and 1.2 are answered against the Plaintiff that means the Plaintiff's case fails, for the sake of completeness, I will also deal briefly with these points. The relevance of the issue relates to whether the transitional extension of the validity and enforceability of the exemption or indemnity provided to the First to the Fourth Defendants to 31 December 2009 means that reliance cannot be placed on it after that date. If the date under consideration relates to when the breaches alleged occurred, there is no issue. However, if the key date is when those Defendants are entitled to invoke the exemption or indemnity provision, then the Defendants cannot claim to have a complete defence to the Plaintiff's action.

The indemnity

45. The general principle set out in para. 28-049 of *Chitty on Contracts* (30th ed.) is that "the limitation period starts to run when the indemnifying party's liability is established", but that is "subject to the construction of the contract of indemnity". Advocate Swan highlighted the analysis undertaken by HHJ Hicks QC, sitting in the Technology and Construction Court, in *The Mayor and Commonalty and Citizens of the City of London v Reeve and Company Limited* (unreported, 25 February 2000). At paragraph 27, the learned judge contrasted the apparent conflict between the possible dates on which a cause of action based on an indemnity provision arises as being between the "inception" of liability and the "realisation" of liability and referred to what he said were the leading cases on each (*Bosma v Larsen* [1966] 1 Lloyd's Rep. 22, 27 and *Telfair Shipping Corporation v Innersea Carriers SA* [1985] 1 WLR 553,

566F respectively). However, both of those cases emphasised the importance of construing the terms of the indemnity provided and so, in my view, do not assist further.

46. Looking at the terms of Article 153 or 172 of the Plaintiff's Articles of Association, I believe that the key words are that the directors "*for the time being of the Company ... and their respective heirs and executors shall be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they or their respective heirs or executors may incur*". The effect of that provision is that the indemnity is given to whoever is found to be liable, but in respect of what happened at the time the person was, in this instance, a director. Whilst it is obvious that reliance on the indemnity given is not triggered until a liability is established, that liability looks backwards to the time of the actions or omissions in question and, because of the inclusion of the words "*may incur*", I take the view that this provision is giving a prospective indemnity to each director "*for the time being*". Accordingly, because the time of the alleged breaches was before 31 December 2009, having found that the indemnity provided to the First to Fourth Defendants was not void, I further find that they can still rely on it now.
47. I also consider that what Lord Brightman said in *Viscount of the Royal Court of Jersey v Shelton* (*supra*) supports that conclusion: "*A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him.*" Because the effect of the indemnity provision in Article 153 or 172 is that the Plaintiff has no cause of action against the Defendants, even if what the Defendants did in the summer of 2009 *prima facie* attracted liability, the Plaintiff cannot sue the Defendants in respect of that loss, with the consequence that the relevant date to consider matters is in 2009 and not today or at some point in the future if, following a trial, liability were to be established.

The exemption

48. If I am wrong about the relevance of the dates for the first part of Article 153 or 172 dealing with the indemnity, then the position of the First to Fourth Defendants is still resolved by reference to the exemption in the latter part of that Article. As a result of providing that none of the directors "*shall be answerable*", it is clear to me that this wording creates an exemption from any liability that otherwise attaches and I do not need to refer to the cases on which Advocate Swan relied so as to support that proposition. In effect, it is the same as saying that there is no cause of action against the wrongdoer, meaning that the usual duty of care has been modified; indeed, it has been removed, save only to the extent that liability arises through the person's "*own wilful act neglect or default*". Accordingly, I take the view that the effect of removing the duty of care can only properly be regarded as operating at the time of the act or omission about which complaint could be made. The effect of Article 153 or 172 as a "*blanket exoneration*" was contemporaneous with the events in 2009 and the First to Fourth Defendants, therefore, have not through the operation of section 157 of the 2008 Law lost the opportunity to rely upon the exemption provided to them by the Plaintiff because they claim its benefit after the end of the transitional period prescribed in the 2008 Regulations.

Conclusion on issue 1.3

49. I am satisfied that the First to Fourth Defendants are entitled to invoke the indemnity or exemption provision from which they benefited as directors of the Plaintiff at the relevant time as affording them a complete defence to the Plaintiff's claim. In my view, the exemption conferred by the latter part of the Article was still valid and enforceable in the summer of 2009 by virtue of the transitional 2008 Regulations and operated in such a way at that time that they are not answerable for the alleged breaches of duty pleaded by the Plaintiff. I also take the view that, if they needed to, they can rely on the indemnity element of Article 153. It would be a strange outcome if they had that benefit if action had been taken immediately against them in 2009 but then lost it. I do not believe that that was the intention of the new legislative regime on directors' indemnities created by and under the 2008 Law.
50. The position of the Fifth Defendant is arguably more straightforward. Section 157 of the Law does not impact on the Fifth Defendant as manager of the Plaintiff, which is how the Plaintiff

has, at least in part, pleaded its case against the Fifth Defendant. Having reached the conclusion that the Fifth Defendant, as a continuing director of the Plaintiff on 1 July 2008 and then as a managing entity in respect of it took the benefit of Article 153 or 172 of the Plaintiff's Articles of Association, it follows that it has a complete defence to the Plaintiff's claim against it. I am not persuaded by Advocate Williams' submissions that there are matters that must be explored in evidence at a trial. As I have found, the basis of the Fifth Defendant's appointment is set out, or can properly be inferred, from the material before the Court.

Conclusion

51. For the reasons given, I find in favour of all five Defendants on the preliminary issues. Whatever conclusion might be reached about the allegations of breach of duty levelled against them, they all have a complete defence to the Plaintiff's claim. As a result, the effect of this determination of the preliminary issues is that the Plaintiff's action is dismissed in its entirety.
52. In relation to costs, in the absence of any contrary submissions, I would be minded to treat them as following the event, certainly in respect of the time following the inclusion of paragraph 52B in the Amended Defences and probably across the whole of the action. If any party wishes to apply for a different outcome on costs, an application to an appropriate Interlocutory Court must be made within 14 days of this judgment being handed down. Equally, the parties might agree to resolve any costs dispute between them on a different basis and lodge a Consent Order within the same period. In default of any such application or a Consent Order, the Plaintiff will be ordered to pay the Defendants' costs on the standard recoverable basis, to be taxed if not agreed.