FEDERAL COURT OF AUSTRALIA

Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd (No 3) [2018] FCA 1411

File number(s):	NSD 1424 of 2017
Judge(s):	**BURLEY J**
Date of judgment:	13 September 2018
Catchwords:	**ADMIRALTY** – joint venture to operate hospitality business aboard vessel – agreement to charter and license vessel **PRACTICE AND PROCEDURE** – further interlocutory application for an order to appoint a receiver and manager to take control of a vessel and business operated on-board –balance of convenience – where the relationships between the parties have broken down – application granted **PRACTICE AND PROCEDURE** – interlocutory application for payment of profits made pursuant to a joint venture agreement – counter interlocutory application for shared costs pursuant to a joint venture agreement – where there are competing legal arguments concerning construction of the joint venture agreement and evidentiary questions that are to be determined at final hearing – interlocutory applications refused **PRACTICE AND PROCEDURE** – application for security for costs – where it is conceded that security for future costs is payable but the plaintiffs contest payment of security for past costs and contend that funds held in trust pursuant to Court order should stand as security for costs of the proceeding – application for security for past costs refused – plaintiffs ordered to provide security for future costs, which are not to be payable from the funds held in trust

Legislation:	*Corporations Act 2001* (Cth), s 1335 *Evidence Act 1995* (Cth), ss 135, 138 *Federal Court Act 1976* (Cth), ss 56, 57 *Shipping Regulation Act 1988* (Cth) *Federal Court Rules 2011* (Cth), r 19.01
Cases cited:	*Arumainathan, Re Stjc Pty Ltd v Stjc Pty Ltd* [2017] FCA 1229 *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 *Commonwealth of Australia v ABC2 Group Pty* [2008] NSWSC 1383; 69 ACSR 228 *F. Hoffman-La Roche AG v Sandoz Pty Ltd* [2018] FCA 874 *Morkaya v Parkinson* [2008] NSWSC 1050 *Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd* [2017] FCA 1124 *Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd* [2018] FCA 647 *Sengthong v Lao Buddhist Society of NSW* [2016] NSWSC 1408 *University of Western Australia v Gray (No 6)* [2006] FCA 1825
Date of hearing:	29 June 2018
Date of last submissions:	10 July 2018
Registry:	New South Wales
National Practice Area:	Admiralty and Maritime
Category:	Catchwords
Number of paragraphs:	95
Counsel for the Plaintiffs:	Mr T Castle
Solicitor for the Plaintiffs:	Musgrave Legal

Counsel for the Defendant:	Ms C O Gleeson
Solicitor for the Defendant:	Barringer Leather Lawyers

ORDERS

	NSD 1424 of 2017
BETWEEN:	**OZMEN ENTERTAINMENT PTY LTD** First Plaintiff and First Cross-Respondent **KANKI SEA TOURISM HOSPITALITY & ENTERTAINMENT PTY LTD** Second Plaintiff and Second Cross-Respondent
AND:	**NEPTUNE HOSPITALITY PTY LTD** Defendant and Cross-Claimant

JUDGE:	**BURLEY J**
DATE OF ORDER:	**13 September 2018**

THE COURT ORDERS THAT:

General

1 The plaintiffs provide security for the defendant's costs of and incidental to their claim in the amount of $123,750.00 prior to 4 October 2018.

2 In default of compliance with order 1 above, the proceedings against the defendant be stayed until further order.

3 The parties have liberty to apply to review the amount of security ordered in order 1 above.

4 The plaintiffs' interlocutory application for payment of profits and the defendant's interlocutory application for the payment of shared costs be dismissed.

5 The plaintiffs pay the defendant's costs of the security for costs application and

the interlocutory applications identified in order 4.

Directions

6 The parties are to discuss the proposed form of orders set out in Annexure A of these reasons for the appointment of a receiver, to identify areas of agreement and disagreement and, on or before Monday 24 September 2018, file and serve written submissions of no more than 4 pages in length addressing their respective proposals on the orders that are not agreed.

7 The proceedings be listed for a case management hearing at 9:30am on Friday 5 October 2018.

8 Prior to the case management hearing referred to in order 7 above, the parties must confer and provide the Court by no later than 4pm on Thursday 4 October 2018 with draft short minutes of order that set out a comprehensive and expeditious timetable for the preparation of the proceedings and identify any areas of disagreement in mark up.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BURLEY J:

1. INTRODUCTION

1.1 The present applications and summary of conclusions

1 In September 2017, I heard an interlocutory application made by the plaintiffs, Ozmen Entertainment Pty Ltd (**Ozmen**) and Kanki Sea Tourism Hospitality and Entertainment Pty Ltd (**Kanki**), for the appointment of a receiver and manager to take control of the operation of the business aboard the vessel "Seadeck". That application

was opposed by the defendant, Neptune Hospitality Pty Ltd (**Neptune**), and on 21 September 2017 I delivered a judgment declining to make that order; *Ozmen Entertainment Pty Ltd and anor v Neptune Hospitality Pty Ltd* [2017] FCA 1124 (***Ozmen 1***).

2 I use the defined terms adopted in *Ozmen 1*. Those reasons include a description of the background to the dispute and set out or summarise various of the terms of the Charter Agreement and JVA (see Section 2, [8] – [44]), which are not repeated here. However, by way of brief summary, Ozmen is the owner of the Seadeck, a vessel registered under the *Shipping Regulation Act 1988* (Cth) that is certified to carry a maximum of 450 passengers and 10 crew members. On 6 January 2016, Ozmen entered into a Charter Agreement with Kanki and Neptune, pursuant to which Ozmen agreed to demise charter the Seadeck in order to operate a hospitality and entertainment business on board the Seadeck (**Business**). On the same day, Kanki and Neptune entered into a JVA to govern the terms of their dealings together in relation to the conduct of the Business.

3 These reasons address a suite of interlocutory applications brought by the parties in the present proceedings. Four applications are now for determination. In the first, the plaintiffs renew their application for the appointment of a receiver and manager to the Business conducted aboard the Seadeck (**receiver application**). In the second, Kanki applies for the payment by Neptune of profits made under the JVA (**payment of profits application**). In the third, Neptune responds by contending that if Kanki is entitled to a payment out of profits, then it is entitled to allowances made under the JVA for the payment by Kanki of shared costs under the JVA (**shared costs application**). Finally, Neptune seeks security for costs from Kanki and Ozmen **(security for costs application**).

4 For the reasons set out in more detail below, I now accede to the application for the appointment of a receiver and manager. I decline the payment of profits application

and the shared costs application. I find that the plaintiffs must provide security for costs for the proceedings.

1.2 The proceedings

5 The relationship between Ozmen and Kanki on the one hand and Neptune on the other has not been harmonious. In a statement of claim dated 11 August 2017, Kanki claims that by reason of various acts of default by Neptune, it was entitled to terminate the JVA and that it successfully did so on 25 July 2017. Ozmen claims that by reason of the same breaches, and also by reason of the termination of the JVA itself, it was entitled to and did terminate the Charter Agreement on 4 August 2017. By amendments made to the statement of claim on 4 December 2017, Ozmen also claims that Neptune was appointed as Ozmen's agent for the purpose of procuring the registration of the Seadeck with a survey capacity of 800 passengers and that in breach of duties owed to Ozmen as agent, and to Kanki under the JVA, Neptune failed to do so. Kanki claims that, by failing to procure the registration, Kanki has lost the benefit of a guarantee under clause 10(n)(i) of the JVA, pursuant to which Neptune agreed to pay any difference between Kanki's share of the net profit and $5,000,000 in the event that Kanki's share was less than $5,000,000 at the end of the first full season (30 September 2017) and each subsequent season (the guarantee being subject to, inter alia, the vessel being licensed for 800 passengers). Ozmen and Kanki seek pecuniary remedies from Neptune, and Ozmen seeks orders that Neptune deliver up possession of the Seadeck to it.

6 On 31 October 2017, Neptune filed a cross-claim in which it claims to have incurred costs totalling $4,850,000 in arranging for the Seadeck to be sailed from Turkey to Sydney and for work conducted on her. It also seeks additional costs incurred since then. Neptune contends that if Ozmen and Kanki are entitled to recover possession of the vessel, then Neptune is entitled to reasonable remuneration for its costs; an equitable lien over the Seadeck; or alternatively a constructive trust equivalent to its entitlement to the assets of the business.

7 It is common ground between the parties that on or about 21 June 2017, Neptune caused the Seadeck to be sailed from Sydney to Brisbane for the purpose of conducting the Business in Brisbane. The Seadeck was returned to Sydney on or about 28 September 2017, before being returned to Brisbane for the 2018 winter. Since approximately 21 June 2017, the Business has been conducted solely by Neptune, which Kanki alleges is a breach of the JVA.

8 In *Ozmen 1,* I held that, despite the fact that the plaintiffs had established an arguable case that Neptune had acted in breach of the JVA, the balance of convenience and justice favoured the maintenance of the status quo. This involved leaving the operation of the Business aboard the Seadeck in the hands of Neptune. I noted that, whilst there was plainly tension between the parties, they have consistently maintained communications between each other. In circumstances where the potential of harm to what was then a fledgling business could well be significant, I determined that the balance of convenience and justice did not favour the appointment of a receiver and manager at that time.

9 Things have moved on since these matters. It is convenient to summarise the conduct of the litigation before addressing the matters in issue.

1.3 The recent course of the litigation

10 There have been a significant number of disagreements between the parties since *Ozmen 1*. Many of them have required the intervention of the lawyers to resolve. Some have required Court orders to be put in place in order to ensure that the parties' position is clear. That this has generated a great deal of expense in the interlocutory parts of the case might be regarded as axiomatic. Because of internecine disputes and failed attempts to settle the proceedings at mediation, little or no movement has been made towards the final determination of the proceedings.

11 On 20 November 2017, the Court made orders by consent concerning aspects of

the conduct of the Business of the Seadeck pending final hearing of the proceedings. The interim regime was detailed and reflected a compromise of what appears to have been an extensive and wide ranging dispute between the parties about aspects of the record keeping and conduct of the Business. Aspects of the Business that were addressed included the provision to Kanki's nominated accountant, Mr Kyle Clarke, (or another nominated person) of a full daily backup of and/or read only access to the data in Neptune's business systems; read only access to the joint venture's bank accounts; weekly stocktake reports; access to documents; and responses to requests for information previously provided by the plaintiffs' solicitors. The agreed regime also allowed for the appointment of an independent accountant to referee or arbitrate future disputes about accounting matters.

12 On 15 December 2017, further disputes between the parties were resolved by Court order. A detailed regime was put into place for Kanki to gain access to the Business' computers. Pursuant to it, Kanki's accountant would have weekly meetings with Neptune's bookkeeper, and details as to how that meeting was to take place were prescribed.

13 On the same day, an order was made requiring Neptune to pay the sum of $66,956 into the trust account of the then solicitors for the plaintiffs, Holman Webb. This amount was a half share of the profits from the operation of the Business of the joint venture, for the fortnights ended 26 September, 10 October, 24 October and 7 November 2017. An order was also made that the amount held in the trust account may be released to Kanki within two working days of the earlier of an agreement between the parties in relation to the amount of the operating profit for that period or a determination being made by the referee as to the amount of the operating profit.

14 Also on the same day, the Court noted undertakings given by Ozmen to it; to pay any costs order made in the proceeding against Kanki; not to remove the vessel or cause it to be removed from Sydney Harbour without giving 7 days' written notice to the

solicitors for Neptune; and not to give any security interest over the vessel without first giving 7 days' written notice to the solicitors for Neptune. These arrangements were to address and resolve a foreshadowed application for security for costs by Neptune.

15 I have noted that on 20 November 2017, the parties agreed to a regime under which an independent accountant could be appointed to referee or arbitrate future disputes about accounting matters. However, the parties were unable to agree on the name of the independent referee.

16 On 19 December 2017, I resolved that dispute and appointed Christian Sprowles, a registered liquidator, to conduct an inquiry in relation to disputes between Kanki and Neptune about the operating profit of the Business for each fortnightly period from 26 September 2017 until 19 December 2017 and produce a report to the Court. On the same day, an order was made that, in relation to all fortnightly profit and loss statements for the Business for the fortnights ending 21 November 2017, and 5 and 19 December 2017, Neptune was to pay a half share of the profits from the operation of the Business, as calculated by Neptune for each such period, into the trust account of Holman Webb. That payment was also to be released to Kanki within two working days of the earlier of an agreement between the parties in relation to the amount of the operating profit for that period or any approval by the Court following the receipt of Mr Sprowles' report. As a result of these orders, the amount held in the Holman Webb trust account is some $265,732. No release has since been agreed and no payments have been made of join profits by Neptune.

17 On 6 February 2018, Mr Sprowles produced his report (**referee's report**). In it he finds that the operating profit of the Business for the period 26 September 2017 to 19 December 2017 is calculated to be $545,870. Although the parties agreed to a number of the referee's findings, they were unable to agree to the adoption of the report, and a further hearing was necessary for this purpose.

18 On 16 February 2018, directions were made for the parties to file and serve submissions concerning the adoption of the referee's report and any application for the release of the funds held by Holman Webb in its trust account concerning the orders made on 19 December 2017. The application was delayed for hearing until 2 May 2018 to accommodate the availability of the Court and to enable the parties to continue their efforts to mediate the dispute.

19 On 2 May 2018, I was informed that half of the profits as calculated in the referee's report, had been paid into the Holman Webb account. The parties indicated that there were a number of further outstanding disputes between them which ultimately became the subject of the present applications. I resolved to address the adoption of the referee's report on that day, and stood over the balance of the disputes between the parties until 31 May 2018. In *Ozmen Entertainment Pty Ltd and anor v Neptune Hospitality Pty Ltd* [2018] FCA 647 (***Ozmen 2***), I set out my reasons why the referee's report should, in large part, be adopted.

20 When the proceedings returned to the Court on 31 May 2018, Neptune applied for the then outstanding interlocutory applications to be adjourned and for the matter to be referred to mediation before a Registrar. I was informed by Neptune's counsel, Ms Catherine Gleeson, that Neptune thought that the matter had settled or was close to settlement. Counsel for the plaintiffs, Mr Timothy Castle, opposed the adjournment. He informed the Court that under a **Management Agreement** entered into on 7 September 2017 between Ozmen, a Mr Eric Woo and a company called Culture Map Pty Ltd (**Culture Map**), Culture Map has lent money to Ozmen and that, as part of the loan arrangement, Culture Map has the conduct of the proceedings effectively as part of a litigation funding situation. Culture Map had not been a party to any of the settlement negotiations. As it turns out, Mr Eric Woo has, since 12 January 2018, been a director of Kanki as nominee of Culture Map. He was not invited to participate in the earlier mediation and had not consented to its outcome.

21 After hearing argument on the matter, I adjourned the hearing to enable the parties to continue their negotiations with the participation of all relevant parties and stood the outstanding applications over until 29 June 2018. I directed that each of the present interlocutory applications be listed for hearing on that date.

22 On 21 June 2018, approximately one week before the date listed for the hearing of the present interlocutory applications, Neptune opened up yet a further front of disputation by filing an interlocutory application seeking orders that the solicitors acting for the plaintiffs be restrained from acting for them on the basis that a conflict of interest had arisen because of the involvement of Culture Map. Neptune relied on an affidavit sworn by Mr Leather on 21 June 2018 in support of the application. Also sought in the 21 June 2018 interlocutory application, was an order that Culture Map be restrained from taking any steps to enforce a security interest that it had registered in respect of the Seadeck for monies advanced by Culture Map. Given the lateness of the filing of the application and limited available time to hear it, I directed that the application be listed for case management hearing only on 29 June 2018.

23 Nevertheless, in response to the 21 June 2018 application, Kanki tendered a letter from Mr John Lee, a director of Culture Map, undertaking to the Court that it will give at least 48 hours' notice, or such other notice as the Court stipulates, to the parties before taking any steps to enforce its security over the Seadeck. Further, without making admissions as to the veracity of the allegations made, the solicitor for the plaintiffs, Mr Mark Sheller of Holman Webb, subsequently withdrew and a new solicitor, Ms Penelope Musgrave of Musgrave Legal, stepped in at short notice. As a consequence, Neptune does not press the 21 June 2018 application in its current form.

24 On the morning of the hearing on 29 June 2018, I was supplied with an affidavit affirmed by Ms Musgrave. In it she states that the current directors of Kanki are Mr Gunay Koyunoglu and Mr Eric Woo, the latter being an appointee of Culture Map. They had confirmed their instructions that she acts for Kanki. Ms Musgrave also states that the

current directors of Ozmen are Mr Koyunoglu and Mr Altikulocoglu. She had not at that stage spoken with Mr Altikulocoglu and could not confirm that she had instructions from the directors to act for Ozmen. As a consequence, Mr Castle made submissions on behalf of Kanki only, and I directed that Ms Musgrave provide a confirmation of her position in relation to Ozmen following the completion of the hearing.

25 After the hearing, on 10 July 2018, I was informed that Ms Musgrave has been instructed to act for Ozmen also, and that Ozmen joins in the submissions made on behalf of Kanki in relation to each of the interlocutory applications heard. Accordingly, I proceed on the basis that the submissions made at the hearing were made on behalf of both of the plaintiffs.

2. THE EVIDENCE

26 The court book for the present applications occupied 7 volumes. Collectively, the parties relied upon part or the whole of 19 affidavits.

27 The plaintiffs rely on part or whole of affidavits sworn by Mr Kyle Clarke, a certified practicing accountant, affirmed on 8 August 2017, 14 September 2017 and 22 May 2018; affidavits sworn by their then solicitor, Mr Sheller, on 11 August 2017, 14 September 2017, 27 November 2017, 21 May 2018; affidavits given by Mr Brian Silvia, the proposed receiver, on 22 August 2017 and 14 September 2017; and the affidavit sworn by Ms Musgrave on 29 June 2018. They also tendered the JVA and Charter Agreement, the referee report and sundry other correspondence and documents.

28 Neptune relies on part or whole of affidavits from Mr Leather given on 22 November 2017, 17 December 2017, 26 February 2018, 30 April 2018, 30 May 2018, 21 June 2018 and 27 June 2018. The affidavits dated 30 April 2018 and 21 June 2018 were the subject of objection, which I discuss further below. Neptune also relied on two affidavits given by Mr Terry Borella, accountant, on 23 November 2017 and 26 February 2018.

29 The plaintiffs object to the Management Agreement and related documents being received into evidence, but I consider them to be relevant to the submissions advanced by Neptune, and receive them for the purposes of determining the current interlocutory applications. The plaintiffs contend that the contents of the Management Agreement are privileged and confidential and also object to the admission of the evidence pursuant to ss 135 and 138 of the *Evidence Act 1995* (Cth). However, as counsel for the plaintiffs referred to the Management Agreement in open Court on 31 May 2018, in my view the substance of the terms of the agreement were disclosed. Furthermore, the evidence indicates that a principal of Ozmen, Mr Mert Ozmen, has disclosed the content of the Management Agreement to representatives of Neptune. In these circumstances, I allow the tender.

3. THE RECEIVER APPLICATION

3.1 The arguments

30 The plaintiffs seek orders for the appointment of Mr Silvia and Mr Ian Currie of BRI Ferrier as receivers and managers of the Business established pursuant to the JVA. They submit that in *Ozmen 1* the Court found that the plaintiffs have established that there is a serious question to be tried that the Charter Agreement and JVA have been terminated. They submit that since delivering *Ozmen 1*, the relationship between Kanki and Neptune has deteriorated and that it is appropriate to re-agitate the issue in light of recent events, including new evidence that has come to light and a change in circumstances that makes it appropriate to do so; citing *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 at 46-47 (***Brimaud***).

31 The plaintiffs point to four contextual matters that are relevant to their current applications. First, that it is tolerably clear that the joint venture between Kanki and Neptune is over. Whatever, the position was in September 2017, the relations between the parties are such that it cannot have a realistic prospect of surviving. Secondly, attempts to settle the case have failed. Thirdly, there is an underlying dispute as to the matters set out

in the pleadings that is yet to be ventilated. Fourthly, Neptune has since its inception received all of its share of the profits from the joint venture, but Kanki has been deprived of them, and something must be done to redress that position. The plaintiffs submit that the events since September 2017 in the litigation demonstrate that what was characterised in *Ozmen 1* at [84] as "tensions" between the parties have evolved into something much worse. Since September the level of disputation between the parties on matters concerning accounting issues, access to the books and records of the joint venture, access to the computer system, the appointment of the referee and so on demonstrate that the issues between the joint venturers have not been able to be resolved amicably between themselves, but have required the intervention of lawyers and the Court on a regular basis.

32 The plaintiffs submit that the status quo that the Court preserved in *Ozmen 1* was that Neptune is in control of the Business and that with the goodwill of the parties they would be able to cooperate in its administration until final trial. However, having given Neptune an opportunity to cooperate with the plaintiffs, the plaintiffs submit that the subsequent events have demonstrated that Neptune has done nothing to cooperate without being required by Court order to do so. The plaintiffs also contend that the circumstances of the Business have changed. They submit that it is no longer a "fledgling business", but has had successful seasons in Sydney and in Brisbane. These matters mean that, unlike the position at the time of *Ozmen 1*, the appointment of a receiver and manager will not be significantly disruptive to the operation of the Business. Thus, the plaintiffs submit that the cost/benefit analysis favours the appointment of a receiver, to avoid disputes and/or manage them between the parties in a commercial and practical manner, without the need for the Court's intervention in the first instance, and thereby ensure that the parties are able to proceed to conduct their litigation.

33 Moreover, the plaintiffs submit that Neptune has created problems in the manner in which it keeps its accounts, because it has failed to separate its own accounts from the books and records of the Business. As a result, there has been a failure to separate out the

costs of the joint venture under the JVA on the one hand, and the affairs of Neptune on the other. There has also been an alleged failure to document contractual arrangements between Neptune and its associates, which has led to difficulties in identifying what is owed by Neptune personally vis a vis what is owed jointly with the other parties.

34 Further, the plaintiffs submit that Neptune has failed to pay key creditors, including the Australian Taxation Office (**ATO**); failed to notify Kanki about certain aspects of its business other than under Court order, and failed to make provision for liabilities alleged to be owed by it (such as a contingent liability to pay $5m for breach of the JVA). Finally, Kanki relies on its contention that Neptune has wrongly withheld payment to it of its agreed profit share, with the result that Kanki has not received any money for the operation of the Business, despite the Business having traded profitably over the past 12 months.

35 Neptune resists the appointment of a receiver and manager on the basis that there has been no material change in circumstances since the decision in *Ozmen 1*, and that arrangements have been put in place to address "some of the complaints" made, particularly of Kanki. It accepts that the plaintiffs have established a serious case to be tried for relief, but notes that in *Ozmen 1* I also found that there is also a reasonably arguable defence.

36 Neptune submits that there has been no miscarriage in the conduct of the JVA on board Seadeck. It contends that Neptune has managed the Business in a fair and transparent way and the Business is operating very successfully. To this end, Neptune points to the referee's report, stating that it fell in favour of Neptune and demonstrates that Neptune's calculation of its profit was accurate and a proper reflection of the business, save for a couple of matters. Further, Neptune submits that in view of the profit made this year, a $400,000 outstanding tax bill and a failure to pay BAS statements on time is not significant.

37 Neptune also points to the fact that recently the parties discussed at management meetings and via correspondence whether the Seadeck should be sailed back to Brisbane for the 2018 winter, a position which Neptune suggests reflects improved communications since *Ozmen 1*. Whilst Neptune did in 2017 take the vessel to Brisbane over the objections of Kanki, Neptune asserts that is not now the situation with the Seadeck's second journey to Brisbane.

38 Furthermore, Neptune submits that the only party that is interfering with the operation of the joint venture is Kanki, pointing to evidence that no nominated Kanki representative has attended any scheduled management meetings since February 2018. It submits that the application for the appointment of a receiver should not be granted on the basis of an alleged relationship breakdown in circumstances where there is evidence that Kanki has failed to participate in discussions with Ozmen.

39 Neptune further contends that it is not the case that Neptune has been uncooperative in providing information to Kanki unless ordered to do so. Neptune submits that "it has provided cooperation where it can, but has 'pushed back' when it thought that what was requested was extraneous. It often lost, but that should not be a matter for criticism. It was simply a matter of two parties having various debates".

40 In written submissions filed following the conclusion of the hearing, Neptune raises two further arguments. First, it contends that the terms of the Management Agreement demonstrate that the plaintiffs are engaged in an abuse of process. It submits that the proceedings are directed to a purpose that is collateral to the vindication of the plaintiffs' rights because the plaintiffs seek to replace Neptune as a party to the Charter Agreement and the JVA with Culture Map and Mr Woo. Secondly, Neptune submits that the documents demonstrate that there is a conflict of interest between certain individuals who are shareholders or directors in the plaintiff companies on the one hand, and Culture Map and Mr Woo on the other. It submits that they are in conflict over the operation of the Management Agreement and that this conflict precluded the settlement of the

proceedings. Neptune submits that the result is that the proceedings as conducted by the plaintiffs are subservient to the interests of a litigation funder, which seeks to exert complete control over the litigation. Ultimately, Neptune submits that these points yield the result that the Court should not grant relief in the form of the appointment of a receiver and manager as requested, because the parties seeking that relief do not come to the Court with clean hands.

41 Finally, Neptune contends that it would suffer significant prejudice if a receiver were to be appointed, and such an appointment is therefore not in the interests of justice in the circumstances. It asserts that the Business is travelling well and that the appointment of a receiver would cause a disruption to the operation of the Business because of the handover that would be required. Further, it submits that it would likely result in damage to the Business, both as a result of the significant fees that would likely be payable to the receiver and the risk that potential patrons may hesitate to book the vessel if a receiver was appointed.

3.2 The relevant law

42 In *Ozmen 1* at section 3.2 ([49] – [59]), I set out the relevant law applicable to the appointment of a receiver. The words of French J (as he then was) in *University of Western Australia v Gray (No 6)* [2006] FCA 1825 warrant repetition:

> **The powers of the Court**
>
> [71] The power of the Court to appoint a receiver is statutory. It has its origins, however, as an equitable remedy. An order in the nature of an equitable remedy can be made under s 23 of the Act. The class of circumstances in which such power may be exercised is not closed. Nor are the purposes for which a receiver may be appointed and the powers and conditions attaching to such an appointment. There may be many circumstances of considerable diversity which would warrant such an order and it is important that the discretion not be unnecessarily confined by any particular line of cases to which it has been applied.
>
> [72] Examples of cases in which receivers have been appointed on an interlocutory basis can be multiplied. Relevantly, a court may appoint a receiver to a trust in order to protect trust property. Such an appointment may be made where the trust is "in a state of disarray" — *Martyniuk v King* [2000] VSC 319 at [14] (Warren J). Her Honour there observed,

> citing Halsburys Laws of England (4th ed, Vol 39, para 827), that the general ground upon which a court appoints a receiver is ultimately in every case the protection or preservation of property for the benefit of persons who have an interest in it. She went on to say (at [15]):
>
> > *The basis upon which a receiver may be appointed has been regarded by the courts on even as wide a basis as when the circumstances render it just and convenient.*
>
> See *Manchester and Liverpool District Banking Co v Parkinson* (1888) 22 QBD 173. And further (at [16]):
>
> > *The court may appoint a receiver of trust property where that it necessary for the wellbeing of the trust.*
>
> See Ford & Lee The Principles of the Law of Trusts (2nd edition) at [1739].

43 In *Commonwealth of Australia v ABC2 Group Pty* [2008] NSWSC 1383; 69 ACSR 228 at [25] Barrett J stated:

> [25] …The court may appoint a receiver in a wide range of circumstances; indeed, whenever the interests of justice warrant it. Appointments are most often made to protect the subject matter of legal proceedings pending determination of those proceedings by the court. But the jurisdiction is wider than that.

See also *Sengthong v Lao Buddhist Society of NSW* [2016] NSWSC 1408 (Lindsay J).

44 Particular categories of cases where a receiver has been appointed include where the relationship between the parties has broken down or is such that the parties cannot agree. For example, in *Arumainathan, Re Stjc Pty Ltd v Stjc Pty Ltd* [2017] FCA 1229, Markovic J appointed a receiver over an early learning centre that was continuing to be operated on the basis that there had been a break down in the working relationship between the unit holders of the Trust, which in turn held the early learning centre. Her Honour did not find that it was necessary for her to consider the cause of the dispute, or resolve it. It was sufficient to note that there had been a breakdown of the working relationship between the parties; at [7].

45 Further, as I stated in *Ozmen 1*, guidance may be obtained from earlier authorities concerning the appointment of receivers and managers to businesses operating as

partnerships or corporations.

46 In *Morkaya v Parkinson* [2008] NSWSC 1050 (***Morkaya)***, Brereton J held:

> [20] The court is not equipped to run businesses on behalf of shareholders or partners in dispute pending winding up or final determination. Nor is it an appropriate use of judicial resources to resolve every dispute that may arise between the parties with respect to the conduct of their businesses pending a final determination. Traditionally, the appropriate remedy in the situation where a partnership breaks down and the partners are unable to agree as to the conduct of the business pending the winding up of the partnership is the appointment of an interim receiver or receiver and manager to conduct the business pending final hearing or winding up – although, because it is recognised that this can be ruinous, sometimes one of the parties will be permitted to conduct the business, or the receiver will be permitted to employ one of the partners to do so. Thus, upon the breakdown of an admitted partnership, either party has a strong case for the appointment of a receiver, although the court will not invariably make such an appointment, retaining a residual discretion, one of the factors informing which is the potentially ruinous consequences of an appointment. But despite the potentially ruinous consequences, if the parties are in intractable dispute appointment of a receiver may be inevitable. If the court is to decline to appoint a receiver in such circumstances, it will usually require that there be some mechanism in place to provide comfort to the court and to the party not in control as to the interim management of the partnership business.
>
> (footnotes omitted)

3.3 Consideration

47 In *Brimaud,* McLelland J noted that the overriding principle governing the approach of the Court to interlocutory applications is that the Court should do whatever the interests of justice require in the particular circumstances of the case. The ordinary rule of practice is that where an interlocutory order of a substantive nature is made after a contested hearing in contemplation that it would operate until the final disposition of the proceedings, an order to vary or discharge it must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application. I am satisfied that circumstances have shifted in the context of the balance of convenience so as to justify the appointment of a receiver and manager to the operations

of the JVA and, to the extent necessary, the Charter Agreement.

48 There is no dispute that the plaintiffs have established that there is a serious question to be tried in relation to their application for the termination of the JVA and the Charter Agreement. In addition to the matters that occasioned reference in *Ozmen 1,* I consider that there is also a serious question to be tried in relation to the question of whether or not Neptune acted in breach of clause 10(n) of the JVA and whether it failed to comply with its obligations as agent acting for Ozmen in procuring a rating of the Seadeck for 800 passengers. The evidence of Mr Sheller in his affidavits of 27 November 2017 and 21 May 2018 satisfies me that this is so.

49 Furthermore, I am not satisfied that the strength of the cross-claim advanced by Neptune is such as to diminish the strength of the arguable case advanced on the part of the plaintiffs; see *F. Hoffman-La Roche AG v Sandoz Pty Ltd* [2018] FCA 874 at [27].

50 The primary dispute between the parties is whether or not the balance of convenience has changed since *Ozmen 1* and whether it warrants the appointment of a receiver.

51 I commence by noting that Kanki and Neptune are parties to a JVA in which they have agreed to participate in an unincorporated joint venture to undertake the operation of the Business on or from the Seadeck. It is apparent that relations between them have significantly deteriorated since the delivery of *Ozmen 1*.

52 For the following reasons I am of the view that it is in the interests of justice that a receiver and manager be appointed. The points that I make below do not represent conclusive findings of fact, but are based on the evidence led in the current applications, most of which is based on information and belief.

53 First, I have in section 1.3 of these reasons summarised the course of the litigation since November 2017. It reflects a steady stream of disagreement between the parties as

to how they are to administer the conduct of the joint venture. There have been significant differences between them concerning the proper management of the books and records of the JVA. That has occasioned the constant supervision by the Court. There is no sign that the sequence of applications will abate. The opposite is likely.

54 Several sensible solutions have been proposed by the lawyers involved in order to diminish or extinguish the level of disputation between the parties. One was the decision to appoint the referee to consider their accounting disputes, of which there were many. That led to the referee's report, but even then the parties could not agree on its outcome. Indeed, they could not agree on the name of an accountant to conduct the independent reference. It is apparent that underlying the level of disagreement reflected in the process that led to the appointment of the referee was a deep level of distrust between the parties, despite the efforts of their lawyers to resolve them.

55 Ultimately, whilst the referee largely agreed with the final figures as recorded in the accounts maintained by Neptune, the referee saw fit to find that his costs should be borne 80% by Neptune and 20% by Kanki. The rationale for this was that Neptune should have provided greater transparency in its documentation for the operating expenses of the JVA. This observation accords with my observation that it has proved necessary for Neptune to be ordered by Court order to supply access to various documents and computer systems to the accountants of Kanki.

56 As noted in *Morkaya* at [20], the Court is not equipped to run businesses on behalf of co-venturers pending final determination of their dispute. Nor is it an appropriate use of judicial resources to resolve every dispute that may arise between the parties with respect to the conduct of their businesses pending a final determination. A receiver, if appointed, would act in the interests of all parties.

57 Secondly, the evidence adduced on behalf of Kanki demonstrates that, despite the supervision of the affairs of the conduct of the joint venture by Neptune, some aspects of

the administration of the JVA remain unsatisfactory. In this regard, the affidavit of Mr Clarke of 22 May 2018 indicates first that there has been no separation in the accounts that he has seen between the affairs under the JVA on the one hand, and the affairs of Neptune on the other. The joint venture uses the same bank account, tax file number and ABN number. Mr Clarke observes that the legal costs of Neptune have been allocated to the joint venture in the accounts, as have costs of the accountant and book keeper whom he understands to conduct services separately for Neptune and for the joint venture. Furthermore, Mr Clarke notes that the accounts of the joint venture record loans by Messrs Douchkov and Como in the amounts of $2,154,250.11 and $1,567,145.28 respectively, but that as neither is a joint venture party, neither can hold equity in it. No evidence filed on behalf of Neptune disputes these allegations.

58 In relation to the tax liability, Mr Clarke's affidavit dated 22 May 2018 notes that, on 14 September 2017, the records indicate a tax liability of $34,326.67 (excluding interest). His scrutiny of the accounts had not revealed any payment of that liability since then. Neptune answers this by an affidavit from Mr Leather of 27 June 2018 in which he indicates that he has been informed by Mr Borella (Neptune's accountant) that following the lodgment of certain BAS statements, negotiations were entered between Mr Borella and the ATO for the payments of outstanding tax liabilities by the joint venture. These led to an instalment arrangement being put in place on 21 June 2018. However, as the plaintiffs submit, it took an affidavit in the present proceedings to yield any information about this tax liability, notwithstanding a letter from the plaintiffs' solicitors in May 2018 seeking confirmation of the position. Furthermore, the instalments are to be paid fortnightly until 15 May 2020 to pay off the amount owing, being $415,080.41. One would have expected that Neptune would have kept its joint venture partner informed of these developments, but it apparently did not until the lens of litigation was brought to bear.

59 Mr Clarke's affidavit also notes that total wages paid by the Business since it commenced operation total $1,918,101, which would yield a superannuation liability of

$180,206. However, the accounts demonstrate payment of only $36,531, leaving $143,767 outstanding. Mr Leather does not address this apparent discrepancy in his responsive affidavit.

60 In my view there is sufficient material to indicate, on an interlocutory basis, that Neptune failed to separate its own accounts from the books and records of the joint venture Business, and pay key creditors (including the ATO) and the superannuation of staff.

61 Thirdly, the allegations most recently made by Neptune against the directors of the plaintiffs reflect a deep distrust between the individuals involved such that it is hard to conceive that they could conduct the Business in a functional manner. (In making the observations here, I do not mean to adjudicate on the correctness of the allegations). Neptune makes a number of allegations about Culture Map, including that it is not entitled to an interest in the subject matter of the proceedings; the proceedings are an abuse of process; and that the provision of a security interest to Culture Map over the vessel is a breach of contract.

62 The current directors of Ozmen are Mr Kartal Altikulacoglu and Mr Gunay Koyunoglu. Mr Altikulacoglu owns 98 shares and Mr Mert Ozmen owns 102 shares in Ozmen. The current directors of Kanki are Mr Koyunoglu and Mr Eric Woo. Mr Koyunoglu owns all of the shares in Kanki. The evidence of Ms Musgrave is that Mr Woo is a nominee for Culture Map. In submissions in support of its position under the current applications, Neptune alleges that Culture Map is a third party who has taken an interest in the subject matter of the proceedings to which it is not entitled. It submits that the proceedings are an abuse of process. The evidence indicates that, on 7 September 2017, Ozmen granted Culture Map a security interest over the Seadeck. In its written submissions, Neptune submits that provision of the security interest was in breach of cl 7 of the Charter Agreement and a breach of Kanki's fiduciary obligations. Moreover, Neptune contends that in April 2018 it reached an "in principle" settlement of the

proceedings with Mr Mert Ozmen and Mr Koyunoglu but that Mr Woo intervened to prevent the settlement from proceeding. Since then, allegations of conflicts of interest by Neptune have led to a change of solicitors for Kanki and Ozmen. I do not record these allegations with a view to indicating any concluded view as to their veracity. However, the nature and seriousness of the allegations reflect a significant level of distrust between the joint venture participants and are demonstrative of a breakdown in relations between the joint venture partners.

63 Fourthly, there is a significant dispute between the parties as to the manner in which profits from the JVA and shared costs are to be addressed in the accounts and, ultimately, paid. I address that dispute in more detail in the context of the payment of profits application and the shared costs application. However, it is apparent that leaving the conduct of the Business in the sole hands of Neptune is likely to escalate the areas of dispute between the parties. As I note in section 4 below, it is not appropriate now to adjudicate on differences between the parties concerning the keeping of accounts. However, the present material before me leads to a conclusion, on an interim basis, that there are significant differences between the parties going to the amounts owing to each of them, including as to the correct legal treatment of those amounts. In my view it is appropriate that the receiver and manager enter into the operation and preserve the assets of the Business pending final determination of the proceedings.

64 It is true that the Business has continued to operate since September 2017 without the appointment of the receiver. But the fact is that Neptune has done so during a period of increasingly bitter relations with its co-venturers. They appear to have a high level of mutual distrust. There are fundamental disputes between them that seem incapable of resolution without the intervention of an independent intermediary. Over the last 12 months that has frequently been the case.

65 At the hearing, Ms Gleeson accepted that the parties had a “less than functional relationship”. However, she submitted that the relationship was not such as to cause a

receiver to be appointed. However, having regard to the matters set out above, I am satisfied that the relationship between the parties has degraded to a point where it is necessary to appoint a receiver.

66 As to the two further submissions made in writing following the conclusion of the hearing, which I refer to at paragraph [40] above, I do not find these arguments persuasive. The first incorrectly characterises the Management Agreement as reflecting the conduct of the proceedings as being for a "collateral purpose". It overlooks the fact that since the inception of the proceedings the plaintiffs have sought a declaration that, on 25 July 2017 and 4 August 2017, the JVA and Charter Agreement respectively were terminated. There is no apparent inconsistency between a desire to pursue the litigation to a successful conclusion with the result (as asserted in the Originating Application) of the termination of those agreements and the return of the Seadeck to Ozmen, and the decision on the part of the plaintiffs to appoint a person to manage the Business. Nor is there any apparent abuse of process to be discerned from the fact that plaintiff companies seek financial assistance from a third party to fund litigation and enter into terms and conditions that enable a loan to be advanced.

67 The second argument proceeds on the premise that Neptune is entitled to make submissions on behalf of individuals who stand behind Ozmen and Kanki. That premise is incorrect. Furthermore, Ms Musgrave, a solicitor of over 30 years' experience, has recently come on the record to act for the plaintiffs and has confirmed (a) that she has instructions to act on behalf of each of the plaintiffs, having obtained instructions from their directors; and (b) that the plaintiffs join in the submissions made to the Court. That being so, there is no material before the Court warranting intervention on the basis of an asserted conflict.

68 Accordingly, in my view the circumstances are such that it is appropriate to make an order pursuant to s 57 of the *Federal Court Act 1976* (Cth) (**FCA**) that a receiver and manager be appointed to preserve the property that is the subject of the agreements

between the parties and ensure the orderly conduct of the Business pending final hearing. Later in these reasons I address the conditions precedent that must be satisfied before I will make orders for the appointment, and the form of orders to be made.

4. THE PAYMENT OF PROFITS AND THE SHARED COSTS APPLICATIONS

69 The payment of profits application brought by the plaintiffs and the shared costs application brought by Neptune are related. The plaintiffs seek payment of the funds held in trust which have been calculated under clause 10 of the JVA to be their share. Neptune submits that it is owed a significant amount in shared costs and that the shared costs argument extinguishes the payment of profits argument. Neptune only presses the shared costs application as a defence to the payment of profits application. I deal with these applications together.

4.1 The arguments

70 The plaintiffs seek orders for the payment to them of profits that have been achieved by the joint venture and which are held in the Holman Webb trust account. Clause 10 of the JVA provides that Neptune agrees to pay Kanki 50% of the net profit of the Business. It states that within 5 business days of each fortnight during the term, Neptune must calculate that profit for the preceding fortnight and provide all details to Kanki regarding the calculation of the net profit and share of net profit payable to Kanki, taking into account any upfront rebates and so on. The mechanism under the JVA is that if there is a dispute about the payment, then an independent accountant (appointed according to an agreed formula) is to determine the dispute and within 1 business day of the decision, the 50% profit share is to be paid. The referee's report concludes that the amount of profits accrued by the joint venture in the period 14 September 2017 until 19 December 2017 is $545,870. However, to date Neptune has resisted payment of half of that amount to Kanki. The plaintiffs contend that they should now be paid.

71 Neptune contends that despite the profits calculated in the referee's report, as

matters presently stand, any order for payment of profit share would be negligible. This is because clause 9(l) of the JVA provides for a reconciliation of annual profit at the end of each year of the term of the agreement. According to Neptune's submissions the current accounting position shows that final accounts for financial year 2017 show a loss of $365,092 and the trading profits for the current financial year show a profit (until 19 June 2018) of $398,097.35. On this basis, Kanki would be entitled to a net amount of $16,502.68.

72 Further, Neptune argues that the accounting records maintained by the joint venture reveal that certain advance payments of profit share have been made to Kanki and also that loans have been made to the majority shareholder in Ozmen, Mr Ozmen. These total $639,768.62. Accordingly, even if the amount owed for profit payments were greater than the amount of $16,502.68, there is still likely to be a significant net indebtedness to Neptune.

73 In relation to shared costs, Neptune seeks an order that Kanki immediately pay to it the sum of $324,634.54 pursuant to clause 9 of the JVA and that Kanki pay the sum of $24,971.89 to Neptune on the first day of each month commencing on 31 January 2018 until 31 October 2019. As stated above, Neptune characterises the shared costs application as a "defensive" application. It is a reason why the Court would not order that there be any payment over of profits in circumstances where there is a strongly arguable case that there are competing debts and a risk that the payment over of profits means that Neptune will never see that money again.

4.2 Consideration

74 I do not consider that either the payment of profits application or the shared costs application should be allowed. The evidence going to accounting matters has to date been given on information and belief. It is disputed by the parties. The arguments of the parties as to the entitlement to profit share (on the part of the plaintiffs) or repayment (on the part of Neptune) depend on both factual accounting matters and on competing legal

arguments concerning, amongst other things, the construction of clauses 7, 9 and 10 of the JVA. These are matters that should not be decided on an interlocutory basis.

75 Further, as noted in [71] above, Neptune submits that it is the plaintiffs, rather than Neptune, who owe money. Kanki disputes that the accounting records relied upon by Neptune are accurate and contends that by its calculations it is entitled to payments. It does not respond directly to the argument advanced by Neptune arising from clause 9(l) JVA, which would be a complete answer to Kanki's claim for payment of profits. Both parties urge that the others' approach to the accounting records is incorrect and that their own construction of the contractual position is correct. Objection is taken to the accuracy of the accounting evidence. Included in the evidence are numerous affidavits sworn on information and belief going to contention and counter contention as to whose record keeping or accounting is accurate. The submissions do likewise. It is plain that at final hearing the parties will dispute the accuracy of each other's' accounts. Many aspects of the accounting remain in dispute. These matters cannot be resolved at an interlocutory level. Furthermore, it is not in dispute that Kanki has no assets and that save for the Seadeck, Ozmen has no assets (see [80] below). The Seadeck is subject to a charge of an uncertain amount (see [86] below). In these circumstances, it is not clear that the plaintiffs would have the means to repay the amount held in trust.

76 In my view, this interlocutory application is not the appropriate vehicle by which to make orders for the payment of funds presently held in trust and the resolution of these issues must await final hearing. However, in my view, upon the appointment of the receiver it is appropriate that the mechanism for the payment of profits calculated to be due pursuant to clause 10 of the JVA to be made (if the receiver considers it appropriate and in accordance with the terms of the JVA to do so) given that they will be calculated by the receiver having regard to the current year of trading.

5. SECURITY FOR COSTS

77 Neptune seeks orders pursuant to s 1335 of the *Corporations Act 2001* (Cth) or

alternatively s 56 of the FCA and r 19.01(1) of the *Federal Court Rules 2011* (Cth) that the Plaintiffs give security in a form acceptable to the Court for the costs of Neptune in the amount of $248,750 within 14 days and that the proceedings be stayed until security is given or alternatively dismissed.

78 Section 1335(1) of the *Corporations Act 2001* (Cth) provides that:

> Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

79 Section 56 of the FCA provides that:

> (1) The Court or a Judge may order an applicant in a proceeding in the Court, or an appellant in an appeal under Division 2 of Part III, to give security for the payment of costs that may be awarded against him or her.
>
> (2) The security shall be of such amount, and given at such time and in such manner and form, as the Court or Judge directs.
>
> (3) The Court or a Judge may reduce or increase the amount of security ordered to be given and may vary the time at which, or manner or form in which, the security is to be given.
>
> (4) If security, or further security, is not given in accordance with an order under this section, the Court or a Judge may order that the proceeding or appeal be dismissed.
>
> (5) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for or in relation to the furnishing of security.

80 There is no dispute between the parties that; the plaintiffs' principals are not resident in Australia; that neither Ozmen nor Kanki have filed tax returns or BAS statements; and that Kanki owns no property and that Ozmen's only asset is the Seadeck. Kanki, on Neptune's case, bears a substantial debt for shared costs under the JVA, which it has not paid. Neptune also submits that Culture Map is providing third party funding for the litigation, with the consequence that this is an additional reason why security for costs should be provided by the plaintiffs. However, it is unnecessary to address the several arguments advanced on behalf of Neptune in this regard because the plaintiffs

have since December 2017 accepted that they must provide security for costs.

81 Two issues remain for determination in relation to the application for security for costs. The first concerns the amount. Neptune relies on affidavits sworn by Mr Leather on 22 November 2017 and 27 June 2018 that identify anticipated future recoverable legal costs in the amount of $123,750 and calculates past recoverable legal costs in the amount of $125,000. The plaintiffs dispute Neptune's entitlement to security for past costs. The second concerns its form. The plaintiffs contend that a portion of the funds held in the Holman Webb trust account should be quarantined and stand as security for costs in the proceedings, Neptune disputes that this is adequate because Neptune alleges that those funds are already payable to Neptune as part of its cross-claim.

82 In relation to the first issue, the estimate provided by Mr Leather in his affidavit of 22 November 2017 of $123,750 is not disputed, and in my view it is the amount that should be paid. I reject the further claim for a payment of $125,000 in relation to past costs, as reflected in Mr Leather's affidavit of 27 June 2018. That amount appears to include within it costs for the dispute concerning the adoption of the referee's report, and ancillary costs concerning the preparation of that report. Those matters were addressed by my order of 2 May 2018 requiring each party to pay its own costs of and associated with the reference to the referee, including the costs incurred in the proceedings in relation to the dispute which gave rise to the reference to the referee. It is not an amount in respect of which I would require the payment of security for costs.

83 In relation to the second issue, I do not accept the plaintiffs' submission that the funds held in trust by Holman Webb can stand as security for costs. Neptune was required by order to place those funds into the trust account, having never conceded that they were the property of Kanki. The various disputes that I have summarised in sections 3 and 4 of these reasons illustrate that in the event that Neptune is successful in the proceedings, the plaintiffs may not be entitled to those funds. Those are issues for another day. However, in exercising my discretion as to an appropriate form of security for costs, I do not

consider that those funds should be applied as security for costs.

84 As Neptune submits, it is now for the plaintiffs to propose a suitable form of security for costs. On 15 December 2017, the Court noted the following undertakings to the Court given by Ozmen:

> 14. Note the undertaking of [Ozmen] to the Court to pay any costs order made in the proceedings against [Kanki].
>
> 15. Note the undertaking [Ozmen] to the Court not to remove the vessel or cause it to be removed from Sydney Harbour without first giving 7 days' written notice to the solicitors for [Neptune].
>
> 16. Note the undertaking of [Ozmen] to the Court not to give any security interest over the Vessel without first giving 7 days' written notice to the solicitors for [Neptune].

85 The affidavit of Mr Sheller of 27 November 2017 provides evidence, on information and belief, that the Seadeck was in April 2016 valued at $7,250,000. The 15 December 2017 orders were made as a form of security that had previously been agreed between the parties.

86 It is apparent from a Personal Property Securities Register entry tendered in evidence that on 7 September 2017, Ozmen permitted Culture Map to register a security interest over the Seadeck. No details have been provided of that interest. There was a suggestion in Neptune's submissions that there was a failure on the part of the plaintiffs to declare the prior charge over the Seadeck when it gave the undertaking in order 16 of the orders dated 15 December 2017. However, the future tense of order 16 indicates that the suggestion is not correct.

87 Nevertheless, it is apparent that the current regime concerning security is not sufficient, and it is for the plaintiffs to propose a suitable form of security that is satisfactory to the Court. I will order that the plaintiffs provide security for Neptune's costs in the amount of $123,750 within 21 days of these reasons, failing which the plaintiffs' claim will be stayed.

6. DISPOSITION

6.1 Appointment of receiver and manager

88 Mr Silvia is a principal of BRI Ferrier NSW. He is a registered liquidator and registered trustee in bankruptcy with over 45 years' experience in insolvency and with experience in the shipping and hospitality industries. He consents to act as an independent receiver and manager in relation to the disputes between the parties arising from the JVA, the Charter Agreement and the operation of the Business. He will act from his firm's Sydney office in conjunction with Mr Ian Currie, who is the principal of the affiliated form BRI Ferrier in South Queensland. I am satisfied that Mr Silvia and Mr Currie are suitable persons to be appointed receivers and managers in the present case.

89 Set out in Annexure A is a modified version of the orders proposed by the plaintiffs for the appointment of the receiver. I broadly consider them to be appropriate. However, as neither party has made specific submissions on the form of these orders, it is appropriate that they have an opportunity to do so. To that end, I direct the parties to confer and identify areas of agreement and disagreement as to the form of the orders in Annexure A. I grant leave for the parties, on or before Monday 24 September 2018, to file and serve written submissions of no more than 4 pages in length addressing their respective proposals on the orders that are not agreed. Unless contended otherwise, I will then finalise the form of the orders on the papers.

90 Prior to making the orders appointing the receiver, however, the plaintiffs must, within 21 days:

(1) Give to the Court the usual undertaking as to damages;

(2) Provide security for Neptune's costs of the proceeding in the amount of $123,750.00;

(3) Provide security for costs for the receivers in the amount of $100,000 to be lodged with the Court. This amount represents the plaintiffs' estimate of the amount that would

be sufficient to indemnify the costs of the receivers for 6 – 8 weeks in the event that the profits of the Business are insufficient to cover them; and

(4) Undertake to prosecute their claim with expedition.

6.2 Other Orders

91 The orders sought in relation to the appointment of the receivers will be allowed and, provided that the conditions precedent set out in paragraph [90] above are met, I will order that Neptune pay the costs of the application for the appointment of the receivers.

92 The applications for the payment of profits and payment of shared costs have been refused. The latter was raised purely defensively, and it was appropriate that they should be considered at the same time. In my view the plaintiffs should pay the costs of both of these applications.

93 The application for security for costs should be allowed. Neptune succeeded in its argument as to the form of the order, but failed in respect of the quantum. Nevertheless, Neptune was substantially the successful party in respect of its application, and should have its costs.

94 It will be necessary for orders to be made to ensure a more expeditious conduct of the proceedings to trial. The parties must confer and propose short minutes of order that set out a comprehensive timetable for the preparation of the proceedings. The proceedings will be listed for case management at 9:30am on Friday 5 October 2018.

95 Finally, I note in [23] above that Culture Map has undertaken not to enforce its security interest in the Seadeck without giving 48 hours prior notice or such notice as the Court stipulates. In my view, that undertaking should be to provide no less than 14 days prior written notice.

I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Burley.

Associate:

Dated: 13 September 2018

ANNEXURE A

Appointment of receiver and manager

Upon:

(a) the giving by the plaintiffs of the usual undertaking as to damages;

(b) the giving by the plaintiffs of an undertaking to prosecute their claim for final relief as set out in its Amended Originating Application dated 4 December 2017 (or in any subsequently amended pleading) with expedition; and

(c) the payment by the plaintiffs of a security deposit in the amount of $100,000 into Court (**Security Deposit**):

1. Brian Silvia and Ian Currie of BRI Ferrier be appointed as receivers and managers (**Receivers**) of:

(a) The Vessel known as the Seadeck IMO Number 8672108 (**Vessel**) owned by the First Plaintiff (Ozmen); and

(b) The business established by the Joint Venture Agreement between the Second Plaintiff (**Kanki**) and the Defendant (**Neptune**) dated 6 January 2016 (**Business**) and, to the extent necessary, the Charter Agreement between Kanki and Neptune dated 6 January 2016.

2. Without limiting their powers, the Receivers may, until further order of the Court:

(a) Take such of the possession of the Vessel as is required for the purpose of conducting the Business, and in relation thereto to make any and all decisions as the Receivers may deem appropriate to secure, moor and steer the Vessel, including without limitation to bring the Vessel back to Sydney at such time and manner as they consider practicable;

(b) Take possession of the bank accounts and all other assets of the business, and if they consider it necessary or desirable to do so, to open a new bank account for the

Business in the name of the Receivers;

(c) Undertake such repairs or maintenance of and in respect of the Vessel as the Receivers consider appropriate;

(d) Undertake such activities for the conduct of the Business on board the Vessel as they consider appropriate;

(e) Employ such staff or engage such contractors for the purpose of the receivership as the Receivers consider appropriate;

(f) Receive all moneys receivable in respect of the operation of the Business into the bank account or bank accounts referred to in paragraph (b) above, and pay all moneys payable in respect of the operation of the Business from that bank account or bank accounts;

(g) Exercise such other powers as may be agreed in writing between the Receivers and the parties to these proceedings.

3. From the proceeds received from the Business, the Receivers are to first pay all reasonable and necessary expenses as and when incurred in the conduct of the Business.

4. Within 5 business days at the conclusion of each fortnight period after the making of these orders, the Receivers are to:

(a) prepare an account of the revenues and expenses of the Business for that period to calculate the net profit of the Business for that period (**Operating Profit**);

(b) calculate how much of the Operating Profit ought reasonably be retained by them as working capital for subsequent fortnightly periods for the conduct of the Business or for such other good cause, including without limitation to meet any income tax liability or superannuation payment (**Retention);**

(c) pay to each of Kanki and Neptune 50% of the amount remaining after deducting the Retention Amount from the Operating Profit for that period (**Profit Distribution**) and provide to each of Kanki and Neptune a copy of account referred to in (a) above and the calculation referred to in (b) above.

5. The Receivers are to file accounts within 14 days after the end of each calendar month with the Court setting out the revenues, expenses and fees of their receivership.

6. The Receivers are entitled to draw their professional fees as and when incurred on a time-cost basis at the rates set out in the attached schedule [to be provided], their remuneration to be drawn as and when accrued and subject to the availability of funds, on the basis that the Receivers must account for any such drawings by the passing of accounts and the approval of their remuneration at the conclusion of the Receivership.

7. The Receivers are to provide a report to the Court about the progress and conduct of the Receivership within 28 days of the completion of each calendar quarter (being 30 September, 31 December, 31 March and 30 June).

8. Within 7 days, Neptune is to deliver up to the Receivers possession and execute any authority, instrument or document to enable the Receivers to take possession and have control of all:

(a) staff records for the business;

(b) accounting and finance records for the business

(c) website domains for the business;

(d) unperformed contracts for hire or letting of the Vessel;

(e) permits, licences and authorities relating to the operation of the Vessel and the business.

9. Note that in the event that the takings from the Business are insufficient to discharge the obligation (both prior to and after the appointment of the Receivers) for fees, expenses and debts, the Receivers will have a right of indemnity and security at first instance over the Security Deposit and at second instance over the Vessel.

10. The Receivers have liberty to apply to the Court for directions on 24 hours' notice, with notice of any such application to be provided to each of the parties to these proceedings.

11. Neptune pay the costs of the plaintiffs' interlocutory application for the

appointment of the receivers.