



22 August 2017

The Club Committee of Club Los Claveles Timeshare Resort  
Club Los Claveles  
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Dear Committee

**Arbitration - Club Los Claveles  
Arbitration (Scotland) Act 2010  
Wimpen**

We are writing in connection with a letter which the Committee has drawn to our attention. This, we understand was sent to all Club owners on or about Thursday 17<sup>th</sup> August 2017 by German Castro. A copy is attached. The Committee has expressed concern to us in relation to several statements in Mr Castro's letter, which concerns the arbitration and the Arbitrator's decision issued on 1<sup>st</sup> August 2017.

As the Committee is aware, we are the solicitors instructed by the Committee and we conducted the whole arbitration between the Committee and WimPen. Yesterday, we received an email from a Club member requesting a copy of the arbitration decision and expressing bewilderment as to why this could not be provided. Today we received a telephone call from another Club member expressing frustration that the arbitration decision cannot be published and requesting a copy. The latter caller made specific reference to the difficulty in knowing whether correspondence from Wimpen about the arbitration was correct, in the absence of being able to read the arbitrator's decision.

We confirm we have had no prior contact with either Club member. Both were informed that the decision cannot presently be released due to confidentiality.

Flowing directly from the above, we have therefore considered what information may be provided, within the confines of the legislation and the arbitration agreement. We have taken into account Mr Castro's letter as being a highly material and relevant consideration in weighing the competing interests of the Committee, its members and the parties to the arbitration. We do not consider that the letter presents a balanced view. Nor are we sure why it has been sent at this particular juncture but we are mindful of the impending Club AGM.

The Scottish Arbitration Rules

According to the Scottish Arbitration Rules, an arbitration is supposed to be confidential. It does not finish until all outstanding matters have been dealt with. The question of the legal expenses of the current arbitration is still

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outstanding. Submissions are due on Thursday. Mr Castro should therefore not be giving out details to the world at large of the outcome of the arbitration. Of concern, anyone reading Mr Castro's letter would assume WimPen had won the arbitration comprehensively. The letter is also highly critical of the Claimants in the arbitration, particularly the Committee Chairman. Put bluntly, it appears to call into question their probity and judgement in even starting an arbitration.

In these circumstances we consider Wimpen's actions entitle the Committee to make some response to the Club members for whom they have contact details, on the basis the information is kept strictly confidential to Club members only. We reach this conclusion since Mr Castro must have anticipated there would be a reaction to his letter. Further, presenting a balanced view and a response to Mr Castro's letter can reasonably be considered necessary to protect the lawful interests of the Claimants, such as their reputations and their function as Committee members.

We consider this approach is permissible having regard in particular to the following provisions of the Arbitration (Scotland) Act 2010:

“26(1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure—

(a) is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised),

(d) can reasonably be considered as being needed to protect a party's lawful interests”

We therefore turn to the matters set out in Mr Castro's letter.

#### Points arising from Mr Castro's letter.

1. If as Mr Castro represents, WimPen has enjoyed success in the arbitration, we question why Wimpen's solicitors wrote to the Trustee company, FNTC, on 14<sup>th</sup> August 2017, claiming that an appeal against the arbitration outcome is under consideration. Not only an appeal, seemingly, but also a new court case against the Committee members in relation to other matters.
2. Mr Castro overlooks that an appeal against the arbitration decision is not permitted by the Constitution. This says the decision of the Arbitrator is “final and binding”.
3. WimPen fought the arbitration whilst maintaining a position that the Committee had no legal title to bring it. They lost on what they clearly intended as a knock-out point. If the Arbitrator had struck out the entire arbitration due to lack of legal title that would have had very serious consequences. The Committee's only option would have been litigation in Spain. Spanish litigation is notoriously slow and expensive.
4. Mr Castro seems to give the impression that the legitimacy of the Club's members on the Club Committee and the calling of Committee meetings were both minor matters, so it does not really amount to much that they were decided in the Committee's favour. However, significant amounts of the arbitration was taken up in addressing Wimpen's refusal to accept that *any* of the Committee members, other than Albert Fletcher, were legitimately in post i.e. Carol Parkinson, Ray Steele, Ann Burston, and Roger Lindsay.

Wimpen's stance had direct consequences because from autumn 2015 onwards, FNTC refused to sign a Deed of Transfer to the new Trustee company, Hutchison. It was Mr Pengelly himself who requested the transfer in 2012.

5. Mr Pengelly previously issued another letter to all owners on behalf of Wimpen/ ONA, again using the Members Register, giving details of the arbitration, which the Committee considers he ought not to have done due to confidentiality. In that letter he complained the Committee had asked for an order for payment by WimPen of €125,000 towards its legal costs. That order was indeed requested as Mr Pengelly says. It was also granted and Wimpen never paid.

On the subject of legal costs it may also be noted that the Committee ran the arbitration with due regard to economy, employing a partner solicitor and staff solicitor throughout, including at the six-day evidential hearing (trial) in December 2016 and the subsequent full day's legal submissions in January 2017. WimPen added an external barrister to its legal team from approximately October 2016 onwards.

6. WimPen was ordered repeatedly to produce the Club Members' Register during the arbitration. It has never done so.
7. Wimpen has been ordered to hand over all Club property and the Membership Register and a full reconciliation of the Comunidad bank account by 29<sup>th</sup> August. This handover is explicitly to "*the Claimant*" and "*the Chairman of the Claimant*". Not, as Ms Castro says in his letter, to "the Committee". These steps have to be carried out now. They do not need to wait for any meeting or election.
8. Mr Castro also apparently claims that the Arbitrator decided that the Management Agreement had not been terminated at the Club AGM in 2015 ("we were right"). This is misleading. The arbitrator in fact said he had no jurisdiction over that Agreement. So this point was not decided but, in any event, that was not fatal to the arbitration since other matters in dispute *were* within the arbitrator's jurisdiction.

Mr Castro's letter is also at odds with several Wimpen acknowledgements that the Committee was entitled to go to arbitration, and that the Committee felt it was bringing the arbitration in the interests of Club members.

Yours faithfully,



Partner

For and on behalf of BTO Solicitors LLP

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Dear Owner,

We write to you following the decision of the arbitrator in the ongoing dispute between WimPen Leisure Management S.A. and certain members of the Club purporting to comprise the Club's Committee. As ever, our goal is to secure the future of the Club, and regularise its constitutional affairs, for the benefit of all the owners at Los Claveles.

#### **Arbitrator's Decision**

Following the closing of submissions in January this year, the arbitrator issued his award on 1 August. This decision deals with various issues surrounding the Club, and the events of the past two years.

We are pleased to let you know that the arbitrator's decision confirms that much of what Mr Fletcher and the 'Committee' have told members over the last two years is simply not true:

- The arbitration was commenced due to a dispute about the termination of WimPen's management agreement with the Club. The arbitrator identified that this was the "main issue" in dispute. We said that the management contract had not been terminated. We were right.
- We said that WimPen and Time Ownership Los Claveles (Management) Limited were, and remain, the 'founder members' of the resort. We were right.
- We said that Mr Pengelly was, and remains, a member of the Club Committee. We were right.

We understand that some Club members have been asking Mr Fletcher why he has been spending potentially hundreds of thousands of pounds of your money pursuing an unnecessary legal action. Mr Fletcher lost on that issue, and must face that he has engaged in a battle using your money and lost the key points he wanted to prove.

Mr Fletcher could have taken the proper procedural steps outlined in the Constitution which would allow the Club members to decide on a change of administrator following the expiry of the management contract. WimPen have said on numerous occasions over the past two years that a general meeting of the Club should be convened in a manner agreed between all parties, with a preference for such a meeting to be overseen by an independent chairperson. We still believe that this is a reasonable and proportionate way to resolve the issues between all parties; instead of engaging in such a constructive discussion, Mr Fletcher has opted to take numerous invalid steps to further distort the constitutional affairs of the Club.

#### **The 'Committee'**

The arbitrator decided that the current Committee is Mr Pengelly together with Albert Fletcher, Roger Lindsay and Norma ('Ann') Burston. It is a simple matter that, to hold a valid Committee meeting, you need to invite all the members of the Committee. This did not happen. Mr Pengelly, having looked after Los Claveles and its members for nearly 30 years, has been wrongfully excluded from Committee meetings since July 2015. The arbitrator's decision shows that it was wrong for this to happen. Any Committee meeting which took place without Mr Pengelly being invited is not capable of being valid.

#### **2017 AGM**

No arrangements have been put in place to convene an AGM of the Club in 2017 due to the circumstances surrounding the dispute. While matters are in dispute, it would be reckless to cause further confusion by making changes which impact the Club, including its Constitution and Committee structure. Mr Pengelly has not received any notice of, been invited to, nor attended, any Committee meeting regarding the calling of any 2017 AGM. Therefore, as outlined above, no valid meeting is capable of having been convened.

*and...*

### **WimPen's Club Membership**

As well as working with you, and acting as your management company for 20 years, WimPen is a member of the Club, owning a number of weeks. WimPen has been threatened with the cancellation of its weeks at the resort. Like you, we pay the same maintenance fees to pay for the upkeep of the resort and are proud to have contributed to the upkeep of Los Claveles over the years.

### **'Founder Member'**

WimPen and Time Ownership Los Claveles (Management) Limited have been the 'Founder Members' at Los Claveles since 1998. Founder Membership of a resort is a commercial right which vests in a developer of a resort, such as Los Claveles. Founder Membership is exclusive from any management arrangement and gives the right holder certain powers. We understand that a recent meeting purported to delete these rights – this is simply not possible.

### **Club Property**

As a result of its position as the management company, WimPen currently holds Club property (including Club funds) on behalf of the Club members. The Club's current management contract with WimPen expired on 3 May 2017. The arbitrator's decision states that the Club's property ought to be transferred to its Committee.

However, there is still unresolved disagreement about the identity of the Club Committee, and the correct version of the Club Constitution. These issues will need to be resolved before it is possible for any progress to be achieved. Regrettably, this process may involve further legal proceedings, which may include an appeal of the arbitrator's decision, or initiating a new arbitration, to achieve the necessary clarity on the points of dispute.

### **Next Steps**

Until these issues have been resolved, WimPen proposes to remain as the acting management company in order to maintain the status quo at the resort. Once the issues have been resolved, we would like all owners to decide the future of their resort at a General Meeting at which the validity is agreed by all parties. We have offered such a meeting before, in August 2016, but this offer was ignored.

The maintenance fees paid to WimPen go directly into the Los Claveles bank account and pay for your resort staff's employment, the restaurant and all the other facilities you enjoy. This is still managed on a day to day basis by WimPen. Therefore, in the interim, please ensure that you continue to pay your maintenance fees to WimPen and ignore any other invoices which you may receive.

We continue to consult with our solicitors in the UK and Spain regarding the next steps to protect the future of Los Claveles for its members. We will let you know what action will be taken at the earliest opportunity.

We hope we can work together with members to regulate the business of Los Claveles as soon as possible.

Yours sincerely,



German Castro  
WIMPEN LEISURE MANAGEMENT, S.A.  
Managing Director