ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 2 of 2001

BETWEEN:

LEEWARD ISLES RESORTS LIMITED

Appellant

and

CHARLES HICKOX

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal

Appearances:

Mr. C. Abel with him Mr. S. Westmaas and Mr. P. Patterson for the Appellant
Mr. C. Hendriques, Q.C. with him Ms. P. Webster, Counsel and Mr. W. Rodgier for the Respondent

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2002: June 4;
2003: April 3.

JUDGMENT

[1] **REDHEAD J.A:** The issue in this appeal involved the determination of a preliminary issue in a dispute, the subject of litigation between the appellant and the respondent in High Court Suit No. 97 of 1998. The learned trial Judge at paragraph 27 of his judgment said:-

> "Following a number of interlocutory applications in the matter, and upon the plaintiff giving a certain undertaking, it was decided to set down for determination as a preliminary issue the following questions:-
>
> "Whether the plaintiff advanced to the defendant
>
> (a) monies totaling US$4,000,000.00 in the period 1986 to 1989 inclusive (being the subject of the Promissory Note dated 31st July, 1990 exclusively of interest); and

(b) monies totaling US$3,962,830.41 in the period 1998 to 1994 inclusive (being the subject of Promissory Note dated 1st January, 1995"

The undertaking given by the plaintiff was to the effect that he would "withdraw this action and not ……..bring any further action against; the defendant in respect of his claim……on the respective alleged Promissory Notes…… if…..he is unable to establish that the monies advance to the defendant was substantially (as determined by the court) in the sums" alleged in the Promissory Note.

[2] The hearing of the preliminary issue took some thirty-seven days. Notwithstanding that the proceedings were only concerned with the determination of the preliminary issue.

[3] For the determination of the preliminary issue the learned trial Judge undertook an analysis of the following (1) the factual issues or evidence (2) the accounting issues and issue pertaining to US banking law. After a careful analysis of the above, the learned trial Judge gave judgment for the respondent. He answered the questions posed on the preliminary issue as follows:-

> ""I would answer the question ordered to be tried as a preliminary issue in this fashion. I am satisfied that the plaintiff has established that he advanced to the defendant monies substantially in the sums set out in the promissory notes. I am satisfied that, of the monies totaling US$4,000,000.00 the subject of the Promissory Note dated 31st July, 1990, the plaintiff advanced to the defendant either all of the same or a substantial position thereof. I am satisfied that, of all the monies totaling US$3,962,830.41 the subject of the Promissory Note dated 1st January, 1995, the plaintiff advance to the defendant either all of the same or a substantial portion thereof."

[4] The learned trial Judge awarded costs to the respondent fit for two counsel.

[5] The appellant is dissatisfied with the learned Judge's findings on the preliminary issues and it has appealed to this court. Some Forty [41] grounds of appeal with sub grounds are filed on behalf of the appellant.

[6] In my opinion it would neither be practical nor would it serve any useful purpose to refer to all the grounds of appeal in order to decide the appeal. The first ground of appeal advanced by the appellant is that the learned trial Judge misdirected himself and erred in law in relation to-

(a) Burden and standard of Proof

(b) The learned trial Judge was wrong in law and misdirected himself in that he determined:

> "for the court to find facts in favour of the defendant I must therefore satisfy myself that, when juxtaposed with Mr. Sheehy's unchallenged testimony and the admitted documents, the factual evidence of Messrs. Hickox and Hassink was so unreliable or discredited by cross examination as to render the plaintiff's case unbelievable. The standard of proof would naturally be the civil one of a preponderance of probabilities."

[7] The appellant contends in ground 1(a) in so holding the learned Judge-

(a) Established a precondition to finding of facts in favour of the defendant

(b) Shifted the legal burden of proof (of the preliminary issue) on to the defendant to discredit by cross-examination the factual evidence of Mr. Hickox and Mr. Hassink, so as to render the plaintiff's case unbelievable, and in so doing imposed on the defendant the need, in discharging that burden, to meet that burden either on the balance of probabilities or on a standard of proof higher than that required in civil cases.

[8] It was also contended on behalf of the appellant that the learned trial Judge misapplied the law in relation to the burden and standard of proof.

[9] What the learned trial Judge said in his judgment at paragraph 31 when he was considering the issue of fact was that:-

> "Mr. Hickox, Mr. Hassink and Mr. Sheehy testified as to certain facts for and on behalf of the plaintiff. Mr. Hassink is an accountant who worked with KPMG, the auditors of LIR [the appellant]. He worked very closely with LIR during the period when the promissory notes were executed and it was he who actually carried out the field work for KPMG in respect of the audits of LIR. Sheehy is a Chartered Engineer. For most of the period of construction of the resort he was the construction manager. *The defendant elected to call no witnesses to fact .*

> *Mr. Hickox and Mr. Hassink were cross-examined at length. Mr. Sheehy was not cross-examined.* For the court to find facts in favour of the defendant I must therefore satisfy myself that, when juxtaposed with sheehy's unchallenged testimony and the admitted documents, the factual evidence of Messrs. Hickox and Hassink are so unreliable or discredited by cross-examination as to render the plaintiff's case unbelievable. *The standard of proof would naturally be the civil one of a preponderance of probabilities.* (My emphasis).

[10] It is not correct to say that the learned trial Judge shifted the legal burden of proof on the defendant. Before analysing the factual issues, the learned trial Judge outlined the approach he would take. What did the learned trial Judge have before him by way of evidence? He had the evidence-in-chief and cross-examination of Hickox and Hassink and the evidence-in-chief of Sheehy and documentary evidence. He had no viva voce evidence from the other side (it may have put in documentary evidence). He reasoned quite rightly, in my judgment, that the appellant having called no witness of fact, if therefore he had to find facts in favour of the appellant, he must satisfy himself that when he examined the documentary evidence and the evidence given by the Hickox and Hassink including the uncontroverted testimony of Sheehy, the evidence of Messrs. Hickox and Hassink must be so unreliable or discredited by cross-examination so as to render the respondent's case unreliable.

[11] The evidential burden was on the respondent that is the burden of proof in the sense of adducing evidence to establish his case. If the other side leads evidence, that evidence may weaken or destroy the plaintiff's case [respondent's]. In the instant case there was no evidence coming from the appellant [defendant]. Evidence given by Hickox, Hassink and the uncontroverted testimony of Sheehy on behalf of the respondent, it follows therefore only the cross-examination and documentary evidence were capable of discrediting Hickox and the documentary evidence of discrediting the uncontroverted testimony of Sheehy. If the evidence led on behalf of the respondent was discredited or unreliable then he will find in favour of the appellant. This is in effect what the learned trial Judge was saying and in my judgment that must be correct because he had nothing else to go on.

[12] As I said above in paragraph 3 of this judgment the learned trial Judge outlined the preliminary issues as referred there and this must have been agreed to by all the parties. This to my mind must be the nub of the issue whether or not the respondent advanced monies totaling US$4,000,000.00 in the period 1986 to 1989 being the subject of a promissory note dated 31st July, 1994 and monies totaling US$3,962,832.41 in the period 1969 to 1994 being the subject of a promissory note dated 1st January, 1995.

[13] The learned trial Judge in, what I regard as, a very detailed and analytical judgment analysed the above queries in detail.

Under ground 3 it was contended as follows:

The learned trail Judge misdirected himself and was wrong in law-

(a) in failing to confine the scope of the trial of the preliminary issue to the question ordered to be tried namely whether the plaintiff [respondent] advanced to the defendant [appellant] the sums of monies alleged and/or alternatively in expanding the scope of the Preliminary Issue to include the advancement of benefit or the benefit of monies or monies worth;

(b) in failing to confine the scope of the trial of the preliminary issue to the question whether the plaintiff advanced to the defendant only the advances specifically recorded in the two schedules of the promissory notes and which monies are expressly referred to as being the subject of the promissory notes.

[14] Under ground 3(bb) the appellant alleges that the learned trial Judge misdirected himself in that he failed to give due weight to the significance of the fact that the promissory notes and contractual documentation specially incorporated the two schedules which specify each and every advance and represent that historically on particular days the plaintiff advanced specified amount to the defendant

(c) In failing to hold that the sole issue for determination of the court at the trial of the preliminary issue, was the factual issue of the origin and destination of the advance on the schedules and whether on the evidence, they were made to the partnership or the defendant in substantially the amounts alleged;

(d) In failing to hold that the issue for determination was not whether the plaintiff legally or "notionally" advanced his monies to the defendant; or whether the plaintiff had any claims in law or equity to have advanced his monies to the defendant; nor that the defendant legally assumed or acknowledged the plaintiff's advances as having being made to the defendant, nor to limiting the scope of his enquiry to determine whether the case should go on to trial or whether the circumstances were such that a plaintiff should make good on his undertaking;

(e) In holding that for the purpose of the preliminary issue advances equal loans

(f) In not holding that the proper evidential focus for the resolution of the preliminary issue was the examination of the flow of the monies or funds, the contracts and invoices relating to construction, the accounting record, the contemporaneous financial statements the books and records of the companies, the relevant bank accounts and their legal ramifications and the proper and reasonable inferences that flow therefrom.

[15] I make the comment that the grounds of appeal are multifarious as they are confusing. One [1] ground for instance runs into the other. I get the impression that they are framed in that manner so as to confuse.

[16] The learned trial Judge began by asking did Mr. Hickox, the respondent make advances? Then he said that he thought this was the least contentious of the factual issues in the trial.

[17] He then went on to examine the question, to whom did he make those advances?

[18] I am now dealing with ground 3 of the appeal. Under this ground it is contended on behalf of the appellant that he learned trial Judge misdirected himself and was wrong in law.

(a) in failing to confine the scope of the trial of the preliminary issue to the question ordered to be tried namely whether the plaintiff [respondent] advanced to the defendant [appellant] the sums of monies alleged and/or alternatively in expanding the scope of the preliminary issue to include the advances and of benefits or the benefit of monies or monies worth ;

(b) In failing to confine the scope of trial of the preliminary issue to the question whether the plaintiff advances specifically recorded in the two schedules attached to the promissory notes and which monies are expressly referred to as being the subject of the preliminary notes.

[19] To my mind the question posed by the learned trial Judge, to whom did he make those advances? Point directly to the preliminary issue and is within the confines of the preliminary issue. The learned trial Judge went to the heart of the matter. The very thing the appellant is alleging that he failed to do. I analyze the judgment to see how the learned trial Judge dealt with the issue.

[20] In an analysis of this issue the learned trial Judge reasoned as follows:-

> "In this written closing submissions counsel for the defendant concedes as early as 1985 Mr. Hickox was expending monies in relation to Cap Juluca, project. There is little doubt that, beyond his purchase of the partnership units, the plaintiff caused Ashland Management [a company of which he is the CEO and in which he holds 70% stakes] to pay into certain bank accounts at the United States Trust Company [USTC] considerable sums of money. The evidence discloses that he advanced funds from a line of credit at the USTC and in some instances from an account he had at the Bank of New York. The defendant's accounting expert, Mr. Love acknowledged, in his report that, with possible reference to the first promissory note, advances totaling US$4,267.966.00 From Mr. Hickox where traced to two partnership bank accounts at USTC, with possible reference to the second promissory note Mr. Love found that 90% of the advances allegedly made to LIR [the defendant] were indeed made to the said accounts without identifying at this stage to whom the same were made. I find as a fact that the plaintiff was the source of those funds"

[21] By August 1988, after US$5.1m was spent on the project, the investors had very little to show for that expenditure.

[22] In his judgment at paragraph 18 the learned trial Judge opined:

> "Construction work proceeded at a more brisk pace after the August 1988 meeting, with the infusion of fresh funds originating from Mr. Hickox. These funds were not enough to complete all phases of the project. Accordingly Mr. Hickox claims that over and beyond the US$4,000,000.00 package he injected further funds into the project. Additionally, the partnership pursued its negotiations with

> Barclays Bank in Anguilla with a view to securing a loan for the purpose of the ongoing construction."

[23] Before the Barclays loan came through Mr. Hickox claims that a further sum of US$3,962,836.00 was spent by him on construction beyond his original US$4,000,000.00".

[24] The Bank negotiations concluded in September, 1990. The Bank was not prepared to lend its funds to the Partnership. They made it clear that they were only prepared to lend their funds to the appellant since it was not only Anguillan registered but also more importantly it was the lessee of the lands upon which all the development was taking place. As part of its security the bank took a personal guarantee from the respondent. He was made to enter into a Standby Loan Agreement by which he personally secured the payment to the bank of the principal and interest on the loan if at anytime the appellant was unable to do so.

[25] He also undertook to finance the completion of the entire resort if Barclays Bank funds proved to be insufficient.

[26] The appellant is a company incorporated in Anguilla. It is the leaseholder of about 179 acres of beachfront lands at Maunday's Bay in Anguilla. The respondent is a financial adviser from the United States of America.

[27] In 1983 Mr. Hickox visited Anguilla and he met Mr. Robin Ricketts who was at the time manager of Mallihouana Hotel in Anguilla. Mr. Ricketts showed the respondent the lands at Maunday's Bay the latter was impressed with the lands. Mr. Ricketts tried to woo the respondent's interest for the purpose of developing the lands.

[28] The respondent was interested. At the time the shares in the appellant were substantially owned by a group of businessmen led by one Mr. Dion Friedland, "the Friedland Group."

[29] The conditions of the lease held by the appellant from the Government of Anguilla required the appellant to develop the lands and to construct, in phase, extensive tourism facilities thereon.

[30] The respondent entered into an option agreement with the Friedland Group to acquire all the shares in the appellant for the sum of US$2.4m. However this option was never exercised by the respondent.

[31] Eventually, four sets of investors, including, Mr. Hickox agreed to participate in a project proposal advanced by Mr Hickox and Mr. Ricketts. They agreed to form a limited Partnership - Cap Juluca Partners under New York law.

[32] The purpose of the partnership was to take control of the appellant or of the lands leased by the appellant.

[33] The partnership was divided into eleven [11] units. In an effort to attract investors to the project the respondent had drawn up a term sheet which set out the relationship between potential investors and defining what investors would get for their money. This term sheet had now become an offering memorandum referred to by the parties as a Private Placement memorandum dated 22nd December, 1986.

[34] On 14th December, 1986 pursuant to a Stock Purchaser Agreement, the Partnership purchased all, but one, of the shares of the appellant that one share was transferred to the respondent personally in order to comply with Anguilla law which mandated that there must be at least two shareholders to form a local company.

[35] In consideration for relinquishing its shares in the appellant's company, the Friedland Group was granted two of the eleven units in the partnership. In further consideration of the sale of the shares, the partnership also agreed to make to the Friedland Group, in instalments, cash payments totaling US$1.4m. A payment of US$500,000.00 was due on 14th October 1998, a further payment of the same amount become due on 14th October,

1989, and the balance of US$400,000.00 with interest due on 14th October, 1990. On 14th October, 1986 the members of Friedland Group resigned as Directors of the appellant and were replaced by Mr. Ricketts, Mr. Hickox as Managing Director. Mr. Ricketts also held the position of General Partner of the Partnership and Managing Director of Maunday's Bay Management Company- a company specially formed by the Partnership to manage the resort.

[36] The Partnership having obtained control of the appellant needed funds in order to fulfil its obligations under the lease and realize its goal of constructing a world class resort. Finance was difficult if not impossible to obtain for that project.

[37] The assets at the disposal of the partnership included the eleven units, two of which went to the Friedland Group and three to the respondent. The other six were sold. Each unit represented a capital contribution of US$626,364.00. The partners did not actually pay cash for their respective units. Instead each partner, as to his proportionate share, pledge his personal credit with a New York financial institution, the United States Trust Company which in turn loaned the partnership the amount owed by that partner for his unit. The sum realized by this method was approximately US$3.5m. This was insufficient to build a resort of the size that was contemplated. The remaining three partnership units were offered for sale to the existing partners. A total of approximately US.$5.1 million was realized from the sale of partnership units. But that sum was still insufficient.

[38] Of vital importance in my opinion in relation to the issue as whether the respondent advanced to the appellant the sums of monies alleged is the Judge's findings at paragraphs 20 and 21 of his judgment that:

> "On 31st July, 1990 prior to Barclays loan closing Mr. Rickcetts on behalf of the LIR (the appellant) executed a loan agreement with Mr. Hickox. (The respondent) Mr. Hickox states that the loan agreement was in respect of the US$4,000,000.00 package……that had been solely absorbed by him. The loan agreement, expressed inter alia, that the US$4,000,000.00 was a loan to LIR (the defendant) and was to bear interest at 15% per annum……."
> On the 1st January, 1995 the Secretary to LIR (the appellant) for and on behalf of LIR (the appellant) executed a second promissory note in favour of Mr. Hickox (the respondent) for the sum of US$3,962,830.00……."

[39] The argument advanced on behalf of the appellant is that the respondent made advances to the partnership and not to the appellant. Of greater significance in the determination of this issue whether the respondent advanced monies to the appellant as alleged and whether the sums advanced by the respondent and referred to as being the subject of the promissory note is another finding by the learned trial Judge at paragraph 52 of his judgment.

[40] The learned trial Judge at paragraph 52 of his judgment made these findings:

> "On the evidence before me I find as a fact that the signed version of the minutes, LIR met on 23rd August and agreed to borrow up to $4,000,000.00 from one or more of the partners, LIR also agreed there and then that it would issue a promissory note to the lender."

[41] I have already said in this judgment that the learned trial Judge said that he was satisfied that, of all the monies totaling US4,000,000.00 the subject of the promissory note dated 31st July, 1990 advanced to the appellant either all of the same or a substantial portion thereof were advanced by the respondent.

[42] I think I am right in saying that it is accepted by all sides that on 14th October 1986, the partnership purchased all the shares of the appellant save one.

[43] In his analysis the learned trial Judge examined the minutes of the Maunday's Bay Management Company (MBM) a company specially formed by the Partnership to manage the resort and the minutes of the appellant. Apparently there were no separate minutes for the partnership as the respondent explained to the court that he did not make separate minutes for the partnership since all the shares were owned by the appellant. The respondent testified that the meeting was a joint partnership LIR and MBM meeting. The witness also testified that the minutes were prepared by the Law Firm of Rogers and Wells.

[44] Unsigned photocopies of minutes were produced. The learned trial Judge opined at paragraph 47:

> "The photocopies of the LIR and MBM minutes……..suggest that they were duly authorised by the appropriate officers. Mr. Hickox signed them in his capacities as Secretary and Director. On both sets of LIR minutes, it is apparent that Mr. Ricketts, as General Partner also signed but below his signature, he or someone also penned in the figure 24/5/90. The likelihood is that Mr. Ricketts may have done so thereby indicating that to be the date on which he signed the minutes….."

[45] The learned trial Judge, then continued at paragraphs 49 and 50:

> "I have examined both the signed LIR and MBM minutes. Both sets refer to adoption of a Resolution dealing with the raising of US$4,000,000 in order to fund construction. The unsigned version states that it was agreed that the partnership or LIR would issue notes in US$500,000 denominations up to a maximum of US$4,000,000. The resolution recorded in what seems to be the official minute is that LIR should obtain from one or more of its partners in the aggregate principal sum of US$4,000,000 in order to finance construction."

[46] Although the learned trial Judge found that the respondent's evidence regarding the matters of the minutes produced some equivocations; he was able to dispel the 'veil of suspicion' hanging over the testimony given by the respondent having found:-

> "…..the decisions taken and recorded in the MBM minutes were almost identical to those found in the LIR minutes and the MBM minutes were apparently signed by or on behalf of almost all the partners and shareholders."

[47] The learned trial Judge stressed that it was a relevant consideration that he had no other positive evidence coming from the appellant to support its contention that LIR never met on the day in question and/or that the purported LIR minutes are a fabrication.

[48] Above I referred to the fact that on 1st January, 1995 the Secretary of the appellant for and on behalf of the appellant executed a promissory note in favour of the respondent who claimed to have spent a further sum of US$3,962,830 on the construction of the resort beyond the US$4,000,000 he had spent.

[49] Two accounts were opened one styled – The Cap Juluca Construction Account at Barclays Bank Anguilla with two signatories. Mr. Sheehy, the Construction Manager and his Quantity Surveyor, Mr. William Parsons. The other account Cap Juluca Construction

Account/Sheehy was also opened at the US Trust to enable Mr. Sheehy to make his U.S purchases.

[50] It was contended on behalf of the appellant that both accounts were partnership accounts and it was argued on behalf of the appellant that it was the partnership that was engaged in the construction of the resort. It is obvious that if this argument was successful then the respondent's claim that he advanced monies to the appellant would have failed.

[51] The learned trial Judge was prepared to regard the factual ownership of these accounts as only one part of the scenario. He also looked at the signatories to the accounts, the purpose for which the accounts were manifestly established, the manner in which they were operated and the role they played in constructing the resort as relevant matters in determining which entity was engaged in the construction of the resort.

[52] Saunders J then reasoned:-

The fundamental purpose for which funds were placed into these accounts and then disbursed was for construction of the resort. Mr. Sheehy kept scrupulous records to ensure every penny placed in the accounts was legitimately used for the purpose of construction. LIR, through its directors, must have always been aware that, outside of their use as a conduit for construction, those accounts held little significance to the partnership.

[53] Under Ground 24 the appellant complains that there was no or no sufficient evidence for the learned trial Judge to find that the partnership account was used as a conduit for the purpose of construction.

[54] I do not agree, for the compelling reasons hereafter stated. The appellant, as the learned trial Judge found, had no bank accounts, at any rate up to the closing of the Barclays Bank agreement monies were placed in the partnership accounts. It was established that these funds were used solely for the construction of the resort.

[55] The justification for finding that the partnership accounts were used as a conduit for funds to construct the resort can also be found in the agreement establishing the Partnership which speaks of its intention to own the resort. In Article 111 of the Amended and Restated Agreement of the Limited Partnership it is stated that:

> "The purpose of the Partnership is to purchase, develop and own the luxury resort on Maunday's Bay……. To carry out is purpose, the Partnership is authorised to…….take an assignment of the lease of the property from L.R to enter into a new lease for the property with the government of Anguilla."

[56] It is also evidenced by the fact, as the learned trial Judge found, that the construction manager had the greatest control over the disbursement of funds from the two accounts. Not even the General Partner of the Partnership could sign on either of these "Partnership" construction accounts. The fundamental purpose for which the funds were placed in these accounts was for the construction of the resort.

[57] This is one of the issues raised by the appellant under ground 13 of the grounds of appeal. The learned trial Judge erred in law, by failing to take any or any proper account of, or drawing invalid or incorrect inferences from, the following evidence in the case which is that the plaintiff made his advances to the partnership.

(a) That the Partnership was formed to own and develop a resort at Maunday's Bay through its ownership of LIR. That the PPM was the document that sets forth the intent that it was the partnership that would be developing the resorts. That Mr. Van Vliet the Plaintiff's expert testified that this was a simple tax structure involving a partnership and two corporations [the defendant and MBM] and for the whole structure to work it is based on the contributions being made to the partnership.

[58] I failed to see how there can be any serious challenge to the Judge's findings that the Partnership was formed to own and develop Maunday's Bay through its ownership of the appellant when that is the stated policy in the official document of the partnership. Neither can I see that there is any room for drawing incorrect inferences from those stated facts. The learned trial Judge in my view did not draw any incorrect inferences as alleged.

[59] The learned trial Judge had no hesitation in finding as a fact that the appellant never granted a sub lease of the property to the Partnership. He also found that the Partnership could not and never did directly own the improvements at Maunday's Bay.

[60] If, as is shown and agreed that the monies provided by the respondent were for construction purposes and the appellant accepted that it owned the improvements at Maunday's Bay and the appellant accepted that it was carrying on the construction; I agree with the learned trial Judge that it is quite clear that the respondent made advances to the appellant having regard to the provisions of the Barclays Construction Loan agreement. The appellant also acknowledged the respondent's advances to the construction accounts were loans to it, then it follows in my judgment that the respondent was making loans to the appellant.

[61] This agreement, the Barclays Loan A,greement which was in existence up to the time of hearing of the High Court action expressly, provides that the advances to be made by Barclays must be used for four purposes. The first to pay off the costs associated with the loan. The second is to repay "loans from Hickox to the Barrower (i.e the appellant) in an amount equal to those villa construction costs incurred prior to the date hereof (i.e 14th September, 1990), in an amount not to exceed US$3,500,000 and set forth in schedule V hereto." The third purpose is to finance the construction. The fourth is to pay interest. Schedule 5 includes a confirmatory letter from Mr. William Parsons, that he and Mr. Sheehy had received from Ashland Management (i.e. Hickox's company) a total of US$7,994,365 that had been spent entirely on the buildings and infrastructure.

[62] The learned trial Judge found that:

> "Barclays Bank actually did reimburse Mr. Hickox US$3,000,000 out of the proceeds of the loan."

[63] In my judgment there can hardly be any better proof that the respondent made advances directly to the appellant when the Quantity Surveyor of the appellant in a confirmatory letter wrote saying he and the construction manager of the appellant received from the

respondent's company funds in the amounts of US$7,994,365, which had been spent entirely on the construction of buildings.

[64] There could be no dispute that the appellant owns the building and infrastructure on which these funds were spent.

[65] To emphasize the point that as further proof that respondent made advances to the appellant for the purpose of the construction of the resort, the learned trial Judge made this very vital comment which I endorse:

> "It is inconceivable that a reputable bank such as Barclays would advance its customers funds to retire a debt that was not accepted by the customer [the appellant] to be the customer's [the appellant's] debt."

[66] The Friedland Group now owns or controls all the shares in the appellant. The shares were sold pursuance to a Settlement Agreement.

[67] Paragraph 9 of the Agreement states:

> "…….With the exception of the Loan Adjustments the Friedland Group shall not challenge the validity or extent of the Hickox loans to the Resort entities to the extent such loans are reflected on the Resort Entities audited financial statements."
>
> The "resort entities" is defined to mean the Partnership LIR and MBM. This to my mind is an acknowledgment by the appellant that it owes debt to the respondent."

[68] At clause 6(a) of the Agreement it implicitly accepts the appellant's certified financial statement for the year ended December 31, 1994. As further proof that the respondent advanced monies to the appellant. The learned trial Judge made the observation:

> "The sale of the shares in the [appellant] was done by Eastdil Realty Company a comprehensive offering memorandum. The memorandum disclosed and details the [respondent] advances to the [appellant] and specially the existence of the Promissory Notes which are the subject of this action. Anyone seeking to purchase the [appellant's] shares must be put on full notice that these were liabilities acknowledged by [the appellant]."

[69] This to my mind puts beyond doubt the issue whether the respondent advanced sums of money to the appellant as reflected in the promissory notes.

[70] However under ground 26 the appellant alleged that the learned trial Judge erred in law in that he ought not to have relied upon the provision of documents, inter alia, the Settlement Agreement, the Eastdil Offering Memorandum and the Barclays Bank Agreement, the validity of or the truth of whose contents had not been tested; and in the case of the Eastdil Offering Memo which had been specifically admitted without admission as to the truth or accuracy of its contents and which issue was clearly outside the terms of the preliminary issue.

[71] I do not agree. The Settlement Agreement for example is the appellant's document. As the learned trial Judge said it was pleaded by the appellant and introduced into evidence by it. The Agreement was signed by Mr. Friedland on behalf of the Friedland Group who now owns all of the shares in the appellant.

[72] The Barclays loan negotiations concluded in September 1990; the agreement, one can assume, was singed shortly thereafter. That agreement was, at least, up until the trial of the action in the High Court still existing. It would have been in existence for at least ten years. The appellant would have acted on and benefited by the agreement. The same can be said for the Eastdil memo. The validity of none of the above mentioned documents, so far as I am aware, has ever been called into question. How can the appellant be heard to say now that the validity or contents of these documents had not been tested? This veil attempt by the appellant to challenge the validity or contents of these documents is fruitless.

[73] Even with this challenge by the appellant of the aforementioned documents the learned trial Judge said:-

> "Without considering these documents, there seems to me no doubt that Mr. Hickox [the respondent] made his advances for the purposes of construction and that at least a substantial portion thereof was used for these purposes.
> There are reports of independent appraisers in evidence that attest to the direct correlation between the plaintiff's [respondent's] advanced and the construction costs……."

[74] Finally the learned trial Judge said that "Mr. Sheehy's uncontroverted evidence is that the Barclays loan monies were placed in his account and disbursed by him for purposes of construction being carried out at the resorts."

[75] Having regard to the foregoing it cannot be seriously argued that the learned trial Judge failed to confine the scope of preliminary issue.

[76] In my view the issue that had to be decided was not a straightforward one. It was complicated by factors such as the close "interlocking" relationship between the appellant and the partnership, as the learned trial Judge put it, the erroneous thinking by the partners and others at sometime that the partnership owned the resort and that the respondent's advances were going to the partnership. All of these made it necessary for the learned trial Judge to undertake a wide analysis in order to discover the true picture.

[77] I return to Ground 3(e). It was contended on behalf of the appellant that the learned trial Judge erred in holding for the purpose of the Preliminary Issues advance equal loans.

[78] The learned trial at page 78 of his judgment said:

> "Other troubling facts emerged from Mr. Love's testimony. He seemed to have traced the flows of the funds from Mr. Hickox into the Partnership bank accounts and then stopped at that point. The ultimate destination of those funds did not seem to interest him even though he had before him credible evidence that the funds were used for construction and he believed they were in fact so used. He took it upon himself to confine the meaning of the term "advances" to the "transfer of monies from one party to another"

[79] The fact is that the ordinary meaning of the term "advances" plainly extends to loans [See concise Oxford Dictionary, 7th Edn.]. It certainly is no accident that, for example, in Barclays Construction Loan Agreement Section 1.01 defines "advance" as any loan made by the lender."

[80] The learned trial Judge said that he did not necessarily rely on the document for his interpretation but he pointed it out so as to emphasise that the appellant could not pretend to be adverse to "advances" being regarded as meaning "loans". I agree.

[81] The learned trial Judge also referred to:

Lincolnshire Sugar Co. v Smart [1937] AC 697 at 704

Lord McMillion said:-

> "I agree that the word "advances" is ambiguous and may either refer to payments of what will become due in future or be a polite euphemism for loans but when advances are declared to be "repayable" [though only conditionally] they certainly lean to the side of loans"

[82] Finally I consider the question of the award of costs under ground 4.1 of the grounds appeal. It was contended on behalf of the appellant that:-

[83] The learned trial Judge erred in law in awarding costs to the plaintiff.

[84] The award of costs is unreasonable and wrong in principle for the following reasons:

[a] The defendant opposed the making of the order in the trial of the Preliminary Issue which was made on the plaintiff's application.

[b] The Preliminary Issue could not conclusively determine the case in the plaintiff's favour.

[c] The plaintiff volunteered his undertaking to make the issue suitable for a separate and earlier trial.

[d] The issue ordered to be tried ought not, in the events that transpired, to have been tried as a preliminary issue, inter alia because of the fact that the learned trial Judge's judgment was not determinative of the main factual issue ordered to be tried.

[e] In the event that the defendant succeeds on the main trial by virtue of the order for costs in the plaintiff's favour the defendant may nevertheless not have its costs follow the event of its victory contrary to established principle.

[f] The learned trial Judge did not give the defendants [or the plaintiff's] attorneys an opportunity to be heard on the question of costs.

[85] In my judgment the respondent was the successful party in the trial of the Preliminary issue. The award of costs is a discretionary exercise on the part of he learned trial Judge.

[86] The trial of the Preliminary Issue in my view should be regarded as an interlocutory matter as it did not finally dispose of the rights of the parties. I know of no rule of law which says that cost must not be awarded in an interlocutory matter.

[87] In fact in the Supreme Court Practice 1999 **ENTITLEMENT TO COSTS**
Order 62/3 (6)(b) (a):

> "where this order [an order for cost] is made in interlocutory proceedings, the party in whose favour it is made shall be entitled to his costs in respect of these proceedings whatever the outcome of the cause or matter in which the proceedings arise"

[88] There is nothing that has been said or advanced to justify this court in disturbing the exercise of the Judge's discretion on the award of costs.

[89] I briefly refer to ground 3(d) to say that in my view it does not allege anything or anything which the learned trial Judge failed to do. It therefore does not require any analysis.

[90] The appeal is therefore dismissed. The judgment of the learned trial Judge is affirmed.

Albert Redhead
Justice of Appeal

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Satrohan Singh
Justice of Appeal