THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2007

CLAIM NO. AXAHCV/1998/ 0097

BETWEEN:

CHARLES HICKOX

Claimant

AND

LEEWARD ISLES RESORTS LIMITED

Defendant

APPEARANCES:

Mr. Roald Henriques, QC, with William Roger and Gerhard Wallbank for the Claimant
Mr. David Phillips, QC, with Mr. David Fisher, Ms Tara Carter and Mr. John Benjamin for the Defendant

---

Date: 2006: May, 8th 9th 10th 11th 12th
15th 16th 17th 18th 19th
2007: April 2nd 3rd , July 10th
2008: July 8th

JUDGMENT

[1] **GEORGE-CREQUE, J.:** The Cap Juluca Resort ("the Resort") at Maundays Bay, Anguilla, usually referred to as Anguilla's Flagship in the tourist and investment market is a premier hotel destination in the Caribbean attracting the rich and famous to Anguilla. To the outsider, all appearances in respect of the Resort are of a highly successful high-end tourist resort catering to the most discerning senses. However, belying this façade battles have been fought in the United States and continue to be fought in this jurisdiction virtually from its very inception in the war over the Resort's ultimate ownership, control and its future prospects. Looming beneath this surface of success, there appears to be an ever growing mountain of debt which remains largely unsatisfied and which is the subject matter of this action.

[2] The Resort is owned by Leeward Isles Resorts Limited ("LIR"), the Defendant herein, a company incorporated in Anguilla and is situate on land at Maundays Bay in respect of which LIR holds a Crown Lease. LIR is ultimately owned and controlled by Mr. Dion Friedland ("Mr. Friedland"). In the beginning, around 1983, LIR was principally owned and controlled by a group of businessmen led by Friedland **(The Friedland Group").** Later, around 1986, by virtue of a series of agreements (the principal one being a sale and purchase agreement of the shares in LIR), LIR came to be controlled principally by the Claimant herein ("Mr. Hickox"), through the medium of a US partnership entity called Cap Juluca Partners 1[1] ("CJP"). As from late 1997, after various legal battles in respect of the sale and purchase agreement which ultimately saw the shares in LIR being placed on the auction block, Mr. Friedland, being the successful bidder, once more enjoys ownership control over LIR.

[3] This action is one in debt brought by Mr. Hickox on two Promissory Notes in respect of advances or loans said to be made by him to LIR totalling approximately US$8 million coupled with a substantially large sum in excess of US$60 million said to be accrued interest (and continuing) thereon in respect of the total advanced sums.

[4] One Promissory Note is dated 31st July, 1990, in respect of a principal sum of US$5, 082, 826.53 ("the First Note") and said to be made by LIR, in favour of Mr. Hickox pursuant to the terms of a Loan Agreement made between LIR, as Borrower, and Mr. Hickox as lender ("the First Loan Agreement"). The First Loan Agreement also provided for a charge over LIR's leasehold property ("the First Charge"). The First Note and the First Loan Agreement shall together be referred to as the "First Transaction". The other Promissory Note is dated 1st January, 1995, in respect of a principal sum of US$3, 962.830.41 ("the Second Note") and said to be made by LIR in favour of Mr. Hickox. The Second Note is also underpinned by a loan Agreement of even date said to be made between LIR and Mr. Hickox ("the Second Loan Agreement"). The Second Loan Agreement also provided for the grant of a charge over LIR"s Leasehold interest ("the Second Charge"). The Second Note, and the Second Loan Agreement will be referred to as the "Second Transaction".

[1] CJP later went through a change of name and became known as HBLS L.P.

[5] Mr. Hickox was a principal investor in the Resort initially through CJP which was formed for the purpose of carrying out the construction and development of the Resort. CJP comprised eleven (11) partnership units. Mr. Hickox, Mr and Mrs Bean jointly, Mr Ronald Leeds and Mr. Robert Sillerman were all limited partners of CJP having purchased partnership units for cash sums indirectly through a New York Financial Institution called United States Trust Company ("USTC"). The Friedland Group also held two of the eleven units in CJP but these did not yield a cash sum to CJP. More will be said later as to how this came about. Mr. Robin Ricketts, through whom Mr. Hickox came to know about LIR and the development of the Resort, was made the General Partner of CJP. He had no capital investment therein

[6] LIR, in response to Mr. Hickox's claim in its re-pleaded Defence and Counterclaim (comprising 155 paragraphs), challenged whether the loans or advances evidenced by the Promissory Notes were in fact made by Mr. Hickox to LIR and contends they were made to CJP[2]. LIR also challenges the validity and/or enforceability of the First and Second Transactions for want of authority or alternatively that same are voidable for breach of fiduciary duty by Mr. Hickox as a director of LIR at the material times and seeks, inter alia, declaratory orders to this effect. LIR also seeks an order directing the Registrar of Lands to cancel the registration of charges recorded against LIR's leasehold interest in favour of Mr. Hickox pursuant to the First and Second Transactions as well as a third charge pursuant to a Standby Loan Agreement between the parties in connection with a construction Loan made by Barclays Bank. LIR also made a claim for compensatory damages but this was withdrawn prior to the conclusion of the trial.

The background

[7] In order to gain an appreciation of the context in which the claim by Mr. Hickok arose and the challenges to that claim made by LIR, it is necessary to set out the history of the matter. To this end, I propose to adopt portions of the closing submissions of counsel for LIR, where the factual background was helpfully set out, in so far as those matters are common ground between the parties. Where I make statements or refer

[2] CJP is not a party to the proceedings.

to matters otherwise, they are to be taken as facts accepted or conclusions arrived at by me on the evidence :

(1) In 1980, Maundays Bay was wholly undeveloped although it was recognised to have great potential for development as a hotel/ resort. By a lease dated 5th March, 1981, LIR was granted a 99 year lease of land at Maundays Bay. The intention was that LIR should develop the leased land into a resort. In the event however, although the Friedland Group invested $2,400,000 in the project, no development was carried out during the period that LIR was controlled by the Friedland Group.

(2) By about 1986, it became clear that this investment could not develop the site. They then wished to sell their shares in LIR so as to recoup their investment. Mr. Hickox who had heard of the potential development from Robin Ricketts entered into negotiations with the Friedland Group for the purchase of LIR and thus the lease. Mr. Hickox's intention was to carry out the project through the medium of a partnership. CJP was eventually formed for this purpose. The first Private Placement Memorandum (PPM) was drafted by Spengler Carlson in January 1986. The intention was that $7,190, 424.00 should be raised ($1,188,192 by way of cash contributions from the partners and $6,002,232 by way of bank loans).

(3) On 7th May, 1986, Mr. Hickox entered into an option Agreement with the Friedland Group entitling him to purchase the share capital of LIR for the sum of $2,400,000. The intention was that $1million would be paid on completion and the balance over a period of five years.

(4) On 12th August, 1986, Mr. Hickox formed CJP. It was intended that CJP would purchase LIR and would carry out the development. CJP was structured into eleven units which would be sold so as to raise the requisite funds. Mr. Ricketts (who made no capital investment) was appointed General Partner. The limited partners who made capital investments or purchased units in CJP were Mr. & Mrs Bean jointly, Mr. Leeds, Mr. Sillerman and Mr. Hickox. However, Mr. Hickox was unable to sell the envisaged number of units with the result that the capital available was significantly less than had been planned in the original PPM. By December, 1986 it was still uncertain how much would be raised. The re-drafted PPM showed the projected available sum to be between $3,131,860 (540,040 in cash from the

partners, $2,591,820 bank loan) and $5,637,348 (972,072 in cash from the partners, $4,665,276 bank loan) as against the sum of $7,190,424 envisaged in January, 1986 in the first PPM.

(5) This revised reduction forecast of available funds meant that CJP would be unable to make good on the payment of $1million to the Friedland Group for the purchase of the LIR shares that was due on completion on 14th October, 1986. The Friedland Group agreed to accept two partnership units in lieu of the cash payment of $1million that would have been payable on completion of the purchase of the LIR shares. They agreed to this only because there was no realistic commercial alternative. Completion of the purchase took place on 14th October, 1986, by way of a series of related agreements the following of which are of particular relevance –

(a) ***A Stock Purchase Agreement ("SPA").***

By Clause 1.1 of the SPA, the Friedland Group sold the shares in LIR to CJP. Clause 1.2 set out the consideration for the purchase, namely: two partnership units together with cash payments totalling $1,400,000 payable over the following five years. Clause 1.4 provided that the sale of the LIR shares should be subject to a pledge agreement.

(b) ***Pledge Agreement***

Under the Pledge Agreement, CJP pledged the LIR shares to the Friedland Group as security for the payment of the cash payments when due under the SPA. The effect of the Pledge Agreement was that ownership (described as "ownership interests") in the LIR shares was granted to the Friedland Group for the period until the final cash payment was made. Clause 1 stipulated, in essence, that provided, CJP made the cash payments when due, CJP was entitled to exercise voting and other rights that attached to the ownership of the shares.

(c) By way of further security, the SPA provided also for a guarantee and for a charge to be executed.

(6) On 8th December, 1986 the USTC agreed to lend CJP $3,131, 860. It was intended that those funds would be used for the development of the Resort. The development, however, proceeded at much greater expense and with less speed than was planned. By August 1988, it had become clear that the

project was in financial difficulty. This is borne out by Mr. Hickox''s letter to Baker McKenzie dated 2nd October, 1990 and his memorandum to the Investors of CJP dated 22nd February, 1991. To Baker McKenzie he wrote ***"In August 1988, it became readily apparent that we had development problems. The initial capital had produced only fifteen units as opposed to the thirty units planned."***

To the Investors of CJP he wrote: ***"You will remember the disastrous condition of the resort in August, 1988. $5,600,000 had been expended and all we had developed were the original 3 villas (15 units), Pimms, and offices for Reservations, the general manager and accounting. Of the 3 additional villas to be built in 1988 for which we had subscribed 3 additional partnership units at $480,000 each, we only had the first ground floor walls of HV 11. We were in default of the development commitment of our Crown Lease and could have lost everything. …….. .***

It was painful, indeed, to finance a construction project when the only method of knowing whether the project was within budget and on time was to go by the site every two weeks and watch progress measured by the invested dollars. There was simply no cost accounting and no one trustworthy on site who was capable of doing this job. …….. . Put this together with a complete lack of faith and trust in anyone or anything having anything with the project and you have the worst possible environment. This was the situation in August 1988."

(7) Mr. Hickox therefore convened a crisis meeting of his fellow investors. This is the meeting that Saunders J found took place on 23rd August, 1988. The minutes which were written by Rogers & Wells in May, 1990, were found to be genuine and to record accurately what was agreed at the meeting. Mr Ricketts who was the General Partner of CJP and a director of LIR testified to signing the minutes in May 1990.

(8) Saunders J found that after the meeting of 23rd August, 1988, Mr. Hickox advanced sums to LIR to enable the development of the Resort to proceed. The sums that were advanced to the project by Mr. Hickox were subsequently recorded in the schedule to the First Loan Agreement. The earliest advance was made on 1st December, 1986 and the latest made on 9th August, 1989, with the last entry being interest up to 31st July, 1990, the date of the First Transaction.

(9) Saunders J reserved to the trial of the action the question whether advances that were made by Mr. Hickox before August 23rd, 1988, were made to CJP. At paragraph 74 Saunders J said:

"I would hold that all of Mr. Hickox's advances made after 23rd August, 1988 for construction purposes were made to LIR. There is a very reasonable argument to be made that his advances for construction made prior to 23rd August 1988 were not made to LIR but I prefer not to decide that point at this stage"

At paragraph 85 he said:

"It will be open to the Defendant at the trial to establish, if it can, that any particular advance was not made to LIR. On that score I can say that I did entertain some doubts as to certain advances"

LIR's case is that the advances made by Mr. Hickox **prior to 23rd August 1988** were made to CJP and not LIR as it was CJP and not LIR up to that point in time carrying out the development and that LIR took over thereafter.

(10) The SPA (Clause 1.2(b) provided that the payment of the first instalment ($500,000) from CJP to the Friedland Group would be made on the second anniversary of the date of the Agreement, that is, 14th October, 1988**.** During that two-year period the Friedland Group had no substantive contact with CJP or with the project. It was not present at the crisis meetings of 23rd August 1988; was not aware that the development had not proceeded as planned and that CJP and LIR were in financial difficulty. CJP was not able to meet its payment commitment of the $500,000 due on 14th October, 1988 to the Friedland Group. The Friedland Group nonetheless agreed to accommodate CJP's financial difficulties. It agreed for this sum to be paid in instalments of $125,000 over a four month period. Those payments were then made.

(11) CJP's financial difficulties continued in 1989. The due date for the next $500,000 instalment payment under the SPA was 14th October, 1989. On 24th August, 1989, Mr. Hickox wrote to Mr. Friedland saying that payment of the instalment would have to be rescheduled. This letter also referred to possible bank funding from Barclays Bank which was to be forthcoming in November to the tune of $7 million, out of which it was expected that the second instalment under the SPA would be paid.

(12) The Friedland Group did not agree to this rescheduling of the 14th October 1989 payment. On 10th October, 1989, Baker McKenzie wrote to Mr. Hickox requiring that the payment be made and pointing out that failure to do so would be an event of default. No payment was made causing a further event of default. On 24th October, 1989, Rogers & Wells wrote to the Friedland Group asserting (wrongly) that the Pledge Agreement was void. By letter dated 31st October, 1989, Baker & McKenzie gave notice that it was taking steps to enforce the Friedland Group's rights under the Pledge Agreement. On 15th November, 1989, Rogers & Wells proposed a compromise. The terms were unacceptable to the Friedland Group and were rejected.

(13) Correspondence ensued over the succeeding months but no agreement was reached and no further payment was made. CJP therefore remained in default under the Pledge Agreement.

(14) Mr. Hickox led Mr. Friedland to believe that the monies owed to the Friedland Group would be paid out of the Barclays loan. In evidence, Mr. Hickox said: ***"I think I agreed at some point that Mr. Friedland would get money out of the proceeds of the Barclays loan when it came down provided Barclays was willing to do that"***

(15) Mr. Friedland says, relying on that assurance, he deferred taking steps to enforce the Pledge Agreement. In his witness statement he said:

"I held off enforcing the Pledge agreement at this time on the assumption that when Mr. Hickox had managed to complete a refinancing exercise with Barclays Bank I would be paid as Mr. Hickox has verbally promised me."

The Barclays loan was not forthcoming until 14th September, 1990, when the Barclays construction loan was completed with an advance of $7,000,000. Whereas half of that advance went to pay Mr. Hickox personally, none of it went to pay the Friedland Group as promised.

(16) On 27th September, 1990, Mr. Hickox wrote to Mr. Friedland reneging on the agreement to pay the Friedland Group once the Barclays loan had completed and put forward further proposals for rescheduling the balance of CJP's debts to the Friedland Group. Mr. Hickox felt safe to renege on his agreement in reliance on the advice of Rogers & Wells that the Pledge Agreement was void. This bit of evidence (T/1/231) demonstrates this:

"Q. You had an obligation, … the partnership had an obligation under the stock purchase agreement to make the payments in October, 1989; didn't it?

A. Yes

Q. And it decided that it was safe for it not to make those payments because it had been advised by its attorneys that the Pledge Agreement which provided the collateral was unenforceable; is that right?

A. Yes."

(17) Despite an assurance from Rogers & Wells on 10th October, 1990, that the outstanding sum of $500,000 would be paid, neither that sum nor the $400,000 falling due on 14th October, 1990 was paid. Thus, some four years after the signing of the SPA, the Friedland Group had been paid only $500,000.

(18) On 26th October, 1990, Baker & McKenzie wrote to CJP/Mr. Hickox complaining of the failure to pay the sums due. On 16th November, Baker & McKenzie wrote to CJP giving 10 days to remedy the default. Further discussions took place to reach a compromise but without success. On 14th January, 1991, the legal battles began. The Friedland Group commenced proceedings in New York against CJP claiming damages for breach of the SPA. Again attempts to reach a compromise were made. Friedland and the CJP investors met on 15th January, 1991 where Friedland set out their position if a compromise was to be achieved. After the meeting CJP put forward in Rogers & Wells' letter of 21st January, 1991, CJP's compromise offer. That offer was not acceptable and the New York proceedings continued. In due course, CJP having failed to make the further instalment due on 14th October, 1991, Judgment was given in favour of the Friedland Group.

(19) On 30th June, 1993, Judge Gammerman made an order in the New York proceedings declaring the Pledge Agreement to be valid and directing that CJP should transfer the LIR shares to the Friedland Group. On 27th December, 1993, CJP filed a voluntary petition for bankruptcy so as to prevent the LIR shares being transferred to the Friedland Group.

(20) On 1st January, 1995, Mr. Hickox caused the Second Transaction to be effected. The schedule to the Second Promissory Note recorded loans said to made to LIR by Mr. Hickox totalling $3,962,830.41. The earliest advance shown on this schedule is 2nd June, 1988 (before the 23rd August 1988 crisis meeting) and the latest 26th August, 1994. (that is almost 4 years after the Barclays construction loan).

(21) On 15th August, 1995, Barry Monheit was appointed by the New York Court to mediate the dispute between the Friedland Group and CJP. On 6th May, 1996 a Settlement Agreement was reached on the following terms:

(a) The Friedland Group's claim against CJP was valued at $4,681,986 as at 1st April, 1996 and would be paid by instalments of:

(a) $1m payable on or before 31st December, 1996;

(b) $1m payable on or before 28th February, 1997; and

(c) the balance including all unpaid interest on or before 30th June 1997.

(b) Compound interest would accrue on the debt and would be payable on 30th June, 1997.

(c) The shares in LIR would stand as security for the payment of the sums due.

(d) In the event of default in payment of any instalment the entire debt would become payable forthwith and the mediator would have the right to dispose of the shares in LIR.

(e) The mediator had the exclusive right to determine any dispute or question concerning the Settlement Agreement.

The Settlement Agreement was approved by the New York Court on 20th June 1996. Although Mr. Hickox was not named as a party to the Settlement Agreement in his own right, the Mediator ruled on 2nd April, 2001, that under New York law he was "*now the de facto party in interest in the current dispute…"*

(22) On 31st December, 1996, CJP paid the Friedland Group the first instalment of $1 million. On 9th January, 1997, Mr. Hickox registered three charges over LIR's leasehold interest in respect of the various sums claimed by him which gave Mr. Hickox priority over the sums due from CJP to the Friedland Group. Mr. Hickox therefore felt secure to default on the remaining payments.

The instalment of $1million due on 28th February, 1997, was never paid. On 6th March, 1997 the mediator declared a default in the performance of the Settlement Agreement. On 15th April, 1997 he reported the default to the New York court citing Mr. Hickox's refusal to cooperate.

(23) Thereafter, the mediator took steps to realize the security by marketing the LIR shares and to this end the firm Eastdil Realty Company ("Eastdil") was engaged. Mr. Hickox took steps to frustrate the sale by inviting the Government of Anguilla to foreclose LIR's Lease. He also sought cooperation from Barclays Bank. On 1st July, 1977 (sic -97) (C5/1524) he wrote in part:

"We would require the Government to cooperate with my foreclosure on the Resort and the final solution to the Friedland problem"

To Barclays bank, on 1st July, 1997, he wrote in part.

" In discussing with legal counsel my pending foreclosure action against LIR …. I was cautioned to be sure that Barclays and I were in agreement and that I would not be surprised by some action by the senior creditor." …….

The suggested action is to prevent the possible take over of the management and ownership of the Resort by an unfriendly and unqualified person or group"

(24) In August, 1997, Eastdil published an offering memorandum for the sale of the LIR shares. That Offering Memorandum listed loans by Mr. Hickox as obligations of LIR in a principal sum of $17.3m as at 5/31/97(C5/1552). Many well known hoteliers responded but were unwilling to bid. In the end, Friedland was the only bidder with a bid of $500,000. His bid was accepted by the Mediator on 15th September, 1997 and the LIR shares sold to him. As at that date the Friedland Group had still only received $1million under the Settlement Agreement.

(25) The battle then moved to Anguilla when Mr. Hickox on 2nd October, 1998 commenced these proceedings on the Promissory Notes.

The Issues

[8] At the opening of the trial, counsel on both sides agreed the issues to be determined by the court. A determination of some issues may no doubt have the effect of causing other issues to fall away. In this regard, I agree with Mr. Henriques, learned Queen's Counsel for Mr. Hickox, that the logical order for considering and determining the issues is as set out in his closing submissions which order I generally adopt whilst at

the same time having regard to the more detailed approach set out by Mr. Phillips, learned Queen's Counsel for LIR, in the hope that in marrying them both I will have captured all of the essential issues raised in this case. I now summarise the issues as follows:

(A) Was Mr. Hickox in breach of duties that he owed to LIR in advancing monies to LIR and then formalising such by way of the First and Second Transactions? In particular,

(1) did he have authority from LIR?

(2) Was he guilty of self-dealing?

(3) Was he in breach of fiduciary duty to LIR in agreeing to advance monies to LIR and then formalise the terms on which such were to be repaid given LIR's financial state?

(B) If Mr. Hickox did act in breach of fiduciary duty to LIR:

(1) the consequences of each such breach.

(2) If any transaction was rendered voidable, has LIR affirmed or ratified the relevant transaction?

(3) Is LIR estopped from relying upon the breach?

(4) If there has been no affirmation, ratification, or estoppel what is Mr. Hickox entitled to: - return of principal? interest? And if so, from when and at what rate?

(C) Were the monies advanced by Mr. Hickox prior to 23rd August, 1988, advanced to LIR or CJP?

(D) Whether the Promissory Notes provide for simple or compound interest.

(E) Whether Mr. Hickox is entitled to recover costs pursuant to contract.

(F) Whether LIR is entitled to have the registration of the charges set aside.

[9] Witnesses at the trial were Mr. Hickox, Mr. Sillerman, Mrs. Nancy Bean and the expert Mr. David Lee on behalf of the Claimant. On behalf of LIR, Mr. Friedland, Mr. Stein, Mr. Ricketts, Mr. Mezzannote and the expert Mr. Emile Woolf gave evidence.

[10] Counsel for LIR presented his arguments against the backdrop of what he termed three areas of strategic importance which run through or underlie the bulk of the issues herein. I set them out as follows and propose to address them seriatim:

(a) Res judicata in the context of the preliminary issue trial;

(b) The Pledge Agreement and its significance; and

(c) Insolvency and its significance.

[11] **(a) Res Judicata**

Counsel submitted that it is only those findings which formed an essential element of the issues which Saunders J was determining that will be binding on this court and not what he said by way of observations by references to facts or even findings he made unless those findings can properly be characterized as essential elements of the decision of the preliminary issue. For that proposition he relied on the case of **Arnold**[3] in which Dillon L.J. in that case stated the basic principle of res judicata at page 594 of his judgment where he recited from the Judgment of Diplock L.J. in **Mills v Cooper**[4] at page 468 thus:

"***The doctrine of issue estoppel in civil proceedings is of fairly recent and sporadic development ….. although*** *Hoystead v Taxation Commissioner [1926] A.C 155* ***did not purport to break new ground, it can be regarded as the starting point of the modern common law doctrine. …. That doctrine, as far as it affects civil proceedings may be stated thus: a party to civil proceedings is not entitled to make , as against the other party, an assertion whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence , if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."***

It is accepted that this is the guiding principle to be applied where issue estoppel or res judicata is to be considered. I adopt it as being a comprehensive statement of the principle.

[12] Saunders J at paragraph 27 of his judgment set out the preliminary issue which he was asked to determine being the questions whether the Claimant advanced to the Defendant:

[3] Arnold and Others –v- National Westminster Bank plc. [1990] 1Ch. 573
[4] [1967] 2QB 459

(a) Monies totalling $4,000,000.00 in the period 1986 to 1989 inclusive.
(being the subject of the Promissory Note dated 31st July, 1990, exclusive of interest); and

(b) monies totalling $3,962,830.41 in the period 1989 to 1994 inclusive
(being the subject of the Promissory Note dated 1st January, 1995)

At paragraph 74 of his judgment he stated thus:

"I would hold that all of Mr. Hickox's advances made after 23rd August, 1988 for construction purposes were made to LIR. There is a very reasonable argument to be made that his advances for construction made prior to 23rd August 1988 were not made to LIR but I prefer not to decide this point at this stage."

This statement prompted me to hold during the trial that Saunders J left open for determination at this trial the question of whether any 'pre -August 1988' advances were not made to LIR the burden being on LIR to so establish. I also held further that in so far as the letter of 10th November, 1988 from Messrs Spengler Carlson can assist the court in any way in determining whether any of those advances that were prior to 23rd August 1988 were made to LIR or to CJP was left open for consideration during the trial notwithstanding that the letter was before Saunders J at the hearing of the preliminary issue.

[13] At paragraph 70 of his judgment Saunders J also made this statement:

"Throughout the trial I sensed that the present shareholders of LIR have not appreciated that at the point in time they gained ownership of those shares they became stuck with all the previous doings of LIR once those acts were validly done. The point is not whether the transaction in question was done based on any motive but rather whether the particular transaction was valid and in keeping with the constitution of LIR."

This left open for determination at this trial whether the acts done by or on behalf of LIR were validly or otherwise effectively done.

Issue estoppel and foreign judgments

[14] Counsel also submitted that issue estoppel applies equally to foreign judgments where it is clear that the issue was being determined and relies for that proposition on the **Carl Ziess** [5]case, a decision of the House of Lords in England in which four of the learned law Lords expressed the view and it was held, that issue estoppel can be

[5] [1967] 1A.C 853

based on a foreign judgment , although in such a case the doctrine should be applied with caution because of the uncertainties arising from the differences of procedure in foreign countries. Lord Reid in his judgment expressed three reasons for exercising caution when applying issue estoppel to a foreign judgment which I take the liberty of summarising thus: (i) being unfamiliar with modes of procedure in many foreign countries, the need to be sure that an issue has been decided or that its decision was a basis of, as distinct from being merely collateral or obiter, the foreign judgment; (ii) where the foreign case was trivial in nature and it was impractical for the litigant to deploy his full case with the result that the decision went against him,- in such a circumstance it would be unjust to hold the litigant is estopped from putting forward his case; and (iii) that the former judgment was a final judgment on the merits , i.e. that the issues in question cannot be re-litigated in the foreign country.

[15] Counsel refers to two judgments of the courts of New York:- one dated 18th April, 2002, in respect of the interpretation of Clause 9.b of the Settlement Agreement and the other dated 21st November, 2001, being the Opinion and order of District Judge Koelti in respect of the estoppel argument it being held that Mr. Hickox was bound by the terms of the Settlement Agreement. Counsel contended that these decisions of the New York Courts were reasoned decisions as seen from the documents and were final and that it is clear that the issue which was decided by those decisions is the same which this court is being asked to consider afresh. As such, counsel contended there is every reason for the court to apply the principles of issue estoppel in relation to those two decisions of the New York Court in the same way as if they were decisions of an Anguillian court. Having read those decisions as well as the Mediator's Award concerning the interpretation of clause 9b of the Settlement Agreement, as well as the Mediator's Final Award of 12th November 1997, I am satisfied that the judgments of the New York court are clear and well reasoned and leaves no doubt as to the matters in issue which were determined, the parties engaged and their full participation therein.

[16] Counsel for LIR also submits that the evidence given by various persons before Saunders J and referred to by counsel for Mr. Hickox in their written submissions, is not admissible as evidence in this trial. In essence, the findings made, which were essential for the determination of the preliminary issue, are binding on the court, but the evidence given is not and could only have become so in the conventional way of

putting to a witness a previous inconsistent statement and then it is the response which becomes the evidence and not the previous inconsistent statement itself. For example, much was said about the evidence of Mr. Hassink and Mr. Love who gave evidence at the trial of the preliminary issue. They did not give evidence in this trial. I agree entirely with this submission as it simply states a basic principle in relation to the general principles of evidence.

(b) The Pledge Agreement

[17] It is to be recalled that when the SPA in 1986 came about, outright purchase of the LIR Shares did not come about. Two partnership units in CJP became part of the purchase price and the balance of the purchase price was payable over time. The Pledge Agreement provided the security to the Friedland Group for lack of immediate payment in that the Friedland Group, as Seller, retained an ownership interest in the LIR shares until such time as the total purchase price was paid per the terms of the SPA. Counsel submits that the Pledge Agreement provided that if the purchaser did not pay the purchase monies when due , first of all, the purchaser could not deal with the asset and secondly, Friedland, if he elected so to do, could compel the sale of the asset to realize the purchase money.

[18] The sole issue in dispute in respect of the Pledge Agreement then is whether the right to deal with the LIR Shares was automatically lost upon default as contended by LIR or whether the loss of such right required the doing of some act by Friedland to trigger same. Counsel for Mr. Hickox relies on clause 5 of the Pledge Agreement whereas Counsel for LIR relies on clause 3. It is necessary to set out the relevant provisions of the Pledge Agreement in determining this issue. Firstly, Clause 1 provided for the deposit of the shares with the Pledge Agent and granted to the shareholders (the Friedland Group) the ownership interests in the shares set out therein. Clause 1 then goes on to state as follows:

"The Pledge Agent, on behalf of the Shareholders, …. shall have the right to have and to hold the Stock together with any rights, titles, interests, privileges and preferences granted to the Shareholders hereunder forever; subject, however, to the terms, covenants and conditions herein set forth."

There is no dispute then that the Pledge Agent held the ownership interest in the Shares and so held them on behalf of the Shareholders. I now set out clause 3:

"So long as no Event of Default ….. shall have occurred and be continuing:

(a) the buyer shall be entitled to exercise any and all voting and/or consensual rights and powers relating to … the Stock ….. for any purpose not inconsistent with the terms of this Pledge Agreement or the Stock Purchase Agreement; and

(b) ……. .

Counsel submitted that this language is plain and simply says that the right of CJP and Mr. Hickox to exercise the voting rights of the shares held by the Pledge Agent is conditional upon there being no Event of Default. Events of Default are set out in clause 4. The relevant portion states as follows:

"The following occurrences shall constitute Events of Default hereunder:

(a) any failure by the Buyer to make any payments due ……. under the Stock Purchase Agreement, if such default is not cured within ten (10) days of the receipt by the Buyer of written notice of such default from any Shareholder."

Under the SPA, instalment payments on the purchase price of the LIR Shares became due on the second, third, fourth and fifth anniversary dates of the SPA. I also set out relevant portions of clause 5 of the Pledge Agreement relied on by Mr. Hickox:

"<u>Remedies.</u> If any Event of Default shall have occurred and be continuing ….. then each Shareholder may direct the Pledge Agent to do either of the following on such Shareholder's behalf:

(a) exercise all voting and/or other rights and powers relating…. to the … Stock for any purpose whatsoever , or

(b) upon ten(10) days prior written notice to the Buyer, sell any of their shares of Stock.

[19] Counsel for LIR contends that clauses 3 and 5 operate independently of each other and submits that even if Friedland chose not to exercise voting rights under clause 5 in the event of a default, this does not mean that the Buyer retains its rights under clause 3. This construction he said made good commercial sense as it ensured that even though the Seller does not exercise the clause 5 powers which he may wish not to do for sound commercial reasons at the time, nevertheless the sanction of the default continues to bite on the Buyer in the sense that he loses his right to operate the company as his own and thus it creates and keeps the pressure on the Buyer to put matters right by making the payment. Further, he contended, it would make a nonsense if the loss of the voting rights under clause 3 were conditional upon clause 5

because one of the powers under clause 5 is to sell the Shares when the voting rights would obviously have gone.

[20] Counsel for Mr. Hickox, postulated his argument only in relation to clause 5 and said that Clause 5 gave Friedland an option to exercise voting rights and that until such option was exercised, control of the LIR Shares and the voting rights remained with the Buyer. He submitted that in order for LIR (as now constituted) to show that the directors of LIR acted without the authority of LIR when the Second Transaction was concluded in 1995, it must be shown that (i) there was a default, (ii) it exercised the option to exercise voting rights, and (iii) the action taken by the officers of LIR was contrary to the wishes of the Friedland Group at the time (viz.1995).

[21] It is common ground between the parties that there was a default under the terms of the SPA after 14th October, 1989 as CJP did not pay the sums owed to the Friedland Group on that date. It is also common ground that the Event of Default continued from then until the matter was overtaken by the Settlement Agreement. Counsel for Mr. Hickox says, however, that LIR cannot get past hurdle (ii) as the Friedland Group never exercised its option to the voting rights. LIR's position, however, is that it does not get there as clause 3 is automatic and independent of the remedies given in clause 5. Clause 3 stipulated, that in the event of default in payment when due that entitlement ceased. In that event, the voting and other rights reverted to the Friedland Group who would be entitled under Clause 5 to sell the LIR shares. Accordingly, the tenor and structure of the Pledge Agreement was that notwithstanding the sale, the LIR shares would remain in the ownership of the Friedland Group. CJP would be entitled to act as owners of the LIR shares for so long as it made the payments due but if it defaulted in such payment then that entitlement ceased. In that event full ownership of the LIR shares would revert to the Friedland Group.

[22] I am persuaded by the arguments of counsel for LIR that clause 3 is independent of clause 5 and is automatic upon an Event of Default occurring. This, to my mind, is the only sensible interpretation to be placed upon clause 3. Were it conditional upon clause 5 it would seem to me that clause 3 would be superfluous as having no useful purpose in the scheme of the Pledge Agreement and SPA in terms of its commercial

purpose when considered against the factual matrix giving rise to the SPA and the Pledge Agreement. The language of clause 3 is pellucid and no good reason has been put forward as to why it should be conditioned upon clause 5. To the contrary, counsel has put forward a very sound commercial reason as to why clause 3 is in those terms and how it was intended to work commercially. In the scheme of the SPA and the Pledge Agreement I agree with counsel for LIR that the operation of clause 3 made good commercial sense by the provision of pressure and thus the incentive for the Buyer to make the payments when due if he was to retain the benefit of the voting rights to the shares.

[23] Counsel for LIR further submitted that the reason that the clause 3 pressure did not work as it should have in this case is because Mr. Hickox and CJP were advised in 1989 by their attorneys and believed in reliance on that advice, that the Pledge Agreement was void and therefore unenforceable. Accordingly, CJP for many years failed to honour their obligation under the SPA. Mr. Hickox accepted that they felt safe in not making the payments under the SPA based on that advice which eventually turned out to be wrong.

[24] The consequence of the default by CJP, counsel for LIR submits, is that from sometime after 14th October, 1989, CJP lost the voting rights to the shares and the consequence of the loss of such rights was that CJP and Mr. Hickox had no power to ratify Mr. Hickox's actions thereafter. Accordingly, ratification on the Duomatic principle of Mr. Hickox's actions no longer availed CJP given the default under the Pledge Agreement. I will revert to this later in this judgment when I consider in detail, the issue of want of authority.

[25] Counsel for Mr. Hickox urged that in any event, the Friedland Group must be deemed to have waived their right to exercise the voting rights under clause 5 as they had elected not to exercise it but instead had sued for their money and eventually ended up in a Settlement Agreement which superseded the Pledge Agreement. He referred to the evidence of Mr. Friedland at paragraph 20 of his witness statement and also to his answers given in re- examination to the effect that at no time did he seek to enforce the Pledge Agreement. He also referred to the evidence of Mr. Sillerman at paragraph 26 of his witness statement where he stated, in essence, that

the Friedland Group, in 1989, based on his meetings and discussions with Mr. Friedland, were well aware that Mr. Hickox was advancing monies to LIR for construction and knew the terms of such loans and the security to be given by LIR and that he could not recall Friedland ever objecting to those advances or alleging that they constituted breach of the Pledge Agreement or the SPA.

[26] Counsel for LIR, in response to this argument, says that Mr. Hickox's submissions are wrong as a matter of fact and as a matter of law because the decision of the Friedland Group not to avail itself of the clause 5 remedy has no impact at all upon the automatic loss by CJP of the voting rights under clause 3 and also because waiver requires consideration and none has been alleged nor is there evidence of any. I entirely agree.

(c) Insolvency – marginal commercial solvency.

[27] Counsel for LIR cited and relied upon the Australian case of **Kinsela**[6] cited with approval in **West Mercia**[7]**.** I need do no more than cite from the head note in **Kinsela** in which it was held, inter alia, that where a company is insolvent or in a state of marginal commercial solvency or doubtful solvency the directors' duty to the company as a whole may, in appropriate cases, require them to consider the interests of the creditors and extends to not prejudicing the interests of the creditors, and in such a case, the shareholders do not have the power or authority to absolve the directors from breach.

[28] Counsel for Mr. Hickox outlined the two classic tests for determining insolvency as set out in **Totty and Moss**[8] namely: (i) an inability of a company to pay debts as they fall due (normally the test set out in the Companies Act) and (ii) an excess of assets over liabilities commonly termed the balance sheet test. He argued that there is no evidence to support that LIR was insolvent on either tests. He relied upon the financial accounts produced for the years 1988 to 1990 in respect of the balance sheet test but as counsel for LIR rightly pointed out, the 1988 and 1989 accounts are the combined accounts for CJP and LIR. In fact, the first accounts for LIR as a separate entity is in

[6] Kinsela v Russell Kinsela Pty Ltd. (in liq) 4 NSWLR 722
[7] West Mercia Safetywear Ltd 9 (in liq0 –v- Dodd and another [1988] BClc 250
[8] Professor Good: Principles of Insolvency Law

1990, and they as well as the later accounts continued to show a deficit. This appears to be in keeping with the picture depicted in the graph drawn by Mr. Lee, the Claimant's expert. Counsel also contended that there is no evidence of any creditor who had demanded payment from LIR and as such no evidence of inability to pay debts and that even if Mr. Hickox and his partners could be considered creditors and not investors, they are the ones who took the decision to go ahead with the development.

[29] Counsel for LIR, on the other hand, contended that the court need not be concerned with the concept of insolvency for winding up purposes but merely for the narrow purposes of creditor protection. He urged that the court's task was merely to consider whether what was proposed, put or might put LIR into a position of marginal commercial solvency and if it did and the directors acted in breach of their duty to the creditors then the shareholders could not ratify prospectively nor retrospectively, that breach. I accept this to be the task for the purposes of this case. Counsel referred to the evidence of the joint experts where they both agreed that as at August, 1988, LIR had a negative value. This is contained in the joint statement of the accounting experts. (B1/540 para.4.1). The graph drawn by the expert, Mr. Lee[9], showed that at all material times the debt of LIR exceeded the value of its assets with the line between the debt and the value of the Resort widening over time. He also pointed to the evidence of the inability to pay the Friedland Group and Mr. Hickox's letters to the effect that the hotel was not generating enough money to pay; waiting for the Barclays Bank loan and the uncontroverted fact that the meeting of 23rd August, 1988, was a crisis meeting given the financial difficulties being faced by LIR. From the totality of these facts, he urged that it may readily be concluded that LIR was in a state of marginal commercial solvency in the **Kinsela** sense and as such the crisis meeting of 23rd August, where it was agreed that a loan of $4 million carrying interest at the rate of 15%, be made to LIR, such a step was obviously going to increase the marginal commercial solvency and thus leads to the inescapable conclusion that as from that date at the very latest, LIR was in a position of marginal commercial solvency. Accordingly, any steps taken on behalf of LIR made the **Kinsela** principle applicable thereto, with the consequence that the directors' fiduciary duty extended to taking into account the

[9] See: Bundle B1 pg.325

interest of LIR's creditors and if they did not, then their actions were unratifiable by LIR's shareholders.

[30] This raises the question as to who were LIR's creditors at the relevant time. LIR has pointed to no persons who were then LIR's creditors unless the Friedland Group are to be treated as creditors of LIR. The evidence shows that the Friedland Group were properly creditors of CJP although from Mr. Hickox's evidence he was relying on the revenue from the hotel to pay them. If Mr. Hickox and his partners in CJP or CJP were to be treated as creditors, then these are the same persons who took the decision to proceed with the loan of $4 million in August 1988. I agree with counsel for Mr. Hickox that a distinction exists between a creditor and an investor. Up to August 1988 when the decision for the $4 million dollar loan was taken at that 23rd August meeting, the evidence tend to support that only Mr. Hickox, based on the dates of advancement of sums comprised in the Promissory Notes retrospectively, may be considered a creditor. He became the lender in respect of the $4 million dollar loan. Accordingly, whilst I accept on an overall view of the evidence, that the financial state of LIR in August, 1988, may be considered as one of marginal commercial solvency, on the peculiar facts of this case I am hard pressed to find in keeping with the **'Kinsela** principle' that the directors failed to take into account the position of the creditors or that there were in fact at that time creditors of LIR whose interest or position the directors of LIR ought to have taken into account at the time of taking the decision for the loan. What is also interesting, and If may say so merely by way of observation, is that at that time, according to Mr. Hickox, it was the partners and CJP engaged in the development of the Resort and not LIR. To all intents and purposes the construction was being carried out by CJP. This was the entity in need of funding. This is borne out time and again in Mr. Hickox's evidence.

[31] I now address the specific issues raised bearing in mind the impact of those overarching areas above addressed and the views I have expressed thereon.

Authorisation for the First and Second Transactions – the legal principles.

[32] Counsel on both sides are ad idem that if Mr. Hickox acted without authority then the consequence is that the relevant loan agreement and promissory note are void. LIR

is governed by the Companies Act.[10] It is trite law that in order for a company's actions to be valid they must have been taken in accordance with the provisions of its articles and its governing statutes. The articles are binding on both the company and its members. In essence, they are in the nature of a contract between the company and its members. They address such matters as the power and duties of directors, the formalities required for meetings (eg. notice required and quorum etc.) If actions are taken by a company which are not in compliance with its articles then, unless saved by some provision of the articles or rule of law, or in certain circumstances ratified by all the members of the company, the consequence is that the actions will be open to challenge as being void or voidable. Compliance with such provisions is essential to proper corporate governance. As such the circumstances in which deviation from the strict adherence to such provisions are allowed are limited. One such exception is known as the **Duomatic** Principle and is derived from [11]the decision in **Re Duomatic,** summarized in **Palmers Company Law:** Vol. 2 para.7.417 thus**:**

"***If it can be shown that <u>all</u> the shareholders who have the right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, then;.... that assent is as binding as a resolution in general meeting would be. This principle applies even when there is only a single shareholder…. . It will not apply, however, if the assenting shareholders could not have validly constituted a quorum for a formal meeting, or if <u>all</u>*** *(my emphasis)* ***the relevant shareholders have not indicated their assent; a majority will not suffice. Nor will it apply unless the relevant shareholders <u>have the appropriate or full knowledge</u>*** *(my emphasis)* ***of what they are assenting to;(eg., if they are unaware of the fact that their assent is being sought or that their consent is significant, or they are merely told of the matter).[12] It is not enough in those circumstances to show that assent would have been given if asked."***

In **EIC Services Ltd. and Another v Phipps and others[13]** the principle was set out thus: ***"The essence of the Duomatic principle was that, where the articles of the company required a course to be approved by a group of shareholders at a general meeting, that requirement could be avoided if all the members of the group being, aware of the relevant facts, either gave their approval to that course, or so conducted themselves as to make it inequitable for them to deny that they had given their***

[10] The Companies Act R.S.A c.65
[11] [1969] 2 Ch 365
[12] Per Neuberger J in EIC Services Ltd.-v- Phipps [2004] 2BCLC 589 @ para. 135
[13] [2004]BCLC 589 - pg.591 – paras. 122, 133, 134 and 135

approval. Whether the approval was given in advance, or after the event, whether it was characterised as agreement, ratification, waiver or estoppel, and whether members of the group gave their consent in different ways at different times, was irrelevant. However, before the Duomatic principle could be applied, the shareholders who were said to have assented or waived their objection had to have had the appropriate or 'full' knowledge. Accordingly, where the directors merely informed shareholders of an intended (or past action) on the part of the directors, in circumstances in which neither the directors nor the shareholders are aware that the consent of the shareholders was required to that action, the shareholders could not be said , as a matter of both ordinary language and legal concept , to have "assented' that action for Duomatic purposes. Quite apart from the fact that a shareholder could not be said to assent to a matter if he was merely told of it, he could not have the necessary full knowledge to enable him to assent if he was not even aware that his assent was being sought in relation to the matter, let alone that the obtaining of his consent was a significant factor in relation to it."

[33] The **Duomatic** Principle recognises that the shareholders together, are in fact the owners of the company and by extension its business and thus they collectively, as owner, should be able to take decisions affecting their business in an informal manner provided, of course, the relevant safeguards have been met. The rationale for the safeguards is obvious. They seek to ensure that notwithstanding the informality: (a) all who are entitled to consent have in fact done so; and (b) They have all done so with full knowledge of all relevant facts. The Duomatic Principle does not afford any greater rights or powers to members than they would have in a general meeting of the company. In other words, if the members were acting ultra vires the powers given in a general meeting the Duomatic Principle cannot be prayed in aid to make those actions intra vires.

[34] Counsel on both sides agree on the basic wide principle. However, there is a narrow difference of view as to whether the application of the principle requires the appropriate or *'full' knowledge* of the relevant facts or whether what is required is *'knowledge of the relevant facts'*. They both rely on the **EIC** case and the judgment of Neuberger J. in that case where, as can be seen from the quote above, both phrases were used, it appears, interchangeably. In my view, there the difference in the phrases is more one of semantics rather than substance. To my mind, '***knowledge of***

the relevant facts' would in that sense amount to the '***appropriate or 'full' knowledge.***

[35] It is well settled law that a director owes a fiduciary duty to the company in exercising the powers conferred upon him as a director. In **Kinsela,** Street J. at page 730 stated it thus:

"In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of the directors arise. If as a general body they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done." This of course is the case once the act is not outside the corporate capacity of the company. If the act is ultra vires the capacity of the company then such an act cannot be approved or ratified.

(a) The First Transaction

[36] Saunders J.; found at paragraph 52 of his judgment as follows:

"***On the evidence before me I find as a fact that consistent with the signed version of the Minutes, LIR met on 23rd AUGUST, 1988 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."***

The wording of the minutes of that meeting are therefore of considerable importance to the resolution of the issue of whether what was actually done was in accordance with what was agreed. If what was agreed to be done differs materially from what was in fact done then Mr. Hickox would not be able to point to the August 23rd 1988 meeting as authorisation for what was done. Accordingly, it is necessary to compare the Minutes of the meeting of LIR of 23rd August, against the documents comprising the First Transaction, namely, the Loan Agreement and the Promissory Note.

The Minutes of meeting of shareholders of LIR signed by Mr. Hickox as secretary and as a shareholder and also signed by Robin Ricketts as general partner of CJP, noted in part as follows:

"The Chairman noted that the proposed terms of the loan agreement had been unanimously approved by the Directors of the corporation ……. . He also noted that loan would be for US$4,000,000, that interest would be payable at 15% per annum….. the term of the loan would be for fifteen years, that the principal amount outstanding on the

note or notes would be repaid annually in the aggregate amount of $266,666.66 per annum, that interest would be payable quarterly in arrears…. ."

It then contained these resolutions passed unanimously:

"Resolved that the Corporation obtain a loan from one or more of the partners in Cap Juluca Partners 1 in the aggregate principal amount of $4,000,000 in order to finance construction at the Resort…… .

Resolved that the terms of the Loan agreement <u>in substantially the form described at the meeting</u> *(my emphasis)* ***be approved, <u>with such changes as any officer… may subsequently approve</u>*** *(my emphasis)* ***such approval to be conclusively evidenced by such officer's signatures thereto… ."***

For completion, it is noted that the Minutes of the meeting of the Directors held immediately prior to the meeting of the shareholders are substantially in the same terms as the Minutes of the shareholders.

The material provisions of the Loan agreement dated July 31st 1990 are paragraphs 2 and 3. Paragraph 2 states in part as follows:

" ***(a) As at the date hereof, the aggregate amount loaned to the Borrower by Lender is $5,082,826.53 (…. …) consisting of US$4,000,000 in aggregate principal amount of Advances to the Borrower and US$1,082,826.53 in Capitalized Interest.***

(b) ……

(c) Subject to the provisions of Section 3 the Loan shall bear interest ……. at the rate of fifteen percent (15%) per annum. Interest on the Loan shall accrue from the date hereof and be payable in arrears on each Interest Payment Date."

Paragraph 3 then states as follows:

<u>"Interest on Overdue Amounts"</u> Any amount in respect of the Loan or the Note not paid when due (……) and all other overdue amounts due under this Agreement shall bear interest from the due date…… until the date of actual payment at the rate of 15% per annum plus to the extent permitted by law two percent (2%) per annum. Interest on such overdue amounts shall be payable to Lender on demand therefor."

The Promissory Note on which the Claimant grounds his action mirrors these terms.

[37] Counsel for LIR contends that what was agreed at the meeting and what was in fact done by way of the First Transaction is substantially different and thus the First Transaction was not authorised. They highlight these differences between the Minutes and the First Transaction having regard to the construction placed on the First Transaction by Mr. Hickox.

Minutes	First Transaction
Authorised $4 million prospective	$4, million includes advances already made and capitalised interest of $1, 082,826.53
Loan to bear 15% simple interest	Loan bearing 15% compound interest
No provision for default interest	17% compound default interest

[38] It is not seriously disputed that these differences exist between what is recorded in the Minutes in respect of the terms of the proposed $4 million loan and the terms as set out in the First Transaction. Counsel for the parties differ, however, on whether the differences were substantial and also as to the extent of authority given to the officer in the second resolution contained in the Minutes. Counsel for LIR contends that the officer's power to make changes was not unlimited but circumscribed by the words '***substantially in the form described at the meeting***.' In construing this resolution he urged that account be taken of the factual matrix of the case, including the fact that the meeting was a crisis meeting, and LIR's state of marginal commercial solvency. It is not at all disputed that they needed to raise money if they were going to seek to save the project. Accordingly, he submitted that the person designated for executing the decision was not free to do whatever he liked and that he was permitted to make changes so long as the resulting agreement remained in substantially the form described at the meeting. This, he said, accords with commercial reality and the way board and shareholders' meetings are conducted. He argued that it could not have been intended that the officer should have carte blanche to substitute any terms for those that had been agreed. If that had been intended, he reasoned, then the resolution would have simply authorised an officer of LIR to agree such terms as he wished; there would have been no need for the meeting to have agreed terms and the fact that this was not the course adopted demonstrated that the intention was that the power to change the terms was limited to something substantially similar to those as had been discussed and agreed. Furthermore, he argued, if the interpretation as urged by counsel for Mr. Hickox is accepted, then the words "***substantially in the form described at the meeting"*** would have no meaning.

[39] Counsel for Mr. Hickox argued that the shareholders (and directors) expressly authorised and approved that any officer of LIR could approve changes to the terms of the draft loan agreement and that if, as LIR contended, the changes the officer could

make were inconsequential amendments such would not be changes to the terms but merely clarification. Further, he submitted, the Loan Agreement was in fact signed by Mr. Ricketts, as Managing director of LIR and that there was no need to make any comparison between the Minutes and the actual terms of the First Transaction to determine that Mr. Hickox did have authority on behalf of LIR to sign the First Promissory Note.

[40] In my view, it is necessary to determine whether the First Transaction accorded with what was agreed or resolved at the 23rd August 1988 meeting. Having compared the documents and applying the principles of construction in giving the words used their ordinary meaning, and taking into account the factual matrix and circumstances at the time it was done, I have no hesitation in concluding that there are material differences in respect of what was agreed in the Minutes and what was actually done in respect of the First Transaction. It is clear, to my mind, that the $4, million loan agreed upon was intended and understood at that time to be prospective and not retrospective so as to include advances previously made plus a sum represented to be capitalized interest and treated as principal. A note of the discussion as recorded in the Minutes stated in part thus: ***"To finance the construction a loan would have to be obtained to provide the necessary funds".*** In my view, this language clearly envisaged a future loan and not one made up with past advances. Additionally, the conversion of the interest rate from simple to compound as well as the addition of a term for default compound interest, all these changes, in my view, resulted in a substantially different agreement to the one agreed in the Minutes. Counsel for Mr. Hickox contended that these were not differences of substance and referred to **Paget on Banking**[14] where the learned author stated that it is common for loan agreements to specify a default interest rate. There is no demur with regard to this statement. But this statement of principle does not assist. It does not seek to say that such a provision can merely be inserted into a corporate loan agreement if not duly authorised. The essence of this aspect of the matter is what was authorised as compared to what was in fact done. As to whether the power given to the officer extended to making such substantial changes to the terms, I reject Mr. Hickox's contention that the officer's authority extended to making such substantial changes. Such a construction does not accord with commercial

[14] 11th Ed. Pg. 182

reality and indeed would suggest a virtual abdication of the powers of the members as a body to make an informed decision in favour of an officer. If it was intended that such carte balance power be given to the officer then no doubt clear words to that effect would have been used. Furthermore, the words ***"in substantially the form described at the meeting"*** would be rendered otiose. Such words, in my experience, are the typical words utilised by shareholders and directors when taking a commercial decision and when authorising an officer to attend to its execution.

The Duomatic principle and ratification

[41] Counsel for Mr. Hickok contends further, that at the time the First Transaction was signed by Mr. Ricketts (the Loan Agreement) and Mr. Hickox (the Promissory Note) Mr. Ricketts, (as the General Partner of CJP) and Mr. Hickox were the only shareholders of LIR and thus even if the resolution of 23rd August did not permit such changes, as per the terms of the First Transaction then on the basis of the Duomatic principle the fact that the First Transaction bears the signatures of all the shareholders demonstrates ***" that the shareholders did give authority for the transaction and had all relevant knowledge."*** He also relied on the representation of due authorization for execution, delivery and performance contained in Clause 5(iii) of the First Loan Agreement made on behalf of LIR. Counsel for LIR argues that for this submission to succeed it must be established that all shareholders had the knowledge and gave the assent and that is not borne out on the facts of the case. He referred to the evidence of Mr. Hickox[15] in which he said, in essence, with regard to the default interest that he didn't know when or how the default interest arose; that Rogers & Wells suggested by phone to the other partners but that he was unaware of it. On the basis of that evidence counsel urges that it must be concluded that at the time Mr. Hickox was incapable of ratifying the decision in the Duomatic sense as he could not be said to have full knowledge as he didn't know of the decision in respect of the default interest. I agree. One cannot be said to have assented to something in respect of which one has no knowledge. As such, there was no assent as a matter of law. Further, the fact that the Loan Agreement contains representations of due authorisation on behalf of LIR does not cure the lack of authorization once the Loan Agreement was as a matter of fact and law not authorised. Such representations as

[15] See; pg. 444 to 445

it relates to Mr. Hickox, being at the time a shareholder of LIR, takes the matter no further.

[42] Mr. Hickox also relies for the purpose of ratification of the First Transaction on a number of meetings of the directors and shareholders of LIR between 1990 and 1995. These are the minutes of 2nd October, 1992 (C3/782), 14th October, 1993 (C3 786 – 787), 3rd October, 1994 (B2/796) and 11th December, 1995 (B2/806-807). These meetings were all meetings with all the directors and shareholders of LIR, in essence, in which the previous year's action taken by the directors were ratified. Counsel argued that at none of these meetings was there any question raised as to Mr. Hickox's authority or bona fides in entering into the Loan Agreement or being in breach of fiduciary duty or any want of authority. He also relied on the evidence of Mr. Hickox[16] and Mr. Sillerman[17]. At paragraph 58, Mr. Hickox in his witness statement said in part as follows:

"My co investors and shareholders of LIR were fully aware of the monies that I advanced … ***and approved the terms of the loans. We acted at all times in what we considered to be in the best interests of LIR"***

Mr Sillerman at paragraph 17 of his witness statement said in part:

"I met with Mr. Charles Hickox and Ronald Leeds at Charles' office on 27th April, 1990. We discussed the monies that had been advanced by Charles. Ronald Leeds and I confirmed our agreement that the first $4m advanced by Charles would bear interest at the rate of 15% per annum and would be senior to the monies advanced by the Partnership… . At paragraph 18 he goes on to say in part as follows:

"Rogers and Wells ….. was asked to prepare a loan agreement recording the $4 advanced by Charles. I approved a draft of those documents before they were signed by Robin Ricketts on behalf of LIR on about 31 July 1990. As a shareholder in LIR I was satisfied with the terms of the Loan Agreement and was grateful to Charles for advancing the money that allowed construction to continue. …."

This evidence however, does not, in my view, address satisfactorily the issue of informed assent as raised by LIR.

[43] With reference to the Minutes relied on as ratification, as counsel for LIR pointed out, those minutes are from 1992 up to 1995 and each speak of approval of actions done in

[16] See: B1/1/22 para 58
[17] See: B1/2/28-30 para 9, 15, 16-18

the previous year. Thus even applying the Duomatic principle, the earliest one, being October 2nd 1992, would only extend retrospectively to October 2nd, 1991, a 12-month period and thus does not capture the First Transaction effected as of 31st July, 1990.

[44] More tellingly, on this issue of ratification, at this point in 1990, CJP was in default under the Pledge Agreement. As stated earlier, indisputably, by the end of October, 1989 CJP was in default under the Pledge Agreement. As I have earlier found, on construction of the Pledge Agreement, CJP, by virtue of its default, lost the right to exercise the voting rights in respect of the LIR shares as from that point onward. The default was never cured. The result was that the shareholders of LIR would have been unable to approve or ratify the changes contained in the terms of the First Transaction. For this reason and also for the reasons stated above, the First Transaction cannot be said to have been duly authorised. The representation to that effect in the Loan Agreement, for the reason I have already given, does not save it. Does this conclusion preclude Mr. Hickox from recovery of any monies found to be duly advanced to LIR? At the end of closing submissions counsel for Mr. Hickox applied for an amendment to the claim to plead restitution. I propose to deal with that aspect of the matter later.

(b) The Second Transaction

[45] Mr. Hickox relies upon various meetings of the shareholders and directors of LIR for establishing that the Second Transaction was authorised. At paragraph 40 of his witness statement[18], Mr. Hickox speaks of minutes of a meeting held at his offices on 27th April, 1990, which was attended by Mr. Sillerman and Mr. Leeds (C3/752-753) and that Mr. & Mrs. Bean and Mr. Ricketts were called after the meeting and informed of the results. He stated in part: ***"It was affirmed that the advances made by me over and above the first $4m would be senior to the initial partnership financing and would bear interest at the rate of 1% over prime, being a lower rate applicable to the first $4m. ..... it was expected that all these further loans advances would be repaid from the proceeds of the Barclays loan. .... In September 1990 my loan was not repaid in full, ... We then agreed that any amounts that were not repaid by Barclays would roll over into a subordinated loan bearing interest at the annual rate of 12% retroactive to the date of each advance. It is my recollection that formal documentation of my second loan was held up because we were in constant negotiation with Barclays Bank.***"

[18] See: B1/1/pg. 15-16

At paragraph 48, Mr. Hickox also speaks of a joint meeting held on 9th January, 1995. Present were Mr. & Mrs. Bean, Mr. Sillerman, Mr. Leeds and Mr. Hickox. Mr. Ricketts had been removed in 1991 as general partner of CJP and replaced by a corporate general partner comprising Mr. Hickox as President, Mrs. Bean as Treasurer and Mr. Sillerman as Secretary. He said in part:

"***We discussed the advances that I had made and agreed the terms of the draft loan Agreement and Promissory Note to be prepared by Rogers and Wells. The schedule to the loan agreement was to be checked by Martin Hassink of KPMG. …. The schedule sets out the further advances that I had made prior to the Barclays Loan Financing and it gives credit for the monies paid to me by Barclays. …. It was decided that I should not be a signatory to this loan and Nancy Bean was authorised to sign on behalf of LIR after final confirmation from Martin Hassink. This confirmation was not received until 30th January, 1995.***

At paragraph 50 he said:

"I attended a shareholders' meeting and a directors' meeting of LIR on 11th December, 1995. ….. Robert Bean, Nancy Bean, Ronald Leeds and Robert Sillerman also attended the meetings. The shareholders' meeting unanimously adopted a resolution that actions of the officers during the past year were approved.

Mrs. Bean and Mr. Sillerman in their witness statements confirm the fact of the meeting of 9th January, 1995, and the discussions regarding the further advances made by Mr. Hickox and for the preparation of a second loan agreement with interest at 12% and for a promissory note, and charge.[19]

[46] Counsel for LIR accepted, based on the evidence adduced of all the various meetings and discussions, coupled with the fact that Mr. Sillerman had also raised queries, the fact that the amounts were to be confirmed by LIR's accountants that they all, as shareholders and director of LIR, met and agreed at the meeting of 9th January, 1995 the terms of the Second Transaction and that this was sufficient for the court to conclude that there was informed consent for the purposes of applying the Duomatic principle in respect of the Second Transaction. Indeed it would have been difficult based upon the preponderance of evidence on this aspect to conclude otherwise. For Duomatic purposes at least, the Second Transaction would have been authorised. The matter does not end there however, as overreaching these actions there is once

[19] See: Nancy Bean B1/3/ para. 6- 9, and Mr. Sillerman B1/2/ para.19- 23

more the matter of the Pledge Agreement in respect of which CJP was in default as from 1989 onwards. I do not consider it necessary to repeat my findings in respect of the Pledge Agreement save to say that in similar manner as the First Transaction the consequence of the continuing default under the Pledge Agreement means that in 1990 and up to the meeting of 9th January, 1995, being the periods in which the meetings relied for authorisation were held, there could be no authorisation or ratification of the decision for the Second Transaction as a matter of fact and law for the reasons already given.

[47] The result is that the First and Second Transactions were not authorised with the consequence that they are both void.

[48] I could no doubt stop at this stage and consider the application by Mr. Hickox for amendment to his statement of case to plead restitution. In the event I am wrong however, I think it useful to proceed to consider the issues regarding breach of directors' fiduciary duty and as one aspect of that, the rule against self-dealing.

The rule against self-dealing – the law.

[49] The text **Gower and Davies**[20] states the rule against self- dealing thus:

"As fiduciaries, directors must not place themselves in a position in which there is a conflict between their duties to the company and their personal interests or duties to others. Good faith must not only be done but must manifestly be seen to be done and the law will not allow a fiduciary to place himself in a position in which his judgment is likely to be biased and then to escape liability by denying that in fact it was biased."

The strictness of this rule is best illustrated in **Aberdeen Railway v Blaikie and** the dictum of Lord Cranworth LC cited at page 393 of the said text as follows:

"A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those

[20] Principles of Modern Company law 7th Ed. Pg. 391-393

whom he is bound to protect ..... . So strictly is this principle adhered to no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. ....”

The author then went on to state as follows:

“..... this principle means that a director is in breach of duty, provided there is a conflict of interest which is not just fanciful, whether or not the conflict had an effect upon the terms negotiated between the parties to the transaction and whether or not the terms of the transaction could be regarded as fair, even if affected by the conflict of interest. It is therefore a strict rule: proof that exactly the same terms would have been negotiated, had there been no conflict of interest, will not save the director.

[50] **Palmers Company Law**[21] puts it thus:

“At common law a director’s powers of contracting with his company are extremely limited, unless the articles of the company expressly permit the director so to contract. He may take up shares or debentures..... of the company (though he cannot vote in respect of the allotments to himself)..... . In other respects he is, like a trustee, disqualified from contracting with the company and for a good reason: the company is entitled to the collective wisdom of its directors, and if any director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising. The director may enter into a contract only if he makes full disclosure of all material facts to the members of the company who then approve the contract. Not even if it can be shown that the contract in question is a fair one is the director allowed to enter into it for the courts will not in such cases, look into the merits, but adhere strictly to the rule that the possible conflict of interest and duty must not be allowed to arise...”

[51] Lightman J. in **Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald**[22] stated the principle thus:

“A director of a company owes a fiduciary duty to the company to act bona fide in the best interest of the company and to prefer its interests to his own where they conflict. If a director on behalf of the company enters into any arrangement or transaction with himself or with a company or firm in which he is interested that arrangement or transaction may be set aside without inquiry as to whether the company has suffered thereby (“ the self- dealing rule”); but it is a defence to such a claim that the shareholders of the company have consented to the transaction, and if the articles of

[21] Vol. 2 para. 8. 517
[22] [1996] Ch 274 @ 279

association of the company provide that a director may vote in matters in which he is interested the self – dealing rule is excluded. …"

[52] Counsel on both sides agree as to the concept of the rule against self-dealing and that if the articles of the company permit it and notice is given to the board meeting then the rule ceases to have such limiting effect. There is some disagreement however, on the extent of its application. Counsel for LIR takes issue with the manner and effect as put forward in the propositions stated by Counsel for Mr. Hickox. At paragraph 78 of Mr. Hickox's closing written submissions he stated the position thus:

"(A) In general, any issue about self dealing arises where a director has used his position as director to obtain a benefit for himself to the detriment of the company. In short it occurs where a director uses his office to conclude a contract… on behalf of the company with himself although his own interests conflict with those of the company."

(B) In this dispute it is abundantly clear that Mr. Hickox did not 'abuse' his position in this way. The converse is the reality. ….. It is LIR that invited. Mr. Hickox as a partner of CJP1 to make a loan to it so as to enable it to fulfil its obligation under the lease and to enhance the economic venture of developing a resort hotel."

[53] Counsel for LIR submits that the way the legal proposition is put on behalf of Mr. Hickox, it tends to suggest that provided the self-dealing is in the interest of the company then it is permissible and unless there is some abuse or contract to the detriment of the company the self-dealing rule does not apply. I am satisfied from the passages cited above from **Gower** (relied on by Mr. Hickox) and **Palmer** (relied on by LIR) that the rule is a strict one and does not extend to any considerations of abuse by the director or detriment to the company. It is a rule derived strictly based on the fiduciary relationship between a principal and its agent that there ought to be no possible conflict of interest arising in respect of the duties owed by an agent as between him and his principal. In short, once there is a conflict of interest in respect of a transaction, whether the transaction is fair or unfair, the director is in breach of duty. Relief from the effect of this strict rule may be obtained if (i) the articles of the company permit it and (ii) if the breach is sanctioned by the shareholders (assuming they have the requisite authority to so do and have so done in an informed manner in the sense as described in **EIC Services.**

The Articles of LIR

[54] It is common ground that the articles of LIR at least prior to December, 1989 at which point they are said to have been amended, contained an absolute prohibition against self-dealing. Prior to 20th December, 1989, LIR's articles were in the form of Table A of the Companies Act[23] which, in Article 57, stated as follows:

"***The office of a director shall be vacated…***

If he is concerned in or participates in the profits of any contract with the company"

As such, the strict rule against self-dealing applied to LIR at least until the Articles were said to be amended on 20th December, 1989. The relevant 'amended' article (Article 94) states in part as follows:

"(a) Any director may vote and be counted in a quorum at any meeting of the directors in respect of any contract, …… with the company, whether or not such director is directly or indirectly interested in any such contract. …..

(b) A director who is in any way, whether directly or indirectly, interested in a contract … with the company shall declare the nature of his interest at a meeting of directors in accordance with the law…..

The Companies Act section 91 states, in part, as follows:

(1) A director or officer of a company—

(a) who is a party to a material contract or proposed material contract with the company; or

(b) who is a director or an officer of any body, or has a material interest in any body, that is a party to a material contract or proposed material contract with the company;

shall disclose <u>in writing</u> *(my emphasis)* ***to the company or request to have entered in the minutes of meetings of the directors the nature and extent of his interest.***

(2) The disclosure required by subsection (1) shall be made, in the case of a director of a company—

(a) at the meeting at which a proposed contract is first considered;

(b) ……

[55] I**n Neptune,** Lightman J. at page 816 stated:

"It is clear that for the Defendant to invoke art 13 as justifying the self- dealing, he must be able to show that he has complied with Table A Cl 84(1) and s 317. The important and novel question raised is whether there must or can be compliance, and if so how, in the case of a company with a sole director ……. The question is novel……."

At page 817 he went on to say:

[23] R.S. A C 335

"I am satisfied that for the purpose of s 317 there can be a director's meeting in the case of a sole directorship. ..... . Section 317 'shows the importance which the legislature attaches to the principle that a company should be protected against a director who has a conflict of interest and duty" (see Guiness plc –v- Saunders [1990] 1 All ER 652, … per Lord Templeman). The requirement is for full and frank declaration by the director, not of 'an' interest but of the precise nature of the interest he holds, and when his claim to the validity of a contract or arrangement depends upon it, he must show that he has in letter and spirit complied with the section and any article to like effect (see Imperial Mercantile Credit Association (liquidators) -v- Coleman (1873) LR 6HL at 205 per Lord Cairns).

The object of s 317 is to ensure that the interest of any director and any shadow director in any actual or proposed contract shall (unless the procedure has been adopted of giving a general declaration under sub –s (3)) be an item of business at a meeting of the directors. Where a director is interested in a contract, the section secures that three things happen at a directors' meeting. First, all the directors should know or be reminded of the interest; second, the making of the declaration should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of the duty to prefer the interests of the company to their own; third, the disclosure or reminder must be a distinct happening at the meeting which therefore must be recorded in the minutes of the meeting under s 382 and cl.86 of Table A. (consider in particular s382(3)). Failure to record the declaration (if made) exposes the company and every officer in default to a fine (…) But does not preclude proof that the declaration was made and that s317 was not complied with. The existence of this record operates as a necessary caution to directors and shadow directors who might otherwise think that their interest might pass unnoticed if the contract falls to be scrutinised at some later date; and it affords valuable information as to the existence of any interest and its disclosure and thereby protection for shareholders and creditors alike in case they later wish to investigate a contract. A sole director will know of his own interest but he may not know of the interest of any shadow director: s 317 ensures that he should know. The reminder of his duty and the making of the record required by s317 must have enhanced value and importance in the case of a sole director, where there are no other directors to witness or police his actions.

The statutory object is achieved by requiring the director interested in any contract of the company to make a declaration of interest at a meeting of directors. The declaration must be made at the meeting at which the contract or arrangement is considered if the director is interested at the date of such meeting."

The First Transaction

[56] Counsel for Mr. Hickox argued that although no formal steps were taken to modify or amend the articles, this is irrelevant as all the 'corporators' were present at the 23rd August, 1988 meeting and therefore the proposed transaction to which they gave their assent, namely, the proposed loans from the partners of CJP, was intra vires the company. Reliance was placed on the case of **Cane v- Jones[24].** However, on the peculiar facts of that case it was clear that the shareholders had addressed their minds to the articles of the company and despite no formal meeting or written resolution all the shareholders had agreed to alter the article (which gave to the chairman a casting vote) depriving the chairman of his casting vote and was an action intra vires the company. Applying the Duomatic principle, the articles of the company were held to be effectively amended.

[57] I agree with counsel for LIR that the 23rd August meeting is significantly different from the facts in **Cane.** In the first place, the evidence does not suggest that there was any thought given at all to an amendment of the articles of LIR. The focus of the discussion was on the need for a loan to fund the construction. In the second place, the discussion in respect of obtaining a loan was not specifically in respect of a loan from Mr. Hickox but a loan from one or more of the partners of CJP. There were partners of CJP who were not directors of LIR and this provides further evidence from which the reasonable inference may be drawn that there was no thought being given to the infringement of the rule against self-dealing contained in the articles and thus no considered agreement to change such article to relax the rule. As such, the Duomatic principle cannot be applied. Accordingly, I hold that there was no alteration of the articles affected by the 23rd August, 1988 Minutes altering the strict prohibition contained in the articles against self-dealing.

[58] Mr. Hickox's further argument is that in any event the articles of LIR were amended in December, 1989 and at that time there was no formal agreement between Mr. Hickox and LIR in relation to the $4m loan, same having been concluded on 31st July, 1990. However, by end of October, 1990, CJP's default under the Pledge Agreement was in operation which meant that at that time the shareholders (CJP and Mr. Hickox) had lost

[24] [1890] 1WLR 1451

their voting rights in the LIR shares and thus had no authority to amend the articles of LIR, that event happening in December, 1989: after the default under the Pledge Agreement was in operation.

[59] Counsel for LIR further contended that even if the amendment to the articles were effective there is no evidence of any disclosure by Mr. Hickox of his interest at the board meeting in the manner as set out in the case of **Neptune.** I agree. The minutes certainly do not record any such declaration being made neither in accordance with the 'amended' articles or the law. In fact, there is no evidence that such a declaration of interest was even in mind. There is also no evidence that the shareholders addressed their minds at that time to the directors' failure to make such a declaration and thus they cannot be said to have ratified such a failure in respect of which clearly they had not addressed their minds. In any event, as counsel has pointed out, even had the shareholders sought, by virtue of the execution of the documents forming the First Transaction, to sanction the failure to disclose, this would have been ineffective due to the operating default under the Pledge Agreement by virtue of the loss of their voting rights thereunder.

[60] **(b) The Second Transaction**

Counsel made the same arguments in respect of the Second Transaction as for the First Transaction. I do not consider it necessary to set them out again. Suffice it to say that I find that the Second Transaction suffers from the same 'conflict of interest' breach as does the First Transaction for the similar reasons expressed. There is no evidence showing that the shareholders sanctioned the failure to disclose and in any event, even if they had, same would be of no effect as a matter of fact and law due to the operating default under the Pledge Agreement.

[61] **Directors' fiduciary duty – the law**

It is well settled law that a director owes a fiduciary duty to the company in exercising the powers conferred upon him as a director. Counsel for Mr. Hickox cited the following legal principles:

(a) Directors must exercise their discretion bona fide in what they consider, not what a court considers, is in the interests of the company and not for any

other collateral purpose. (**In re Smith Fawcett Ltd. [1942] Ch 304 @ 306,** per Lord Greene MR)

(b) The 'interests of the company' means the interests of the majority of the shareholders. (**In re Westbourne Galleries** [1973] AC 360 @ 381 per Lord Wilberforce)

(c) In determining whether a director's power has been used for a collateral or improper purpose the court will examine the range of possible purposes for which it might be used and ask whether the substantial purpose in exercising the power was to benefit the company. (**Howard Smith Ltd. v- Ampol Petroleum Limited** [1974] AC 821 @ 835 . Provided that the substantial purpose is a proper purpose the exercise of the power will not be invalidated by the presence of some other improper but insubstantial purpose. (**Hannigan Company Law** pg. 236-237)

(d) The court will not review or interfere with any acts of directors which are bona fide and within their powers. (**Burland –v- Earle** [1902] AC 83 Per Lord Davey at pg. 93).

[62] Counsel then set out the two stage test which he invited the court to apply as follows:

(a) Did the director subjectively believe that his act was bona fide in the interests of the company? and

(b) Was the act viewed objectively, substantially for a proper purpose?

If the answer to <u>either</u> of these questions is "yes" then, he said, there is no breach of fiduciary duty.

[63] Counsel for LIR put forward the following additional legal propositions:

(a) When a company is solvent 'the interests of the company' means the interests of the current and future shareholders.(**Gaiman –v- National Association for Mental Health** (1971) Ch. 317 per Megarry J. at 330)

(b) Where, however, a company is insolvent its interests are to be equated with those of the creditors. (**West Mercia** supra)

(c) Where a director asserts that he is acting in what he bona fide believes to be in the best interests of the company, that assertion is a question of fact that has to be determined by the court on all the evidence.

(d) Where a decision taken by the directors also promotes their personal interests, the court should examine the directors' conduct with particular care. (see: **Gore- Brown: On Companies** Vol. 1 at 15(9); **Colin Gwyer & Associates Ltd -v- London Wharf (Lime House Ltd** (203) BCLC 153 pg. 179)

(e) Where a director fails to consider the separate interests of the company the court will apply an objective test, namely, whether an intelligent and honest man in the position of the director could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. (see: **Charterbridge Corporation –v- Lloyds Bank Ltd** (1970) Ch. 62 per Pennycuick J at pg. 74

(f) Where the directors act in breach of fiduciary duty in voting for a resolution, or a director acts in breach of his fiduciary duty in entering into a contract with the company then that resolution or contract may be avoided by the company. If the company avoids the contract then it may be required to return to the director any benefit that it received under the contract. (see**: Gore- Brown On Companies** Vol. 1 at 15(9))

(g) Where a director does so in breach of his fiduciary duty to the company, and but for his presence at the meeting there would not have been a quorum, then the resolution is void. (see: **Colin Gwyer Associates** *supra* per Leslie Kosmin QC (sitting as a dep. High Court Judge) para. 91-93)

[64] There is no disagreement among counsel in respect of these legal propositions. There is also consensus as to the consequence flowing from a breach of fiduciary duty including the rule against self-dealing, that is, unless ratified (if ratifiable), the action or transaction is voidable. On this wider aspect of the law relating to directors' fiduciary duties however, counsel disagree on the test to be applied by the court. Counsel for LIR submits that the test as set out by counsel for Mr. Hickox is wrong and submits that the exercise of a power for an improper purpose will not be saved by the fact that the directors bona fide believed it to be in the best interest of the company as such an exercise of power will be in breach of fiduciary duty in that if it is an improper purpose then such act is ultra vires the directors. (**Hogg –v- Cramphorn** [1967] 1Ch. 254 @ 255**; Howard Smith Ltd –v- Ampol Petroleum and Others** [1974] 1AC 821 @ pg. 831, 834 and 838). I agree that this is a correct statement of the legal principle based

upon these well known and applied authorities. Counsel for LIR submits that the correct test to be applied by the court on this aspect of the matter is a two - limbed test which he formulated as follows:

(a) If a director considered the company's interests and took an act within his power it is sufficient that it was taken bona fide in the interest of the company and the court would not inquire further and would not be a breach of fiduciary duty. (See: Smith Fawcett supra)

(b) If the director did not consider the company's interests when he took the act then that act will be a breach of fiduciary duty if a reasonable director in the same position could not have believed it to be in the company's best interest.

There is no difficulty on the first limb which is the well recognised and often applied subjective test and the one in principle being urged on the court by Mr. Hickox. In respect of the second limb Counsel for LIR relies on the cases of **Charterbridge** and **Colin Gwyer.** I have already set out at paragraph 61(e) above the legal principle taken from the dictum of Pennycuick J in **Charterbridge.** In **Colin Gwyer,** Kosmin QC applied the **Charterbridge** test and stated that the test was one of general application. (See: para. 85-87).

[65] Counsel for LIR then submitted that the starting point for the court is to first consider on the evidence whether Mr. Hickox considered LIR's interest, - in essence, did he form a subjective view of what he was doing from the standpoint of LIR. If he considered LIR's interest and took an act within his power and bona fide in the interest of the company, then the court is not going to subject that exercise of power to scrutiny and he will not have acted in breach of fiduciary duty. As Lord Davey said in **Burland – v- Earle** [25] ***"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so."***

Secondly, if however, the director failed to consider the company's interest, such failure, without more, does not render him in breach of fiduciary duty. The court must go on to consider whether an honest and intelligent person in the position of that director having regard to all of the circumstances then prevailing, could have thought that his actions were in the interest of the company – in essence apply an objective

[25] [1902] AC 83 at page 93

test to the actions of the director. I am quite satisfied that this is the correct approach to be applied to the case at bar.

The First Transaction.

Did Mr. Hickox consider LIR's interest?

[66] It is not in dispute that at the time of the First Transaction, Mr. Hickox was a director of LIR. In his oral evidence[26] he had this to say:

"Q. So as at August, 1988, what the partners were discussing was the partners raising money amongst themselves for the partnership to carry on with the construction.

A. That's right it.

Q. And so the position of the company in all this didn't arise because that was only later that Barclays said it had to be a company liability.

A. Yes.

Q. And so it follows from that, that when you were discussing the rate of interest and such like, no consideration was given to the company's position because at that stage the company wasn't in the picture.

A. Yeah, I guess you can say that, yes.

Q. There was no doubt about it because as you have explained in 1988 this was a partnership matter. It became a company matter in 1990 because of the bank.

A. Yes."

[67] This evidence would tend to suggest that no thought at that time was being given to LIR or its interest. I must, however, have regard to the findings of Saunders J where he stated at paragraph 52 thus:

"***On the evidence before me I find as a fact that, consistent with the signed version of the Minutes, LIR met on 23rd August, 1988 and agreed to borrow up to $4,000,000 from one or more of the partners. LIR also agreed there and then that it would issue a Promissory Note to the Lender."***

He accordingly found the Minutes to be accurate. The Third Resolution documented in those Minutes both in respect of the directors and shareholders of LIR (in identical terms) set out as follows:

[26] See: T 2 pg. 436

"RESOLVED, that the terms of the loan agreement described at the meeting were fair and reasonable and that entering into such agreement was in the best interest of the Corporation (LIR) and its shareholders ....."

This express finding is binding on the court. Accordingly, despite the conflicting conclusion one may be minded to reach based on Mr. Hickox's testimony, I am constrained to hold based upon the express resolution contained in the Minutes and accepted by Saunders J that he did consider the separate interests of LIR. I do not accept counsel's suggestion that a finding by this court to the contrary would not be inconsistent with the findings of Saunders J. In my view, that would be precisely the result. Furthermore, Mr. Hickox also said in evidence in speaking about the state of development in 1988 as follows:

"… ***my idea was that the first interest of LIR was that its resort get built, that it become economically viable and that all new funding should go into getting that resort finished."***

Accordingly, I do not consider that it is open to the court to apply to the transaction the objective test as set out in **Charterbridge**.

[68] The question then is whether the directors subjectively believed (and not whether the court considers) their actions were bona fide in the best interest of LIR. This is categorically so stated in the Minutes. Monies were needed to fund construction so as to prevent forfeiture of LIR's Lease. This is borne out also in the Minutes. Mr. Ricketts who at that time was the managing director of LIR and the General Partner of CJP eventually agreed that the contents of the Minutes were true. He signed and accepted the minutes in May, 1990. He also accepted that at the time, funds were desperately needed to continue construction (see: T3/807). Mr. Hickox also repeatedly in his evidence spoke of the likely forfeiture of the Lease for breach of the development covenants contained therein. Mr. Ricketts and Mr. Hickox at the time were the directors of LIR and at that time Mr. Ricketts was the general partner of CJP, the majority shareholder of LIR, the other shareholder being Mr. Hickox. I am satisfied that they all felt that it was in the best interest of LIR to obtain more funds to continue the construction to prevent loss of the Lease and in the hope that the Resort would eventually be a viable enterprise. The decision to obtain a loan would certainly have been within the directors' powers. Discussions had been underway with Barclays for a loan but this had so far not materialized and was unlikely. Mr. Hickox's evidence is that there was no prospect of bank financing at that time. Mr. Sillerman's evidence is

also of like effect.[27] The consensus as regards the experts at least is that such a loan in the circumstances existing was considered to be speculative and of high risk and thus in essence attracting a higher rate of interest. Mr. Woolf accepted this to be the case, although he qualified his answer as being more applicable in respect of an outside investor. (see: T/ 4/1080- 1085). Mr. Sillerman was not willing to advance monies to LIR because he said, "***even with the MBM equity 'kicker', the 15% interest rate was not attractive enough to persuade me or any of the other limited partners to make advances to LIR."***[28]

The experts Mr. Woolf and Mr. Lee, in their joint report, agreed that both sets of projections which they each produced for the purpose of showing whether the project was viable, indicated that: ***"The First Loan and the additional finance required would be repaid- from 1994 onwards in Mr. Woolf's projections and from 1991 onwards in Mr. Lee's projections"*** (see: B1/ 538).

[69] To my mind, while on one view it may be argued that the loan had the potential of saddling LIR with a large debt, on another view it was perfectly reasonable to seek to save the project rather than closing down in midstream with the potential of losing the entire asset. There is no evidence, nor has it been asserted, that the directors acted for some improper purpose or motive. I find there was none. They cannot, in my view, be faulted for seeking to save the project by the provision of additional funding required for moving the project forward towards completion of the Resort which was the primary objective. Accordingly, I do not consider it necessary or desirable to review those actions further. I do not consider that I need delve in detail in the projections and assumptions made by both experts in arriving at their conclusions as to the viability of the Resort nor to engage in an examination as to which expert was the more reliable. Suffice to say that the areas on which they found common ground was more helpful to the court. I am quite satisfied, based on the evidence weighed as a whole, that there was no breach of fiduciary duty in this sense by Mr. Hickox in participating in the decision for the making of the $4m loan to LIR in August, 1988 and the entering into by LIR of the First Transaction in July, 1990.

[27] See; B1/2/28 para 11
[28] See: Witness Statement: Sillerman B1/2/30 para.16

The Second Transaction

[70] The evidence suggests that discussions on the second Advances did not take place until April, 1990. This is according to the minutes dated 21st May, 1990. (see:C3/752.) This was at the same time that the decision was taken to formalise the agreements in respect of the First Transaction. In the minute of 21st May 1990, mention was made of the First $4m advance for a term of 15 years at 15% interest. Reference was also made to advances by Mr. Hickox over and above the $4m which was to bear interest at 1% over prime and the priority of payments. Mr. Sillerman in his witness statement (paragraphs 17 to 25) stated in effect that he met with Mr. Hickox and Mr. Leeds at Mr. Hickox's office. Mr. and Mrs. Bean were not present but were contacted later by phone as to what was discussed and they agreed to the matters discussed. Mrs. Bean in her oral evidence said they participated in the meeting by teleconference. He said that the additional advances by Mr. Hickox was in the nature of bridging finance pending the financing from Barclays and thus interest was agreed at 1% over prime and that when it turned out that Barclays did not allow for full repayment it was then agreed in September, 1990, following the Barclays loan that the balance of the further advances being almost $4m would attract interest at 12% and be secured by a charge as it had become longer financing. On 27th September, 1994 he received a fax from Mr. Hickox detailing the various periods or stages of resort financing[29]. After he, in essence, verified the amounts of the advances with the assistance of Mr. Hassink, (LIR's auditor) he met with Mr. and Mrs. Bean, Mr. Hickox and Mr. Leeds on 9th January 1995, and agreed that Rogers & Wells should prepare a further loan agreement, promissory note and charge in relation to those additional advances. Mrs. Bean was authorised to execute the documents on behalf of LIR. Mrs. Bean's evidence is, in essence, to the like effect.[30] She says she signed the documents on 5th September, 1995. Mrs. Bean and Mr. Sillerman then in effect also say that they considered that the action was considered to be in the best interest of LIR to have funds to complete construction with the hope that the hotel would be profitable and be able to service the level of debt rather than cease construction with the resultant effect of an uncompleted resort and the risk of the Lease being forfeited. It must be remembered that LIR has at all times been the holder of the Lease and the development commitments and covenants contained in the Lease were LIR's. LIR

[29] See: C5
[30] See: B1/3/ 37-38 paras. 5-10.

was committed to carrying out and completing Phase 1 of the development works which called for villas providing a total of 34 guestrooms, among other things, within a two year period.[31]

[71] LIR's complaint is that there is no mention of any consideration of LIR in any of the various informal meetings giving rise to the Second Transaction and there is no mention of the Second Advances in the minutes of any subsequent meeting of any entity or group. This is so. As such, LIR contends that Mr. Hickox gave no consideration to the separate interests of LIR and again urged the court to apply the objective test as laid down in **Charterbridge**. However, Mr. Sillerman and Mrs. Bean gave evidence of the meetings and the discussions regarding the Second Advances; of the interest rate they agreed and of the instructions to Rogers & Wells to prepare the loan documentation including security documents.(see:T/4/892-893) From Mrs. Bean's evidence most of these meetings were informal. In relation to the meeting taking place in September 1990, her evidence **(T/3/542)** was:

"Q Do you remember the discussion which took place?

A. Well basically it was about the promissory notes and the monies that had been advanced

Q. And what was said?

A. I think we were all very concerned that the hotel continues its building. We all had faith in it and we were very concerned about where the money was coming from and Mr. Hickox had been advancing money, so the meeting was about that.

Q. And what happened? What was said at the meeting about Mr. Hickox advancing money?

A. Well, we agreed to provisions of interest on more monies that he was wiling to advance."

There is no positive evidence pointing to the fact that there was a failure to consider the separate interest of LIR. From the totality of the evidence however, this much becomes clear, there was a genuine desire on the part of the directors and shareholders of LIR to see the Resort through to completion with the potential of producing a high rate of return rather than acceding to the alternative of bringing construction to a halt and winding up LIR. In my view, it was a genuine attempt to

[31] See: The Lease C1/190-209

save the project. No alternative financing at that time was available. CJP looked to one or more of its partners who were already invested in the project. By that time, Mr. Hickox was already heavily invested being the largest investor in CJP and also by virtue of the additional advances he had made towards continued construction of the Resort. It also cannot be overlooked that CJP (in which he was the largest stakeholder) and Mr. Hickox at that time together, represented all the shareholders of LIR. Mr. Hickox's interest at that time were threefold, namely, (i) as a director (ii) as a shareholder of LIR (individually and through CJP) and (iii) as a lender. I am satisfied that consideration was given to the interest of LIR and that the proposed steps and actions were for a legitimate purpose. As such, I do not consider it necessary to embark upon a detailed discourse in seeking to determine what an honest and intelligent director would have done in all of the prevailing circumstances. I find as a fact that the same considerations informing the decision in 1988 to fund the construction so that the Resort could be realized continued to be the same considerations informing the decision in respect of the further advances in 1990 culminating in the Second Transaction executed on January 1st, 1995.

[72] Counsel for Mr. Hickox also contends that it was clearly in LIR's interest to have a formal loan agreement providing for a set term and scheduled payments rather than a loan which could be called at any time. This appears to me to accord with the commercial reality of the circumstances as they then existed. Even though the interest rate was fixed and may be regarded as high, based on the opinions of the experts this rate was not out of the ordinary given prevailing interest rates at the time. Furthermore, it is to be noted that both the First and Second Loans allowed for prepayment without penalty. Also, as was pointed out by the experts in their evidence, there are downsides and upsides to fluctuating rates or fixed rates of interest in respect of a borrower depending on market trends. I have been unable to discern any improper motive or purpose in the taking of the decision to make the further advances culminating in the entry into of the Second Transaction. I find, in this sense, that there was no breach of fiduciary duty by Mr. Hickox as director of LIR in taking or participating in the taking of the decisions and the entry into of the Second Transaction by LIR.

Consequences of breach of fiduciary duty

[73] Having concluded that there was no breach of fiduciary duty by Mr. Hickox (self-dealing aside**),** I now address the consequence of breach of fiduciary duty only from breach of fiduciary duty flowing from the infringement of the rule against self - dealing as I have found. Such a breach makes the action or transaction voidable at the option of the company. Where a transaction is voidable however, it will not be set aside unless restitutio in integrum is possible. Counsel for Mr. Hickox cited and relied on the dictum of Lord Pearson in **Hely- Hutchinson –v- Brayhead Limited** [32] where at page 594 he said:

"The contract is voidable at the option of the company, so that the company has a choice whether to affirm or avoid the contract, but the contract must be either totally affirmed or totally avoided and the right of avoidance will be lost if such time elapses or such events occur as to prevent rescission of the contract."

He also relied on the dictum of Simon Brown J in **Runciman –v-Walter Runciman plc** [1992] BCLC 1084 at page 1084 where he said:

"But once again there is a dispute here as to whether the article [85(1)] has in fact been breached. And even if it was submits Mr. Elias, there are compelling reasons why the court should not permit the defendants now to avoid the contract. Four particular questions are raised upon this part of the case. First, as to whether s317 and therefore art 85(1) has any application to service contracts between a company and its own directors. Second ….. .. Third ….. whether disclosure was made here by the plaintiff in conformity with the section. Fourth, assuming that the plaintiff was in breach of a duty to disclose, whether it is equitable to permit the defendants now to rescind.

Although these four questions were argued before me at considerable length I shall hope to be forgiven for dealing with them relatively shortly. The reason I do so is quite simply this. Whatever may have been the strict legal requirements of the position, on the particular facts of this case I am perfectly satisfied that for the plaintiff to have made a specific declaration of interest before agreement of the variations here in question would have served no conceivable purpose. It would have been mere incantation. Any non compliance with art 85(1) was accordingly wholly technical. Nothing could be less just than the new owners of the company after take-over should now benefit from their adventitious discovery of such breach. To allow them to do so would be to sacrifice the plaintiff's legitimate interest on the altar of slavish adherence to ritualistic form"

[32] [1968] 1QB 549@ pg. 594

[74] LIR contends that it made the election to avoid the transactions and therefore they have been avoided. Mr. Hickox contends that LIR has lost its right to avoid by virtue of the following:

(a) LIR ratified or adopted the First and Second Transaction or alternatively, LIR acquiesced in the transactions;

(b) Under the terms of the Settlement Agreement under which the Friedland Group acquired the shares of LIR they agreed not to challenge the validity of the loans;

(c) The alleged breaches are mere technicalities and the steps which it is alleged Mr. Hickox ought to have taken would have served no conceivable purpose and thus to allow LIR (as controlled by the Friedland Group) to avoid the transactions by reason of such failings in the words of Simon Brown J in **Runciman** would be "*to sacrifice the plaintiff's legitimate interest on the altar of slavish adherence to ritualistic form;"* and

(d) The decision to obtain loans from the partners of CJP was taken in 1988 (almost 20 years ago) and it is too late and inequitable to seek to unpick the consequences of that decision.

[75] It is established by well settled legal principles settled law that if a company ratifies or adopts the transaction which is voidable, then the right to avoid is lost. This is borne out in the dictum of Cotton LJ in **Re: Cape Breton Co**[33] The dictum of Ligthman J in **Neptune** *(supra)* reinforces this principle. Counsel for Mr. Hickox says that with regard to the First Transaction it was affirmed or ratified in 1990 when LIR sought the advice of its lawyers, Rogers & Wells, after a meeting of its shareholders and directors it was open to it to avoid the agreement that had been reached years earlier. However, they did not adopt this course but chose instead to affirm the agreement with full knowledge of the extent and terms of the loan. With regard to the Second Transaction Mr. Hickox says that when all the shareholders and directors of LIR met in January 1995, it was open to them to decide to avoid the agreement made with Mr. Hickox but instead they chose again to affirm the agreement with full knowledge of the extent and terms of the loan and the Second Loan Agreement and Note was signed on behalf of LIR. LIR's succinct response to this argument is that there was no ratification or

[33] (1885) 29 Ch.D 795 at pg. 803

adoption in fact or as a matter of law because of the operating default under the Pledge Agreement.

Estoppel

[76] The Settlement Agreement[34] is stated to be governed by the laws of the State of New York. Mr. Hickox did not sign the Settlement Agreement in his personal capacity. The Mediator noted in his award that Mr. Hickox at the time of execution of the Settlement Agreement "***specifically refused to sign the agreement in his individual capacity." (the Settlement Agreement -C5/ 1603).***

In Clause 9b of the Settlement Agreement there appears this statement:

"With the exception of the Loan Adjustment, 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."

This is the statement relied upon by Mr. Hickox in saying it is not open to LIR (now under Friedland) to challenge Mr. Hickox's loans. LIR points out that this particular statement is contained in section III of the Settlement Agreement which deals with 'ownership change' – in the event of change in ownership of LIR before the sums payable to the Friedland Group under the agreement had been paid. Clause 17 provided for any disputes relating to or in connection with, inter alia, its interpretation to be determined solely and exclusively by the Mediator whose decision ***"shall be final and binding and non appealable"***. On 2nd April, 2001, the Mediator made a determination in respect of clause 9 of the Settlement Agreement in which he stated, in essence, that Clause 9b was limited to the facts and circumstances contemplated by paragraph 9, i.e. 'change of ownership' only and not intended to be applied universally, He concluded, in essence, that this provision could not be read or taken as '***precluding Friedland from challenging the Hickox loans under any circumstances'.*** The Mediator concluded thus:

"… I find that the intent and the language of the Settlement Agreement provides that Friedland is not estopped from challenging the loans of Charles Hickox to LIR."

The New York Bankruptcy Court on 18th April, 2002 confirmed the Mediators determination which made it an order of the New York Bankruptcy Court. (C5/ 1623). Accordingly, LIR contends, in essence, that it is not open to Mr. Hickox to seek to litigate afresh the construction of Clause 9b of the Settlement Agreement

[34] See: C2/568-595

since it is clear that this was the very issue determined by the Mediator and confirmed by the New York Bankruptcy Court. In essence, he is estopped from so doing. Reference has already been made to the **Carl Zeiss case** above in outlining counsel's submissions on the principles of res judicata and issue estoppel. In the **Carl Zeiss** case, Lord Reid at page 918, after setting out the reasons for exercising caution in applying the principle of issue estoppel to a foreign judgment, went on to say this:

"The case for Stiftung …. was fought as tenaciously in West Germany as this case has been fought here, and it is not difficult to see what were the grounds on which the West German judgment was based."

A similar observation can be made in respect of the present case. Based on the record of the New York proceedings in which there was reference to the Anguilla proceedings and reference to the very issue of Clause 9b raised therein and the current proceedings, I am in no doubt that the issue determined by the Mediator and confirmed by the New York Court is the same issue being raised anew in this court. It appears it was obviously raised before Saunders J on the hearing of the Preliminary Issue. (Judgment of Saunders J paras. 68- 71.)[35] I am also satisfied that the Order of the New York Court confirming the Mediators award was a final judgment in which Clause 9 of the Settlement Agreement was determined.

[77] Counsel for Mr. Hickox does not accept that issue estoppel is applicable in respect of the Mediators' determination of Clause 9 of the Settlement Agreement, the reason being, he said, that the Mediator/ Arbitral award cannot be likened to a judgment of a court where the suit is between the relevant parties. He contends that a condition precedent to arbitration is an agreement to arbitrate. There was no such agreement to arbitrate as Mr. Hickox never signed the Settlement Agreement. And thus, in essence, the Mediator in seeking to bind Mr. Hickox in respect of his award on the determination of Clause 9 of the Settlement Agreement and then having a judge endorse the award does not make it enforceable as a foreign arbitration award because there is no binding agreement by the parties to arbitrate. Incidentally, a New York Court decided that under New York Law Mr. Hickox was indeed a party. I must confess to some difficulty in following Mr. Hickox's line of reasoning in light of the fact that Mr. Hickox participated fully in the proceedings before the Mediator on the question of the

[35] It does not appear that the Mediator's Award or the Order of the New York Court confirming it was brought to the attention of Saunders J.

construction and determination of Clause 9b of the Settlement Agreement. Indeed, as the Mediator's Award discloses "***Mr. Hickox had previously submitted to the Mediator the issue of interpreting the very provision involved herein…"*** and also the fact that Mr. Hickox seeks in his personal capacity to obtain the benefit of Clause 9b by seeking to rely on it as a defence to LIR's attack on the loans whilst at the same time protesting vehemently that he is not a party to the said agreement on which he places reliance for the purpose, it appears, of avoiding the decision of the New York Court being binding on him and thus defeating the 'issue estoppel' argument. Certainly, Mr. Hickox cannot have it both ways. If he relies on Clause 9b of the Settlement Agreement then it must be on the basis that he considers himself a party to the Settlement Agreement and by extension as being bound by the Mediator's Award and the New York Court's decision confirming the award in which event I am quite persuaded that he would be estopped from re-litigating this issue. If his protestations of not being a party are to be acceded to then he cannot, in my view, rely on Clause 9b of the Settlement Agreement as an answer to LIR's attack on the loans for the simple reason, as counsel for LIR has rightly said, due to lack of privity of contract.

[78] For the reasons which I have already given, I have no hesitation in holding that Mr. Hickox was bound by the terms of the Settlement Agreement as found by the New York Court and further that the New York Court having confirmed the interpretation of Clause 9 of the Settlement Agreement that decision is also binding on Mr. Hickox. He is accordingly, estopped from seeking to raise this issue afresh by seeking to now have this court construe Clause 9 of the Settlement Agreement. In any event, were I wrong in so concluding, on my construction of Clause 9 of the Settlement Agreement I arrive at a similar conclusion as the Mediator on the plain reading of Clause 9 that Clause 9b is limited in scope to the particular circumstances relating to 'change of ownership' with which that section of the Settlement Agreement is concerned and is not intended nor is it a statement of general application. Accordingly, Mr. Hickox's argument on this ground also fails.

The alleged breach being a mere technicality.

[79] Counsel for LIR has urged caution in applying a broad brush approach, as seemingly suggested in **Runciman** for two reasons: (i) the decision in **Runciman** was based on the peculiar facts of that case and (ii) Simon Brown J appears to have introduced a

discretionary element into an area of law which, at that time, and subsequently, has been shown not to exist. He relies on the dictum of Lightman J., in **Neptune** already cited in which he in turn cited Lord Templeman in **Guiness Plc-v- Saunders.** Similarly, the mandatory provisions of s91 of the Companies Act of Anguilla cannot be overlooked where it says that a director ***'shall*** *(my emphasis)* ***disclose in writing to the company or request to have entered in the minutes of meetings of the directors the nature and extent of his interest.'*** The mischief sought to be protected against is clearly as enunciated by Lightman J recited above. Furthermore, the rules of corporate governance are of importance in ensuring certainty in respect of actions taken on behalf of a company in the full appreciation that such an entity can only act through its agent. I adopt fully the views of Lightman J and Lord Templeman in **Neptune** and **Guinness** respectively and would hold that the failure to disclose is not a mere technicality which can simply be overlooked. Such an approach would, in my view, fly in the face of the provisions mandated by the legislature for the purpose of ensuring proper corporate governance and more so, in the case of a sole director, provide little or no comfort to shareholders or subsequent directors who may have the need, at some later date, to scrutinise a transaction undertaken by the company. For my part, corporate transparency is to be encouraged and the statutory provisions designed to ensure such transparency ought not to be allowed to be whittled down.

Delay in avoidance

[80] I have already referred above to the dictum of Lord Pearson in **Hely - Hutchinson.** Counsel for LIR in response to Mr. Hickox's submission in respect of the delay in seeking to avoid the transaction accepts that in some instances the right of avoidance may be lost because the character of the subject matter may have changed thus making restitution no longer possible. In such a case, it would be inequitable to allow the unscrambling of the transaction. Counsel points out however, that this case has been and continues to be about money and therefore restitution given now or ten years ago would be the same save for the increment of interest. It requires working out what the principal is for restitution and then the appropriate rate of interest to be applied. Mr. Hickok accordingly, would be amply compensated in respect of elapse of time by the addition of the interest over the period elapsed. I agree with LIR's submission that this case being simply about money, there is in reality no change

which would make restitution impossible or inequitable. At the end of the day, whatever the amount upon which restitution ought to be made as a consequence of avoidance of the transaction can fairly and properly be awarded with the compensating factor of interest thereon over the relevant period of elapsed time.

Restitution

[81] At this juncture, I now consider on what amounts a restitution order ought to be made as a consequence of avoidance of the First and Second Transactions by LIR. This brings me back to the findings of Saunders J on the Preliminary Issue and the question '**to whom**' and not **'for what purpose'** were advances made by Mr. Hickox. I have already set out the questions which were posed for preliminary determination.

[82] Saunders J in his Judgment in relation to those questions found as follows:

(a) Paragraph 72: ***"..... there seems to me no doubt that Mr. Hickox made his advances for the purposes of construction and that at least a substantial portion thereof was used for those purposes."***

(b) Paragraph 74: "***I would hold that all of Mr. Hickox's advances made after the 23rd August, 1988 for construction purposes were made to LIR. There is a very reasonable argument to be made that his advances for construction made prior to 23rd August 1988 were not made to LIR but I prefer not to decide that point at this stage."***

(c) Paragraph 84: "***I am satisfied that, of the monies totalling US$4,000,000 the subject of the Promissory Note dated 31st July, 1990, the plaintiff advanced to the Defendant either all of the same or a substantial portion thereof. I am satisfied that, of the monies totalling US$3,962,830.41 the subject of the Promissory Note dated 1st January, 1995, the plaintiff advanced to the defendant either all of the same or a substantial portion thereof."***

He then concluded at paragraph 85 thus:

".... . This means that it will be open to the Defendant at trial to establish, if it can, that any particular advance was not made to LIR. On that score I can say that I did entertain some doubts as to certain advances."

[83] My task now on the trial is to determine whether LIR has established that certain advances were not made to LIR. The scope of this investigation, based on the conclusive finding of Saunders J at paragraph 74 referred, is limited to an investigation

of those advances made prior to 23rd August, 1988. It is on this aspect of the matter that the letter of 10th November, 1988 from Spengler Carlson takes on significance ("the Spengler Carlson Letter") (C4/1213 - 1218)).

[84] LIR contends that all of the advances made prior to 23rd August, 1988 were made to CJP and not to LIR as up to that time, it was CJP that was carrying on the project and not LIR. At paragraph 58 Saunders J opined as follows: ***"It seems as though originally the partnership*** (CJP) ***went into the loan negotiations with the notion that it was the entity doing the construction. The Partnership was therefore initially seeking funds for itself. The bank, however, was only prepared to lend to LIR and it is LIR that entered into the Loan Agreement with Barclays Bank."***

[85] With regard to the First and Second Transactions, LIR challenges the following advances made prior to 23rd August, 1988: In respect of the First Transaction:

Amount $	**Date**
383,184	1st December, 1986
180,000	8th December, 1987
60,000	4th February, 1988
240,000	1st March, 1988
160,000	12th April, 1988
$1,023,184	**Total**

With regard to the Second Transaction:

Amount $	**Date**
100,000	2nd June, 1988
100,000	2nd July, 1988
15,000	18th July, 1988
$215,000	**Total**

LIR relies on the evidence of Mr. Keith Stein of Spengler Carlson, the attorneys acting for CJP, the Spengler Carlson Letter written by Mr. Stein and the evidence given by Mr. Hickox.

[86] Mr. Stein in his affidavit stated that between 1985 and 1989 he was an associate attorney at Spengler Carlson who did work for CJP. A number of documents and

letters were drafted by him and others at the firm of Spengler Carlson with regard to CJP relating to the Cap Juluca project such as the PPM as well as the very establishment of CJP as an entity. He said his main contact with CJP was Mr. Hickox. Robin Ricketts was also one of the contact persons. Specifically, he stated that he wrote the Spengler Carlson Letter and sent it to everyone on the distribution list; that the information contained in the schedules A and B to the letter came from Mr. Hickox, and that the letter accurately reflected the instructions he was given. He said no one contacted him at any time to say that the contents of the letter were inaccurate. I accept this evidence.

[87] The purpose of the Spengler Carlson Letter is stated "***as updating each of the partners of CJP on the current status of the capitalization of and ownership of CJP and Maundays Bay Management Ltd."*** It went on to say that Schedule A described the current interests of each partner in the Partnership and Schedule B described additional contributions and/or loans made by each partner. Schedule A showed against Mr. Hickox's name the sum of $816,000 in the column marked **"*additional cash/units".*** This carried the reference **"C"** which in the footnote stated as follows: ***"includes $383, 183.82 contributed by Mr. Hickox as an exchange of the Partnerships' promissory Note for said amount which he held as the result of a loan to the Partnership in 1986."***

In Schedule B under the column referring to ***"Additional Cash Contributions and /or loans since December 1987 *"*** the following sums appear under the column headed ***'Mr. Hickox'***,

- 12/8/87 $180,000 **A**
- 12/14/87 60,000 **A**
- 3/1/88 240,000 **A**
- 4/12/88. 160,000 **B**

These specific sums plus the sum of $383,184 appear with identical dates in Schedule 1 to the First Transaction detailing the amounts and dates of advances made by Mr. Hickox as advances to LIR. Schedule B of the Spengler Carlson Letter also detailed, inter alia, the following sums under the column headed "Mr. Hickox":

- 6/2/88 100,000 **C**
- 2/7/88 100,000 **C**; and
- 7/18/88 15,000 **C**

These sums and dates are identical to similar sums and dates noted in the Second Transaction as advances by Mr. Hickox to LIR. The asterisk at the end of the year 1987 and the footnotes to the letter references against the amounts bear note. The asterisk notation says: ***"Does not include any amounts loaned to the partnership after 9/22/88"***

The footnote reference to the letter **"A"** says as follows:

"Treated as a contribution to capital in exchange for partnership interests."

The footnote to letter **"B"** states:

"$80,000 treated as a contribution to capital in exchange for partnership interests and $80,000 treated as a loan."

The footnote reference to Letter **"C"** states as follows:

"Treated as a loan"

Schedule B also carries this notation:

"NOTE: All amounts paid by Bean, Sillerman and Leeds are contributions to capital in exchange for partnership interests."

It is noteworthy that neither Mrs. Bean nor Mr. Sillerman has at any time asserted or sought to suggest that they loaned monies to LIR, notwithstanding that their contributions equally went towards construction of the Resort on LIR's Leasehold property.

[88] Based upon the Spengler Carlson Letter (including the explanatory footnotes) the sums $180,000; 60,000; 240,000; 80,000 (being one half of the $160,000 dated 4/12/88) total $560,000 and are said to be contributions for Partnership interest or equity in CJP. The questioned advances under the Second Transaction totalling $215,000 are said to be treated as loans to the partnership. To that sum must be added the sum of $80,000 (being one half of the $160,000 dated 4/12/88) said to be treated as a loan. The total of loans to CJP prior to 23rd August, 1988 is then $295,000. The sums of $560,000, 295,000 and $383,184, (which Mr. Hickox said was for start up costs of the partnership among other things), amount to the total of the the pre 23rd August 1988 advances in question.

[89] If the content of this letter is taken as accurately reflecting the flow of these funds, then it provides compelling evidence that these sums at the time they were advanced were to the partnership CJP either by way of capital contributions in CJP in respect of partnership units, or as loans <u>to CJP</u> and not <u>to LIR.</u> I am satisfied that such detailed

information must have been given to Mr. Stein by Mr. Hickox on behalf of CJP as he would reasonably be expected to have had such information.

[90] The statements in the Spengler Carlson Letter accords with Mr. Hickoxs' own view of the way in which they were proceeding at the time. He said in effect (/ 516-523) that:

(a) LIR at that time was not involved in the construction of the Resort. LIR had not become involved until 1990.

(b) At the time of those advances the construction was being carried on by CJP.

(c) At the beginning loans were made to the partnership on the basis that the partnership would own the Development.

(d) The $383,184 was put into the partnership. Some were to pay formation costs, some to pay arrears in rent of LIR's lease and on construction.

(e) In reference to the sums with the notations "A", "B" and "C" in Schedule B of the Spengler Carlson Letter, those payments made between July 87 and December, 1988 were made for the purposes of construction being carried out by the Partnership.

[91] This also accords with what Saunders J referred to in Paragraph 58 of his Judgment as the notion held that CJP was carrying out the construction and that CJP was seeking funds for itself. In my view, based upon the evidence, this was clearly the view held by Mr. Hickox and others. In cross examination Mr. Hickox said (T/2/209-210):

"Q. **The Loans which were authorised in August 1988 they weren't thought to be partnership loans, were they?**

A. **That's right.**

Q. ***They were thought to be company loans.***

A. ***They were thought to be loans which were… there was a long period of time where we thought we were loaning – that the money that was coming in was going into the Partnership and the Partnership was going to be developing the property and owning the actual assets, the buildings there on the leasehold, and it remained in that way until Barclays came along in 1990 and refused to loan to the Partnership and insisted that their loan be to LIR. And at that particular time, we realised that everything had to be switched, that LIR had to own everything that was on the property and at that particular time it was changed to reflect that. The financial statements got changed to reflect that. I think all the loan agreements got changed to reflect that, that particular change."***

[92] Mr. Sillerman wrote to Mr. Hickox in August 1989 (C4/ 1249). In that letter, in response to Mr. Hickox's letter of 25th August, 1989 (C4/1248), in which he spoke of additional funds needed by the hotel, he wrote in part:

"I will certainly be glad to pick up my share of the interest. Accordingly, can you send me a breakdown of the amount of the loan….. . Additionally, how will we account for this contribution? Will it be considered a loan to the partnership or will it be purchasing new portions of the Partnership?"

Mr. Hickox agreed, in essence, that as at that time Mr. Sillerman considered he was putting money either by way of loan or equity in the partnership CJP.

[93] From this evidence, coupled with the documentary evidence it is pellucid that at the time of the 'advances' in question, it was the entity CJP that was carrying out the construction on LIR's leased land. Funds for the construction were being either loaned to CJP or were being injected by way of contributions for CJP units and such funds in turn were used in the construction of the project. Indeed this is how the scheme was initially conceptualized and to this extent Mr. Hickox was acting in accordance with this concept. As Mr. Hickox said during cross examination –"***If money went into the partnership it really went to LIR."*** It is in this context that Mr. Hickox's statement in light of his unequivocal evidence is understood.

[94] It so transpired that CJP never acquired a leasehold interest in the property on which the Resort was being built. The Leasehold remained with LIR. But that however, does not obscure or change the fact that it was CJP that was carrying on the construction up to and during 1988, notwithstanding that it did not hold the leasehold interest. Whether that arrangement was a good one or bad one at the time, in my view, is of no relevance to the factual determination of who was doing what. The issue is not who ought properly to have been carrying out the construction but simply who in fact was carrying it out. Furthermore, it is not difficult to understand that this arrangement was workable given the fact that CJP at that time controlled LIR by virtue of its voting rights as well as through its directorships which were then Mr. Ricketts and Mr. Hickox. The joint audited accounts for the years prior to 1990 bore this out. It seems that the partners were content to continue in this vein which posed no real issues to them in terms of their lending or contributing given their then common

ownership and control of both entities, until Barclays entered the picture in a serious way and insisted that it must be LIR and not CJP to whom the loan must be made given LIR's ownership of the Leasehold asset on which the development was being done. This caused a change of course and things done one way previously, as the pre 1990 joint financial accounts showed, had to be treated differently. It is at that time that LIR entered the picture as the entity carrying out the development. Thus as Saunders J found at paragraph 60 of his Judgment, LIR not only accepted that it (LIR), was the entity carrying on the construction but also acknowledged that Mr. Hickox's advances for the said construction were made to LIR**.** It is from this point that the audited accounts as borne out by the later accounts as from 1990 up to 1994 showed a different treatment of Mr. Hickox's advances as being a liability on the books of LIR instead of CJP. Saunders J then found that these "***later LIR Financial Statements are more in keeping with a true and fair view of LIR's assets and liabilities***." (para. 66)

[95] The question then is whether this 'switching' or change in treatment of the advances (where some were admittedly capital contributions to CJP), changed the legal character of the transactions. In short, were the loans or contributions to CJP effectively converted from being loans or contributions to CJP into being loans to LIR? Mr. Hickox, in essence, says that he was mistaken in believing that advances were being made to CJP. Reliance has also been placed on certain dicta of Saunders J in his Judgment as contained in paragraphs 63, 64, 66 and 73. I am reminded in this regard, of the principles of res judicata in that it is only those findings which formed an essential element of the issues which were being determined that will be binding on this court and not what was said by way of observations by references to facts or even findings made unless those findings can properly be characterized as essential elements of the decision of the preliminary issue. I am satisfied that the statements made by Saunders J in paragraphs 64 and 73 were by way of observation or obiter, and not findings which were essential to the decision on the preliminary issue.

[96] LIR contends that this idea of Mr. Hickox being mistaken cannot be accepted as there is no basis for the mistake. He was the person running the business at the time and his evidence is clear. It is not disputed that the monies were used for construction. But that is not the fact in issue. The issue to be resolved is <u>to whom</u> were the monies loaned and not <u>for what</u> was the loaned monies used. It appears an easy but

dangerous conclusion to draw that if the monies were used for construction and the construction was on LIR's property then it must follow that the loans were made to LIR. I agree with counsel for LIR that such a conclusion is not a logical one based on the facts. This line of reasoning in its simplest terms would mean that if A made a loan to B who in turn loaned it to C then A may sue C for the recovery of the loan although no legal relations exist between A and C. This is not a logical conclusion both as a matter of fact or law and implies a failure to recognise the separate legal personalities and capacities of the respective parties, not to mention the basic principles of contract such as the requirement of consideration and the like as well as the principles relating to privity. As counsel also rightly pointed out, USTC's loan was made to CJP and those monies also went to construction but there is no argument being made that USTC's loan must thus have been made to LIR applying the same reasoning.

[97] Having so said however, I cannot overlook the fact that Saunders J found at Paragraph 60 that LIR acknowledged Mr. Hickox's advances to the two Construction Accounts as loans to LIR and that LIR accepted that it was the entity carrying on the construction. This can only mean that Mr. Hickox's advances which were loans to CJP were in a sense 'assigned' to LIR and LIR acknowledged and accepted those advances as loans made by Mr. Hickox to it. Whilst I am prepared to accept that this is the metamorphosis which occurred in respect of the sums advanced or treated as loans initially to CJP, I have great difficulty in accepting that a similar metamorphosis occurred in respect of those advances which were obviously by way of capital contribution or equity (Mr. Hickox having acquired rateably, partnership units in respect thereof) applying the same reasoning. There was a benefit flowing to Mr. Hickox from CJP, namely partnership units. It is difficult to rationalize how Mr. Hickox could then acquire a second benefit by recovering sums from LIR in respect of which he had already received consideration in the form of partnership units in CJP. The precise position as it relates to the advance of $383,184. is less clear. How much went to CJP's formations costs and how much to payment of LIR's Lease has not been specifically determined. Suffice it to say that in the Spengler Carlson Letter, Note (c) to Schedule A termed it a contribution to CJP rather than a loan. I accordingly hold that it was a contribution to CJP.

[98] Mr. Hickox also relies on estoppel. In paragraphs 84 and 85 of his Reply to the Re- re amended Defence to Amended Counterclaim, he contends that LIR is estopped from asserting that the loans were not made to the Defendant because the loans were to the knowledge of LIR made to LIR and pleads, in essence, the following particulars:

(a) By virtue of the resolutions passed at the 23rd August 1988 meeting in which it was resolved that the partners in CJP would make advances for the $4m loan to LIR for constructing the villas on LIR's leased land and in reliance on said resolution Mr. Hickox acted to his detriment.

(b) LIR executed a loan agreement on 31st July, 1990 acknowledging loans from Mr. Hickox to LIR in the sum of $4m and executed a Promissory Note of even date acknowledging its debt to Mr. Hickox.

(c) Mr. Hickox further acted to his detriment when he entered into a standby loan agreement with LIR and Barclays bank whereby Mr. Hickox agreed to:
Provide further funds as necessary to finish construction;
Pay interest due by LIR to Barclays if not paid by LIR; and
Make further advances under that agreement;

(d) On January 1st,1995, LIR entered into a loan agreement acknowledging advances made by Mr. Hickox to LIR in the sum of $3,962,830.41, and gave a Promissory Note in respect of same.

(e) Out of the Barclays bank construction Loan of 14th September, 1990 to LIR it was agreed that Mr. Hickox would be reimbursed $3m. This was done with the full knowledge and approval of LIR.

(f) The independent audited financial statements of LIR issued by KPMG, auditors, for years 1991 to 1994 set out the loans by Mr. Hickox and the interest due thereon.

[99] In paragraph 85, the following additional particulars are pleaded which deals with the position after September, 1997:

(a) The current shareholders of LIR expressly agreed in the Settlement Agreement not to challenge the loans made by Mr. Hickox to LIR as set out in the audited accounts and signed by the current shareholders of LIR;

(b) The current shareholders purchased the shares in LIR in September 1997 pursuant to a Confidential offering Memorandum prepared by Eastdil Realty Company LLC that stated that the shares of LIR were being offered for sale subject to certain debts including the loans made by Mr. Hickox to LIR for construction of Cap Juluca Resort;

(c) The shareholders were creditors in Bankruptcy proceedings relating to CJP in the US Bankruptcy Court and did not contend that the partnership had an asset in the form

of loans to LIR as a receivable having regard to the statement of Partnership assets and liabilities disclosed in the proceedings;

(d) the current shareholders of LIR purchased the shares of LIR at a price calculated by taking into account the loans of Mr. Hickox to LIR.

Additionally, Mr. Friedland accepted in cross examination that:

(a) he knew that Mr. Hickox had advanced substantial sums for the construction of Cap Juluca;

(b) He had purchased the shares of LIR for $500,000 on the conditions set out in the Eastdil Memorandum;

(c) he signed the Settlement Agreement; and

(d) he had seen the audited financial statements of LIR.

[100] It is well settled that the principle elements for mounting a successful plea of estoppel of this nature are that there must be a representation, reliance on that representation and detriment flowing from such reliance. It is an equitable doctrine grounded in the concept of fairness. LIR submits that the estoppel argument is simply not made out either on the pleadings or on the evidence. It is common ground that the advances in question are those made prior to 23rd August, 1988. Counsel contends that there is no rational explanation as to how events which took place nine or more years later could have induced Mr. Hickox to act to his detriment, nor is it explained what were the acts taken (or not taken) by him to his detriment so that the plea fails on basic principles.

The particulars pleaded on the plea of estoppel

[101] In respect of the particulars at 84(a), it is clear that advances in question were made prior to 23rd August, 1988, and thus before the passing of the resolutions at the 23rd August meeting. In short then, if the resolutions of 23rd August, 1988 are said to be the representations, they would have occurred after the reliance thereon and the date of the making of the advances. Accordingly, the estoppel plea cannot be made out on these facts.

[102] The execution of the First Transaction and the Second Transaction took place some years after the advances in question had already been made, similarly with the Barclays Construction loan in 1990. Neither is it said what the representation was on

which he relied in respect of the Barclays construction loan. Similarly the LIR accounts as from 1991 to 1994 would have been some years after the advances in question and thus it is difficult to see how reliance could be placed on a later occurrence for inducing an earlier act.

[103] A similar argument has been made in respect of the matters pleaded in respect of paragraph 85 which refers to events after September, 1997, when Friedland acquired (or re-acquired) the LIR shares. Once more these events, if they may be considered as representations, occurred much later in time in respect of the advances. It is therefore understandably difficult to rationalize how later events could have induced the taking of an earlier decision in the making of the advances. In short, the elements required for establishing an estoppel are simply not present. I have already dealt with the plea of estoppel (i.e. issue estoppel) in relation to the Settlement Agreement and this needs no further amplification here.

[104] In respect of the Eastdil Memorandum, counsel for LIR makes the following points:

(a) Mr. Hickox was not a party to the agreement in which Mr. Friedland re - acquired the LIR shares such as to have become bound in accepting the authenticity of Mr. Hickox's loans as stated in the Memorandum.

(c) In essence, he said, Mr. Friedland bought the LIR shares subject to such liabilities as LIR had when he bought it. Thus, if the liabilities of LIR at the time of purchase were not valid liabilities, they do not become transformed into valid liabilities by virtue of the fact that such liabilities were listed in the Eastdil Memorandum. Saunders J', alluded to this in paragraph 70 of his Judgment where he said:

"***.. Throughout the trial I sensed that the present shareholders of LIR have not appreciated that at the point in time they gained or (re-gained) ownership of those shares they became stuck with the previous doings of LIR <u>once those acts were validly done."</u>*** *(my emphasis)*

Indeed it is the validity of LIR's actions which is at the root of the issues raised in this trial. Furthermore, there is no representation and no reliance and thus there can be no estoppel.

I agree with these submissions.

[105] Counsel for LIR makes the same argument in respect of the particulars in subparagraphs 85 (c) and (d) there being no representation, or reliance to detriment shown. Further, in relation to subparagraph (d) to the effect that Friedland paid a price for the LIR shares which took account of the debt to Mr. Hickox, this, he says, is factually incorrect as the evidence showed that in taking into account Mr. Hickox's debt, LIR would have been worthless at the time. The evidence showed that no one else was bidding for the LIR shares. Even so, the estoppel argument would not have been made out in respect of the questioned advances for the reasons already expressed.

[106] I am quite satisfied having examined the pleadings and the evidence and having regard to the legal principles on which a successful plea of estoppel may be grounded that on the pleadings, the evidence and as a matter of law the plea falls short in respect of the advances in question and accordingly fails.

[107] Based upon the foregoing, I hold that the following pre- 23rd August advances made by Mr. Hickox were advances to CJP by way of contributions to capital or equity in CJP, and not to LIR: $383,184; $180,000; 60,000; 240,000 and 80,000 (being one half of the $160,000 dated 4/12/88), the sums all together totalling **$943,184.** These contributions to CJP do not as a matter of law amount to good consideration moving from Mr. Hickox to LIR for the delivery or making of the First Promissory Note. To this extent, I agree with counsel for LIR that in respect of the First Note there is partial failure of consideration. A party to a Promissory Note, being a bill of exchange, is presumed to have become a party thereto for value. Section 30(1) of the Bills of Exchange Act[36] states as follows:

"***Every party whose signature appears on a bill is*** *prima facie* ***deemed to have become a party thereto for value."***

Byles on Bills of Exchange and Cheques[37] states thus:

"As between immediate parties, the partial failure of consideration affords a pro tanto defence provided it is for a liquidated and ascertainable amount"

LIR and Mr. Hickox are the immediate parties to the First Promissory Note and the amounts are liquidated and ascertainable.

[36] R.S.A. B30
[37] 27th Ed. Para19-42

[108] Having arrived at the conclusion that there is a partial failure of consideration to the extent of the five pre -23rd August advances made by Mr. Hickox, to which I have referred, it follows that by way of restitution LIR would be obliged to repay to Mr. Hickox the remainder of the advances comprised in the First Promissory Note and the advances comprised in the Second Promissory Note together with interest thereon. This brings me to a consideration of the rate and type of interest. Before embarking on that exercise however, I consider this an appropriate point at which to return to the consequence flowing from want of authority in the entry into of the First and Second Transactions (which also includes the First and Second Promissory Notes) which is that they are void. As such, Mr. Hickox's claim as pleaded up to the date of trial being an action brought solely upon the First and Second Promissory Notes will have failed in its entirety. I now turn to consider Mr. Hickox's application for an amendment to his case made at the commencement of closing submissions so as to plead restitution as an alternative claim.

Amendment to statement of case

[109] In support of Mr. Hickox's application to amend his statement of case, reliance was placed on the overriding objective of the rules contained in CPR 1.1 being to '*deal with cases justly.'* He then cited CPR 20.1(3) a rule which has been the subject of much discussion and differing interpretation in judicial circles given the negative mandatory nature of its provisions as to whether it gives a general or limited discretion. Rule 20.3 states as follows:

"***The court <u>may not</u>*** *(my emphasis)* ***give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in circumstances which became known after the date of that case management conference."***

Counsel for Mr. Hickox noted that the issue of want of authority did not manifest itself until the re-re amended defence. He further stated that the amendment sought requires neither new facts nor the leading of additional evidence. He also sought to rely on Rule 17.3 of the White Book 2002 [UK] which allowed for amendment even after the close of evidence and after judgment. This rule however, cannot be imported into our Rules in light of the express provisions of Rule 20.1 (3). He urged

an interpretation of this Rule allowing for a broad discretion which he urged would be in keeping with the overriding objective. It is not being argued here that there was a change of circumstances of the sort envisaged by the Rule. Counsel for LIR, although not opposed to the amendment being sought in as much as he invited such at the opening of the trial, considers that Rule 20.1(3) does not permit an amendment to the statement of case at this stage the discretionary power being limited only to where the court is satisfied of a change in circumstances occurring after the first case management conference.

[110] Joseph-Olivetti J. in **Corniche A.V.V** –v- **Banco Maracairo S.A.C.A**[38] was of the view that ***"the court retains a discretion to grant leave to amend … even after the case management conference if the justice of the case demands"*** also placing reliance on the overriding objective of CPR. D'Auvergne J.A., in **Ormiston Ken Boyea and another –v- East Caribbean Flour Mills Ltd.**[39] in the Court of Appeal had this to say:

"… the overriding objective does not in and of itself empower the court to do anything or grant to it any discretion residual or otherwise. Any discretion exercised by the court must be found not in the overriding objective but in the specific provision that is being implemented or interpreted.

The discretion of the court to permit changes to Statement of Case has to be considered with reference to CPR20. 1(3), changes to be made after the first case management conference. …. the overriding objective cannot be used to widen or enlarge what the specific section forbids."

I am guided and bound by the interpretation given by the Court of Appeal.

[111] The circumstances of this case strikes me as an occasion however, where the strict application of this rule does not sit well with the overriding objective of CPR. I trust I am forgiven for resorting to s19 of the Eastern Caribbean Supreme Court (Anguilla) Act in striving to arrive at a just result. S19 states as follows:

"The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act shall in every cause or matter pending before the Court grant either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatsoever as any of the parties thereto <u>may appear</u> *(my emphasis)* ***to be entitled to in respect of any legal or equitable claim or matter so that as far as***

[38] ANUHCV/0233/2001 (unreported) para. 8
[39] SVG Civil Appeal No. 3/2004 (unreported) paras. 29, 30

possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided."

Applying the basic principles on interpretation of statutes the provisions of an act take precedence over a rule. I consider that this provision empowers me to grant relief to the Claimant Mr. Hickox in the nature of restitution. LIR does not oppose the grant of this relief and from the onset has reiterated over and again that there is no desire by LIR to obtain a windfall at the expense of Mr. Hickox by virtue of the manner in which he chose to plead his case. I would accordingly order that LIR repays to Mr. Hickox those advances which formed the subject of the First and Second Promissory Notes save and except the five pre- 23rd August 1988 advances referred to in paragraph 107 above.

Interest

[112] Having reached the conclusions I have, I do not consider it necessary to delve into the construction of the provisions in the First and Second Transactions as to whether the advances should bear automatic compounding interest, or only on demand or whether the provisions call for simple interest. It is trite law that compound interest is not the norm and is only allowed by agreement expressed or implied by well established custom or usage.[40] The Transactions however, were commercial transactions even though not at arms length given the relationship between the parties. As such, I consider that the advances ought to attract a commercial rate of interest. Demand was made for payment in respect of the monies advanced and the subject of the First Transaction on 30th April, 1997. There is no evidence that demand was made for repayment of the monies advanced and the subject of the Second Transaction. Under the Second Transaction the repayment date was said to be 14th March, 1998. This action seeking recovery of the monies including those sums the subject of the Second Transaction, commenced on 2nd October,1998.

[113] What then is an appropriate commercial rate of interest which ought to be applied? The expert, Mr. Lee, gave evidence and set out in his report at section 5 (B1/352-367) prevailing market rates in respect of interest at the relevant time. Both experts agreed

[40] Halsbury's Laws Vol. 32 pg. 128.

that the First and Second Loans would be considered to be speculative. Speaking of rates of interest, Mr. Lee said:

"In 1988 rates in the market were far higher than they are today. ..... A speculative bond with a similar risk profile is calculated to have required a yield of 13% to 17% in 1988 and therefore I consider the rate of interest on the First Loan to be in accordance with the market at the time and appropriate to LIR's financial situation."

Mr. Sillerman did not consider this rate attractive enough for him to lend. Mr. Woolf considered this rate excessive given Mr. Hickox's insider relationship with LIR but does not disagree that this would have been a reasonable rate for an arms length third party lender. In my perusal of the reports of both experts I have not found a wide area of disagreement in respect of the 12% rate of interest which was accorded to the Second Loan save for considerable discussion as to whether the rates should have been fixed or floating and on which I have already commented.

[114] Considering the matter in the round and without venturing into an in depth examination of the differences and reasons therefor in respect of both experts, as to what a fair rate of interest at the material time would have been, I am satisfied based on the detailed analysis of interest rates contained in the report of Mr. Lee, which in essence was not disputed by Mr. Woolf, that a 15% rate of interest ought to be applied in respect of the advances which formed the subject of the First Promissory Note, payable as from the date of demand namely, 30th April, 1997. I am also satisfied that a 12% rate of interest ought to be applied in respect of those advances which formed the subject of the Second Promissory Note payable as from the date of issue of the claim namely, 2nd October, 1998.

Costs

[115] Mr. Hickox sought to amend his statement of case to also include a claim for costs pursuant to contract. The claim as pleaded merely sought costs as may have been allowed on taxation. As counsel for LIR, in my view, rightly argued, a claim for costs pursuant to contract ought to have been pleaded as a claim merely for costs, in the conventional manner, appearing as it does only in the prayer at the end of the statement of claim, would not have alerted the other party that what was being claimed

was costs on a wholly different basis being, pursuant to an agreement. Reliance was placed on the case of **Gomba Holdings (UK) Ltd.-v- Minories Finance Ltd. (No 2)[41].** Scott L.J. at page 194 set out the following principles relating to costs:

" (i) An order for the payment of costs of proceedings by one party to another party is always a discretionary order: …

(ii) Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right.

(iii) …….

(iv) A decision by a court to refuse costs, in whole or in part, to a mortgage litigant, may be a decision in the exercise of the section 51 discretion or a decision as to the extent of a mortgagee's contractual right to add his costs to the security or a combination of two or more of these things. The pleadings in the case and the submissions made to the judge may indicate which of the decisions to which we have referred has been made."

From these principles what is clear is that whether costs are claimed on a contractual basis or not, at the end of the day, the power lies in the court in the exercise of its discretion to decide whether or not to award costs and to decide the basis on which such an award is to be made. In this regard CPR 2000 is also clear. CPR64.6 (1) and (2) states:

"(1) Where the court ….decides to make an order about costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party

(2) The court may however, order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs."

[116] Where one is seeking contractual costs there is every good reason to plead it. It alerts the other party as to the type and basis for costs being claimed. In the context of this case, costs pursuant to contract would amount to a considerable larger sum on an indemnity basis. It is to be noted that CPR 2000, does not provide for costs on an indemnity basis. Contractual costs were not pleaded. It is now too late to amend the statement of case to plead contractual costs for the reasons already given. In any event, were the amendment allowed this does not avail the Claimant, the transactions having been determined to be invalid. As CPR 2000 states, costs are to follow the event as a general rule. I do consider however, given the basis by which Mr. Hickox

[41] [1993] 1Ch. 171

has obtained relief, LIR having essentially succeeded for the most part in its defence, that such an order would be just in the circumstances. I would accordingly order that each party bears their own costs.

LIR's counterclaim

[117] LIR seeks an order setting aside the registration of the First, Second and Third Charges. The First and Second Charges are pursuant to the First and Second Transactions which I have found to have been unauthorised and therefore void. Consequently, the security, namely the First and Second Charges are also void and of no effect. The third Charge is security for the Standby Loan Agreement in respect of the Barclays construction loan. The Standby Loan Agreement, though mentioned in these proceedings, is not the subject of these proceedings.

[118] Counsel for LIR relies on the provisions of clause 19 of the Settlement Agreement (C2/585) which said in effect that neither the Resort Entities nor their equity holders shall intentionally undertake any action which will adversely affect or diminish any right or interest granted to the Friedland Group pursuant to the Settlement Agreement. It is not disputed that at the time when monies were owing to the Freeland Group pursuant to the Settlement Agreement which was also secured by a Pledge of the LIR shares that Mr. Hickox in January, 1997 procured the registration of the First Second and Third Charges at the Land Registry. I have already alluded to Mr. Hickox's strenuous protestations of not being a party to the Settlement Agreement and the confirmation of the New York Court of the Mediator's Award in which Mr. Hickox was held to be so bound. Further, I have earlier ruled that Mr. Hickox having sought to take and enforce the benefit of its terms must also be deemed to be bound also by the burdens contained therein. By Order dated May 7th 1998, the New York Bankruptcy Court confirmed the Final Award of the Mediator dated 12th November, 1997 in which he found that '***the registering of the charges in favour of Mr. Hickox on LIR's leasehold interest, after the Settlement Agreement was executed by the parties constituted a violation of the terms, spirit and intent of the Settlement Agreement including but not limited to paragraph 19 of the Settlement Agreement.'***

It is common ground that Mr. Friedland re-acquired the LIR shares by auction after the the payments under the Settlement Agreement were not met. It is only at that time that the terms of the Settlement Agreement may be said to have, to some extent,

become spent. Thus any registration by Mr. Hickox of the Third charge ought only to be effective as from date of the sale of the LIR Shares under the Settlement Agreement. Accordingly, I would order and direct that the registration of the First and Second Charges be set aside and that the registration of the Third Charge be deemed to be effective only as from the date following the sale to Mr. Friedland of the LIR Shares pursuant to the terms of the Settlement Agreement.

Conclusion

[119] Based upon the foregoing, I make the following declarations and orders:

(1) The First and Second Transactions are void for want of authority.

(2) The pre-23rd August, 1988 advances, being the sums $383,184; $180,000; 60,000; 240,000; and 80,000 (being one half of the $160,000 advance dated 4/12/88) all together totalling **US$943,184** were not loans to LIR but rather contributions to the partnership CJP in respect of partnership units or interests.

(3) LIR shall repay by way of restitution to Mr. Hickox, those advances which formed the subject of the First Promissory Note save and except those advances set out in subparagraph (2) hereof. The advances to be repaid shall bear interest at the rate of 15% per annum as from the date of demand namely 30th April, 1997, to date of judgment.

(4) LIR shall repay to Mr. Hickox by way of restitution all of the advances forming the subject of the Second Promissory Note said advances to bear interest at the rate of 12% per annum payable as from the date of issue of the claim namely 2nd October, 1998 to date of judgment.

(5) The registration of the First and Second Charges by Mr. Hickox over the Leashold interest of LIR in and around January, 1997 is hereby set aside and the Registrar of Lands is hereby directed to cancel the said entries in respect thereof appearing on the Land Register in respect of LIR's leasehold interest.

(6) The Registration of the Third Charge is hereby deemed to be effectively registered only as from the date following the sale of the LIR shares pursuant to the Settlement Agreement, namely as from 16th September, 1997.

(7) Each party shall bear their own costs.

[120] Finally, I am grateful to counsel for the parties for the assistance given to the court throughout the trial and in presentation of arguments written and oral and the formulation of the issues which made my task, though lengthy and involved, an easier and mentally stimulating one.

Janice George Creque
High Court Judge