THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

ANGUILLA

CLAIM NO. AXAHCV2012/0039

DION FRIEDLAND

Respondent/Claimant

AND

CHARLES HICKOX

Applicant/Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mr. Alex Richardson with Mr. George Menzies for the Claimant
Mrs. Joyce Kentish-Egan with Mr. Kerith Kentish for the Defendant

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2013: April 16, July 23
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Civil Procedure Rules 2000 (CPR 2000) – application to strike out statement of claim under CPR 26.3 (1) (b) – whether registration of charges was invalid – whether registration of charges should be set aside and cancellation of entries on the Land Register - granting summary judgment under CPR Part 15 – abuse of process and collateral attack on prior binding decisions of the court – res judicata by cause of action estoppel and issue estoppel – unwarranted harassment of defendant.

RULING

[1] TABOR, M (Ag.): By notice of application and affidavit in support by Charles Hickox filed on 3rd October, 2012, the defendant applied to the court pursuant to rule 26.3 of the CPR for the following relief:

1. The claimant's Claim Form and Statement of Claim filed on 24th May, 2012, be struck out on the grounds of issue estoppel and/or abuse of the court's process pursuant to rule 26.3 (1) (b).
2. In the alternative that the defendant is granted summary judgment on the grounds that the claimant has no real prospect of succeeding on the claim and/or the issue raised on the claim pursuant to Part 15.
3. That costs be awarded to the defendant.
4. Such further relief as the nature of this application may require.

The defendant filed submissions on 22nd February, 2013 in support of the application to strike out the claim and summary judgment, while the claimant filed submissions on the same date as well in opposition to the application of the defendant. The supporting affidavit of the claimant was filed on 23rd February, 2013. The defendant also filed a second affidavit on 2nd April, 2013 in reply to the Purchase and Sale Agreement exhibit that Master Pearletta Lanns on 26th February, 2013 ordered the claimant to file.

[2] The grounds of the application are presented under the heads Abuse of process, Issue Estoppel, Unwarranted Harassment of the Defendant and No Real Prospect of Success Rule. The presentation of these grounds are quite extensive so rather than outlining them in their entirety, I will provide a synopsis of each head.

Abuse of Process

[3] The defendant's contention under this head is that the claimant has embarked on a collateral attack on prior binding decisions of the court. The claimant's cause of action in the present claim is rooted in the alleged breach of a Settlement Agreement dated 6th May, 1996 to which the claimant, defendant and others were parties. As a consequence of this alleged breach, the claimant in his statement of claim filed on 24th May, 2012 sought the following primary remedies:

(1) A declaration that the registration of the Hickok Charges was invalid and of no effect.
(2) An order setting aside the registration of the Hickox Charges and directing the Registrar of Lands to cancel the entries in the Land Register in respect of the Hickok Charges.
(3) A declaration that the purported auction and sale and purchase of the Land were invalid and of no effect.

[4] The Settlement Agreement resulted from the mediation conducted by Mr. Barry M. Monheit, who was appointed on 15th August, 1995 by the New York Bankruptcy Court, to mediate the disputes between the claimant as the Friedland Group and the HBLS (an entity in which the defendant Charles Hickox was an equity holder). The disputes were related to a Stock Purchase Agreement for the sale by the Friedland Group of the shares in Leeward Isles Resorts (LIR) to HBLS and a companion Pledge Agreement. The Settlement Agreement was reached on 6th May, 1996 on the following terms:

(1) The Friedland Group's claim against Cap Juluca Partners (CJP) was valued at $4,681,986 as at 1st April, 1996 and would be paid by installments 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.

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

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

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

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

[5] There was a default in the payment of the second installment and the mediator initiated steps to realize the security by putting up the LIR shares for sale. The sole bid for the shares came from Dion Friedland and this was accepted by the mediator on 15th September, 1997 and LIR shares were sold to him. Following this event, a number of issues were referred to the mediator and the New York Bankruptcy Court for determination. One such issue was whether the registration by Charles Hickox on 9th January, 1997 of three (3) charges against the Resort property as security for three loans made to LIR and Maundays Bay Management (MBM) breached the terms of the Settlement Agreement. The mediator found that this was a breach of the Settlement Agreement. Subsequently, the Bankruptcy Court on a motion by Friedland also ordered a deficiency judgment of $4,378,820.53 against HBLS, LIR and MBM jointly and severally for the remaining amounts due to Friedland. Hickox appealed this ruling to the United States District Court, New York, and his appeal was dismissed.

[6] From the New York Courts, the next phases of litigation involving the parties moved to the Eastern Caribbean Supreme Court. In this regard, the process started in October, 1998 when Hickox commenced proceedings in the Anguilla High Court to determine several preliminary issues, inter alia, whether moneys advanced by him to facilitate the construction of the Resort were loans to LIR or CJP (Claim No. AXAHCV/1998/0097 Charles Hickox v Leeward Isles Resorts Limited). This matter was heard by Saunders J who decided that the advances by Hickox were loans to LIR. Leeward Isles Resorts appealed this decision to the Court of Appeal (Civil Appeal No. 2 of 2001 - Leeward Isles Resorts Limited v Charles Hickox) and the Court on 3rd April, 2003 upheld the decision of the Saunders J.

[7] The substantive issues of Claim No. AXAHCV/1998/0097 Charles Hickox v Leeward Isles Resorts Limited came before George-Creque J in May, 2006 and continued up to 10th July, 2007. She ruled that that the First and Second Transactions (i.e., the first and second loans of Hickox to LIR) were void for want of authority by LIR and that the consequent

charges were void and of no effect and therefore were set aside. With respect to the third charge, she ruled that "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".

[8] The next stage in the litigation process for the matter was to the Court of Appeal (Civil Appeal HCVAP 2008/0003 Leeward Isles Resorts Limited v Charles Hickox). The matter was heard by the Court of Appeal on 23rd March, 2009 and it rendered its decision on 22nd March, 2010. In its judgment the Court of Appeal reversed the decision of George-Creque J and held that the First and Second Transactions were valid and binding on LIR and set aside the order cancelling the registration of Hickox's First and Second Charges on the Land Register. With respect to the Third Charge, the Court of Appeal upheld the decision of George-Creque J.

[9] Based on the foregoing evolution, chronology and the decisions that have been reached in the litigation of this matter, it is the view of the defendant that in bringing the present claim, the claimant is seeking to mount a collateral attack on the decisions of the court and that this is an abuse of process.

Issue Estoppel

[10] Under this head the defendant has indicated that the central issues raised on the statement of claim are whether the defendant committed a breach of clause 19 of the Settlement Agreement by registering the Hickox Charges against LIR's leasehold interest in January, 1997; and if so, whether the Hickox Charges are invalid and should be set aside. Learned Counsel contends that these issues have been addressed by Courts in the United States and Anguilla over the past 10 years, and they have been conclusively determined on their merits by the decisions of the Courts in both jurisdictions.

[11] With respect to the Anguilla High Court Civil Appeal No. 3 of 2008 case, learned Counsel reiterated that the Court of Appeal in its judgment of 22nd March, 2010 has made binding determinations on the issue of the breach of clause 19 of the Settlement Agreement, the claim to have the Hickox Charges declared invalid and the claim to have them set aside and their registration cancelled.

[12] With respect to the most recent case between the parties before the United States Bankruptcy Court for the Southern District of New York [Case No. 93-B-46399 (BRL)], it is noted by learned Counsel that in the Court's ruling on 17th April, 2012 the motion by Friedland seeking an order to reopen the bankruptcy case was denied. Counsel indicated that the reasons given for this ruling were:

(i) The Courts in Anguilla have previously determined that Hickox's Charges have effect and that he is bound by the Mediator's determination.

(ii) After years of litigation on issues relevant to the Motion, Anguillan Courts have, based on the Meddiator's Amplification, given effect to the Charges as of the Stock Sale Date and have not required Hickox to re-file the Charges.

(iii) Each of the High Court and the Court of Appeal have accounted for and applied the Mediator's determination in their decisions.

(iv) Friedland's contention that Hickox is in violation of the Mediator's finding that Hickox may not rely on the Charges for any purpose is "certain to fail" as the Mediator held that the Charges could be registered under Anguillan law and Anguillan courts, with due consideration of the Mediator's findings, have permitted the Charges without requiring their registration.

(v) Throughout much of the Anguillan proceedings, LIR was owned and controlled by Friedland. Therefore, granting the Motion in order to question Hickox Charges would be concomitant to permitting Friedland an end-run around some of the sound findings of the Anguillan courts.

(vi) To the extent that Friedland argues that Anguillan law requires Hickox to re-register his Charges as of the Stock Sale Date, the Anguillan courts have held otherwise.

(vii) Freidland has essentially litigated the same issues in the Anguillan courts and lost.

[13] Learned Counsel noted that the claimant tried to re-open the Bankruptcy case simply to stop the defendant from enforcing his Charges by selling Cap Juluca Resort at a public auction scheduled for 2nd May, 2012. Counsel further noted that the present claim was also filed to stop the sale of the Resort, but that the public auction had already taken place on 2nd May, 2012 and the Resort was sold to the defendant through his company Cap Juluca L & C Properties Limited. The point was also made that the present claim was filed after legal challenges to the Hickox Charges and to the 2nd May auction sale were dismissed by the High Court on 26th April, 2012.

Unwarranted Harassment of the Defendant

[14] Learned Counsel has repeated the points raised under the Abuse of Process head to support the contention that the claim represents an unwarranted harassment of the defendant, and therefore should be struck out as an abuse of process of the court.

No Real Prospect of Success Rule

[15] Learned Counsel has repeated the points raised under the Abuse of Process and Issue Estoppel heads to support the contention that the claim should be struck out as having no real prospect of success.

Background Facts

[16] The litigation between the parties in this matter and related matters involving Leeward Isles Resorts (LIR), Maundays Bay Management (MBM), HBLS and Cap Juluca Properties (CJP) has a long and convoluted history. As a consequence, the background facts surrounding the various litigation are well-established.

[17] For the purposes of the present case, learned Counsel for both the claimant and defendant has presented an account of the background facts giving rise to the claim which for the

most part are in agreement. I will, therefore, utilize the facts presented by both Counsel to provide the factual background from which the present case precipitated.

[18] In March,1981 LIR obtained a 99 year lease from the Anguillan government of land located at Maundays Bay to develop a luxury resort. LIR was wholly owned by the Friedland Group, which was headed by the claimant, Dion Friedland. The latter in 1986 sold the stock of LIR to HBLS (a Partnership controlled by Charles Hixkox) for US$1,400,000 pursuant to a Stock Purchase Agreement, which required HBLS to pay the price in installments. The parties also executed a Pledge Agreement, which transferred the stock of LIR back to the Freidland Group as security for the installments.

[19] HBLS paid the initial installment under the Stock Purchase Agreement and subsequently defaulted on the remaining payments. Coupled with that, HBLS failed to transfer the LIR stock back to the Freidland Group as security as required by the terms of the Pledge Agreement. As a consequence, the Friedland Group sued HBLS in the New York courts to enforce the Pledge Agreement, and the court in June, 1993 ordered HBLS to transfer the shares of LIR back to the Friedland Group.

[20] The next stage in the saga was the filing of a voluntary petition in December, 1993 by HBLS for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The court stayed the June, 1993 order and in August, 1995 the Bankruptcy Court referred the dispute to a court-appointed mediator, Barry M. Monheit, for a global resolution of all the issues between all the parties.

[21] On 6th May, 1996 the parties reached a comprehensive Settlement Agreement resolving all the issues between the Freidland Group and HBLS. Under the Settlement Agreement the mediator determined that the remaining amount due to the Freidland Group under the Pledge Agreement was US$4,681,986. As security for the payment, the outstanding shares of LIR were to be transferred to the mediator to be held in escrow pending payment in full or a default by HBLS.

[22] On 9th January, 1997 Hickox registered three (3) Charges against the Resort property as security for three loans made to LIR and MBM for the construction of Cap Juluca. This was clearly a breach of clause 19 of the Settlement Agreement. Subsequent to the registration of the Charges, HBLS defaulted on the payments owed to the claimant. As a consequence, pursuant to the Settlement Agreement and with the approval of the Bankruptcy Court, the mediator proceeded to sell the shares of LIR and MBM. The claimant was the sole bidder and on 17th September, 1997 once again became the owner of LIR.

[23] The litigation between the parties then moved to the Anguillan court when the defendant filed a claim (Claim No. AXAHCV 1998/0097) against LIR, in which he sought the recovery of monies loaned to LIR pursuant to three Loan Agreements and Promissory Notes for the construction of Cap Juluca Resort. In response, LIR counterclaimed challenging the validity of the First and Second Transactions for want of authority or alternatively that same are voidable for self-dealing. It also challenged whether the loans evidenced by the Promissory Notes were made by Hickox to LIR rather than to CJP. It sought a declaration

that the Hickox Charges were invalid and sought orders to have them set aside and their registration on the Land Register cancelled.

[24] Hearing of the claim commenced on 8th May, 2006 before Justice George-Creque and was concluded on 10th July, 2007. Justice George-Creque delivered her decision in the matter on 8th July, 2008 and made 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; $600,000; $240,000; and $80,000 (being one half of the $160,000 advance dated 4/12/88) all together totaling 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 by way of restitution to Mr. Hickox, 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 leasehold interest of LIR in 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.

[25] LIR appealed the decision of Justice George-Creque to the Court of Appeal. The Court of Appeal heard the appeal on 23rd March, 2009 and delivered their judgment on 22nd March, 2010. The Court of Appeal allowed the appeal of LIR to the extent that paragraphs 3, 4 and 7 of the order of the trial judge was set aside. Mr. Hickox's cross-appeal was allowed and paragraphs 1, 3, 4 and 7 of the order were set aside. The Court of Appeal also gave judgment to Mr. Hickox in the following sums and terms set out below:

(1) The appellant, Leeward Isles Resorts Limited, shall pay to the respondent, Charles Hickox, US$4,000,000 in aggregate principal for amounts of advance by the appellant to the respondent less the pre-August, 1988 advances to CJP totaling US$943,184 being the subject of the First Promissory Note dated 31st July, 1990 and capitalized interest to be assessed by the court below if not agreed on by the parties, in accordance with clause 3 of the First Loan Agreement dated 31st July, 1990.
(2) The appellant, Leeward Isles Resorts Limited, shall pay to the respondent, Charles Hickox, US$3,962,830.41 being the subject of the Second Promissory

Note dated 1st January, 1995 and interest to be assessed by the court below if not agreed on by the parties, in accordance with clause 4 of the Second Loan Agreement dated 1st January, 1995.

(3) There be an assessment by the High Court of the interest accruing to the respondent on the principal sums due under the First and Second Promissory Notes in accordance with paragraphs 1 and 2 of this order up to the date of assessment; or the parties are to file a consent agreement as to the interests accruing under the Promissory Notes.

(4) The respondent and the appellant are to file and serve submissions on the court's exercise of discretion in relation to costs under CPR 64.6 (3) to (6) within 30 days of the assessment of interest by the High Court, or within 30 days of the date the consent agreement as to accrued interest has been filed in order for a proper determination to be made on the question of costs in the court below and on the appeal.

Principles Governing CPR 26.3 (1)(b) - Applications to Strike Out a Claim and Part 15 - Summary Judgment

[26] The power of the court to strike out a statement of case is provided for by Rule 26.3 (1) of the CPR 2000 which states as follows:

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
> (a) …..
> (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
> (d) the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10".

[27] The striking out of a statement of case or defence is a draconian step which a court would only take in exceptional circumstances. In Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997) Dennis Byron CJ (Ag.), as he then was, restated the seminal test that should be applied by the court on an application to strike out when he said:

> "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court…. Striking out has been described as 'the nuclear power' in the court's arsenal and should not be the first and primary response of the court".

[28] In his judgment in the interlocutory appeal in Tawney Assets Limited v East Pine Management et al (BVI High Court Civil Appeal No. 7 of 2012) Mitchell JA (Ag.) in underscoring the need why the court should proceed cautiously when dealing with an application to strike out noted that:

> "The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial".

[29] In Citco Global Custody NV v Y2K Finance Inc. (BVI High Court Civil Appeal No. 22 of 2008) Edwards JA in dealing with an application to strike out noted that:

> "Striking out under the English CPR, r 3.4(2)(a) which is the equivalent of our CPR 26.3 (1)(b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim.

Also, in Ian Peters v Robert George Spencer (Antigua and Barbuda High Court Civil Appeal No. 16 of 2009), Pereira CJ (Ag.), as she then was, indicated that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined at trial by hearing oral evidence.

[30] The power of the court to give summary judgment on a claim or on a particular issue is provided for under rule 15.2 CPR which states:

> "The court may give summary judgment on the claim or on a particular issue if it considers that the –
> (a) claimant has no real prospect of succeeding on the claim or the issue; or
> (b) Defendant has no real prospect of successfully defending the claim or the issue.

In Swain v Hillman [2001] 1 All ER 91 Lord Woolf provided some guidance in considering an application for summary judgment when he indicated that what should be shown is that the claim or defence has "no real prospect of being successful or succeeding" and that the word "real" implies that there is a "realistic" as opposed to a "fanciful" prospect of success.

Applicant/Defendant's Submissions

[31] Learned Counsel for the defendant noted that the central issues raised on the claimant's statement of claim are (a) whether the defendant breached clause 19 of the Settlement Agreement by registering the Hickox Charges against LIR's leasehold interest in January, 1997 and (b) if so, whether the Hickox Charges are invalid and should be set aside. Counsel has respectfully submitted that both issues have been already litigated between the claimant and defendant and have been determined on their merits by several final and conclusive judgments of courts of competent jurisdiction in Anguilla and New York. It is the contention of Counsel, therefore, that the issues that are required to be resolved in these proceedings are *res judicata*.

[32] Learned Counsel contends that the claimant's attack on the validity of the Hickox Charges is based on the defendant's breach of clause 19 of the Settlement Agreement and its effect on him. The requirement of clause 19 is that neither the Resort Entities nor their equity holders or any member of the Friedland Group shall intentionally undertake any action which will adversely affect or diminish any right or interest granted to either side pursuant to the Settlement Agreement. Counsel has noted that while Hickox's breach of clause 19 was confirmed in the Final Award of the Mediator, the Mediator's Amplification of Final Award and the rulings of the New York Bankruptcy Court upholding the Mediator's Award, as well as the judgment of the Anguilla High Court; the Court of Appeal has made final and binding determinations confirming the validity of the Hickox Charges.

[33] To further support her contention that the issues raised in the present claim have been the subject of prior litigation, Learned Counsel noted that the New York Bankruptcy Court in its ruling on 17th April, 2012 denied the claimant's Motion seeking the opportunity to re-litigate the same dispute under the guise of enforcing prior orders and determinations. Counsel opined that the claimant tried to re-open the Bankruptcy case for the sole purpose of stopping the defendant from enforcing his Charges by selling Cap Juluca at a public auction scheduled for 2nd May, 2012. Counsel also noted that the present claim was filed with the same objective in mind with the only difference being, that the public auction was conducted already on 2nd May, 2012 and Cap Juluca Resort was sold to the defendant. It was also noted that the present claim was also filed after legal challenges to the Hickox Charges and to the May 2nd auction sale were dismissed by the High Court on 26th April, 2012.

[34] Learned Counsel has objected to the position of the claimant stated in his affidavit that when the trial Judge handed down her decision on 8th July, 2008 he "did not own or control LIR and I did not have conduct of LIR's defence, having sold LIR some three months prior. Accordingly I was not in a position to challenge any of the findings made by the trial Judge on 8th July, 2008, including those that were or may have been prejudicial to me in my personal capacity". Counsel noted that this is a disingenuous position since the claimant still owned and controlled LIR up to the conclusion of the trial in May, 2006; and that he marshaled its defence to the Hickox claim and launch its counterclaim. Counsel noted further that in both his defence and counterclaim, he relied heavily on the breach of clause 19 of the Settlement Agreement and the invalidity of the Hickox Charges.

[35] To support her contention that the claimant bringing this claim is tantamount to a collateral attack on prior binding decisions of the court and is an abuse of process, learned Counsel cited the case of Hunter v Chief Constable of West Midlands Police [1981] 3 All ER 727 where Lord Diplock held that:

> "The initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending plaintiff reached by a court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the court".

As to what constitutes a collateral attack on an earlier decision, Lord Diplock noted at pages 733-734:

> "My Lords, collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A. L. Smith LJ in Stephenson v Garnett [1898] 1 QB 677 and the speech of Lord Halsbury LC in Reichel v Magrath (1889) 14 App Cas 665 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cited from the judgment of A. L. Smith LJ in Stephenson v Garnett [1889] 1 QB 677 at 680-681:
>
> > '… the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court.'
>
> The passage from Lord Halsbury LC's speech in Reichel v Magrath 14 App Cas 665 at 668 deserves repetition here in full:
>
> > '… I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again'".

[36] Learned Counsel outlined the history of the disputes between the parties which started from the Stock Purchase Agreement for the sale by the Friedland Group of the shares in LIR to HBLS and a companion Pledge Agreement. Following default in payment by HBLS under the Stock Purchase Agreement and also its failure to transfer the shares to LIR as security under the Pledge Agreement, the Freidland Group brought a suit against HBLS in the New York state court. The matter then went to New York Bankruptcy Court which referred it to mediation for resolution. The mediator Barry M. Monheit successfully guided the parties to the execution of a Settlement Agreement which should resolve all of the disputes between them. In January, 1997 Charles Hickox breached this agreement by registering three charges against LIR's leasehold interest in the Resort. In October, 1998 Charles Hickox brought an action in debt against LIR in the Anguilla High Court in respect of advances or loans allegedly made by him to LIR. Judgment in this case was handed down in July, 2008. LIR appealed and the matter was heard by the Court of Appeal in March, 2009. In March, 2012 the Court of Appeal delivered its judgment on the appeal. As learned Counsel has noted, 15 years have elapsed since the Hickox Charges were registered and the claimant has brought this claim to have the Hickox Charges declared invalid by the court and to have their registration set aside.

[37] Based on the litigation history in this matter between the parties, learned Counsel has submitted that the claimant was privy and a party to the previous proceedings in Anguilla. Her reason for this submission is grounded in the fact that the claimant was a controlling shareholder/director of the Friedland Group as well as LIR at all material times, and was intricately involved with all court proceedings such that by his conduct and involvement, he cannot now claim not to have been privy to those matters because he was not previously

acting in a personal capacity. To support this contention learned Counsel cited Carl Zeiss Stiftung v Rayner & Keeler Limited and Others (1966) H.L. at page 877 where their Lordships stated "Privy covers a person who is in control of proceedings". Counsel also cited the case In re HBLS, L.P. Case No. 93-b-43399 (BRL) in the New York Bankruptcy Court where Justice Burton R. Lifland noted:

> "Throughout much of the Anguillan proceedings, LIR was owned and controlled by Friedland. Therefore, granting the Motion in order to question Hickox's Charges would be concomitant to permitting Friedland an end-run around some of the sound findings of the Anguillan courts. This court, however, declines to grant him such an opportunity to re-litigate the same dispute under the guise of enforcing prior orders and determinations".

Learned Counsel has submitted, therefore, that having satisfied the same party rule of *res judicata,* the claimant is estopped from re-litigating the validity of the Hickox Charges which have been determined already in binding judgments of courts of competent jurisdiction, and his statement of claim should be struck out for an abuse of process.

[38] Learned Counsel has opined that the claimant obviously feels that the Hickox Charges are invalid, but has submitted that if in fact that is so, then the proper course would have been an appeal to the Privy Council. Counsel has noted that the time for doing this has since lapsed and the claimant is now bound by the final and conclusive judgment of the Court of Appeal on the issue of the validity of the Hickox Charges. In this regard, Counsel has relied on Halsbury's Laws of England, Vol. 12, 5th Edition, Paragraph 1166 where it states:

> "The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interests of justice that there should be re-trial of a case which has altready been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions, there is a danger, not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. The principles of res judicata, issue estoppel and abuse of process have been used to address this problem".

Counsel noted that it is now well settled authority that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process quite apart from any question of *res judicata*. It is also noted that the claimant failed to re-open the issue before the United States Bankruptcy Court on 17th April, 2012 because the court regarded the issue to have already been decided by the Court of Appeal.

[39] Learned Counsel cited Arnold and Others v National Westminister Bank Plc [1991] 2 AC 93, page 104 where Lord Keith stated:

> "…There may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct

> determination of a point involved in the earlier proceedings whether or not that point was specifically raised or decided, being material which could not by reasonable diligence have been adduced in those proceedings".

It is respectfully submitted by learned Counsel, however, that none of the factual matters relied on in support of the allegations of breaches of the Settlement Agreement put before this Honourable Court accrued after the Court of Appeal ruling. Counsel contends there was no fresh evidence and that the present claim against the defendant is designed to harass him and is thus an abuse of the process of the court and should be struck out.

[40] It is noted by learned Counsel that taking into consideration the prior litigation of the issues contained in the claimant's statement of claim, it is clear that the matters between the parties arising out of the Settlement Agreement have been settled unequivocally by the Courts of Anguilla and New York. Despite this, however, Counsel contends that the claimant continues to issue proceedings against the defendant. In that regard, Counsel recalls the proceedings issued in April, 2012 before the New York Bankruptcy Court to stop the auction sale of Cap Juluca; and that those proceedings having been dismissed, the claimant now seeks to set aside the auction through the filing of the present claim which advances the very same points that have been decided and which were dismissed in his claim before the New York Bankruptcy Court.

[41] Finally, learned Counsel has submitted, that the claimant must be held to know that the questions he raises cannot at this stage yield alternative responses. As a consequence, the defendant contends that the sole purpose of this claim is to subject him to harassment, further expense and commercial prejudice beyond what is ordinarily encountered in proceedings. Learned Counsel quoted from the Court of Appeal judgment (HCVAP 2008/0003) where it stated at paragraph 90 "Mr. Friedland did not appreciate when he bought back all the LIR shares at auction that he was also buying all the debts of LIR". Counsel contends that the claimant having now understood this factor late in the day, he is now seeking to reverse the effects of the sale as it relates to the debts owed to the defendant.

[42] Learned Counsel has urged the court that for all the reasons discussed and in consideration of the public interest in the finality and efficient management of litigation, the claimant's statement of case should be struck out as an abuse of process.

Respondent/Claimant's Submissions

[43] Learned Counsel for the claimant has argued that the defendant in her submissions is guilty of several misrepresentations and inaccuracies. He indicated that the defendant has ignored the claimant's alternative claim in this action which includes a claim for the loss of the asset comprised in the defendant's Charge over the Cap Juluca Resort. He noted that this misrepresentation of the claimant's claim is significant as it gives the court the impression that the only issues at large in these proceedings are those relating to the Hickox Charges or the purported auction sale of the Resort.

[44] Learned Counsel submitted that the claim form filed on 24th May, 2012 raised five (5) issues. He noted that the defendant has asserted that these five issues have already been decided by earlier court decisions, both in this court and elsewhere, in the defendant's favour and that these proceedings accordingly amount to a collateral attack on those alleged prior binding rulings. He is of the view that the defendant's position is completely false and can be demonstrated by simply looking at the five issues and at the prior rulings of this and other courts. He submitted that the five issues that have been raised in these proceedings are:

(1) Was the applicant, Mr. Hickox, a party to the Settlement Agreement and was he bound by its terms?
(2) Was the registration of the Hickox Charges by the applicant a breach of the Settlement Agreement?
(3) Was the applicant's reliance on the Hickox Charges in May 2012 itself a breach of the Settlement Agreement?
(4) Has the claimant suffered loss and damage by reason of the applicant's breaches of the Settlement Agreement?
(5) If the claimant has suffered loss how should he be compensated – by a monetary award or by a rectification of the Lands Register?

Counsel has noted that the first two of these questions have come before the courts in New York and they have been decided in favour of the claimant. He is of the view that these findings would obviate an abuse of process or issue estoppel complaint against the claimant as they are decisions in his favour and upon which he relies in his statement of claim. In fact, Counsel has submitted that *issue estoppel* does not apply where the prior decision is in favour of the person bringing the subsequent claim. Counsel has cited as authority for this proposition the case The Rev. Oswald Joseph Reichel v The Rev. John Richard Magrath, HL [1889]. However, I do think that Counsel is correct in his interpretation of that case. In fact in that case Lord Halsbury LC noted rather forcefully:

> "My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr. Reichel can resist the claim by Mr. Magrath to occupy the vicarage is that he (Mr. Reichel) is still vicar of Sparsholt".

[45] In turning to the extensive scrutiny that have been given to the Hickox Charges in the Anguillan Courts in the judgment of George-Creque J in July, 2008 and the Court of Appeal judgment in March, 2010; learned Counsel noted that the defendant's Notice of Application dated 3rd October, 2012 and Skeleton dated 22nd February, 2012 set out a series of errors and over-statements with respect to these two judgments.

[46] Learned Counsel has taken issue with paragraph 24 of the defendant's Notice of Application which claims that paragraph 119(5) of George-Creque's judgment where she ordered that "the registration of the First and Second Charges is hereby set aside and the Registrar of Lands is hereby directed to cancel the said entries" was reversed by the Court

of Appeal. Counsel has noted that this is completely untrue as indicated by paragraph 93(6) of the Court of Appeal's judgment which stated:

> "Grounds 3.30 to 3.32 question the learned judge's finding and conclusions relating to the First, Second and Third Charges. These grounds were not pursued at the hearing, and no skeleton arguments addressed them I have concluded therefore that they were abandoned".

Counsel further noted that this error was also addressed in his letter of 25 February, 2013 to the defendant's Counsel when he wrote:

> "'… we note that you make the suggestion that the error in paragraph 24 of the Notice of Application is in some respects a harmless error. We do not accept your position and note that the effect of the Court of Appeal's approach is to leave your client in the position as that specified by the Mediator in his Amplification dated 20th July, 1998 when he said 'Accordingly Mr. Hickox status with respect to the Charges that he holds is deemed to be that of an unregistered Charge-holder'. We accordingly invite you to accept that this is a potentially valid alternative interpretation to the Court of Appeal's approach".

[47] In paragraph 25 of the defendant's Notice of Application it is stated that the Court of Appeal upheld the decision of the trial judge with respect to the Third Charge being effective as from 16th September, 1997. Learned Counsel has noted that this is an error and that the defendant appealed against this ruling to the Court of Appeal, but that paragraph 93(6) of the Court of Appeal's judgment also makes clear that this ground of appeal was regarded as being abandoned.

[48] Paragraph 21 of the defendant's Notice of Appeal was also considered as a misrepresentation of the trial judge's ruling. While the defendant claims that the judge "considered that with the re-acquisition by the claimant of the shares of LIR, the terms of the Settlement Agreement had become spent"; learned Counsel is of the view that what in fact she had ruled is that following the September, 1997 transaction "the terms of the Settlement Agreement may be said to have, to some extent, become spent". He noted that the judge was not granting immunity to the defendant in respect of any claim for breach of the Settlement Agreement, because if that was the case the defendant would not have appealed against paragraph 119(6) of her judgment to the Court of Appeal.

[49] With respect to paragraph 26 of the defendant's Notice of Appeal where it is said that "The Court of Appeal in overruling the trial judge's decision setting aside the First and Second Charges, did not expressly state that those Charges were deemed to be effectively registered from 16th September, 1997 but significantly did not require their re-registration"; learned Counsel is of the view that paragraph 119(5) of the judge's decision was never overruled. He noted that it was left intact by the Court of Appeal leading the defendant initially to seek and then abandon his appeal to the Privy Council. Counsel has opined, therefore, no significance should be attached to the fact that the Court of Appeal did not require re-registration of the First and Second Charges.

[50] On the question of the decisions of the New York Bankruptcy Court, learned Counsel has argued that the Anguilla court should not give any weight to the decision of that court since it did not give a decision "on the merits" of any issue, but rather on the question as to whether it should have re-opened the case between the parties, which is more a jurisdiction decision. Counsel has opined, therefore, that the decision of the New York Bankruptcy Court not to accept jurisdiction in respect of a prospective breach of the Mediator's prior determinations is binding on Mr. Friedland, but that is the only matter that is binding since it is not a substantive ruling on the underlying merits of any issue other than that of jurisdiction. Learned Counsel to support this contention cited the House of Lords judgment in DSV Silo – und Verwaltungsgesellschaft mbH v Owners of the Sennar and thirteen other ships [1986] 2 All ER where Lord Diplock stated:

> "It was repeatedly urged upon your Lordships that the Judgment of the Dutch Court of Appeal had done no more than to hold that it had no jurisdiction over the dealers claim against the ship-owners and so did not fall into the category of a judgment on the merits".

[51] With respect to the question of *issue estoppel* and its test, learned Counsel cited the case of Desert Sun Loan Corporation v Hill [1962] 2 All ER where Evans LJ stated:

> "For there to be such an issue estoppel, three requirements must be satisfied: first, the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits; secondly, the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and thirdly, the issues raised must be identical. A decision on the issue must have been necessary for the decision of the foreign court and not merely collateral".

Despite the defendant's assertion, learned Counsel submits that requirement (b) "final and conclusive" is missing from the Court of Appeal judgment with regard to the issue of the registration of the Hickox Charges. He noted as well that the parties to the Hickox Claim are not the same parties as the parties to the present action and that the issues raised in the two sets of proceedings are similar but not identical.

[52] Learned Counsel is therefore of the view that there is no *issue estoppel* issue that would bar Mr. Feriedland from progressing with this matter. In fact, it is Counsel's position that there is nothing in the Court of Appeal's judgment or that of the New York Bankruptcy Court which bars the claims made by the claimant in the present case either by way of *issue estoppel*, abuse of process or *res judicata* as claimed by the defendant. He opined that if the issues were finally and conclusively determined in the defendant's favour (as he claims), it is difficult to see why he appealed to the Privy Council. He noted, however, that even if the issues had been determined finally and conclusively by the Court of Appeal, its ruling would not have been binding on the claimant who at the time of the judgment had no control or ownership over LIR.

[53] With respect to the issue of abuse of process, learned Counsel contends that in the present case several of the key elements of abuse of process are missing. In that regard, he noted that the issue with respect to the Hickox Charges has not been disposed of in the

manner asserted by the defendant; the litigant in the Hickox Claim is not the same litigant as the claimant in the present case and the claimant had no opportunity to participate in any of the various appeals mounted in the Hickox Claim as prior to the judgment he lost all interest and privity with LIR.

[54] In his second affidavit the defendant noted that he observed that clause 4.7 of the Deferred Consideration Agreement gave the purchaser "exclusive responsibility for all discussions relating to the settlement of the Hickox Litigation" and that he failed to see how clause 4.7 would assist the claimant. Learned Counsel in response, however, sold his interest in LIR and no longer controlled or had any involvement in the litigation. At that time he was simply a former shareholder and director and pursuant to the Agreement was contractually prohibited from negotiating with the defendant after April, 2008. Counsel has opined that the significance of this is that nothing in the George-Creque J or Court of Appeal judgments are binding on the claimant. Based on the Hunter v Chief Constable of West Midlands [1982] AC 529 judgment where Lord Diplock indicated that Hunter's attempt to re-litigate an issue in a civil matter which was decided prior in a criminal matter was an abuse of process and that what he should have done was to appeal, learned Counsel has argued that in the present case the claimant did not have the slightest opportunity to appeal either the George-Creque J or Court of Appeal judgments since he was not a director or shareholder of LIR.

[55] In response to the application for summary judgment, learned Counsel cited the case of Saint Lucia Motor & General Insurance Co. Limited v Peterson Modeste HCVAP 2009/0008 where George-Creque JA in outlining the cases in which summary judgment should be granted stated:

> "Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in Swain v Hillman is that the claim or defence has no "real" (i.e., realistic as opposed to fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment".

Learned Counsel has urged that this is a case for the court to hold the opposite since the claimant has a real prospect of succeeding. He noted that the case raises a variety of complex issues and is not as straightforward as the defendant's application appears to suggest. Counsel further noted that the basis of the defendant's claim derives from the New York Judge's comment that the claimant's claim is "certain to fail". This comment he has suggested was itself founded upon three (3) fundamental errors which have been

repeated to this court and once these errors are taken away there is no basis for saying that the claimant's claim is certain to fail.

[56] Finally, learned Counsel concluded his submissions by returning to the five (5) issues he raised at the outset. In the interest of completeness I will note these issues again and also provide the answers given to them by Counsel:

(1) Was Mr. Hickox a party to the Settlement Agreement?

The answer is plainly "yes": the New York Court has so held and so has the trial Judge in Anguilla.

(2) Was the registration of the Hickox Charges a breach of the Settlement Agreement?

Again the answer is clearly "yes".

(3) Was reliance on the Hickox Charges in May 2012 a breach of the Settlement Agreement?

The Mediator held that the defendant's status was that of an unregistered Charge-holder. "It was the Mediator's intent that Mr. Hickox be returned to the same status that he had as of the date of the May 6, 1996 Settlement Agreement. Accordingly, Mr. Hickox's status with respect to the Charges that he holds is to be deemed that of an unregistered Charge-holder. Specifically, Mr.Hickox may not seek to rely on the prior registration of his Charges for any purpose". The defendant plainly relied on the Hickox Charges when in May 2012 he held an auction at which he credit bid using the Hickox Charges. In so doing he ignored the Mediator's ruling and breached further the Settlement Agreement".

(4) Has the claimant suffered any loss?

The claimant' (which secured sums owing to pursuant to the Deficiency Judgment) became valueless when the defendant as the purported prior Charge-holder exercised his power of sale in May 2012.

(5) What compensation is owed to the claimant?

The compensation owing to the claimant for this breach of contract is arguably a sum equal by the Deficiency Judgment but this issue is plainly something to be argued before this court on another occasion.

Learned Counsel has submitted based on these reasons and those set out in the claimant's skeleton argument filed on 22 February, 2013 that the application should be dismissed and direction should be given for the trial of this matter.

Analysis and Conclusion

[57] As I have indicated at the outset the litigation between the parties is one with a very long and convoluted history. While the dramatis personae changed slightly in two instances, namely, in the cases Dion Friedland v Charles Hickox AXAHCV 2012/0039 and LIR v William Tacon/Stuart Mackellar et al AXAHCV 2011/0082, the common thread running through all of the cases is the Hickox Charges registered in 1997 against LIR's leasehold interest in the Cap Juluca property. I wish to note at this point as well, the grounds set out by the defendant in his Notice of Application i.e., abuse of process, issue estoppel and unwarranted harassment are all interrelated so there is no merit in addressing them separately. Consequently, they will all be integrated in the analysis.

[58] In the present claim the claimant is seeking, inter alia, a declaration that the registration of the Hickox Charges was invalid and of no effect and an order setting aside the registration of the Hickox Charges and directing the Registrar of Lands to cancel the entries in the Land Register in respect of the Hickox Charges. In my analysis, I will focus primarily on the Hickox Charges since that is the fulcrum upon which all the other issues turn, and once the issue of the Charges is determined all the other issues would become non sequitur, except of course the issue of damages which I will comment on later.

[59] An ideal starting point for the analysis is the claim Charles Hickox v Leeward Isles Resort Limited AXAHCV 1998/0097. Two of the issues that the court was called upon to decide in this case were whether Mr. Hickox was in breach of duties that he owed to LIR in advancing monies to LIR and then formalizing such by way of the First and Second Transactions and whether LIR is entitled to have the registration of the Hickox Charges set aside.

[60] Justice George-Creque, who heard the matter, in her judgment on 8th July, 2008 declared that the First and Second Transactions are void for want of authority and that the registration of the First and Second Charges is set aside and the Registrar of Lands directed to cancel the said entries on the Register in respect of LIR's leasehold interest. With respect to the Third Charge, she declared that it is deemed to be effectively registered only as from the date following the sale of the LIR shares pursuant to the Settlement Agreement i.e., from 16th September, 1997. She also ordered that LIR should pay Mr. Hickox by way of restitution the advances that formed the First and Second Promissory Notes.

[61] LIR appealed against the learned judge's finding on restitution, while Mr. Hickox cross-appealed on the remaining findings. The judgment of the Court of Appeal in Leeward Isles Resort Limited v Charles Hickox HCVAP 2008/0003 was delivered on 22nd March, 2010. The important aspects of the Court of Appeal's judgment with respect to the present claim are that the judge's order with respect to the First and Second Transactions was set aside and the order with respect to the First, Second and Third Charges was left in some doubt since the Court of Appeal at paragraph 93(6) of its judgment stated:

> "Grounds 3.30 to 3.32 question the learned judge's findings and conclusions relating to the First, Second and Third Charges. These grounds were not pursued at the hearing, and no skeleton arguments addressed them I have concluded therefore that they were abandoned".

Based on this finding by the Court of Appeal, learned Counsel for the Claimant has submitted that paragraph 119(5) of George-Creque's J judgment stands and was not overruled. However, learned Counsel for the defendant has submitted that since the Court of Appeal found that the trial judge was wrong to set aside the First and Second Transactions; then by necessary implication, the First and Second Charges which were put in place based on the First and Second Transactions retained their validity as security for the First and Second Transactions and could not be treated as having been set aside. Counsel for the defendant is therefore of the view that based on the final binding decision of the Court of Appeal, all three Hickox Charges were held to be valid and enforceable security for the three transactions that have been contested by LIR.

[62] Learned Counsel for the defendant further submitted that the claimant's view on the abandonment of grounds 3.30 to 3.32 by the Court of Appeal, is asking the Court to take a novel position that when it takes a ground to be abandoned that they are in effect making a substantive decision on the abandoned ground. This she has opined is more than an overreach and does not assist the claimant's opposition to the application and we are left with the substantive rulings of the High Court and Court of Appeal. Moreover, it is indicated that at the start of the Court of Appeal hearing on 23rd March, 2009 the parties were asked by the Court to limit their oral submissions to 2 hours each and to address the Court only on 'critical issues', and were given assurances that the Court would consider the lengthy written submissions filed by the parties. It is noted that Counsel for the Respondent did not give any indication that paragraphs 3.31 and 3.32 of the Grounds of Appeal were not being pursued.

[63] With respect to the Hickox Charges and their status following the Court of Appeal judgment, I agree with the submission of Counsel for the defendant that it would not make sense for the Court of Appeal to validate the First and Second Transactions by setting aside the High Court order, but at the same time upholding the registration of the First and Second Charges as being invalid. The First and Second Transactions are sine qua non for the validity of the First and Second Charges. It was for this very reason that the trial judge was correct when after ordering that the First and Second Transactions were invalid, that she went on to also find that the registration of the First and Second Charges was invalid. The Court of Appeal in determining that the trial judge was wrong to set aside the First and Second Transactions, then by necessary implication, the First and Second Charges which followed from the First and Second Transactions must perforce also retain their validity as security for the First and Second Transactions and should not be treated as being set aside. Regarding the Third Charge, the Court of Appeal did not interfere with the ruling of the trial judge that the registration of this Charge was deemed to be effectively registered from the 16th September, 1997 following the sale of the LIR shares pursuant to the Settlement Agreement.

[64] The matter of abuse of process and issue estoppel figured prominently in the application to strike out the statement of claim. While Counsel for the defendant has argued that the claimant has engaged in its litigation in collateral attacks on binding decisions of the court, Counsel for the claimant has of course denied this. Counsel for the claimant has argued instead that the litigant in the Hickox Claim is not the same litigant as the claimant in the present claim. He noted also that the claimant in these proceedings had no opportunity to participate in any of the various appeals mounted in the Hickox Claim as prior to judgment the claimant had lost all interest and privity with LIR. I do not think, however, that this contention is entirely correct since the claimant in the present matter, Mr. Dion Friedland, was in complete control of LIR from 17th September, 1997 to 9th April, 2008 when he sold his interest to Mr. Adam Aron of Cap Juluca Properties Limited. This fact is attested to by Mr. Friedland himself in his affidavit of 25th February, 2013 where he said:

> "Prior to 9 April, 2008 I owned and controlled 100% of the equity interests in Cap Jucula Holdings Limited, which owned 100% of the equity interests in Leeward Isles Resorts Limited (LIR) and Maundays Bay Management Limited (together 'the Companies'). All of the Companies were formed under the laws of Anguilla. I did not obtain control of LIR until September 1997".

Clearly then, the claimant could be considered to be integrally involved in all of the proceedings from the hearing of the preliminary issues by Saunders J in 1998 right through to the appeal to the Court of Appeal in 2008. With the exception of the proceeding before Saunders J, the central issue of all the other proceedings in the Eastern Caribbean Supreme Court as well as those before the New York Bankruptcy Court was the status of the Hickox Charges. I should note here that even if it is conceded that the claimant was not himself a party to the prior litigation, and as a result the conditions for issue estoppel would not exist; the fact that it is established that the claimant is privy to the party involved in the prior litigation and the subject matter in the prior and subsequent litigation is the same, a cause of action estoppel exist.

[65] The Anguilla High Court and the Court of Appeal have both addressed the same issues involving the Hickox Charges, namely, whether their registration is invalid and whether they should be set aside. The present case is seeking answers to those very issues. Additionally, the parties in the present case and the prior cases before the High Court and Court of Appeal are the same. While Counsel for the claimant has argued that the parties in the cases are different, the only difference between the present case and the other cases is that in the other cases one of the litigants is LIR (which was part of the Friedland Group of which Dion Friedland was a controlling shareholder/director) rather than Dion Friedland himself. As was quoted earlier in the Carl Zeiss Stiftung case "Privy covers a person who is in control of proceedings". Clearly then, the circumstances surrounding the Hickox Charges litigation would aptly fit Lord Diplock's description in Hunter v Chief Constable of West Midlands Police, which was quoted earlier, as to what constitutes an abuse of process.

[66] I will now turn to the issue of damages which I alluded to earlier. Learned Counsel for the claimant has claimed damages for breach of contract, namely, the Settlement Agreement of 6th May, 1996 and has suggested that the defendant has ignored this claim. The

essence of the breach is the registration of the Hickox Charges on 9th January, 1997. However, learned Counsel for the defendant denied ignoring the claim and has argued that the claimant's claim is predicated on the belief that the rulings of the Mediator underpinned the right to have the Hickox Charges set aside. She noted that this is not the case since in the Amplification of Final Award on 20th July, 1998 he stated:

> "As a result of the closing, Mr. Hickox was no longer an equity holder of LIR. Therefore, effective September 17, 1997, the Settlement Agreement no longer prohibited Mr. Hickox from registering his charge. Accordingly, Mr. Hickox is no longer restrained from registering his charges on LIR's leasehold interests and, so far as the Settlement Agreement is concerned, is free to do so, subject only to the requirements of Anguillan law".

Learned Counsel has submitted that from the date of the Amplification of Final Award nothing could affect the registration of the defendant's Charges except perhaps an action to set them aside brought within 6 years from 20th July, 1998. This approach was not adopted. Counsel has reiterated, therefore, that by bringing the claim the claimant is seeking to mount a collateral attack on the judgment of the Court of Appeal which upheld the validity of the Hickox Charges, refused to set them aside and did not require the defendant to re-register them.

[67] It is quite clear from the evolution of the litigation between Charles Hickox, LIR and Dion Friedland in the Anguillan Court and also the New York Bankruptcy Court, that the one issue at the center of all the proceedings was the validity of the Hickox Charges. The Court of Appeal, whose decision is binding on this court, has made its determination on this issue. With the Court of Appeal having declared the Hickox Charges valid, it is not within the jurisdiction of this court to make a ruling on that issue. In the present circumstances, an appeal by the claimant of the judgment of the Court of Appeal would have been the appropriate manner to challenge that judgment. The claimant chose not to appeal the matter to the Privy Council and is now bound by the final and conclusive judgment of the Court of Appeal.

[68] In his second affidavit filed on 2nd April, 2013, the defendant in commenting on the Purchase and Sale Agreement entered into between the claimant and Adam Aron of Cap Juluca Properties on 9th April, 2008, noted that the claimant approved the validity and enforceability of the Hickox Charges since it was expedient for him to do so in expectation of the consideration he would receive from the sale, as well as the Purchaser's agreement to pay him US$4,378,820.53 plus interest (the Deficiency Judgment of the New York Bankruptcy Court). It is further noted by the defendant, that with the insolvency and subsequent liquidation of LIR the claimant is now seeking to repudiate the very Charges in the mounting of the present action.

[69] Learned Counsel for the claimant has opined that the claimant suffered no loss by the breach of the Settlement Agreement in 1998, but rather he only suffered loss in May, 2012 when Cap Juluca was sold in an auction to the defendant. Counsel has noted that the loss suffered by the claimant would amount to US$7,307,212 as of 24th May, 2012 or alternatively such amount as would have been paid to the claimant but for the purported

auction and sale and purchase of the land. The claimant is also claiming interest from the date of the Deficiency Judgment on 9th June, 1998 at the commercial rate, or in the alternative at such rate and for such period as the court thinks fit.The entirety of the remedies sought by the claimant in the present claim are as follows:

(1) A declaration that the registration of the Hickox Charges was invalid and of no effect.
(2) An order setting aside the registration of the Hickox Charges and directing the Registrar of Lands to cancel the entries in the Land Register in respect of the Hickox Charges.
(3) A declaration that the purported auction and sale and purchase of the Land were invalid and of no effect.
(4) An order prohibiting the defendant from dealing with or disposing of the land or taking any other action in reliance on the purported auction and sale and purchase of the land.
(5) Damages.
(6) Interest.
(7) Further or other relief as this Honourable Court deems fit.

[70] With respect to the relief sought by the claimant, numbers 1 and 2 have been conclusively dealt with by the Court of Appeal and are therefore *res judicata*. With numbers 1 and 2 removed, the other relief sought by the claimant would perforce fall away. Suffice it to say that having not pursued an appeal, the only avenue that I can see open to the claimant at this time is to bring an action in debt to realize the amount that would have accrued under the Deficiency Judgment of the New York Bankruptcy Court.

Order

[71] In the premises, having examined all the documentation supplied in the case, as well as reviewing the written and oral submissions of learned Counsel on both sides and for the reasons that I have outlined above, the court orders as follows:

(1) The Statement of Claim of the claimant filed on 24th May, 2012 is struck out as an abuse of process.

(2) Costs to be assessed in accordance with Rule 65.5 (2).

[72] The court is extremely grateful for the helpful written and oral submissions and authorities of learned Counsel on each side.

Charlesworth Tabor
Master (Ag.)