THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: AXAHCV2012/0039

BETWEEN:

DION FRIEDLAND

Claimant

and

CHARLES HICKOX

Defendant

Before:
Eddy Ventose — Master [Ag.]

Appearances:

Mr. David Fisher with Mr. Alex Richardson for the Claimant
Ms. Tana'ania Small with Mr. Wesley George for the Defendant

2016: November 17
2017: February 21

JUDGMENT

1. VENTOSE, M. [AG.]: This matter has a chequered history and it is hoped that this legal battle would mark the end of a war between the parties that has been raging beneath the crystal clear waters and the pristine sands of Cap Juluca Resort, one of Anguilla's original luxury resorts.

2. The Master in an order dated 29 April 2016 pursuant to CPR 26.1(2)(e) ordered the following to be tried as preliminary issues, namely:

    1) Whether the defendant acted in breach of the settlement agreement by exercising his power of sale by holding a public auction on 2 May 2012 pursuant to the Hickox charges; and
    2) Whether the claimant has locus standi or is estopped from bringing this action or claiming damages against the defendant for loss as a result of the auction of the property.

The First Preliminary Issue

3. This issue requires an examination of the events leading to the Settlement Agreement, the terms of the Settlement Agreement, the subsequent actions of the parties and the exercise by the Defendant of the power of sale pursuant to the Hickox charges.

4. Leeward Islands Resorts Limited ("LIR") obtained in 1981 a 99-year Crown Lease over lands situated at Maundays Bay, Anguilla. It was intended that the lands would be developed into a resort. In 1983, LIR was owned and controlled by a group of entities led by the Claimant (referred to as the "Friedland Group"). By 1986, LIR was owned and controlled by the Defendant through a United States partnership called HBLS L.P. ("HBLS"). HBLS was previously called Cap Juluca Partners but nothing turns on this. In 1986, HBLS and the Friedland group entered into a: (1) share purchase agreement ("SPA") by which the shares in LIR were sold to HBLS for $1.4m

cash and two partnership units in HBLS; and (2) pledge agreement by which HBLS pledged the LIR shares to the Friedland Group as security for the payments due under the SPA ("**Pledge Agreement**").

5. Monies due to the Friedland Group under the SPA were not forthcoming so in 1991 the Friedland Group commenced proceedings in New York against HBLS, seeking damages for breach of the SPA and enforcement of the Pledge Agreement. The Friedland Group was successful and in 1993 the trial judge directed that HBLS transfer the shares in LIR to the Friedland Group. Before the transfer could take place, HBLS filed for bankruptcy thereby thwarting the transfer of the LIR shares to the Friedland Group. In 1995, the bankruptcy court referred the matter to mediation.

6. In 1995, the New York Court appointed Mr. Bary Monheit to mediate the dispute. The resulting settlement agreement dated 6 May 1996 was entered into between HBLS, LIR, Maundays Bay Management ("**MBM**"), collectively called the "**Resort Entities**", and the Friedland Group (the "**Settlement Agreement**"). On 20 June 1996, the New York Court approved the Settlement Agreement. The purpose of the Settlement Agreement was to settle the dispute between the parties concerning the claims for monies due to the Claimant under the SPA and the Pledge Agreement. Article I of the Settlement Agreement provides for the calculation of the claim of the Friedland Group and sets out a mechanism for payment. Article II, Paragraph 6.a, provides that all of the issued and outstanding shares in LIR and MBM shall be collateral for the payment obligations owed to the Friedland Group. Article II, Paragraph 6.1, of the Settlement Agreement also mandated HBLS to transfer the shares in LIR and MBM to the Mediator to secure the pledge of the collateral.

7. Article VIII, Paragraph 15.a, of the Settlement Agreement provided that if there was any default by HBLS in the payment of any instalment the entire amount of the monies due to the Friedland Group would become payable forthwith and the Mediator would have the right to dispose of the shares in LIR and MBM. Article XX, Paragraph

17, gave the Mediator the exclusive right to determine any dispute or question relating to the Settlement Agreement. Article IX, Paragraph 19, provides as follows:

> 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 this Settlement Agreement. Nor shall any member of the Friedland Group intentionally undertake any action which will adversely affect or diminish any right or interest granted to the Resort Entities or their equity holders pursuant to this Settlement Agreement …

8. Pursuant to the Settlement Agreement HBLS agreed to pay the Friedland Group the sum of US$4,681,986.00 in four (4) instalments. On 6 March 1997, HBLS defaulted on the payments due to the Friedland Group pursuant to Article I, Paragraph 2, of the Settlement Agreement. Consequently, the Mediator sold the shares in LIR and MBM held in escrow to the Claimant at an auction held on 15 September 1997. The Claimant then obtained on 9 June 1998 a deficiency judgment in the courts of New York against LIR, HBLS and MBM for the difference between the settlement sum and the value of the LIR shares acquired at auction ("Deficiency Judgment").

9. During the period from 1986 to 1996, the Defendant injected millions of dollars into the development of the resort that became known as Cap Juluca Resort. The three loans that the Defendant provided to LIR were secured by the grant of three charges over LIR's leasehold interest. On 9 January 1997, the Defendant registered the three charges over LIR's leasehold interest in the lands situated at Maundays Bay ("Hickox Charges").

10. In the Mediator's Final Award dated 12 November 1997, the Mediator found that the registering of the Hickox Charges, after the execution of the Settlement Agreement, constituted a violation of the terms, spirit and intent of the Settlement Agreement, including but not limited to paragraph 19 of the Settlement Agreement. In addition, the Mediator found that the appropriate sanction to be imposed on the Defendant for

violating the Settlement Agreement is to enjoin the Defendant from pursuing his remedies as a registered chargee under Anguillian Law, and to permit him instead to take legal action to collect the indebtedness, if any, owed to him by the Resort Entities only as an unregistered chargee.

11. On 20 July 1998, the Mediator issued an amplification of the Mediator's Final Award ("Amplification") in which the Mediator reiterated that the registration of the charges by the Defendant in Anguilla violated the Settlement Agreement. The Mediator clarified that it was the Mediator's intent that the Defendant be returned to the same status that he had at the date of the Settlement Agreement. Therefore, the Mediator stated that the Defendant's status with respect to the charges that he holds is deemed to be that of an unregistered charge holder and that, specifically, the Defendant may not seek to rely on the prior registration of his charges for any purpose.

12. It will be remembered that the first question was whether the Defendant acted in breach of the Settlement Agreement by exercising his power of sale by holding a public auction on 2 May 2012 pursuant to the Hickox Charges. A prior question that needs to be answered is whether the registration of the Hickox Charges was an intentional act undertaken by the Defendant that adversely affected or diminished any right or interest granted to the Friedland Group under to the Settlement Agreement. The Settlement Agreement was intended to facilitate the settlement of the dispute between the Friedland Group and HBLS in respect of payments due under the SPA. Moreover, one specific intention was to ensure that the Friedland Group was paid in accordance with the terms of the Settlement Agreement for the amounts owed to them by HBLS under the SPA.

13. As will be seen later, there was no question that LIR properly entered into the loan agreements with the Defendant and that the Hickox Charges were properly registered in accordance with the Registered Land Act (R.S.A. c. R30 of the Laws of Anguilla) ("RLA"). The effect of the registration of the Hickox Charges is to grant the Defendant

the contractual right to appropriate the property to discharge the debt due under the various loan agreements. The Defendant may enforce its contractual right by the sale of the property by court order, if necessary. This is what occurred when the Defendant in February 2012 advertised and subsequently sold the Cap Juluca Resort at public auction on 2 May 2012. It is not doubted that the power of sale was properly exercised pursuant to Hickox Charges.

14. The effect of registering the Hickox Charges meant that the Defendant had priority over any other unregistered charge holder/creditor or subsequently registered charge holder/creditor of LIR after 9 January 1997. The Mediator found that the: (1) registering of the Hickox Charges constituted a violation of the terms, spirit and intent of the Settlement Agreement; (2) status of the Defendant is deemed to be that of an unregistered charge holder; and (3) Defendant may not seek to rely on the prior registration of his charges for any purpose. The effect of the registration of the Hickox Charges meant that the Defendant obtained priority over the Claimant's charge that was only registered on 23 October 2003 ("Friedland Charge"). The Friedland Charge was registered against LIR's leasehold interest for the sum owed to the Claimant under the Deficiency Judgment.

15. Was the registration of the Hickox Charges by the Defendant in priority to the Friedland Charge, and the right of sale of the property in the event of default by LIR on the three loans, an intentional act that adversely affected or diminished any right or interest granted to the Friedland Group under the Settlement Agreement? There is no question that the registration of the Hickox Charges was an intentional act. To answer the second part of that question one must determine the nature of the right or interest granted to the Friedland Group under the Settlement Agreement. As mentioned earlier, the Settlement Agreement provided for: (1) the amount to be paid to the Friedland Group and the mechanism for payment; and (2) the collateral to secure the payments to be made to the Friedland Group. Article II, Paragraph 6.c provides as follows:

> As part of the Collateral, the Friedland Group shall have the right to receive from LIR a Charge, for the same duration as the Collateral is held by the Mediator, on the resort property leasehold interest of LIR, conditioned upon the Friedland Group obtaining (i) an alien landholder's licence, if necessary to register a Charge under Anguillian law, (ii) the consent of the Government of Anguilla, if necessary to register a Charge under Anguillian law, and (iii) the consent of Barclay's Bank and United States Trust Company of New York and/or any other institutional lender. …

16. The Friedland Group was given the right to receive a charge from LIR for the time period within which the Mediator held the shares in LIR and MBM in escrow. The right to receive the charge ended when the Mediator sold the shares in LIR at public auction on 15 September 1997. In any event, the Friedland Group never exercised that right. On the interpretation most generous to the Claimant, the registration by the Defendant of the Hickox Charges meant the Claimant lost the opportunity of registering the charge it had the right to receive, but never requested or received, from LIR from 6 May 1996 to 15 September 1997 (the duration of the Settlement Agreement) in priority to the Hickox Charges. The registration meant that the Hickox Charges would have priority over any charge that might be registered by the Claimant in the exercise of the right granted under the Settlement Agreement. This act clearly adversely affected the Claimant's right under the Settlement Agreement. The mere registration of Hickox Charges meant that at least before 15 September 1997, the Defendant had a legal right to sell the property, the subject of the Settlement Agreement, in priority to the charge that the Friedland Group was entitled to receive from LIR. In so doing, the collateral (an interest of the Friedland Group in the Settlement Agreement) was thereby adversely affected and its value diminished.

17. In *Hickox v Leeward Isles Resorts Limited* (AXAHCV1998/0097 dated 8 July 2008), the Defendant sued LIR on the promissory notes relating to the loans made to LIR. LIR challenged the validity and/or enforceability of the three loan agreements/transactions. The trial judge found that the first two loan agreements were not authorised by LIR and therefore void. LIR counterclaimed that the

Defendant breached Paragraph 19 of the Settlement Agreement. After considering the Mediator's Final Award and the Amplification, the trial judge stated (at [118]) that:

> It is common ground that Mr. Friedland re-acquired the LIR shares by auction after 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.

18. The trial judge therefore ordered that the registration of the third charge be deemed to be effectively registered only from the date following the sale of the LIR shares pursuant to the terms of the Settlement Agreement, namely 16 September 1997. On appeal, the Court of Appeal in *Leeward Isles Resorts Limited v Hickox* (HCVAP 2008/003 dated 22 March 2010) overruled the trial judge's finding that the first two loans were not valid. The Court of Appeal did not opine on the trial judge's ruling that the effective date of the third charge was 16 September 1997.

Conclusion on First Preliminary Question

19. If it is accepted that the Defendant breached the Settlement Agreement when the Hickox Charges were registered, what is the effect of that breach on the actions of the Defendant? Does it mean that the Defendant: (1) cannot rely on the prior registration of the Hickox Charges for any purpose as the Mediator held in the Amplification; or (2) may rely on the prior registration of the Hickox Charges but only after 16 September 1997, the date the Settlement Agreement became spent as held by the trial judge in *Hickox v Leeward Isles Resorts Limited*. The first approach seeks to prevent the Defendant from enforcing a lawful right under the Hickox Charges whereas the latter seemingly permits the Defendant to benefit (without

consequences) from breaching the Settlement Agreement. The reality, however, is that the Defendant was not required by this court or the Court of Appeal to re-register the charges. When on 2 May 2012 the Defendant sold the shares in LIR at public auction the Settlement Agreement was no longer in existence, having come to a natural end on 16 September 1997 when its main purpose had been achieved. The object of the Settlement Agreement, namely the provision of a mechanism for the payment by HBLS to the Friedland Group and the associated collateral, was achieved when LIR was sold by public auction on 15 September 1997. The answer therefore to the first preliminary question is that the Defendant did not breach the Settlement Agreement by exercising his power of sale by holding a public auction on 2 May 2012 pursuant to the Hickox Charges.

The Second Preliminary Question

20. The second preliminary question is whether the Claimant has *locus standi* or is estopped from bringing this action or claiming damages against the Defendant for loss as a result of the auction of the property. Since the Defendant did not breach the Settlement Agreement when he sold the shares in LIR, the question of whether the Claimant is estopped or can claim damages from the Defendant does not therefore arise. In the event that I am wrong on the first preliminary question, I will address the second preliminary question. The answer to this question requires an examination of events subsequent to the registration of the Hickox Charges following the execution of the Settlement Agreement. It will be remembered that the Claimant acquired the shares in LIR at the auction held by the Mediator following the default by HBLS on the payments to be made to the Friedland Group under the Settlement Agreement.

The Three Agreements

21. On 9 April 2008, the Claimant entered into an agreement for the purchase and sale of the entire share capital of LIR to Cap Juluca Properties Limited ("CJPL") ("Sale and Purchase Agreement"). The Sale and Purchase Agreement was signed between CJPL and the Claimant. Pursuant to the Sale and Purchase Agreement, the Claimant sold Cap Juluca Holdings Limited ("CJHL") to CJPL. CJHL owns the entire share

capital of both LIR and MBM. The consideration for the sale of the shares in CJHL was as set out in Clause 2.2 of the Sale and Purchase Agreement and the Deferred Consideration Agreement.

22. Clause 3.28, which forms part of the Seller's representations and warranties under the Sale and Purchase Agreement, expressly recognises the existence of the Hickox Charges/Litigation. Clause 7.4, which deals with matters relating to closing, incorporates the Hickox Charges and Hickox litigation by providing that CJPL shall pay the costs associated with the litigation with the Defendant. Clause 7.4 also states that CJPL acknowledges that it is responsible for the payment of the Hickox Litigation Costs and the Hickox Fee Award and subject to the occurrence of the Hickox Litigation Resolution even if any financing of the property or any funding thereof fails to occur for any reason. The "Hickox Litigation Resolution" is defined as the means by which the dispute with the Defendant is resolved by either: (i) final judicial determination; or (ii) final settlement by the parties with the Defendant. Hickox Litigation Costs means any costs and expenses necessary to satisfy the Hickox Litigation Resolution and Hickox Fee Award incurred in connection with the Hickox Litigation Resolution.

23. Clause 9.1 provides that the CJPL shall indemnify the Claimant from and against all claims, costs, penalties, damages, losses, liabilities and expenses that may at any time be incurred by the Claimant as a result of: (ii) any nonfulfillment or breach of any covenant or agreement made by CJPL in the Sale and Purchase Agreement. Clause 9.2 provides that the Claimant indemnifies CJPL against any Retained Liabilities and all claims, costs, penalties, damages, losses, liabilities and expenses that may be incurred by CJPL as a result of or relating to Retained Liabilities, whether occurred, accruing or arising prior or subsequent to the closing date. A Retained Liability is defined as excluding an Excluded Liability. An Excluded Liability includes Schedule 1 that sets out the excluded liabilities, including the Hickox Charges (section 32) and the Friedland Charge (section 12). The effect of these provisions is that there is a

clear recognition by the parties to the Sale and Purchase Agreement of the Friedland Charge and the Hickox Charges.

24. A deferred consideration agreement was signed on 9 April 2008 between the Claimant, Dion Friedland Ltd and CJPL relating to payments to be made by CJPL to the Claimant pursuant to the Sale and Purchase Agreement ("**Deferred Consideration Agreement**"). The Claimant assigned his rights to receive the consideration under that agreement to Dion Friedland Ltd. The deferred consideration is outlined in Clause 2.1 and includes at (d) the Friedland Charge Amount and the Deferred Friedland Charge Amount. The Friedland Charge is defined in Clause 1.1 as having the meaning as set out in the Sale and Purchase Agreement but including accrued interest. Clause 1.1 of the Sale and Purchase Agreement defines the "Friedland Charge" as:

> that recorded lien, charge or other encumbrance against the Property securing that certain loan in the original principal amount of $4,378,820.53 plus interest at the rate of 4.79% per annum, held by the Seller, as lender, and reflected in the records affecting Block 17808B, Parcel 1/1, within Registration Section West End, as Instrument #2819/2003.

25. The Friedland Charge Amount is defined in the Deferred Consideration Agreement as

> the outstanding amount of the Friedland Charge plus accrued simple interest thereon under the terms of the Friedland Charge … until the Resolution Date upon which the Friedland Charge Amount is paid or deferred pursuant to Section 2.1(g)(1)(iii).

26. In addition, on the same date, CJPL, the Claimant, CJHL, Leeward Islands Resorts Holding Company ("**LIRHC**"), MBM and others entered into an indemnification and release agreement by which CJPL, CJHL, LIRHC, MBM and the other parties indemnify the Claimant for certain losses etc. ("**Indemnification and Release**

Agreement"). Clause 1 provides that CJPL indemnifies inter alia the Claimant for any and all judgments, penalties, losses, claims, damages, costs, fees and expenses or liabilities that may at any time be incurred by the Claimant as a result of acts or omissions relating to inter alia LIR or the leasehold interest which occur prior to the closing date to the extent to which the matter is an Excluded Liability or matters pursuant to a legal proceedings commenced following the closing arising out of an Excluded Liability.

27. CJPL, CJHL, LIR, Linda Hickox and the Defendant entered into a settlement agreement and release on 6 October 2010 ("Hickox Settlement Agreement"), the purpose of which was the full and final settlement of the dispute between the LIR and the Defendant and for the termination of the court actions taken by the Defendant against LIR. Clause 2 of the Hickox Settlement Agreement provides for a schedule of payments to be made to the Defendant by CJPL within a period of five (5) years. Clauses 5.1-5.3 recognise the existence of the Hickox Charges and provide a mechanism by which the charges shall be removed upon payment by CJPL in accordance with the agreement. In particular, Clause 5.1(A) specifically includes the Hickox Charges as security for the obligations under the Hickox Settlement Agreement.

28. In November 2011, CJPL defaults on the Hickox Settlement Agreement and in February 2012 the Defendant advertises the public auction of the leasehold interest of LIR, which is sold at auction to the Defendant on 2 May 2012. The Claimant sought unsuccessfully to stop the sale in the New York Court: *In re: HBLS, L.P.*, 468 B.R. 634 (Bankr. S.D.N.Y 2012).

The Claimant's Claim

29. The Claimant in his amended statement of claim filed with sworn affidavit on 18 December 2014 states (at [10]) that the Claimant does not seek to advance a claim for damages for breach of the Settlement Agreement which occurred when the Defendant registered the Hickox Charges on 9 January 1997. The Claimant states (at

[25]) that he has suffered loss and damages by reason of the Defendant's breach of the Settlement Agreement in the sum of the amount owed to the Claimant under the Deficiency Judgment, namely US$9,141,042.64. The essence of the Claimant's claim is that the sale of the shares in LIR at the auction held on 2 May 2012 by the Defendant was possible solely because of the prior registration of the Hickox Charges. The property was sold free of the Friedland Charge, which was subordinate to the Hickox Charges and the Defendant did not pay any of the proceeds of sale to the Claimant treating the Claimant as a subsequent chargee.

30. The Claimant states (at [11]) that the Defendant relied on the prior registration of the Hickox Charges in breach of the Settlement Agreement to: (1) exercise the rights of a charge holder which has been completed by registration; (2) exercise the powers of sale under the RLA, which is only available to a holder of a charge that has been completed by registration under the RLA; (3) treat the Friedland Charge as a subsequent incumbrance and thus selling the property free of that incumbrance; and (4) treat the Friedland Charge as a subsequent incumbrance and not discharging the same out of the purchase price before paying the monies due under the Hickox Charges. The Claimant also states that as a result of reliance by the Defendant of the prior registration of the Hickox Charges, the Claimant has been deprived of the payment of the monies secured by the Friedland Charge.

The Defendant's Submissions

31. Counsel for the Defendant makes six (6) arguments in respect of the second preliminary issue. First, the Claimant registered its charge in 2003 with the recognition that the Hickox Charges had priority and never applied to the court to determine the priority of the charges. Therefore, the Claimant accepted that his charge would be subordinate to the Hickox Charges by operation of law. Second, the Claimant sold his shares in LIR to CJPL under the Sale and Purchase Agreement, which recognised and incorporated the Hickox Charges. Under the Sale and Purchase Agreement, the Claimant agreed to pursue its rights against CJPL for the payment of the purchase price of the shares, which included the amounts owing to

the Claimant. Third, the Deferred Consideration Agreement expressly set out the Claimant's charge described as the "Friedland Charge Amount" and defined in Clause 1.1. The deferred consideration in Article 2 included the Friedland Charge Amount in Clause 2.1(d), which means that CJPL assumed liability to pay the same amount upon which the Claimant bases his damages claim in the statement of claim. The combined effect of the Sale and Purchase Agreement and the Deferred Consideration Agreement is that the obligation to pay the sums owed to the Claimant (which is the subject of a charge against the leasehold interest of LIR) passed from LIR to CJPL as part of the consideration for the Sale and Purchase Agreement.

32. Fourth, pursuant to the terms of the Indemnification and Release Agreement CJPL agreed to indemnify the Claimant against any loss or damage that the Claimant may sustain to the extent that it arises out of the "Excluded Liabilities", which is defined in Schedule 1 as including the "Friedland Charge" and the Hickox Charges. Fifth, the Claimant agreed that CJPL had the exclusive right to enter into Hickox Settlement Agreement for any amount without the Claimant's approval. Sixth, under the Hickox Settlement Agreement, LIR acknowledged the Hickox Charges and expressly agreed that in the event of default of payment of any sums agreed to be paid by LIR to the Defendant the Defendant is entitled to exercise any and all of the rights under the security interests.

33. The Defendant invites the court to find that the Claimant is estopped from challenging the Defendant's exercise of rights pursuant to the Hickox Charges because the Claimant: (1) accepted the validity of the Hickox Charges; and (2) having sold his shares in LIR, and having agreed to a purchase price with CJPL, a component of which is the amount equal to the Friedland Charge, now being claimed as damages and having expressly granted full right and authority to CJPL to negotiate a settlement of the Hickox charges and claims.

The Claimant's Submissions

34. The Counsel for the Claimant states that it is a basic proposition that a third party can derive no benefit from a contract between others, nor is a third party bound by a contract to which he is not a party. LIR was not a party to the Sale and Purchase Agreement, the Deferred Consideration Agreement and the Indemnification and Release Agreement and that whatever agreement the parties to those contracts made between themselves cannot have the effect of a contractual release of LIR's liability under the Deficiency Judgment. Counsel continues that there is nothing inconsistent with the undertaking of an obligation by a third party to pay the Claimant the sum due under the Deficiency Judgment and the continuation of LIR's liability to pay the same. The Claimant was not a party to the Hickox Settlement Agreement (nor did he control or have any interest in any of the entities that were a party). Consequently, the Claimant cannot be bound by anything that was agreed between the parties to the Hickox Settlement Agreement.

35. Counsel further submits that estoppel requires, as a minimum, a representation from A to B, which B relies on to his detriment. There is no representation and none is alleged – a fortiori, there can be no reliance or detriment and, again, none is alleged. Counsel concludes that for those reasons there has been no release by the Claimant of LIR's liability under the Deficiency Judgment or the Friedland Charge, nor is the Claimant estopped from pursuing the claim he advances in this action. The Claimant answers the second preliminary question as follows: the Claimant has *locus standi* and is not estopped from bringing this action or from claiming damages against the Defendant for loss as a result of the auction of the property.

Conclusion on Second Preliminary Question

36. The question therefore is whether the Claimant has *locus standi* or is estopped from bringing this action or claiming damages against the Defendant for loss as a result of the auction of the property because of: (1) the combined effect of the Sale and Purchase Agreement, the Deferred Consideration Agreement and the Indemnification and Release Agreement (together the "Three Agreements"); and/or (2) the Hickox

Settlement Agreement; and/or (3) the Claimant's acceptance of the legal validity of the Hickox Charges.

37. The Claimant sold the shares in LIR to CJPL under the Sale and Purchase Agreement for consideration (as contained in the Deferred Consideration Agreement), which included the sums owed to the Claimant by LIR under the Deficiency Judgment. The recognition or otherwise of the Hickox Charges under the Three Agreements, to which the Claimant was not a party, does not in principle preclude a claim for breach of the Settlement Agreement. The same reasoning would apply to the Defendant's argument that under the Hickox Settlement Agreement LIR recognised the Hickox Charges and expressly agreed that in the event of default of any sums LIR agreed to be paid to the Defendant, the Defendant is entitled to exercise any and all rights under the security interests, namely, the Hickox Charges.

38. By entering into the Sale and Purchase Agreement, the Claimant ensured that the consideration for the share sale included a sum equivalent to the amount secured by the Friedland Charge. This act does not automatically release LIR of its obligation to the Claimant under the Deficiency Judgment. The Claimant may exercise its rights against CJPL under the Sale and Purchase Agreement but LIR's obligation to the Claimant continues so long as the debt remains unsatisfied. The fact that under the Deferred Consideration Agreement CJPL assumed the obligation to pay the Friedland Charge Amount does not mean that the obligation to pay that sum passed from LIR to CJPL as Counsel for the Defendant suggests. What is clear however is that pursuant to the Three Agreements the Claimant now has a contractual right to sue CJPL for the Friedland Charge Amount in addition to its existing claim against LIR under the Deficiency Judgment. The Defendant's argument that LIR is somehow relieved of its obligation to the Claimant under the Deficiency Judgment is untenable. The indemnification of the Claimant by CJPL under the Indemnification and Release Agreement for any loss or damage that the Claimant may sustain to the extent that it arises out of the Friedland Charge takes the argument no further.

39. It is true, as Counsel for the Claimant's argues, that LIR was not a party to any of the three agreements but it is clear that LIR could not be since these agreements relate to the sale by the Claimant to CJPL of all the shares in LIR. I agree with Counsel for the Claimant that there is nothing inconsistent with an undertaking of an obligation by a third party to pay the Claimant the sum due under the Deficiency Judgment and the continuation of the liability of LIR to pay the same sum to the Claimant. Of course, if the Claimant recovers the sum in full from either LIR or CJPL their liability to the Claimant under the Sale of Purchase Agreement (CJPL) or the Deficiency Judgment (LIR) would cease. Counsel for the Defendant argues that the Claimant agreed that CJPL had the exclusive right to enter into the Hickox Settlement Agreement for any amount without the Claimant's approval. This agreement however relates to the amounts owed by LIR to the Defendant and does not affect LIR's liability to the Claimant. It would matter little that the Claimant did not challenge the registration of the Hickox Charges if, as stated above, the Defendant did in fact breach the Settlement agreement by selling the shares in LIR at public auction. Consequently, the Claimant has *locus standi* and is not estopped from bringing a claim against the Defendant for loss as a result of the auction of the property.

Conclusions

40. It is hereby ordered that:

(1) The answer to the first preliminary question is that the Defendant did not breach the Settlement Agreement by exercising his power of sale by holding a public auction on 2 May 2012 pursuant to the Hickox Charges.

(2) Since the Defendant did not breach the Settlement Agreement, the second preliminary question does not arise.

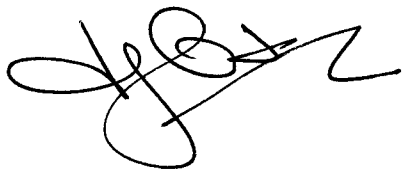
(3) If however I am wrong, the answer to the second preliminary question is that the Claimant has *locus standi* and is not estopped from bringing

this action or claiming damages against the Defendant for loss as a result of the auction of the property.

(4) The Claimant's statement of claim is dismissed.

(5) Costs to be assessed if not agreed.

41. I wish to thank Counsel for the parties for their submissions.



Eddy Ventose
Master [Ag.]