EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2017/0003

BETWEEN

DION FRIEDLAND

Appellant

and

CHARLES HICKOX

Respondent

Before:

The Hon. Mr. Mario F. Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. David Phillips, QC with him, Mr. J. Alex Richardson for the Appellant
Mrs. Tana'ania Small-Davis for the Respondent

2018: January 18;
June 14.

Interlocutory appeal – Registration of charges – Settlement Agreement – Whether respondent acted in breach of settlement agreement by exercising power of sale by holding a public auction – Whether settlement agreement "spent" prior to auction – Counter notice – Estoppel – Whether appellant estopped from bringing claim for damages for loss as a result of sale of property

Leeward Islands Resort Limited ("LIR"), an Anguillan company owned and controlled by a group of companies led by the appellant ("the Friedland Group"), obtained a lease of property with the intention of developing it into a luxury resort. In 1988 LIR entered into a Stock Purchase Agreement and a Pledge Agreement with HBLS LP ("HBLS"), a United States limited partnership owned and controlled by the respondent. HBLS also owned and controlled the management company of the resort ("MBM"). In the Stock Purchase Agreement, the Friedland Group agreed to sell the shares in LIR to HBLS for cash and two

partnership units in HBLS, and in the Pledge Agreement HBLS pledged the LIR shares to the Friedland Group as security for the payments due under the Stock Purchase Agreement.

HBLS defaulted on the payments due under the Stock Purchase Agreement and the Friedland Group successfully brought proceedings against them in the New York courts which resulted in an order for the transfer of the shares. Subsequently, HBLS filed for voluntary bankruptcy and the Bankruptcy Court referred the matter to mediation. This resulted in a Settlement Agreement dated 6th May 1996 between HBLS, LIR, MBM (collectively "the Resort Entities") and the Friedland Group.

HBLS defaulted on the payments under the Settlement Agreement and on 15th September 1997 the mediator sold the shares in LIR and MBM that he was holding in escrow by public auction. The sole buyer at the auction was the appellant. He went on to obtain a deficiency judgment in the New York courts for the difference between the amount due under the Settlement Agreement and the amount paid for the shares.

During the period 1986 to 1996 the respondent loaned substantial amounts of money to LIR and in January 1997 the respondent registered three charges against LIR's leasehold interest in the property to secure repayment of the loans ("the Hickox Charges"). In October 2003 the appellant registered a charge against the property for the amount due under the deficiency judgment.

The mediator made a final award on 12th November 1997 and found that the registration of the Hickox Charges by the respondent was in breach of the Settlement Agreement. The mediator subsequently issued an amplification of his final award ("the Amplification Award").

In October 2010 the new owners of LIR, Cap Juluca Properties Limited ("CJPL") and its affiliated entities, entered into a Settlement Agreement with the respondent for the payment of the monies owed to the respondent for the loans previously made to LIR. In February 2012 the monies due were still outstanding and the respondent sold the property by public auction. The appellant filed an action in the court below claiming that the respondent breached the Settlement Agreement by registering the Hickox Charges and then relying on those charges to sell the property. In response to two preliminary issues submitted to him for determination, the learned master found that the respondent did not breach the Settlement Agreement by selling the property and that the appellant was not estopped from bringing the claim.

The appellant, being dissatisfied with the master's decision, appealed. The respondent counter-appealed on the basis that the appellant was estopped from bringing the claim. The issues on appeal are: whether the master erred in considering the decision of the High Court in Hickox v Leeward Isles Resorts Limited ("the Hickox Action") in coming to his decision; whether the master erred in finding that the High Court had concluded in the

Hickox Action that the Settlement Agreement was "spent", having come to an end on 16th September 1997; and whether the master should have found that the Amplification Award enjoined the respondent from relying on the prior registration of the Hickox Charges for any purpose.

Held: dismissing the appeal; confirming the order of the learned master with costs to the respondent of two-thirds of the amount awarded in the lower court; and dismissing the counter-appeal with costs to the appellant to be assessed if not agreed within 28 days of the date of this order, that:

1. The learned master was entitled to consider the findings in the Hickox Action as it also dealt with the issues of the respondent's breach of the Settlement Agreement and the validity of the registration of the Hickox Charges which were among the matters being considered by the master. He was free to consider all the circumstances of the claim that was before him which included the findings made by the High Court in the Hickox Action, and come to his own decision whether or not they coincided with the findings made by the High Court.

2. The learned master erred in interpreting the judgment in the Hickox Action as deciding that the Settlement Agreement became spent. As a result, his conclusion that the respondent did not breach the Settlement Agreement was based on a wrong premise. The learned judge in the Hickox Action stated that the agreement became spent "to some extent" which is not the same as becoming actually spent. It is clear that the judge did not treat the Settlement Agreement as actually spent as she proceeded to grant relief pursuant to the terms of the Agreement. Further, there are obligations under the Agreement that will continue until the debt due to the Friedland Group from HBLS is settled. However, this is not fatal to the overall conclusion of the first preliminary issue.

3. Clause 19 of the Settlement Agreement effectively enjoined the Resort Entities, which then included the respondent and HBLS, from taking any step that would adversely affect or diminish the interests of the Friedland Group, and vice versa. The respondent, as a Resort Entity, was restricted by clause 19 and by the mediator's final award from exercising his powers as a chargee pursuant to the charges. However, the respondent ceased to be a Resort Entity as of 16th September 1997 and the restrictions were lifted by the mediator in July 1998 by his finding in the Amplification Award. After that date, the respondent was free to register the charges subject only to the requirements of Anguillan law. As a matter of Anguillan law, the respondent was not required to re-register the charges in order to exercise his powers of sale as a chargee.

4. Merely giving CJPL and/or LIR authority to negotiate a settlement is insufficient to bind the appellant to an agreement subsequently made between CJPL, LIR and other persons to which the appellant was not a party. Further, there is no

evidence of reliance on any representation by the appellant or detriment suffered by the respondent, which are essential elements of estoppel. Accordingly, the appellant was not estopped from bringing the claim against the respondent.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an appeal by Mr. Dion Friedland ("the appellant"), against the decision of the learned master dated 21st February 2017 by which the master found that Mr. Charles Hickox ("the respondent") did not breach the terms of a Settlement Agreement dated 6th May 1996 and dismissed the appellant's claim. The respondent opposed the appeal and counter-appealed contending that the master should have found that the appellant was estopped from bringing the claim.

Background

[2] Leeward Islands Resort Limited ("LIR") is an Anguillan company which acquired a 99-year lease of property located at Maundays Bay, Anguilla in 1981 with the intention of developing the property into a luxury resort ("the Property"). LIR was owned and controlled by a group of companies led by the appellant which I will refer to in this judgment as "the Friedland Group".

[3] HBLS LP ("HBLS") is a United States limited partnership owned and controlled by the respondent. The management company for the resort was Maundays Bay Management Limited ("MBM"), an Anguillan company which is also owned and controlled by HBLS.

[4] In 1986 HBLS and the Friedland Group entered into a Stock Purchase Agreement by which the Friedland Group sold the shares in LIR to HBLS for $1.4 million and two partnership units in HBLS. The parties also entered into a Pledge Agreement by which HBLS pledged the LIR shares to the Friedland Group as security for the payments due under the Stock Purchase Agreement.

[5] HBLS defaulted on the payments due under the Stock Purchase Agreement and in 1991 the Friedland Group commenced proceedings against HBLS in the New York courts for damages for breach of the Stock Purchase Agreement and enforcement of the Pledge Agreement. The Friedland Group was successful and on 30th June 1993 the New York Court ordered HBLS to transfer the LIR shares to the Friedland Group. Before the shares were transferred, HBLS filed for voluntary bankruptcy in the United States District Court for the Southern District of New York ("the Bankruptcy Court"). This had the effect of staying the transfer of shares order made by the New York courts on 6th June 1993.

[6] On 15 August 1995 the Bankruptcy Court referred the dispute to Mr. Barry Monheit, a court-appointed mediator. The mediation resulted in a settlement agreement dated 6th May 1996 ("the Settlement Agreement") between HBLS, LIR, MBM (collectively "the Resort Entities"), and the Friedland Group. The purpose of the Settlement Agreement was to settle the dispute between the parties concerning the claims for monies due to the Friedland Group from HBLS under the stock purchase agreement and the pledge agreement. The Settlement Agreement made provision for HBLS to pay the amount found due to the Friedland Group by instalments and that upon default in the payment of any instalment payment the entire balance became immediately due and payable. The shares of LIR and MBM served as collateral for the payments due to the Friedland Group. HBLS was required to transfer the LIR and MBM shares to the mediator to secure the pledge of the collateral.

[7] During the period from 1986 to 1996 the respondent loaned substantial amounts of money to LIR that were used to develop the Property. In January 1997 the respondent registered three charges against LIR's leasehold interest in the Property to secure repayment of the amounts loaned to LIR ("the Hickox Charges").

[8] HBLS defaulted on the payments to the Friedland Group under the Settlement Agreement and on 15th September 1997 the mediator sold the shares in LIR and MBM that he was holding in escrow by public auction. The sole buyer at the auction was the appellant and the shares were sold to him for $500,000.00. Thereafter, the appellant obtained a deficiency judgment in the New York courts for $4.378,820.53, being the difference between the amount due under the Settlement Agreement and the amount paid for the shares at the auction ("the Deficiency Judgment"). In October 2003 the appellant registered a charge against the Property for the amount due under the Deficiency Judgment. This was long after the registration of the Hickox Charges in 1997 and would therefore rank in priority after the Hickox Charges.

[9] The mediator made a final award on 12th November 1997. He found that the registration of the Hickox Charges by the respondent was in breach of the terms, spirit and intent of the Settlement Agreement, including but not limited to paragraph 19 of the Agreement. At page 7 of his final award, he enjoined the respondent from:

> "…pursuing his remedies as a registered chargee under Anguillan Law, and to permit him (the respondent) to instead take legal action to collect the indebtedness, if any, owed to him by the Resort Entities only as an unregistered Chargee."

[10] On 20th July 1998 the mediator issued an amplification of his final award ("the Amplification Award"). The Amplification Award plays an important part in determining whether the respondent breached the terms of the Settlement Agreement and it is set out and discussed in detail in paragraphs 24 – 29 below.

[11] In October 1998 the respondent commenced a claim against LIR in the court below to recover the loans made by him to LIR. Briefly, the results of the trial that are relevant to this appeal are that orders were made for the payment of various amounts to the respondent by LIR, two of the three charges registered by the

respondent were cancelled and the registration of the third charge was found to be effective as from the date following the sale of the shares to the appellant. The Court of Appeal allowed the appeal in respect of the trial judge's order setting aside two of three charges and left standing the judge's order in respect of validity and effectiveness of the third charge.

[12] In October 2010 the new owners of LIR, Cap Juluca Properties Limited (CJPL") and its affiliated entities, entered into a Settlement Agreement with the respondent for the payment of the monies owed to the respondent by LIR under the loans previously made to LIR for the development of the Property.

[13] In February 2012 monies due to the respondent from the new owners were still outstanding and the respondent took steps, as chargee, to sell the Property by public auction. The appellant applied to the Bankruptcy Court in New York to restrain the proposed sale. The Bankruptcy Court dismissed the application finding among other things that the disputes between the parties were clearly more appropriate for resolution by the courts of Anguilla. The respondent then proceeded with the sale of the Property and sold it on 2nd May 2012.

[14] The appellant filed an action in the court below claiming that the respondent breached the Settlement Agreement by registering the Hickox Charges and then relying on those charges to sell the Property as chargee, and claiming damages for breach of the Settlement Agreement. When the matter came before Master Glasgow for case management, he ordered that the following issues be tried as preliminary issues:

(a) Whether the respondent acted in breach of the Settlement Agreement by exercising his power of sale by holding a public auction on 2nd May 2012 pursuant to the three Hickox Charges; and

(b) Whether the appellant has locus standi and/or is estopped from bringing the claim for damages against the respondent for loss as a result of the auction of the Property.

[15] The preliminary issues were heard by Master Ventose. The learned master found on the first preliminary issue that, the respondent did not breach the Settlement Agreement by exercising his power of sale by selling the Property by public auction pursuant to the Hickox Charges. On the second preliminary issue, he found that the appellant had locus standi and was not estopped from bringing the claim or claiming damages against the respondent for loss as a result of the sale of the Property.

The Appeal

[16] The appellant appealed against the learned master's decision that the respondent did not breach the Settlement Agreement by exercising his power of sale by selling the Property by public auction pursuant to the Hickox Charges. The notice of appeal lists three grounds of appeal in support of the position that the master erred in finding that the respondent did not breach the Settlement Agreement. I have crystalised these grounds into the following issues:

(a) Whether the master erred in considering the decision of the High Court in Hickox v Leeward Isles Resorts Limited[1] ("the Hickox Action") in coming to his decision because the case dealt with the different issue of the validity of the registration of the Hickox Charges and not whether the respondent had breached the Settlement Agreement by registering the charges. Further, the case was between different parties, and the appellant, not being a party, could

[1] AXAHCV1998/0097 (delivered 8th July 2008, unreported).

not appeal against the findings of the High Court contained in its judgment.

(b) Whether the master erred in finding that the High Court had concluded in the Hickox Action that the Settlement Agreement was "spent", having come to an end on 16th September 1997.

(c) Whether the master should have found that the Amplification Award enjoined the respondent from relying on the prior registration of the Hickox Charges for any purpose.

Issue 1: Reliance on the Hickox Action

[17] In the Hickox Action, the respondent sued LIR on three promissory notes relating to the loans made to LIR for the development of the Property. In its defence and counterclaim LIR challenged the underlying loan transactions and the validity and enforceability of the first and second promissory notes. LIR also relied on clause 19 of the Settlement Agreement and sought orders that included the cancellation of the registration of the Hickox Charges. The learned trial judge found that the first and second transactions were void for want of authority, but confirmed the validity of the third loan and that the third charge was effective as of the date following the sale of the LIR shares to the appellant (15th September 1997).

[18] The learned master was entitled to consider the findings by the High Court in the Hickox Action. That Action also dealt with the issues of the respondent's breach of the Settlement Agreement and the validity of the registration of the Hickox Charges which were among the matters that were being considered by the master. He was free to consider all the circumstances of the claim that was before him which included the findings made by the High Court in the Hickox Action, and come to his own decision whether or not they coincided with the findings made by High Court. What he could not do was to consider himself bound to follow the

decisions of the High Court. The fact that the appellant was not a party to the Hickox Action and could not appeal from the decisions made in that action is of no moment.

[19] In any event the learned master's decision can be supported without reference to the judgment of the High Court in the Hickox Action and I will illustrate this when I deal with the third issue before this Court of the effect of the Amplification Award.

Issue 2: Was the Settlement Agreement spent

[20] In the course of delivering her judgment in the Hickox Action, the trial judge made the following finding in paragraph 118 of the judgment:

> "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 [the] 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."(underlining added)

The learned master treated this finding by the trial judge as a finding that the Settlement Agreement had become spent. He found at paragraph 19 of his judgment that:

> "When on 2 May 2012 the Defendant sold the shares in LIR (sic)[2] 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

[2] This is an error. On 2nd May 2012 the respondent sold the leasehold interests in the Property by public auction, not his shares in LIR which had previously been sold to the Friedland Group on 15th September 1997.

> Group and the associated collateral, was achieved when LIR was sold by public auction on 15 September 1997."

This was followed immediately by a finding that the respondent had not breached the Settlement Agreement by exercising his power of sale by selling the Property by public auction on 2nd May 2012 pursuant to the Hickox Charges.

[21] Mr. Phillips, QC submitted that this was an error on two levels. Firstly, the learned judge in the Hickox Action did not find that Settlement Agreement had become spent. This must be correct. What the learned judge said was that when the appellant reacquired the LIR shares in September 1997 the Settlement Agreement became spent "to some extent". Spent "to some extent" is not the same as actually spent and it is clear that the judge did not treat the Agreement as actually spent as she then proceeded to grant relief in the same paragraph of the judgment pursuant to the terms of the Settlement Agreement.

[22] Secondly, the master erred in finding that the main purpose of the Settlement Agreement was to set up a payment mechanism for HBLS to pay the amounts due to the Friedland Group. Mr. Phillips, QC submitted that the main purpose of the Settlement Agreement was to secure payment to the Friedland Group and that obligation has not been discharged and the Agreement cannot therefore be said to have become spent.

[23] I agree with and accept both submissions. If the trial judge had wanted to say that the Settlement Agreement had become spent she would have said so without qualification. Further, there are obligations under the Agreement that will continue until the debt due to the Friedland Group from HBLS is settled. Therefore, I find that the master erred in finding that the Settlement Agreement was spent. This was the basis on which he found the Settlement Agreement was not breached when the respondent sold the Property by public auction in May 2012 pursuant to

the power of sale in the charges. However, this finding by the master is not fatal to his overall conclusion on the first preliminary issue as appears from my treatment of the effect of the Amplification Award under issue 3 in the following paragraphs.

Issue 3: Effect of the Amplification Award

[24] The Settlement Agreement provides in clause 19 that:

> "Neither the Resort Entities nor their equity holders shall intentionally undertake any action which will adversely affect or diminish any right or interest granted to the Friedland Group pursuant to 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, or interfere with the business of the Resort Entities."

This provision effectively enjoined the Resort Entities, which then included the respondent and HBLS, from taking any step that would adversely affect or diminish the interests of the Friedland Group, and vice versa. In his final award the mediator found, correctly in my view, that the registration of the Hickox Charges breached the terms, spirit and intent of the Settlement Agreement including clause 19, and as a sanction enjoined the respondent from pursuing his remedies as a registered chargee in respect of the Property. As matters stood then there is no doubt that the respondent could not exercise any of his powers as a registered chargee under the charges. However, when the appellant acquired the LIR and MBM shares on 15th September 1997 the respondent and HBLS lost their legal and beneficial interest in these companies and they were no longer "Resort Entities" within the meaning of the Settlement Agreement and therefore not bound by the terms of the Agreement. This is confirmed by the mediator's Amplification Award.

[25] The construction of the Amplification Award is important. Counsel for the appellant, Mr. Phillips, QC relied heavily on the third paragraph of the award which reads:

> "The Mediator has previously determined that the registration of the charges by Mr. Hickox in Anguilla violated the May 6, 1996 Settlement Agreement. More specifically, Mr. Hickox violated Article IX, Paragraph 19 of the Settlement Agreement, which specifically prohibited the Resort Entities and their equity holders from intentionally taking any action which would adversely affect or diminish any right or interest granted to the Friedland Group (as defined in the Settlement Agreement) pursuant to the Settlement Agreement. 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."

Mr. Phillips, QC relied on this paragraph to support his submission that the mediator was confirming that Mr. Hickox was still enjoined by the final award not to take any action regarding the registered charges that would have an adverse effect on the interests of the Friedland Group.

[26] Learned counsel for the respondent, Mrs. Tana'ania Small-Davis, took a different position. She submitted that the third paragraph of the Amplification Award was in substance the mediator's way of reciting his prior decision in the final award. She relied instead on the fifth paragraph of the Amplification Award which reads:

> "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."

Mrs. Small-Davis submitted that in this paragraph the mediator took account of the changed position that had come about after the Settlement Agreement as a result of the appellant acquiring the shares in LIR and MBM and the respondent thereby losing his status as a Resort Entity. Thereafter, he was not bound by the terms of the Settlement Agreement and particularly clause 19.

[27] I agree with Mrs. Small-Davis' submission. What the mediator said in the third paragraph of the Amplification Award is no different from what he had earlier found in the final award. This supports the submission that the mediator was merely reciting his earlier finding as a prelude to the new finding reflecting the new position that is contained in the fifth paragraph. Read any other way the two paragraphs are internally inconsistent. The mediator could not be maintaining his prior finding that the respondent was enjoined from relying on the registration of the Hickox Charges and yet find in the fifth paragraph that the respondent was no longer restrained from registering his charges subject only to the requirements of the laws of Anguilla.

[28] The appellant's alternative position is that even if the respondent could have relied on the charges after 15th September 1997, he was still required to re-register them having obtained the first registration in breach of the Settlement Agreement. He could not now benefit from the earlier wrongful registration of the charges. I do not accept this submission. The charges were properly registered in January 1997 as a matter of Anguillan law and there are no restrictions recorded against them in the land registers of the Property.[3] There is no need to re-register properly registered charges.

[29] To conclude on this issue, I find that the respondent, as a Resort Entity, was restricted by clause 19 of the Settlement Agreement and by the restrictions imposed by the mediator in the final award from exercising his powers as a chargee pursuant to the charges or otherwise dealing with the Property in a manner that would adversely affect or diminish any right or interest of the Friedland Group. However, the respondent ceased to be a Resort Entity as of 16th September 1997 and the restrictions were lifted by the mediator in July 1998 by his finding in the fifth paragraph of the Amplification Award. The decision of the

[3] The land registers for the Property are at pages 377-404 of the record of appeal.

mediator was final, binding and unappealable.[4] The respondent was once again free to deal with his charges without having to re-register them in the land register in Anguilla. These conclusions are similar to the findings by the learned trial judge in the Hickox Action but they are not based on those findings.

Summary and conclusion of the appeal

[30] In summary, I find that the learned master was entitled to consider the judgment of the trial judge in the Hickox Action but he erred in interpreting the judgment as finding that the Settlement Agreement became spent. As a result, his conclusion that the respondent did not breach the Settlement Agreement was based on the wrong premise. However, the respondent ceased to be a Resort Entity within the meaning of the Settlement Agreement as of 16th September 1997 and the mediator, whose decision is final and binding and not appealable, found that the respondent was no longer restricted by clause 19 of the Settlement Agreement and that he was free to register the charges subject only to the requirements of Anguillan law. As a matter of Anguillan law, the respondent was not required to re-register the charges in order to exercise his powers of sale as a chargee.

[31] I have come to the same conclusion as the learned master, albeit by a different route, that the answer to the first preliminary issue is that the respondent did not breach the Settlement Agreement by exercising his power of sale under the charges by selling the Property by public auction on 2nd May 2012.

[32] I would dismiss the appeal. The master awarded the costs of the proceedings in the court below to the respondent to be assessed if not agreed. There is no appeal against this order and I would therefore award the costs of the appeal to the respondent at the rate of two-thirds of the costs awarded in the lower court.

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[4] See the final page of the Final Award at page 040 of the record of appeal.

[33] The respondent counter-appealed against the learned master's decision to answer the second preliminary issue by finding that the appellant was not estopped from bringing the claim against the respondent or claiming damages for loss as a result of the sale of the Property.

Background

[34] The counter-appeal takes us into the period following the auction sale of the Property in 1997. On 9th April 2008 three agreements were executed:

(i) The appellant, who then owned all the shares in LIR, sold those shares to CJPL. The agreement for purchase and sale recognised and incorporated the Hickox Charges.

(ii) CJPL, its holding company Cap Juluca Holdings Limited ("CJHL"), LIR and MBM entered into an indemnification and release agreement with the appellant by which they agreed to indemnify the appellant against any loss or damage that the appellant may sustain to the extent that it arises out of certain named liabilities in the agreement including the Friedland Charge and the Hickox Charges.

(iii) A deferred consideration agreement between CJPL and the appellant's affiliate, Dion Friedland Ltd ("DFL"), by which DFL agreed that CJPL, its affiliates and representatives, would have sole and exclusive authority to enter into and settle each and every element of the Hickox litigation for any amount without DFL's approval.[5]

[35] In October 2010 LIR, CJPL, CJHL and the respondent entered into a settlement agreement ("the Hickox Settlement Agreement") for the final settlement of the disputes between LIR and the respondent. The Agreement acknowledged the

[5] Clause 4.7 of Deferred Consideration Agreement, p. 117 of Appeal Bundle 1.

Hickox Charges and stipulated that in the event of default in the payment of any sums agreed to be paid by LIR to the respondent, the respondent would be entitled to exercise any and all rights under the security interests which included the Hickox Charges.[6]

[36] Mrs. Small-Davis submitted that the parties to the foregoing agreements acknowledged the existence of the Hickox Charges and that in the event of default, the respondent would be entitled to exercise any and all rights under the said charges. The appellant is therefore estopped from challenging the respondent's exercise of his power of sale that arose from LIR's default in paying the amounts due under the Hickox Settlement Agreement.

[37] I have taken note of the acknowledgement of the existence of the Hickox Charges in some of the agreements and crucially the stipulation in the Hickox Settlement Agreement referred to above that the respondent was free to exercise his rights under the Hickox Charges in the event of default in payment by LIR. However, counsel was faced with the obvious hurdle that the appellant was not a party to the Hickox Settlement Agreement and could not be bound by its terms. Therefore, the appellant could not be estopped from challenging the respondent's sale of the Property by auction pursuant to his powers as chargee under the charges. Counsel's response to this issue appears to be relying on an exception to the privity rule in that the appellant, having agreed (presumably in the Deferred Consideration Agreement) that LIR (which I take to include CJPL, its affiliates and representatives) could settle the Hickox Charges on any terms that it saw fit without his approval, cannot be heard to say that the respondent is not entitled to or is estopped from exercising the power of sale under the charges. In short, the appellant is bound by the stipulation in the Hickox Settlement Agreement even though he is not a party to that Agreement.

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[6] Cause 3.1 of the Hickox Settlement Agreement, p. 331 of Appeal Bundle 1.

[38] The answer to the estoppel plea is quite simple. The appellant was not a party to the Hickox Settlement Agreement and cannot be bound by anything that was agreed by the parties to that agreement. Merely giving CJPL and/or LIR authority to negotiate a settlement is not sufficient to bind the appellant to an agreement that is subsequently made between CJPL, LIR and other persons. Further, there is no evidence of reliance on any representation by the appellant or detriment suffered by the respondent. These are essential elements of estoppel and the principle cannot be "stretched", as suggested by Mrs. Small-Davis, to establish a proper estoppel plea. On the facts of this case the plea fails.

[39] I would dismiss the counter-appeal for the reason that the appellant was not estopped from bringing the claim against the respondent and claiming damages.

Orders

[40] I would make the following orders:

(1) The appeal is dismissed and the order of the learned master is confirmed.

(2) Costs of the appeal to the respondent at the rate of two-thirds of the amount awarded in the lower court.

(3) The counter-appeal is dismissed with costs to the appellant to be assessed if not agreed within 28 days of the date of this order.

I concur.
Mario F. Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar