Hilary Term
[2021] UKPC 3
Privy Council Appeal No 0081 of 2019

JUDGMENT

Friedland (Appellant) *v* Hickox (Respondent) (Anguilla)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Anguilla)

before

Lord Lloyd-Jones
Lady Arden
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON

1 February 2021

Heard on 17 and 18 November 2020

Appellant	*Respondent*
David Phillips QC J Alex Richardson Amanda Lee (Instructed by Seymours Solicitors)	Tania’ania Small Davis (Instructed by Axiom Stone Solicitors)

LADY ARDEN: (with whom Lord Lloyd-Jones, Lord Burrows and Lord Stephens agree)

THE KEY ISSUE ON THIS APPEAL

1. This is the latest round in long-running litigation between Mr Dion Friedland and Mr Charles Hickox, and/or their associates and companies. The present dispute is between Mr Friedland and Mr Hickox alone. The full story is lengthy and only a small part of it is needed for the limited issues which arise on this appeal, which are issues of law.

2. This appeal is against an order made by the Eastern Caribbean Court of Appeal ("the ECCA") (Michel, Thom and Webster JJA) dated 18 January 2018. The key issue is whether Mr Hickox was prohibited by obligations imposed by awards made by a mediator pursuant to an agreement dated 6 May 1996 ("the Settlement Agreement") from enforcing certain charges ("the Hickox charges").

3. For the reasons given in this judgment, which are essentially the same as the reasons given by the ECCA, the Board dismisses the appeal.

THE SETTLEMENT AGREEMENT: BACKGROUND AND RELEVANT PROVISIONS

4. Mr Friedland headed a group of companies known as the Friedland group, which acquired the shares of Leeward Isles Resorts Ltd ("LIR") in March 1981. In October 1986 the Friedland group sold the shares in LIR to a limited partnership, HBLS, in which Mr Hickox was interested, for a sum to be paid by instalments secured by a pledge of the LIR shares. Mr Hickox was a shareholder in HBLS, LIR and a third company, Maundays Bay Management Ltd, an Anguillan company ("MBM"). After the sale, MBM ran the resort known as the Cap Juluca resort ("the resort").

5. Over the period 1986 to 1996, Mr Hickox advanced moneys to LIR for the purposes of its business. In January 1997, Mr Hickox took three charges, being the Hickox charges, to secure the repayment of those moneys over the leasehold interest in the resort owned by LIR. Mr Hickox presented them for registration in the land registry of Anguilla.

6. In normal circumstances, the Hickox charges would, by virtue of the Registered Land Act of Anguilla ("the RLAA"), have had priority over other charges on the same property as from the date of presentation for registration (RLAA, section 41(1)). However, the High Court can rectify the registered particulars of a charge (RLAA, section 146(1)). By order dated 8 July 2008, as hereinafter appears, the High Court of Anguilla post-dated the date of registration of the Hickox charges to 16 September 1997 ("the deemed priority date").

7. In September 1990, HBLS defaulted on the instalments due to the Friedland group. Litigation ensued in New York, and HBLS filed for Chapter 11 bankruptcy in the Bankruptcy Court for the Southern District of New York ("the Bankruptcy Court"). Through a mediator approved by the Bankruptcy Court, HBLS and the Friedland group reached a settlement of their litigation on the terms set out in the Settlement Agreement. The bankruptcy case was subsequently closed but the Board does not have the precise date for this.

8. The Settlement Agreement designates HBLS, LIR and MBM as the "Resort Entities". The parties agreed the amount outstanding for the sale of the LIR shares and the funds which HBLS would use to pay these amounts. The Friedland Group would be entitled to security over the LIR shares and those of MBM for the amounts owed to it by HBLS.

9. Under the Settlement Agreement, the Friedland Group obtained the right to acquire a new charge over LIR's leasehold interest in the resort, but this was expressly subject to certain existing charges to secure loans reflected in its financial statements prior to 31 December 1994, including security granted to Mr Hickox (article II, para 6c). The Friedland group did not exercise this right, but the right is significant for two reasons. First, it contains some of the references in the Settlement Agreement to Mr Hickox's loans to LIR. Second, it explains the presence in the Settlement Agreement of article IX, para 19 ("the anti-dilution clause"). This provided that the Resort Entities and their equity holders were prohibited from "intentionally [undertaking] any action which would adversely affect or diminish any right or interest granted to the Friedland group pursuant to the settlement agreement". Those rights undoubtedly included the right to take further security in the form of a charge over LIR's leasehold interest in the resort. There were other rights, such as the right of first refusal if HBLS chose to sell its LIR shares.

10. The Settlement Agreement provided for the mediator to adjudicate on any dispute between the parties arising from the Settlement Agreement and that his decision should be final and binding and non-appealable. The mediator had to implement the spirit and intent of the parties when interpreting the Settlement Agreement and resolving any disputes thereunder (article IX, para 17).

11. The Resort Entities defaulted on payments due under the Settlement Agreement. The mediator agreed to hear certain disputes, including the question whether Mr Hickox had acted in breach of the Settlement Agreement when he registered the Hickox charges in January 1997.

12. The mediator issued a Final Award dated 12 November 1997 in favour of the Friedland group. In particular, the mediator decided that the registration of the Hickox charges was a violation of the Settlement Agreement and that Mr Hickox should be subject to the sanction that he could not enforce the charges and was confined to his rights as an unregistered charge holder. The mediator rejected an argument that the Friedland group was entitled to be repaid the amount due to it before Mr Hickox enforced the Hickox charges if he was entitled to do so under the applicable law, observing parenthetically and without further elaboration that Mr Hickox "is not now an 'insider'".

13. The mediator sold the shares in LIR which had been lodged as security under the Settlement Agreement by public auction. The successful (and only) bidder for the LIR shares was Mr Friedland. The date of the closing was 16 or 17 September 1997 ("the stock sale date"). At that point, the Resort Entities and their equity holders no longer had any interest in the LIR shares and it would seem to follow that the reason for the anti-dilution clause in relation to any right which the Friedland group had in relation to that company fell away.

14. On 10 June 1998, Mr Friedland obtained a deficiency judgment in the Bankruptcy Court against LIR, HBLS and MBM for $4,378,820.53 with interest accruing, being the sum secured on the LIR shares but not recovered on their sale.

15. The mediator on 27 July 1998 issued a further award, called the Amplification Award, which critically enlarges on the sanction imposed by the Final Award.

THE AMPLIFICATION AWARD

16. In the Amplification Award, the mediator held as follows:

> "So as to avoid any misinterpretation of the Mediator's Final Award dated November 13, 1997, the following amplification is submitted:
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> > 1. The parties (including Mr Dion Mr Friedland and Mr Charles Hickox) are hereby directed to submit promptly a

copy of this amplification in any legal proceedings in Anguilla which concerns or relates to the Mediator's Final Award and/or Mr Hickox's charges on Leeward Isles Resort Ltd's ("LIR") leasehold interests.

2. [*Sentence 1*:] The Mediator has previously determined that the registration of the charges by Mr Hickox in Anguilla violated the May 6, 1996 Settlement Agreement. [*Sentence 2:*] More specifically Mr Hickox violated article IX, para 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.[*Sentence 3:*] 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. [*Sentence 4:*] Accordingly, Mr Hickox's status with respect to the charges that he holds is to be deemed that of an unregistered charge holder. [*Sentence 5:*] Specifically, Mr Hickox may not seek to rely on the prior registration of his charges for any purpose.

3. [*Sentence 1*:] As a result of the payment default by the Resort Entities, the Mediator, acting as collateral agent and pursuant to an Order Approving Sale Procedures and Authorizing Sale, dated September 11, 1997, entered by the United States Bankruptcy Court for the Southern District of New York, conducted a sale of the shares of LIR and Maunday's Bay Management Limited (collectively, such shares are referred to as the "Collateral"). [*Sentence 2*:] As a result of receiving only one initial bid, a bid from the Friedland Group, the Collateral was sold to the Friedland Group. The closing took place on September 17, 1997.

4. [*Sentence 1:*] As a result of the closing, Mr Hickox was no longer an equity holder of LIR. [*Sentence 2:*] Therefore, effective September 17, 1997, the Settlement Agreement no longer prohibited Mr Hickox from registering his charge. [*Sentence 3:*] 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.

> 5. The Mediator has not and does not opine here on Anguillan law." (sentence numbers inserted)

17. In these proceedings, Mr Friedland contends that the Amplification Award imposes a permanent ban on Mr Hickox from enforcing the Hickox charges before he actually re-registers the Hickox charges. He claims damages for breach of contract.

THE FIRST ANGUILLAN PROCEEDINGS: THE COURT ESTABLISHES THE DEEMED PRIORITY DATE FOR THE HICKOX CHARGES

18. Mr Hickox then sued LIR on promissory notes relating to the loans which he had made to it. Mr Friedland was not a party to these proceedings. In its defence LIR contended that it had not duly authorised the loans and that the loans and charges in support were void. Those charges were the Hickox charges. On 8 July 2008, George Creque J (as she then was) held that LIR had not duly authorised the first two loans and that the first two Hickox charges were accordingly void. LIR counterclaimed that Mr Hickox violated the anti-dilution clause by registering the Hickox charges. The judge expressly referred to the Final Award, and the Board considers it more likely than not that in the light of paragraph 2 of the Amplification Award and the fact that the order of the judge identifies the stock sale date, the judge also saw that Award. She went on to direct that the registration date should be the deemed priority date:

> "By Order dated May 7 1998, the New York court confirmed the Final Award of the Mediator dated 12 November 1997 in which he found that 'the registering of the charge in favour of Mr Hickox on LIR's leasehold interest, after the Settlement Agreement was executed by the parties constituted a violation of the terms, spirit and intent of the Settlement Agreement including but not limited to para 19 of the Settlement Agreement.'
>
> 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." (para 118)

19. On appeal, the ECCA reversed the judge's order on the loan transactions which the first two Hickox charges secured, which meant that those charges were in law valid charges. There was therefore a window of time between 8 July 2008 and 22 March 2010 when only one of the Hickox charges could be enforced. There is on the face of it a lacuna in the order of the ECCA because it did not go on to make consequential orders reversing the judge's order setting aside the first two Hickox charges and amending the date of registration of these two charges in line with the order of George Creque J of 8 July 2008. The ECCA stated that the appeal against her order in relation to the charges had been abandoned. On this appeal, Mr David Phillips QC, appearing for Mr Hickox, made an attempt at a late stage in his reply to argue that Mr Friedland's claim for damages for breach of contract should be remitted because it appeared that Mr Hickox must have relied on the first two Hickox charges as well as the third Hickox charge when he sold the leasehold interest belonging to LIR and that he must therefore have relied on the original registration date of January 1997, which would be in breach of paragraph 3 of the Amplification Award. The Board declines leaves for this point to be raised at this stage. This is a new point and it enlarges the basis on which Mr Friedland claims damages for breach of the contract contained in the Settlement Agreement. Moreover, the Board has not been given any reason to doubt that the ECCA would have made the consequential orders if it had been asked to do so. Finally, Mr Friedland could have made this point ten years ago but has not done so and his inaction supports the respondent's submission, which the appellant did not gainsay, that the parties have proceeded until now on the basis that the registration of all the Hickox charges was to be treated as effective as of 16 September 1997. The Board accordingly proceeds on the same basis. As a separate and minor point, it is not clear whether the correct date should have been 16 or 17 September 1997, but nothing turns on that point.

2012: THE BANKRUPTCY COURT REFUSES MR FRIEDLAND'S APPLICATION TO REOPEN THE US BANKRUPTCY CASE TO DETERMINE WHETHER MR HICKOX STILL PREVENTED FROM ENFORCING THE HICKOX CHARGES

20. Mr Friedland did not, however, accept that Mr Hickox could enforce the Hickox charges at all and the point is important to him because he is entitled to a charge ("the Friedland charge") executed on 24 October 2003 by LIR to secure the Deficiency judgment and registered against the same property. Mr Friedland claims that Mr Hickox is permanently prevented by an award made by the mediator under the Settlement Agreement from enforcing the Hickox charges unless he actually re-registers them, which he had not done. If this argument succeeds, the Friedland charge will have priority over the Hickox charges.

21. Mr Friedland sought the determination of this dispute by the mediator in the Bankruptcy Court but on 17 April 2012 Judge Lifland, the Chief Judge of that Court, denied his motion to reopen the bankruptcy case for this purpose. Judge Lifland noted the order of George Creque J of 8 July 2008, adding that "after years of litigation on

issues relevant to the Motion Anguillan courts have, based on the mediator's Amplification [Award], given effect to the charges as of the stock sale date and have not required Hickox to re-file the charges". He ruled that the courts of Anguilla were able to deal with the issues. He held that the case which Mr Friedland proposed to put forward was without merit and certain to fail as the courts of Anguilla had held that it was not necessary for the charges to be re-registered and simply amended the date of registration of the charge.

22. In the opinion of the Board, Judge Lifland must therefore have been satisfied that the proceedings in the High Court of Anguilla had dealt with the matter correctly so far as the Final Award and the Amplification Award were concerned.

23. On 2 December 2012 in reliance on the Hickox charges Mr Hickox sold LIR's interest in the Cap Juluca Resort for sums said by Mr Friedland to be $50m and by Mr Hickox $13m.

MR FRIEDLAND COMMENCES THE SECOND ANGUILLAN PROCEEDINGS TO ESTABLISH A BAN ON MR HICKOX ENFORCING THE HICKOX CHARGES WHICH IS REJECTED BY THE ECCA

24. On 24 May 2012, Mr Friedland commenced these proceedings against Mr Hickox claiming damages for breach of the Settlement Agreement by virtue of the enforcement of the Hickox charges. By order dated 29April 2016, Master Glasgow directed the trial of preliminary issues, including the issue whether Mr Hickox was prevented by the terms of the Settlement Agreement from enforcing the Hickox charges.

25. At the trial of this issue, Master Ventose held that because of the sale to the Friedland group the Settlement Agreement was no longer in existence as from the stock sale date. Mr Friedland appealed to the ECCA.

26. Dismissing the appeal, but disagreeing with the Master on the question whether the Settlement Agreement had become spent, the ECCA held that there had been a breach of the anti-dilution clause but that the Settlement Agreement had ceased to have effect after the sale to Mr Friedland so that Mr Hickox could enforce the Hickox charges. The ECCA considered that this was in accordance with the Amplification Award. Paragraph 3 of the Amplification Award merely recorded the position in the Final Award. Paragraph 5 of the Amplification Award addressed the consequence of a change in circumstances. The ECCA rejected the argument that Mr Hickox still had to re-register the Hickox charges. There was no need for actual re-registration.

APPEAL TO THE BOARD TO ESTABLISH THE BAN

27. Mr Phillips submits that the ECCA was wrong in its interpretation of the Amplification Award. It made a material error of fact because its reasoning suggested that Mr Hickox was released from the anti-dilution clause only after the date of the Final Award, and that that had been a reason for the Amplification Award. Mr Hickox had in fact been released from the anti-dilution clause by reason of the sale of the LIR shares before the issue of the Final Award.

28. Mr Phillips further submits that under sentence 5 of paragraph 3 of the Amplification Award there was a permanent bar on enforcing the Hickox charges. It precluded Mr Hickox from relying on the Hickox charges for any purpose without re-registration. Re-registration had not happened. All that happened was that the court made an order deeming the date of the charges to be 17 September 1997. This was not the same as re-registration and was not sufficient.

29. Mr Phillips laid great emphasis on the use of the present tense in the penultimate sentence of paragraph 5 of the Amplification Award. He submits that that Award was speaking about the status of the Hickox charges at the date of that Award, which was after the stock sale date.

30. Ms Tana'ania Small Davis submits that the ECCA was correct in its interpretation. They made no error of fact because they were not saying that the Amplification Award was issued because there had been a change of circumstances after the issue of the final award.

31. Moreover, all the mediator had done was to prevent reliance on the prior registration of the charges. It was still open to Mr Hickox to rely on the Hickox charges as they no longer had any priority by virtue of their registration on a date prior to the sale to Mr Friedland of the shares of LIR.

OPINION OF THE BOARD

32. The Board agrees with the decision of the ECCA for the following reasons:

(1) No error of fact: the ECCA did not make an error of fact as to the reason for the Amplification Award

33. The Board takes the view that the ECCA did not erroneously consider that the sale of the LIR shares to Mr Friedland occurred after the Final Award. It had indeed

earlier in its judgment disagreed with the ruling of the Master that the Settlement Agreement had become spent on the sale of the LIR shares to Mr Friedland, and so it was well familiar with the correct sequence of events.

(2) Amplification Award to be read as a whole: the bar on registering the Hickox charges was not permanent and expired on the sale of the LIR shares on the stock sale date

34. The Board rejects the submission that paragraph 3 of the Amplification Award imposed a permanent ban on enforcing the Hickox charges. In the opinion of the Board, the Amplification Award must be interpreted as a whole and therefore paragraph 3 of that award has to be interpreted in the light of the specific permission given by paragraph 5 to Mr Hickox to rely on charges registered after the stock sale date. The process of interpretation is not properly carried out unless both provisions are given effect in law.

35. The Board is also satisfied that, when George Creque J amended the registration date of the charges, she chose the date of 16 September 1997 on the basis that this would meet the conditions in para 5 of the Amplification Award and that it would enable Mr Hickox to enforce the Hickox charges. In addition, since her order affected the registered particulars of the third charge at the land registry, it would affect Mr Friedland even though he was not party to the first Anguillan proceedings.

36. Mr Phillips submits the judge's order operated only in public law and it did not alter the obligations in private law constituted by the terms of the Amplification Award. The Board does not accept this submission for the reasons already given.

37. Further, in the judgment of the Board, Mr Phillips' submission could only succeed if there was any reliance on the prior registration. That would have entailed reliance on a priority date in January 1997. Mr Hickox did not rely on this date but on the deemed priority date. There was no obligation preventing reliance on the Hickox charges as such. On the contrary the Amplification Award recognised that even if the charges were unregistered the holder of the charges would have the rights of an unregistered chargee. Therefore, Mr Hickox was always able to rely on the charges. What the Amplification Award prohibited him from relying on was the date of registration if this preceded the stock sale date. In the light of the order of George Creque J, this is not what happened.

(3) The Amplification Award is concerned with substance, not form: para 3 of the Amplification Award is not directed to the formalities of registration if a suitable deferred priority date has been achieved

38. In the opinion of the Board the concern of the mediator was one of substance and not of form. In framing the sanction, the evident purpose of the mediator was to deprive Mr Hickox of the benefit of premature registration of the Hickox charges. This was prevented by the order of George Creque J dated 8 July 2008. Mr Hickox no longer had any right to rely on the priority date obtained by his premature registration of the Hickox charges. It was immaterial whether he had resubmitted his charge for registration. What was material was the priority date of the Hickox charges after the stock sale date.

39. Registration is merely the outward manifestation of the priority attaching to a charge. Registration in January 1997 was found by the mediator to have interfered with the Friedland group's rights under the Settlement Agreement because of the priority it gave. Registration is not, however, controlled solely by the date of filing the charge: under the RLAA it can be amended by the High Court of Anguilla in an appropriate case. It was so amended in this case.

40. Like Judge Lifland and George Creque J, the Board takes the view that the anti-dilution clause has to be interpreted in the light of its role of supporting the Friedland group's rights under the Settlement Agreement, specifically its rights in respect of its security over the LIR shares. Once this security was enforced, the rights of the Friedland group were transferred to the proceeds of realisation and the anti-dilution clause ceased to apply.

41. Thus the anti-dilution clause had no currency after that date. Even if it had, it did not require the physical re-registration where the order of the High Court of Anguilla achieved the same effect and produced no detriment to the Friedland group other than in respect of its claim that the ban had been permanent. This is confirmed by the judgment of Judge Lifland.

42. Even in the absence of that judgment, the Amplification Award is not, in the Board's opinion, to be interpreted as imposing an obligation on Mr Hickox actually to re-register his charges. The difference between what happened and what would have happened if he had re-registered the Hickox charges is simply that he would have to have invited the land registry of Anguilla to cancel the registration of the Hickox charges and to re-present them for registration. The Amplification Award simply prohibited reliance on registration prior to the stock sale date. Because of the order of the George Creque J, that was no longer possible.

(4) Use of tenses: the use of the present tense in paragraph 3 of the Amplification Award is appropriate to the retrospective analysis of the position there

43. As to the use of the present tense in sentence 3 of paragraph 3, the Board analyses the position as follows. Paragraph 3 addresses the legal status of the Hickox charges as a result of the terms of the Final Award. By contrast, paragraph 5 of the Amplification Award addresses the position in the events which had happened.

44. Mr Phillips argues that Mr Friedland was not a party to the action which led to the judgment in 2008. That is so, but the order which the judge made amending the date of the registration of the Hickox charges resulted in an alteration to the land register which affects all persons, not just those who are parties to the action. This order made it possible for Mr Hickox to enforce the charges as against Mr Friedland and without violating the terms of the Settlement Agreement. Mr Friedland cannot now argue that those charges were registered as of the January 1997 at the time when they were enforced. Reliance on these charges is therefore no longer prohibited by para 3 of the Amplification Award.

JUDGMENT OF LORD SALES

45. Since the circulation of this judgment in draft, the Board has received and considered the judgment of Lord Sales. The Board is grateful to him but do not consider that his reasoning affects its conclusions. The principal points the Board would respectfully make are as follows. Lord Sales agrees that Mr Hickox would not have been in breach of contract by re-registering the charges after 17 September 1997: but under Anguillan law that is what he is deemed to have done. He was therefore not relying, in breach of contract, on the prior registration in January 1997: rather he was relying, as he was contractually entitled to do, on being a registered holder of the charges after 17 September 1997. The Board does not consider that it is open to it to consider whether the order of George Creque J was outside her powers. Her order has not been set aside or varied, and therefore stands: see *Smith v East Elloe Rural District Council* [1956] AC 736 at 769 per Lord Radcliffe. The terms of the order are clear, and as its effect is to amend a public register on which rights of priority depend, it operates in rem. (Even if it had not amended the register, it would still be binding on the parties). There was no suggestion that the register could not now be rectified to give effect to that order, if it is unimplemented. The Board accepts that a party may by contract prevent itself from relying on an order of the Court made in its favour but, for the reasons explained above, the Board does not consider that there was, in the events which happened, a breach of the Settlement Agreement as explicated in the Final and Amplification Awards. The Board does not criticise either party for delay in enforcing their rights. The point was not argued but it is possible that Mr Friedland was unable to take up his entitlement under the Settlement Agreement to a charge over LIR's leasehold interest in the resort because it would have constituted unlawful financial

assistance by it (an Anguillan company) contrary to section 54(1)(b) of the Companies Act c65 of Anguilla.

CONCLUSION

46. The Board will therefore humbly advise Her Majesty that this appeal should be dismissed.

LORD SALES: (dissenting)

47. Unfortunately, for the reasons I explain below, I am not able to agree with the majority's view.

48. It is common ground between the parties that the mediator's Final Award dated 12 November 1997 and his Amplification Award dated 20 July 1998 have binding contractual effect. It is also common ground that although the proper law of both awards is New York law, which is the proper law of the Settlement Agreement, for the purposes of this appeal they are to be construed in accordance with principles of English law, which in this respect is the same as the law of Anguilla. The appeal turns on the proper interpretation of the Amplification Award, construed in light of the Final Award.

49. Simplifying somewhat, the background to the Settlement Agreement was that in 1991 entities associated with Mr Hickox ("the Hickox entities") had purchased Leeward Isles Resorts Ltd ("LIR") from entities associated with Mr Friedland ("the Friedland Group"), with the purchase price to be paid in instalments secured against a pledge of the shares of LIR.

50. In the period to 1996 Mr Hickox made loans to LIR to assist in the development of its business.

51. The price for the LIR shares was not paid, so the Friedland Group sued for the outstanding amount and sought to enforce their security rights in New York. This was resisted by Mr Hickox arranging for the principal Hickox entity, HBLS, to file for Chapter 11 bankruptcy protection. The bankruptcy court in New York referred the proceedings to a court appointed mediator. Under his auspices, on 6 May 1996 the parties entered into the Settlement Agreement. Under that agreement, the balance of the purchase price for the LIR shares was to be paid in agreed instalments and the LIR shares were to be held by the mediator as collateral. In addition, by article II para 6(c) of the Settlement Agreement, the Friedland Group was given the right to take a charge

over LIR's leasehold property comprising the Cap Juluca resort ("the LIR lease"). For reasons which were not explained, the Friedland Group did not exercise that right.

52. In the Settlement Agreement, LIR and certain companies involved in running the Cap Juluca resort were defined as "the Resort Entities". Article IX para 19 of the Settlement Agreement was an anti-dilution provision which stated, "neither the Resort Entities nor their equity holders shall intentionally undertake any action which will inadvertently affect or diminish any right or interest granted to the Friedland Group pursuant to this Settlement Agreement." At the date of the Settlement Agreement Mr Hickox was an equity holder in relation to the Resort Entities and as such was a party to that agreement and was accordingly bound by this provision. Article IX para 17 provided for the mediator to have wide jurisdiction to make orders binding on the parties to resolve disputes arising between them.

53. At the date of the Settlement Agreement, LIR had not granted Mr Hickox any charge in respect of his loans to the company. He was an unsecured creditor so far as they were concerned.

54. The Resort Entities failed to pay the price instalments due under the Settlement Agreement.

55. In January 1997 Mr Hickox arranged for LIR to grant three charges over the LIR lease as security for his loans to the company made previously ("the Hickox charges"). On 9 January 1997 he registered those charges at the Land Registry. According to Anguillan law as set out in Registered Land Act, registration of a charge in respect of property gives that charge priority as a security interest as against the holders of subsequent charges which may be granted in respect of the same property. As the mediator later ruled, the registration of the Hickox charges in January 1997 was done in breach of Mr Hickox's obligation under article IX para 19 of the Settlement Agreement.

56. The Friedland Group brought proceedings in New York for the balance of the sums due under the Settlement Agreement. The collateral comprising the shares in LIR was put up for auction by the mediator and on 17 September 1997 they were purchased by Mr Friedland. At this point Mr Hickox ceased to hold equity in any of the Resort Entities and so was no longer bound by article IX para 19 of the Settlement Agreement.

57. On 10 June 1998 Mr Friedland obtained a judgment in his favour in the New York proceedings against the Resort Entities (including LIR) for US $4,378,820.53, representing the sums remaining due to him under the Settlement Agreement ("the Deficiency Judgment").

58. In the meantime, the Friedland Group made a complaint to the mediator under the dispute resolution provision in the Settlement Agreement regarding an alleged breach by Mr Hickox of article IX para 19 in registering the three Hickox charges and seeking an order to restrain him from pursuing his remedies as chargee.

59. On 12 November 1997 the mediator issued his Final Award in relation to this complaint. The first three findings in the Final Award are relevant:

> "On Issue No 1 the Mediator finds that the registering of charges in favor of Charles Hickox on LIR's leasehold interest, after the Settlement Agreement was executed by the parties, constituted a violation of the terms, spirit and intent of the Settlement Agreement, including but not limited to [article IX para 19] of the Settlement Agreement.
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> On Issue No 2 the Mediator finds that the appropriate sanction to be imposed upon Charles Hickox for violating the Settlement Agreement is to enjoin Charles Hickox from pursuing his remedies as a registered Chargee under Anguillan law, and to permit him to instead take legal action to collect the indebtedness, if any, owed to him by the Resort Entities only as an unregistered Chargee.
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> On Issue No 3 the Mediator finds that the Settlement Agreement does not require that the Friedland Group be paid in full on the Claim [ie for the outstanding sums due under the Settlement Agreement] prior to Charles Hickox (who is not now an 'insider') taking legal actions to collect the indebtedness, if any, owed to him by the Resort Entities. To the extent that Charles Hickox is permitted, under applicable law, to proceed with a foreclosure action as an unregistered Chargee, the Mediator finds that the Settlement Agreement does not require that the Friedland Group be paid in full on the Claim prior to Charles Hickox being paid. The Mediator finds that each party should be paid, in these circumstances, in accordance with requirements of whatever law is deemed applicable to that action."

60. The description of Mr Hickox as not now being an "insider" is a reference to the fact that by virtue of his having ceased to own shares in LIR he had ceased to be associated with the Resort Entities which owed the balance of the sums due under the Settlement Agreement and had therefore ceased to be bound by article IX para 19 of that agreement. However, the mediator's ruling on Issue No 2 was based on the fact that in January 1997, when he registered the Hickox charges, Mr Hickox had been bound

by that provision and had acted in breach of it. By that ruling, Mr Hickox was restrained from pursuing remedies available to him under Anguillan law arising from his registration of the charges. The effect of this was that Mr Hickox was subject to a contractual obligation owed to the members of the Friedland Group, including Mr Friedland, prohibiting him from relying on rights of priority he had in Anguillan law by virtue of such registration.

61. Mr Hickox maintained that the Final Award was not clear in its effect. He sought clarification of the award from the mediator. This resulted in the mediator issuing the Amplification Award dated 20 July 1998. Lady Arden has set out the terms of that award at para 16 above.

62. In my view, paragraph 1 of the Amplification Award makes it clear that the mediator did not intend to change the effect of the Final Award he had made. Rather, he intended to confirm its effect by making clear what he had ordered in that award and explaining what he had intended to achieve by it. The remainder of the Amplification Award confirms that this is the case.

63. The Amplification Award contains (i) text to explain the background to and the mediator's thinking in making the Final Award and (ii) text comprising the operative part of the Amplification Award itself, imposing (in fact, reiterating) specific obligations on Mr Hickox which have binding contractual force. In my view, the first part of paragraph 3 of the Amplification Award (sentences 1, 2 and 3, as listed by Lady Arden) and paragraphs 4 to 6 of that award comprise category (i) and the last part of paragraph 3 (sentences 4 and 5) constitutes category (ii).

64. Sentences 1 and 2 of paragraph 3 of the Amplification Award referred to the mediator's ruling in the Final Award that Mr Hickox had acted in breach of article IX para 19 by registering the Hickox charges. Sentence 3 explained the mediator's intention in making the Final Award, namely that Mr Hickox should be deprived of the advantage he obtained by registering the charges in breach of his obligation under article IX para 19 and should be returned to the position he had been in vis-à-vis LIR and the Friedland Group as at the date of the Settlement Agreement, when he did not have the benefit of holding registered charges over LIR's lease in respect of his loans to LIR. As appears from sentence 4, the mediator assumed in Mr Hickox's favour that LIR had already granted Mr Hickox the Hickox charges by that date. According to the explanation of the facts given to the Board, this is not correct; but it does not matter for present purposes.

65. Sentences 4 and 5 contain the operative part of the Amplification Award, so I set them out here:

> "Accordingly, Mr Hickox's status with respect to the charges that he holds [ie the Hickox charges] 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." (Emphasis supplied)

66. In my view, by these sentences the mediator reiterated the effect of the order he had made in his ruling on Issue No 2 in the Final Award, which restrained Mr Hickox from taking advantage as against the members of the Friedland Group of his registration of the Hickox charges in January 1997. As at the date of the Amplification Award there had been no further act of registration by Mr Hickox, so as at that date (see the mediator's use of the present tense in sentence 4), as a matter of obligation between Mr Hickox and the Friedland Group, Mr Hickox was to be deemed to have the status of an unregistered charge holder in relation to the Hickox charges (sentence 4). The effect of that obligation was further spelled out in sentence 5: Mr Hickox was restrained, as a matter of contractual obligation, from seeking to rely "on the prior registration" of the Hickox charges "for any purpose." The reference to "the prior registration" is a reference to the registration effected in January 1997, as the use of the definite article makes clear: as the mediator knew, there had been no other act of registration.

67. Paragraph 4 of the Arbitration Award recited the background to Mr Friedland's acquisition of the shares in LIR in the auction held by the mediator in September 1997. Paragraph 5 explained the effect this had on Mr Hickox's obligations: as a result of that acquisition, Mr Hickox ceased to be an equity holder of LIR (sentence 1) and therefore, as of 17 September 1997, the Settlement Agreement (ie article IX para 19 thereof) "no longer prohibited Mr Hickox from registering his charge[s]". This, of course, did not change the fact that Mr Hickox had registered the Hickox charges at a time when he was prohibited by that provision from doing so. Sentence 3 then explained the current position as at the date of the Amplification Award: "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" (emphasis supplied).

68. In my respectful opinion, the meaning of paragraph 5 is clear. Prior to 17 September 1997 Mr Hickox was subject to a contractual obligation not to register the Hickox charges. From 17 September 1997, he was no longer subject to that obligation. None of this changed the facts that his act of registration of the Hickox charges in January 1997 had been in breach of that obligation and that there had been no subsequent act of registration (even though, on a proper understanding of his rights, he had been free from 17 September 1997 to register them). In sentence 3, therefore, the mediator explained that as at the date of the Amplification Award (hence his use of the present tense) Mr Hickox remained free to register his charges, ie with all the usual consequences that registration would have. In this way, the mediator explained that although in paragraph 3 of the Amplification Award he continued the restraining order

already issued against Mr Hickox in the Final Award, that order was confined to the registration he had effected in January 1997 and Mr Hickox was free as at the date of the Amplification Award (20 July 1998) to register the Hickox charges.

69. Mr Hickox, however, did not take steps after the Amplification Award explained all this to effect a new registration of the Hickox charges on which he would be entitled to rely against the members of the Friedland Group. There would have been no difficulty in him applying to the Land Registrar to delete the registration of 9 January 1997 and then applying for a new registration (ie one which would take effect with a new priority right). As with the omission of the Friedland Group to exercise its rights at an earlier stage to register a charge against the LIR lease (see para 51 above), the reason for this was not explained to the Board. It appears that both sides slept on their rights at critical points in the history. They have to bear the consequences of that.

70. In October 2003, Mr Friedland registered a charge in his favour over the LIR lease to secure payment of the sums still owed to him pursuant to the Deficiency Judgment.

71. The position at this stage can therefore be summed up as follows: (i) LIR had granted the Hickox charges in favour of Mr Hickox to secure his previous loans to the company and they appeared on the public Land Register with a priority date of 9 January 1997; (ii) Mr Hickox was subject to an order of the mediator, having contractual effect against him as between himself and Mr Friedland, that Mr Hickox was to be deemed to be an unregistered charge holder in respect of those charges and was prohibited from seeking to rely on the registration of his charges in January 1997 for any purpose; and (iii) Mr Friedland had registered a charge over the LIR lease to secure the sums due under the Deficiency Judgment.

72. Mr Hickox had not been ordered to de-register the Hickox charges, and did not do so. He therefore enjoyed as against the world all the benefits, including the priority benefits, which registration of a charge on the public Register secures for the charge-holder under the Registered Land Act. However, there is no conceptual difficulty about a person who has such rights as against the world assuming a contractual obligation to a particular person not to exercise or take advantage of those rights against him. As regards Mr Hickox's rights against the world arising by reason of his registration of the Hickox charges on 9 January 1997, by virtue of the Final Award and paragraph 3 (sentences 4 and 5) of the Amplification Award Mr Hickox was subject to such a contractual obligation in relation to Mr Friedland. As against Mr Friedland, Mr Hickox was not entitled to assert any priority in relation to security over the LIR lease arising as a consequence of the act of registration on 9 January 1997 of his security in the form of the Hickox charges.

73. Mr Hickox did not effect any registration of the Hickox charges after 17 September 1997, from which date he was no longer contractually bound by article IX para 19 to refrain from registering them. As between himself and Mr Friedland, there was no obligation preventing him from registering them after that date. Mr Hickox could have registered them after that date, but he did not do so. When Mr Friedland registered his own security over the LIR lease in October 2003, according to the general rights stemming from registration of charges on the Land Register that security ranked behind the Hickox charges which had been registered previously, on 9 January 1997. But as between Mr Hickox and Mr Friedland, Mr Hickox was contractually prevented from asserting any rights based on that prior registration. Therefore, as between the two of them, Mr Hickox could not rely upon the prior registration of his charges and, once Mr Friedland had placed his charge on the Land Register, Mr Hickox was contractually obliged to recognise that Mr Friedland's charge took effect with priority over his charges.

74. In the meantime, in October 1998 Mr Hickox commenced a claim in the High Court in Anguilla against LIR (which since 17 September 1997 had been owned by Mr Friedland: see para 56 above) to recover the loans made by him to LIR. LIR counterclaimed for an order setting aside the registration of the Hickox charges on the basis that the charges had not been authorised and were void. Mr Friedland was not a party to these proceedings and no issue estoppel affecting him arises out of them.

75. In her judgment dated 8 July 2008, George-Creque J upheld LIR's counterclaim in relation to two of the three Hickox charges, but dismissed it in relation to the third. As to the third charge, the effect of para 118 of the judge's judgment is that she accepted the argument by counsel for LIR that LIR was entitled to rely on the obligation of Mr Hickox under article IX para 19 of the Settlement Agreement not to register that charge, as explained by the mediator in the Final Award. The judge observed that this obligation no longer applied after Mr Friedland acquired the shares in LIR. She then reasoned as follows:

> "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 [ie 17 September 1997]."

76. At para 119 the judge set out the orders she made in consequence of this reasoning. At sub-paragraph (5) she set aside the first and second of the Hickox charges and directed the Registrar of Lands to cancel the entries in the Land Register in respect

of them. Sub-paragraph (6) stated, "[t]he 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 16 September, 1997" (it seems that this date is a slip, as it should be 17 September 1997).

77. Mr Hickox appealed. By a judgment dated 22 March 2010 the Eastern Caribbean Court of Appeal allowed his appeal in relation to the first two Hickox charges, holding that they were not unauthorised or void. The position in relation to the third charge was not challenged on the appeal and there was no debate regarding the effect of the Court of Appeal's ruling in relation to the first two charges. The present appeal to the Board has proceeded on the basis that the effect of the Court Appeal's judgment was to restore all the charges to the Land Register on the same footing as the judge had upheld the registration of the third charge, namely that they were "deemed to be effectively registered only as from [17 September 1997]". I agree with Lady Arden that there is no good reason to approach the present appeal on any other basis.

78. Lady Arden says (para 6) that the effect of the judge's order in relation to the third Hickox charge was to rectify the registered particulars of that charge pursuant to section 146(1) of the Registered Land Act. I respectfully doubt that this is correct. Section 146(1) provides, so far as relevant:

> "… the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake."

79. Therefore, the court's power of rectification under that provision is limited to cases in which the court is satisfied that the relevant registration was obtained or made "by fraud or mistake". The judge made no finding that Mr Hickox's registration of the third Hickox charge in January 1997 had been obtained or made by fraud or mistake, and the fact that she was willing to give it some effect indicates that she did not think that it had been. In giving her ruling in relation to the third charge the judge did not direct any rectification of the Land Register (by contrast with her order in relation to the first and second charges, which she had found to be void); nor did she refer to section 146(1); nor does it appear that there was any argument directed to the application of that provision in relation to the third charge. Further, as appears from the entries in the Land Register which we were shown, the date of registration of the third charge never was subject to amendment in the Register, which again suggests that the judge did not order rectification.

80. It seems to me that a better reading of the judge's order in relation to the third charge is that it was deemed as between the parties to the proceedings (LIR and Mr

Hickox) to take effect as a registered charge only from 17 September 1997 as a matter of the contractual arrangements between them. It may have been of relevance to the working out of the rights of LIR and Mr Hickox as between themselves that LIR could hold him to the terms of the Settlement Agreement in this regard.

81. However, I do not think it really matters whether I am right about this or not. In my view, even if Lady Arden is correct in her understanding of the effect of para 118 of the judge's judgment and the order made by her, that would not avail Mr Hickox in the present proceedings, in which Mr Friedland is asserting his contractual rights against Mr Hickox.

82. The contractual rights on which Mr Friedland relies are those based on the Final Award and paragraph 3 (sentences 4 and 5) of the Amplification Award. Mr Hickox was and is contractually bound to treat himself as an unregistered charge holder in relation to the Hickox charges as at the date of that award (sentence 4) and was and is contractually bound not to seek to rely on his registration of the Hickox charges in January 1997 "for any purpose".

83. According to Lady Arden (paras 35-37), the judge's order in relation to the third of the Hickox charges has the effect of constituting a new registration of that charge as on 16 (or 17) September 1997, at a time when Mr Hickox was free of the obligation in the Settlement Agreement which prevented him from registering the charge. It is to be inferred that the Court of Appeal produced the same effect in relation to the first and second Hickox charges. Therefore, Lady Arden says, Mr Hickox is entitled to rely on the courts' orders as amounting to a new registration of the Hickox charges at a time when he was free to register them, giving those charges priority over Mr Friedland's later charge over the LIR lease registered in October 2003.

84. In my respectful opinion, this conclusion does not follow. In my view, even if the effect of the courts' orders was to change the date of registration of the Hickox charges in the Land Register, Mr Hickox still inevitably has to rely on his own wrongful act of registration in January 1997 when seeking to derive benefit from the courts' orders for the purposes of his priority dispute with Mr Friedland. This is for two reasons.

85. First, section 146(1) makes it clear that the court does not have an original power to register a charge where there is as yet no registration of that charge in the Land Register. The power conferred by that provision is for the court to direct that "any registration be cancelled or amended". On this argument, it is the power to amend a registration which is in issue. As regards the third of the Hickox charges, according to the argument, the judge ordered that the existing registration in relation to it should be amended (and the Court of Appeal followed suit and did the same in relation to the first and second charges). But in order for the registration to take effect subject to

amendment, it first had to exist. The only registration in place on which the court's order could operate was the registration effected by Mr Hickox in January 1997. If he seeks to rely on that registration as amended, he has to rely on the registration of the charges in January 1997. But he is contractually prevented from doing this as against Mr Friedland. That is both because as against Mr Friedland that registration is deemed not to exist (sentence 4 of paragraph 3 of the Amplification Award), so Mr Hickox cannot take a position which depends upon it being treated as having existence in amended form; and also because, by sentence 5 of paragraph 3 of that award, Mr Hickox is prohibited from seeking to rely on the registration of the Hickox charges "for any purpose". For Mr Hickox to seek to rely on an amendment to the registration of the Hickox charges taking effect on 17 September 1997 still requires him to rely on his earlier actual registration of the charges, in order that they be amended and given effect in their amended form. That involves Mr Hickox relying on the actual registration of his charges in January 1997 for a purpose, ie the purpose of giving effect to them in amended form, which he is prohibited from doing.

86. Secondly, the language of the judge's judgment at para 118 and the order made by her at para 119(6), quoted above, shows that Mr Hickox has to rely on his own prior registration of the Hickox charges in January 1997 if he is to take advantage of her ruling and order. As the judge said in her order, "[t]he registration of the third charge is hereby deemed to be effectively registered only as from [17 September 1997]". She did not purport to make a new registration of the charge on behalf of Mr Hickox. She ordered that the existing registration of the charge which he had made in January 1997 should be deemed to have a particular effect. That order necessarily depends upon there being a registration in place, and the only available candidate is the registration by Mr Hickox in January 1997. In order to rely upon the judge's order, Mr Hickox has to assert and rely upon his own registration of the third charge in January 1997, which he is contractually prohibited from doing as against Mr Friedland: see para 85 above.

87. Despite being contractually bound in this way to respect the priority of Mr Friedland's security interest over the LIR lease, Mr Hickox exercised his rights as registered charge-holder in relation to that property and arranged for the lease to be sold on 2 May 2012. That sale was effective and the purchaser acquired good title. Mr Friedland's security rights in relation to the LIR lease transferred to the asset which replaced it, namely the proceeds of sale. Mr Hickox remained contractually bound to recognise Mr Friedland's security rights as having priority in relation to the proceeds of sale. However, in breach of contract, Mr Hickox has denied that he is required to recognise Mr Friedland's rights as having priority and has failed to pay him such part of the proceeds of sale as were affected by his security rights.

88. For these reasons, I would have allowed the appeal and ordered that the case be remitted to the High Court for assessment of the damages which in my opinion Mr Hickox is due to pay Mr Friedland for breach of contract.