EASTERN CARIBBEAN SUPREME COURT
ANGUILLA CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: **AXAHCV2012/0039**
Between

DION FRIEDLAND

Claimant

AND

CHARLES HICKOX

Defendant

Appearances:
Alex Richardson for the Claimant/Respondent
Tana'ania Small Davis along with Kurlyn Merchant for the Defendant/Applicant

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2015: November 24
2016: February 4; April 29

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[1] **GLASGOW, M:** The applicant, Charles Hickox has applied to the court for a direction pursuant to CPR 26.1(2)(e) that the following issues are tried preliminarily –

(1) Whether the defendant acted in breach of the settlement agreement by exercising his power of sale by holding a public auction on 2 May, 2012 pursuant to the 3 Hickox charges;

(2) Whether the claimant has locus standi and or is estopped from bringing this action or claiming damages against the defendant for loss as a result of the auction of the property.

[2] I have found that, for the reasons set out herein below, that this is indeed a proper case for the court to consider these issues preliminarily.

The relevant facts

[3] The business relationship between Friedland and Hickox started in the 1980s. I will commend to those interested in a fulsome recital of the seemingly interminable legal battles between these two

gentlemen the judgment of our High Court in Claim No: AXAHCV1998/0097. A sort of compendium of the relevant facts as I see them will suffice for this ruling.

[4] Friedland and Hickox were both principals in two different entities. Friedland was the owner of the Friedland group which owned full interests in Cap Juluca Holdings Limited which in turn owned the full interest in the Leewards Islands Resorts Limited (LIR). Hickox was the principal partner in H.B.L.S L.P, ("HBLS") a limited partnership formed in New York, United States of America. LIR obtained a lease of property from the government of Anguilla. The object of the lease was the development of the subject property located at Maunday's Bay, Anguillla into a luxury resort. In 1986, HBLS bought the shares in LIR. LIR and HBLS partnered to build the resort styled Cap Juluca Resort.

[5] The sale of the shares in LIR to HBLS was concluded via several instruments which together obligated HBLS and related entities to pay the stipulated purchase price over a number of years and in stated installments. The instruments of agreement also pledged the shares in LIR to the Friedland Group as security for the payments to be made by HBLS to the Friedland Group. The facts reveal that HBLS did not comply with the terms of payments. A number of years passed and the parties expended quite some effort to resolve the issue of the outstanding payments. Finally, in 1993, the Friedland Group sued for the breach of the agreement. In particular they wished the shares of LIR to be transferred to them as was contemplated as the remedy for breach for nonpayment of the sums owed by HBLS. HBLS filed for bankruptcy and in 1995 the bankruptcy court referred the entire affair to mediation.

[6] The mediation exercise produced a resolution in May 1996 which the parties reduced into what is termed the "settlement agreement." The settlement agreement contemplated, among other things, that HBLS transfer the shares held in LIR at that date to the mediator. The mediator would hold the same in escrow pending HBLS' compliance with or default of the terms of the settlement agreement. If HBLS defaulted, the mediator would sell the shares.

[7] While these discussions and negotiations ensued among HBLS, LIR and the Friedland Group, work continued apace with the development. The facts reveal that the development seemed to

have run into capitalization and other issues from the outset. Several steps were taken by Hickox and his partners to remedy that situation, one of which involved financial injections by Hickox. In January 1997, he registered 3 charges against LIR's leasehold interest in the property (hereinafter referred to as the Hickox charges). The object of the registration was evidently to secure the substantial capital injections he had made into the project.

[8] Meanwhile, HBLS and related entities defaulted on their obligations under the settlement agreement. Further to this default, the mediator sold the shares in LIR at a public auction held on 17 September 1997. Friedland was the sole bidder and the shares in LIR were sold to him for a sum below the figure owed by HBLS. Thereafter the mediator issued his Final Award in November 1997. In that award, he made pronouncements on the Hickox charges. In particular the mediator stated that:

> *... 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 the paragraph 19 of the Settlement Agreement.*
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> *... The Mediator finds that the appropriate sanctions 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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> *... The Mediator finds that the Settlement Agreement does not require that the Friedland Group is paid in full on the claim 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 Meditator finds that the Settlement Agreement does not require 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 the requirements of whatever law is deemed applicable to that action.[1]

[9] On 9 June 1998, Friedland obtained in the courts of the United States a Deficiency Judgment against HBLS, LIR and affiliated entities for the sums outstanding after the sale of the shares in LIR to him. Proceedings ensued both in the United States and in Anguilla regarding, among other things, whether Friedland could enforce his Deficiency Judgment. Relevant to this discourse is the order obtained by Friedland in those proceedings that the mediator issue a pronouncement on whether Hickox could rely on the Hickox charges registered in 1997. Clarification arose from the mediator's specific finding that Hickox had indeed violated the settlement agreement by registering his charges against LIR's property. In July 1998, the mediator issued an "amplification of mediator's prior arbitration award" which stated the following

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 the equity holders from intentionally taking any action which would adversely affect or diminish any right or interest granted to the Friedland Group ... pursuant to the Settlement Agreement. It was the Mediator's intent that Mr. Hickox is 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 to be that of an unregistered charge holder. Specifically, Mr. Hickox may not seek to rely on the prior registration of his charges for any purpose.

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, September 11, 1997 ... conducted a sale of the shares of LIR and Maunday's Bay Management Limited,(collectively such shares are referred to as the Collateral) ... 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.

[1] Mediator's Final Award at pages 7 and 8

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 charges. 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 requirement of the Anguillian Law.[2]

[10] Hickox then sued LIR in October 1998 to recover the sums that formed the subject of the charges he had previously registered. Those proceedings were heard both in the High Court and the Court of Appeal. In the High Court it was found, among other things, that 2 of the 3 transactions which led to the eventual registration of the Hickox charges were invalid. Those 2 transactions were set aside by the trial judge. The third transaction and the registered charges arising therefrom were left standing. Relevant to this discourse is the finding that as from the date of the sale of the shares of LIR to the Friedland Group,

...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[3].

[11] The matter went to the Court of Appeal which set aside the decision that the 2 transactions were unauthorized and therefore invalid. There was no pronouncement on the ruling that the settlement agreement was spent from the date of sale of the shares on 17 September, 1997 or that the effective date of the third charge was indeed to run from that time.

[12] While Hickox prosecuted his claims against LIR, Friedland was, with commensurate vigour, pursuing his remedies for the sums outstanding to him. In October 2003, he registered a charge against LIR's leasehold interest in the property. In April 2008 he sold his interest to Cap Juluca Properties and other investors (hereinafter called Cap Juluca). Cap Juluca then entered into an agreement with Hickox in October 2010 to resolve LIR's indebtedness to him. When they defaulted

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[2] Mediator's Amplification Award July 20, 1998

[3] Hickox v Leeward Isles Resorts Limited Claim No. AXAHVC 1998/0097 at paragraph 118

on those agreements and went into liquidation, Hickox, in furtherance of his registered charges against LIR, advertised LIR's property for sale. Friedland sought to intervene in this process by instituting another claim against Hickox in the courts in New York. Among other things, the claim sought an injunction to stop the sale. In refusing the same, the courts in New York held the following

> *The court found that the Mediator's Amplification only delayed the effective date of the Third Charge to the Stock Sale Date and that, under Anguillan law, there was no need for Hickox to refile that Charge.*[4]
>
> *The Appellate Court left unaltered the lower court's conclusion regarding the effective date of the Third Charge... Thus after years of litigation on issues relevant to the Motion, Anguillan courts have, based on the Mediator's Amplification, given effect to the Charges as of the Stock Sale Date and have not required Hickox to refile the Charges.*[5]
>
> *But the courts in Anguilla have previously determined that Hickox's charges have effect and that he is bound by the Mediator's determination.*[6]
>
> *Friedland asserts that Hickox is in violation of the Mediator's finding that Hickox may not rely on the Charges for any purpose. But this assertion is meritless because the Mediator also found that, as of the Stock Sale Date, Hickox was free to reregister the Charges "subject only to the requirements of Anguillan law"... and Anguillan courts subsequently gave effect to the Charges as of the Stock Sale Date without requiring their reregistration. Specifically, the Eastern Caribbean Supreme Court deemed the Third Charge effective as of the Stock Sale Date ... and the Anguilla Court of Appeals validated the other two Charges ... The Court of Appeals also declined to consider the Eastern Caribbean Supreme Court's treatment of the effective date of the third Charge. Each of these courts also accounted for and applied the Mediator's determination in their decisions. Friedland's contention is therefore "certain to fail" as the Mediator held that the Charges could be*

[4] In re: HBLS, L.P Case No. 93-B-46399(BRL) at page 5
[5] In re: HBLS, L.P Case No. 93-B-46399(BRL) at page 4
[6] In re: HBLS, L.P Case No. 93-B-46399(BRL) at page 8

reregistered under Anguilla law and Anguillan courts, with due consideration of the Mediator's findings, have permitted the Charges without requiring their reregistration. Throughout much of the above Anguillan proceedings, LIR was owned and controlled by Friedland. Therefore, granting the Motion in order to question the Hickox's Charges would be concomitant to permitting Friedland an end run around some of the sound findings of the Anguillan courts. This Court, however declines to grant him such an opportunity to re-litigate the same dispute under the guise of enforcing prior orders and determinations.[7]

To the extent that Friedland argues that Anguillan law requires Hickox to re-register his Charges as of the Stock Sale Date' the Anguillan courts have held otherwise. But should Friedland nevertheless wish to pursue this argument or any other argument pertaining to Hickox's Charges, the courts of Anguilla are available and competent to adjudicate these issues.[8]

[13] On 2 May, 2012 Hickox procured the sale of LIR's property by public auction. It is this latter sale which prompted Friedland to bring this action. In it he claims that Hickox breached the settlement agreement when he exercised his powers of sale in pursuance of the Hickox Charges. His contention is that Hickox was precluded from relying on the prior registration of the charges. Hickox failed to reregister the same as he was free to do. As such the sale was improper.

[14] Hickox has responded by way of a defence in which he asserts that at the date of sale, his charges were valid having been thus declared to be valid by the combined rulings of the mediator and the courts. On this application he asserts that this recent action can be entirely disposed of by a trial of the preliminary issues. Friedland disagrees with Hickox's posture to the claim and asks that the court find that this is not a claim in which the issues outlined can be disposed of preliminarily.

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[7] In re: HBLS, L.P Case No. 93-B-46399(BRL) at page 9

[8] In re: HBLS, L.P Case No. 93-B-46399(BRL) at page 10

SUBMISSIONS

[15] Hickox who has brought this application argues that

> *The central issues in this case concern primary issues of law and construction of legal documents and as such do not warrant any evidence being produced to assist the Court in the determination of the issues as would be the case if the matter were to proceed to a full trial...*[9]
>
> *In addition to a review of the documents, the determination of the central issue may be resolved by reference to judicial pronouncements on the very matter: the High Court in* ***Charles Hickox v Leeward Islands Resorts Limited****, the Court of Appeal in* ***Leewards Islands Resorts Limited v Charles Hickox*** *and the NY Bankruptcy Court in* ***Re HLBS, L.P. Case No. 93-B-46399 (BRL), 17 April 2012****.*[10]

[16] Hickox identifies the central issues as the fact that the settlement agreement had no efficacy as at the date that he exercised his power of sale under the charges. Therefore his sale pursuant to the charges could not be a breach of the settlement agreement that did not exist at the date of sale. For this argument, he relies on the rulings of the mediator in the amplification award and the ruling in the High Court to make the point that there could be no reliance on the prior registration of the charges as averred by Friedland. The only prior registration which could have any significance on the case for Friedland is a registration prior to 17 September 1997. This is the date that the trial judge found to be the effective date of the third charge. The trial judge did not require cancellation of the third charge but rather gave it a date from which it obtained efficacy. The approach of declaring 17 September 1997 as the effective date of the third charge was equally applicable to the first and second charges since the first and second transactions which led to the first and second charges were given effect by the Court of Appeal. Based on all these rulings there can be no other conclusion than that 17 September 1997 was the effective date of the Hickox charges.

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[9] Submissions filed by Hickox on November 23, 2015 at paragraph 8

[10] Supra, note 9 at paragraph 9

[17] Hickox also says that Friedland has no locus standi to challenge his powers of sale and indeed is estopped from so doing for a number of reasons –

(1) Friedland sold all his shares in LIR to Cap Juluca on 9 April 2008 which is a date prior to the Hickox sale in 2012. In concluding the sale to Cap Juluca, it was agreed that Cap Juluca would pay the sums due to Friedland by LIR which is the same sum of money that Friedland claims in this action. The obligation then to pay any outstanding sums due to Friedland passed from LIR to Cap Juluca as part of Cap Juluca's obligation to pay Friedland for his interest in LIR. The agreement further obligated Cap Juluca to indemnify Friedland for any losses he suffered as a consequence of certain liabilities which were excluded from the agreement and these excluded liabilities included sums that might be due under the Hickox charges. In fact Friedland agreed specifically that Cap Juluca had the right to enter into settlement of the Hickox litigation without Friedland's approval;

(2) When Friedland registered his charges in 2008 he was aware that the Hickox charges were already in place as a first charge against LIR's leasehold interest. He did not act to have his charge registered as a priority over the Hickox charges;

(3) Cap Juluca entered into a settlement agreement with Hickox in October 2010 in which it accepted that the Hickox charges could be enforced in any all and all manner for any default in payments by LIR to Hickox;

[18] Hickox submits that his positon will be considered by the trial judge by reference to the various agreements referenced above in addition to the judicial pronouncements regarding the same. All these documents and pronouncements are before the court. There will be no dispute as to the facts. Hickox also points out that Friedland has stated in his reply to the defence that he intends to rely on these very documents and pronouncements. Therefore this is said to be a fitting case for the application of the court's case management powers set out in CPR 26.1(2)(d) and (e).

[19] Hickox also asks the court to consider the guidance given by Lord Neuberger in **Steele v Steele**[11] where His Lordship set out several factors that may assist the court to determine whether it ought to direct a trial of preliminary issues. The 10 points to consider are

(1) Would the determination of the preliminary issue dispose of the case or at least one aspect of it;

(2) Would the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself?;

(3) Where the preliminary issue is one of law, the court should ask itself how much effort would be involved in identifying the relevant facts;

(4) If the preliminary issue was one of law to what extent was it to be determined on agreed facts? The more facts were disputed, the greater the risk that the law could not be safely be determined until those issues had been resolved;

(5) Where the facts were not agreed the court should ask itself to what extent that impinged on the value of the preliminary issue;

(6) Would determination of the preliminary issue unreasonably fetter the parties or the court in achieving a just result;

(7) Was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial? If the determination could prompt settlement that was a factor to weigh against this risk;

(8) The court asks itself to what extent the determination of the preliminary issue may be irrelevant;

[11] [2001] C.P. Rep. 106

(9) Was there a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination?

(10) Taking into consideration the previous points, was it just to order a preliminary issue?

[20] Taking these 10 points seriatim Hickox urges the following

(1) In respect of the first factor, if the trial of the preliminary issues is decided in his favor, the entire claim would be resolved. He explains that if he is correct that the question of the effective date of the Hickox charges has been previously determined then the sale he conducted in May 2012 could not be in breach of the settlement agreement. Additionally, he pleads that, if he is correct that the settlement agreement became spent on 17 September 1997 when Friedland purchased the shares in LIR, then there was no subsisting contract in place for him to have breached when he conducted the sale in May 2012. The further point is made that if Hickox is correct that Friedland sold all his shares in LIR at a price that included the value of the sums owed to him, then Friedland has absolved LIR of these obligations to him and by extension, has also absolved Hickox of these obligations. It would be the purchasers of Cap Juluca who would have to pay Friedland;

(2) In respect of the second factor, Hickox argues that there is no date set for the trial of this claim. The application is being made at the first case management conference and all the material for the court's review of the preliminary issues is before the court. In the absence of a trial of the preliminary issues, substantial costs and time would be expended on preparing for a full trial;

(3) On the third, fourth and fifth points Hickox contends that there are no contested facts exposed on the pleadings. The main plank of the case revolves around the agreed fact that Hickox conducted a public auction on 2 May 2012 pursuant to a power of sale under the Hickox charges. The determination of the preliminary issue will be based on purely matters of law further to the material already before the court;

(4) On the sixth issue, the point is made that the hearing of the preliminary issue will in no way fetter a just result but would rather achieve a conclusion in a *"most expeditious and cost efficient manner."* Hickox posits that even if the preliminary issue is concluded in Friedland's favor, it can only lead to the outcome that he acted in breach of the settlement agreement. Thereafter, there could be only a trial on damages which trial itself can be obviated by a negotiated agreement on the amount owing to Friedland as damages;

(5) In respect of the seventh issue, the trial of the issues at this juncture will not increase costs as there is no evidence to be taken. On the contrary, if the matter proceeds to the full trial, delay would ensue from awaiting a date for trial and this would be affected by the fact that some of the witnesses would have to travel from overseas;

(6) Regarding the eighth factor, the issues raised are not irrelevant but instead form the kernel of the defence;

(7) On the ninth factor, there would be no need for an amendment of the pleadings. Friedland has already amended his pleadings to assert that he is not challenging Hickox's right to register the charges. He has "*retooled*" his claim to contend that while Hickox was entitled to rely on his charges, his reliance on the same amounted to a breach of the settlement agreement;

(8) On the final factor, Hickox pleads that trying the preliminary issue is "*just and in keeping with the overriding objective.*"

[21] In answer to the foregoing submissions, Friedland opposes the exercise of the court's power to hear the issues at a preliminary stage. Friedland says that Hickox:

> *has shown no fact, circumstance or reason that may permit the Court to conclude that there are special grounds to exercise its discretion in favour of the Defendant and direct a trial on the Preliminary Issues. In particular, the Preliminary Issues are misconceived, such that even if the Defendant were to succeed on any one of them the claim would continue*

and the need for a full trial would remain, such that directing a trial of the Preliminary Issues would be inconsistent with CPR 1.1[12]

[22] In furtherance of his position, Friedland explains that he is not challenging Hickox's "*entitlement to rely on the Hickox Charges so as to hold a public auction on 2 May 2012.*"[13] Rather his "*pleaded case is that the Defendant, in exercising his power of sale, was in breach of the Settlement Agreement.*"[14] Friedland submits that the valid exercise of a power to do something may turn out to be a breach of contract, as in this case. Regarding locus standi, Friedland also asks the court to find that this issue is misconceived since his contractual relationship with Cap Juluca has no bearing on the claim regarding Hickox's breach of the settlement agreement. In his opinion, the sole matter for consideration is whether in exercising his power of sale under the Hickox Charges, Hickox acted in breach of the settlement agreement and thus caused him (Friedland) loss and damages.

[23] Relying on the cases of **Craig Reeves v Platinum Trading Management Limited**[15], **Allen v Gulf Refining Limited**[16], **Bond v Dunster Properties Ltd**[17] and **Tilling v Whiteman**[18], Friedland urges the court not consider a trial of the preliminary issues as there is "*no justification for the same*" [19] as those issues "*cannot be said to be finally determinative of the case as a whole.*" [20] He states that the preliminary issues "*involve issues of fact and law, such that Court would be required to embark on a mini trial in order to determine them, with the attendant cost and time implications.*"[21] The court is asked to find that the first issue will require it to

consider the findings of four different bodies and to address ancillary issues such as the extent to which the judgment of the Court of Appeal in Leeward Islands Resorts Limited v

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[12] Submissions filed by Friedland on November 20, 2015 at paragraph 4
[13] Ibid at paragraph 13
[14] Ibid at paragraph 14
[15] SKNHCVAP2008/0004
[16] [1981]AC 1001
[17] [2011] EWCA Civ 455
[18] [1980] AC 1
[19] Supra, note 12 at paragraph 23
[20] Ibid
[21] Ibid

> *Charles Hickox is res judicata in relation to the Claimant, who had no control over the appeal. The determination of this issue will require the Court to consider evidence of fact.*[22]

With respect to the second issue, Friedland maintains that it involves

> *complex legal and ... factual issues relating to the numerous contractual documents and a consideration of the Claimant's standing in respect of his subsequent registration of the Friedland Charge and knowledge of the earlier registration of the Hickox Charges. To the extent that the matters raised by the Preliminary Issues are relevant to the final disposition of this matter, they are properly left to the trial judge.*[23]

[24] In closing submissions, Friedland expanded on his arguments in reliance on the terms of the amplification award as set out above in this ruling. His view is that the mediator's statement that Hickox may not seek to rely on the prior registration of his charges for any purpose meant that the charges were in essence ineffective for all times going forward. He posits that the mediator's statement that, after 17 September 1997, the settlement agreement no longer restrained Hickox and thus he may seek to register his charges, meant that Hickox had to reregister his charges. Having failed to cancel the charges and reregister them, Hickox acted in breach of the settlement agreement by holding the sale on 2 May 2012.

[25] Friedland acknowledges that the courts in Anguilla did not direct a reregistration of the Hickox charges but, in his view, this did not change Hickox's contractual obligations set out in the settlement agreement. In addition, he submits that the courts never made a finding that the settlement agreement was spent. If it did so, he (Friedland) would not have been in a position to challenge that finding since he was not a party to the action between Hickox and LIR. An examination of whether he was so bound by what transpired in that claim would require an examination of facts such as his locus standi on the claim between Hickox and LIR. An excursion into factual disputes of that nature made it improper for the issues to be tried preliminarily. The

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[22] Supra, note 22 at paragraph 23
[23] Ibid

argument that Friedland does have locus standi to bring this claim is also repeated in the further submissions and does not bear repetition.

THE LAW

[26] **CPR** 26.1(2)(d) and (e) permit the court to decide the order in which issues in a claim may be tried and/ or to direct the separate trial of an issue. As with rules establishing such broad discretion, much has been pronounced on the manner in which the discretion ought to be exercised.

[27] Baptiste JA has recently offered this assistance in the case of **Aquaduct Limited et al v Faelesseje et al**[24]

> *The court, and the parties should give careful consideration to the issues to be determined when making an order for a split trial. Where a claim is highly fact sensitive, it is important to establish the factual premise for the issue of law on which the judge was invited to rule. There is a need for total clarity when a court orders the trial of a preliminary issue of law. Preliminary issues should not be set in motion in a casual and unstructured way. The right approach to preliminary issues should be (inter alia) that the questions should be questions of law and should be decided on the basis of a scheduled of agreed or assumed facts*
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> *It cannot be doubted that the power to order preliminary issues or the separate trial of different issues is a valuable case management tool... This tool, however, has to be used with great care. Circumspection in its use is dictated by the fact that, as Lord Scarman said in* ***Tilling v Whiteman,*** *preliminary points of law are too often treacherous short cuts. Their price can be as here delay, anxiety and expense.*

[24] SVGHCVAP 2014/0017; paras. 12 and 14

Quoting from **SCA Packaging Ltd v Boyle**[25], Baptiste JA continued

> *The essential criterion for deciding whether to hold a pretrial hearing is whether, as it was put by Lindsay J in **CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, 1140,** there is a succinct knock out point which is capable of being decided after only a short hearing. This is unlikely to be the case where the preliminary issue cannot be divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case, it is preferable that there should be only one hearing to determine all the matters in dispute.*

[28] Further enlightenment also emerges from the now oft quoted decision in **Craig Reeves v Platinum Trading Management Limited**[26], where it is explained that the trial of a preliminary issue

> *is a procedure that the court employs when costs and time can be saved if decisive issues can be tried before the main trial... there are three types of orders than can be made: (a) for the trial of a preliminary issue on a point of law; (b) for the separate trial of preliminary issues or questions of law; and (c) for separate trials of liability and quantum.*
>
> *Wasting rather than saving time, complicating rather than simplifying issues, and engaging in mini trials with no true justification for doing so, are among the risks that require careful consideration before a court decides to order the trial of a preliminary issue.*
>
> *.... the trial of a preliminary issue will usually be a point of law, which can be isolated from any factual dispute, or may be made separately triable because facts are agreed.*

ANALYSIS AND RULING

[29] The core of this case as agreed by the parties is as follows

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[25] [2009] UKHL 37, paras 9
[26] SKN 2008/0004, paras 16 et seq

(1) The business relations between Friedland and Hickox was, at some point, subject to the terms of the settlement agreement under which they were both enjoined from, among other things, taking any steps to frustrate the settlement exercise;

(2) Hickox registered a number of charges against the property subject to the terms of the settlement agreement which registration was found by the mediator to be against the letter and spirit of the agreement;

(3) Hickox sold the property subject to the charges sometime later. Friedland has claimed that the sale amounted to a breach of the settlement agreement since Hickox could not rely on the prior registration of the charges to conduct the sale. Friedland insists that Hickox was supposed to cancel the improper registration and register the charges all over again if he wished to rely on the same to realize the sums owed to him by LIR;

(4) Hickox disagrees with Friedland and responds that there was no need to cancel the registration of the charges and to register them again. His response is that, notwithstanding the fact that the mediator ruled that he should not have registered the charges at the date that he did so, it was subsequently declared that the settlement agreement was spent from the time that Friedland bought the shares in LIR. The charges were given an effect date from the time that the agreement became spent and as such he was quite entitled to rely on them as at the date of sale. He was not in breach of the settlement agreement as there was nothing to breach and his charges had not been cancelled but had been given an effective date.

[30] As has been set out in this ruling, the facts that form the substratum of the present disagreement can be gleaned from a number of agreements, rulings and judicial pronouncements. In this context, the obligations of the settlement agreement are readily apparent. Equally, the conduct of the parties subsequent to the signing of the said agreement is uncontroverted. For instance, it is undisputed that it was found by the mediator and later accepted by the courts that Hickox registered charges against LIR's property at a time when the settlement was still in force. It is also agreed that it was found by the mediator that Hickox's act of registering the charges was contrary

to the settlement agreement. What is in contention is the interpretation of what both the mediator and the courts have had to say about what should happen to those charges. For Friedland it is suggested that both the mediator and the courts have ruled in a way that obligates Hickox to cancel the registration of the charges and to register them again if he wished to rely on them. Hickox responds that the mediator and the courts have made no such ruling but rather have made positive rulings about the effect of the settlement agreement after the sale of shares to Friedland and also made positive findings about the effective date of the charges. These rulings have, in essence, given effect to the charges and permitted him to proceed in the manner that he did on 2 May 2012.

[31] Friedland has proposed on this application that the foregoing issues are fact sensitive and therefore are incapable of distillation and disposal on a trial of preliminary issues. I cannot see how this is the case. For one thing, Friedland has not set out what are the facts in dispute as he has so strenuously emphasized. As stated by Hickox, the central issues in this case can be determined by deciding whether at the date of sale by Hickox, the settlement agreement was in fact spent or whether it still bound the parties. If indeed it did bind the parties thereto, then Hickox did not act properly by relying on charges which were in breach of the agreement .Equally, it will have to be decided whether Hickox is correct that the prior registration of his charges referred to by the mediator was a registration prior to 17 September 1997 and whether he is correct that the trial judge found the effective date of those charges to be a date after 17 September 1997. Disposal of none of these matters requires a trial on disputed facts as there can be little contention as to what transpired further to the settlement agreement.

[32] Whether the agreement was spent as averred and/or the mediator intended that Hickox cancel the registration of his charges and start over can only be derived from an examination of the settlement agreement, what transpired further to the same and what the mediator said on those matters. Whether the court also pronounced on the expiration of the agreement and/ or an effective date for the charges can only be discerned from the terms of the various rulings. Friedland has not shown to this court how any of these matters are fact laden or ill- suited to disposal by a trial of the preliminary issues.

[33] Accordingly, I would agree with the arguments for Hickox that a ruling that he is accurate in his assessment of any of these issues would conclude the proceedings in his favor. If he is incorrect, it would be quite apparent that it was not proper for him to rely on the registration of the charges and that he would have acted either without authority and/or in breach of the settlement agreement. In this instance, the only question remaining would be an assessment of the damages, if any, to be paid to Friedland. There can only be considerable costs savings and a reduction in the time to conclude this case if this approach is adopted. Of the triumvirate of orders that could be made on applications of this sort, I find that the trial on preliminary issues in this instance will be primarily a trial on issues of legal interpretation of various documents and judicial pronouncements.

[34] On the question of locus standi, I have also formed the view that this issue can be easily disposed of on the documents available to the court. It must be a relevant query whether Friedland has divested himself of the right to pursue the sums outstanding under the settlement agreement by entering into the various agreements with Cap Juluca. Determining this issue is not fact sensitive or fact laden at all. In his written submissions, Friedland relies on instruments governing his recent relationship with Cap Juluca to reason that his arrangements with Cap Juluca do not deprive him of standing to pursue Hickox for breach of the settlement agreement. Hickox argues that the contrary is true on the specific provisions of the very documents. Friedland has not demonstrated that there is anything beyond the four corners of these instruments of agreement and the already agreed facts that is required to elucidate this point. It is therefore irrefutable that the court will have to look to the documents to determine whether or not Friedland has thus divested his interests and claims in LIR and as such is precluded from continuing this claim. Utilizing this approach will enable the court to quickly determine whether this action ought to proceed or be dismissed. Again, if it is found that Friedland is precluded from bringing this claim, this finding can only save the time of the court and the parties with the added benefit of forestalling the costs of a full trial.

[35] Having found the issues susceptible to disposal by a hearing on preliminary issues, the parties are to prepare themselves for the said hearing.

[36] It is therefore ordered that:

1. The following issues are to be tried as preliminary issues –

(a) Whether the defendant acted in breach of the settlement agreement by exercising his power of sale by holding a public auction on 2 May, 2012 pursuant to the 3 Hickox charges;

(b) Whether the claimant has locus standi and or is estopped from bringing this action or claiming damages against the defendant for loss as a result of the auction of the property.

2. The applicant, Hickox is to file written submissions along with authorities in support of his contentions within 14 days of today's date.

3. The respondent, Friedland, is to file and serve written submissions along with authorities in response within 14 days of the receipt of the submissions and authorities from Hickox.

4. The applicant, Hickox is to file one hearing bundle comprising the main pleadings, copies of the various judicial pronouncements both local and foreign, the rulings of the mediator and all relevant agreements touching and concerning the preliminary issues to be tried. The bundle must be filed at least 7 days before the date fixed for the hearing of the preliminary issues.

5. The court office is to set the matter down for hearing as soon as practicable after the last day for the parties to comply with this order.

6. The parties are to each bear their own costs on this application.

[37] I thank counsel for their thorough and well – reasoned submissions.

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RAULSTON GLASGOW

MASTER