

ANGUILLA

IN THE COURT OF APPEAL

HCVAP 2008/003

BETWEEN:

LEEWARD ISLANDS RESORTS LIMITED

Appellant

and

CHARLES HICKOX

Respondent

Before:

Hon. Mde. Ola Mae Edwards
Hon. Mr. Michael Gordon, QC
Hon. Mde. Rita Joseph-Olivetti

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. David Phillips, QC, Mr. David Fisher and Ms. Tara Ruan for the Appellant
Mr. Roald N.A. Henriques, QC, Mr. William Rodger and Ms. Tameka Davis for
the Respondent

2009: March 23;
2010: March 22.

Civil Appeal – Commercial Law – res judicata by issue estoppel – whether clauses 3 and 5 of the Pledge Agreement operated as independent clauses or supplemented each other – whether the First and Second Transactions were authorized – whether the First and Second Transactions were ratified – whether the First and Second Transactions offended against the rule against self-dealing – whether Saunders J.’s decision on the pre-23rd August, 1988 advances was binding – whether leave should have been granted to amend claim to plead restitution – rule 20.1 of the Civil Procedure Rules 2000 – whether court had discretion to grant restitutionary relief under section 19 of the Eastern Caribbean Supreme Court (Anguilla) Act c. E15 – whether party was entitled to compound interest – whether party was entitled to indemnity costs

The appellant, LIR, is a company incorporated in Anguilla. The respondent Mr. Hickox is a former director and shareholder of LIR. Mr. Hickox loaned monies to LIR sometime after 23rd August 1988, (“the First Transaction”) and in January, 1995 (“the Second Transaction”) while he and Cap Juluca Partners (acting through Mr. Ricketts) were the directors and shareholders of LIR. In 1997, LIR’s shares were sold to Mr. Friedland of the Friedland Group. In 1998, Mr. Hickox filed an action against LIR for monies due and owing to him in respect of the First and Second Transactions based on 2 Promissory Notes which formed part of the First and Second Transactions.

LIR challenged the validity of these Transactions on several alternative grounds, namely that: (1) the loan agreements and promissory notes constituting the First and Second Transactions varied substantially from the resolutions approving the loans; (2) CJP (a limited partnership formed by Mr. Hickox) was in breach of a Stock Purchase Agreement and Pledge Agreement previously concluded with the Friedland Group, and could not therefore have authorized or ratified the Transactions having lost its voting rights in accordance with clause 3 of the Pledge Agreement; (3) Mr. Hickox had made no formal disclosure of his interest in the loans to LIR and the Transactions offended against the rule against self-dealing in Articles 57 and 94 of LIR's Articles of Association.

Mr. Hickox countered that: (1) having regard to a Settlement Agreement which had been reached in 1996, Mr. Friedland was prevented from challenging the Hickox loans; (2) clause 3 had to be read in conjunction with Clause 5 of the Pledge Agreement with the effect that clear and unequivocal steps had to be taken to divest CJP of its voting rights; (3) the First and Second Transactions, which included a provision on compound interest, were authorized and ratified; and (4) Mr. Hickox was not in breach of the rule against self-dealing. Mr. Hickox also sought to amend his claim at the commencement of closing submissions to plead restitution as an alternative claim.

At the trial of preliminary issues Saunders J. (as he then was) in his judgment delivered on the 21st April 2001 made certain findings concerning some sums of money that Mr. Hickox alleged were advanced to LIR before 23rd August 1988.

The learned judge at the trial of the substantive claim and counterclaim held, among other things, that the ruling by the mediator and the New York bankruptcy court that the Settlement Agreement did not prevent Mr. Friedland from challenging the Hickox loans was binding on Mr. Hickox; the pre-23rd August advances were not recoverable and she was not precluded by the judgment of Saunders J. from determining that issue at trial; the First and Second Transactions varied substantially from the resolutions approving the loans; CJP had lost its voting rights in accordance with Clause 3 of the Pledge Agreement and could not therefore ratify the unauthorized Transactions in accordance with the Duomatic principle; and, in any event the Transactions were voidable at the option of LIR as Mr. Hickox had breached the rule against self-dealing.

The learned judge refused to allow Mr. Hickox to amend his claim to include restitution but nonetheless granted restitutionary relief under section 19 of the **Eastern Caribbean Supreme Court (Anguilla) Act** c. E15. LIR appealed against the learned judge's finding on restitution and Mr. Hickox cross-appealed on the remaining findings, as stated above. Mr. Hickox further claimed to be entitled to costs on an indemnity basis.

Held: allowing the appeal and cross-appeal, setting aside paragraphs 1, 3, 4 and 7 of the order, giving judgment for the respondent and directing that submissions on costs be filed:

Per Olivetti J.A. [Ag.]:

1. Mr. Hickox had, as a member of the CJP, adopted the Settlement Agreement. He also participated in the New York mediation and in the proceedings before the

New York bankruptcy court. Applying the principles on res judicata by issue estoppel for foreign judgments enunciated in **Carl Zeiss**, Mr. Hickox was bound by the ruling of the mediator as confirmed by the New York bankruptcy court. This ground of appeal accordingly fails.

Carl Zeiss Stiftung v Rayner and Keeler Ltd. (No. 2) [1967] 1 AC 853, applied.

2. The court must seek to ascertain the parties' intentions having regard to the express words used in the context of the contract as a whole and to the factual matrix and accord a meaning which would make commercial sense to a reasonable commercial person.

Dictum of Lord Steyn in **Mannai Investments Co. Ltd. v Eagle Star Life Assurance Co. Ltd.** [1997] 2 WLR 945 and dictum of Lord Hoffman in **Investors Compensation Scheme Ltd. v West Bromwich Building Society** [1998] 1 WLR 896, applied.

3. Having regard to the factual matrix, to clause 3 of the Pledge Agreement and to the Pledge Agreement as a whole, the only commercially sensible construction is that clause 3 was not meant to operate automatically. Clause 3 is a declaration of CJP's rights to exercise the voting rights and rights to dividends, once it is not in default and clause 5 enables the innocent party (the Friedland Group) to assert and enforce its rights in the event of default by taking active, practical and unequivocal steps to divest CJP of the voting rights. On a reasonable construction, clauses 3 and 5 were not therefore meant to operate as independent clauses but were intended to supplement each other. The practical result of such construction is that there would be no mystery as to who is in control of LIR and no hiatus in LIR's affairs. The ruling of the learned judge on this issue is accordingly set aside.
4. With the exception of the compound interest provision which was authorized by reference to the words in clause 3 of the draft loan agreement, the First Transaction differed significantly from that which was approved at the meetings of the directors and shareholders on the 23rd August, 1988. Neither Mr. Ricketts nor Mr. Hickox had authority to make these changes as resolution 2 cannot be construed as giving any officer of LIR authority to depart in such significant terms from the substance of the resolutions. The First Transaction, with the exception of the provision on compound interest, is accordingly voidable.

Dictum of Cooper J. on compound interest in **Consolidated Fertilizers Limited v Deputy Commissioner of Taxation** [1992] FCA 224 (Federal Court of Australia), approved.

5. Having regard to the fact that Mr. Hickox and Mr. Ricketts both signed the First Transaction documents, they are deemed in law to know its contents. The fact that Mr. Hickox was unaware of the genesis of the First Transaction does not mean that he did not have the requisite knowledge of its provisions to consent to it. In all the circumstances, Mr. Ricketts and Mr. Hickox had knowledge of the changes

and treated the First Loan Transaction as valid so that they can be deemed to have ratified the First Transaction.

The Duomatic principle established in **Re Duomatic Ltd.** [1969] 2 Ch 365, applied.

6. The failure of the shareholders to raise any questions concerning the loans made by Mr. Hickox can be relied on to establish ratification in accordance with the doctrine of unanimous informal assent.
7. The shareholders were fully aware of the difficulties faced by LIR in constructing Cap Juluca resort; they authorized the directors to obtain loans from all of the members of CJP which included Mr. Hickox; they subsequently attended meetings at which the auditors' reports documenting the loans were tabled; they approved the reports and they were aware that construction was continuing. However, they asked no questions about the loans, neither did they object to them. These factors constitute exceptional circumstances from which it can be said categorically that the shareholders (always CJP acting through Mr. Ricketts and Mr. Hickox) had all requisite knowledge of the loans and their terms, and assented to them. The First Transaction though voidable initially for lack of authorization was thus ratified informally by the shareholders and is valid and binding on LIR.
8. The learned judge correctly found, based on all the evidence adduced, that the shareholders and director of LIR met and agreed to the terms of the Second Transaction at the meeting of 9th January, 1995. This was sufficient for the court to conclude that there was informed consent for the purposes of applying the Duomatic principle in respect of the Second Transaction. Having regard to the interpretation of clause 3, the shareholders had the power to vote in accordance with their rights under the LIR shares and ratify the Second Transaction, which was accordingly valid. The learned judge erred in holding that the Second Transaction was void, which ruling must be set aside.
9. Article 94 of LIR's Articles of Association incorporated section 91 of the **Companies Act** c.65 and required a director to disclose his interest in a contract with the company. Article 57 contained a strict prohibition against self-dealing. The relationship forged by the Articles of Association between a company and its shareholders is a contractual one. The shareholders accordingly have authority to waive compliance with articles or other provisions which govern internal procedure or exist for their protection. The shareholders knew all the relevant information about the loans and Mr. Hickox's interest in the transactions and must be taken to have ratified the First and Second Transactions and impliedly waived compliance with Articles 57 and 94. The First and Second Transactions do not accordingly offend against the rule against self-dealing.

Euro Brokers Holdings Ltd. v Monecor (London) Ltd. [2003] B.C.C. 573, applied.

10. Saunders J.'s judgment on the preliminary issues left the question of the pre-23 August, 1988 advances open for determination at trial so that the learned judge was correct to consider and make a determination on this issue in favour of LIR.
11. The learned judge correctly refused to allow Mr. Hickox to amend his claim at the commencement of closing submissions so as to plead restitution as an alternative claim. **CPR 20.1(3)** only permits amendments to pleadings after the first case management conference if the court is satisfied that there was some change in circumstances which became known after the date of the case management conference.
12. The First and Second Transactions, having been found to be valid and binding on LIR, the grant of restitutionary relief under section 19 of the **Eastern Caribbean Supreme Court (Anguilla) Act** does not fall for consideration.

Per Edwards J.A.:

13. Clause 11(e) of the Pledge Agreement specifically provided for its provisions to be modified or waived only by an instrument or instruments in writing signed by all the parties. The learned trial judge's finding that the Friedland Group did not waive any rights that it might have had to rely upon clause 3 of the Pledge Agreement would be unimpeachable. In any event, having regard to the conclusions of Olivetti J.A. stated at No. 3 above, this ground has no merit.
14. In the absence of any known statutory provision in Anguilla prohibiting the accrual of compound interest in relation to any debt upon which interest is payable by virtue of an agreement, the provisions for compound interest payments in the First and Second Loan Agreements and Promissory Notes (which were expressly claimed in Mr. Hickox's statement of case) ought to prevail.
15. The questions as to whether LIR had lost its right to avoid the First and Second Transactions by virtue of the operating default under the Pledge Agreement, or whether Mr. Hickox's failure to disclose his interest in the Transactions was a technicality which could be overlooked, or whether delay in avoiding the Transactions was fatal, are all rendered otiose having regard to Olivetti JA's findings that the First and Second Transactions were ratified and remained valid.
16. Unjust enrichment is an independent cause of action giving rise to restitution. A claim for restitution based on unjust enrichment cannot be raised in a Reply or Defence to Counterclaim, as Mr. Hickox purported to do. Such restitutionary claim must be made in a claim form and statement of claim.
17. Section 19 of the **Eastern Caribbean Supreme Court (Anguilla) Act** provides that the court may grant all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim. Mr. Hickox had established no legal or equitable claim to restitution in his pleadings and was therefore not entitled

to the exercise of the court's discretion under section 19. The learned judge accordingly erred in granting such relief.

18. Indemnity costs on a contractual basis must be specifically pleaded as found by the learned judge. Having failed to plead such costs, Mr. Hickox is not entitled to it.

JUDGMENT

- [1] **JOSEPH-OLIVETTI, J.A. [AG.]:** This appeal is concerned in the main with the validity of two loan transactions allegedly entered into by Leeward Islands Resorts Ltd. ("LIR") and Mr. Hickox whilst he was a director and shareholder of LIR. LIR has changed ownership since those transactions and Mr. Hickox is seeking to recover the monies allegedly loaned by him to LIR over twenty years ago which claim includes a claim for compound interest of close to US\$100 million.

Background

- [2] This action first saw the light of day on 2nd October 1998, as a simple action by Mr. Hickox for monies due and owing to him under two promissory notes issued pursuant to the loan agreements. LIR challenged the validity of the loans relying in the main on the effect of a Stock Purchase Agreement and a Pledge Agreement between the original owners of LIR (the Friedland Group headed by Mr. Dion Friedland) and Cap Juluca Partners 1 ("CJP"), a New York limited partnership formed by Mr. Hickox.
- [3] Since its commencement many events have occurred, the main events being the trial of preliminary issues before Saunders J. (as he then was) which lasted thirty seven days and is reflected in Saunders J.'s judgment of 27th April, 2001; an unsuccessful appeal from that decision to this Court dated 3rd April 2003, per Redhead JA); a decision by Master Mathurin dated 25th October 2004 on a successful application by Mr. Hickox to strike out pleadings in reliance on the judgment of Saunders J.; and finally the trial and decision of the learned trial judge of 8th July, 2008 giving rise to this appeal. In addition, there were related New

York proceedings which resulted in judgment for the Friedland Group, a Settlement agreement and the eventual sale by auction of the shares in LIR back to Mr. Friedland.

- [4] From this vantage point one may very well question the wisdom of undertaking the trial of the preliminary issues which far from achieving what it was intended to do - shorten the trial - had the effect of prolonging it and if anything rendering it more complex.
- [5] I will not contribute to the prolixity of these proceedings by rehearsing the complete background facts which are fully set out in the judgments referred to and in particular that of the learned trial judge's.

The judgment

- [6] The learned trial judge dismissed Mr. Hickox's claim on the main basis that the first loan agreement and the first promissory note (together "the First Transaction") and the second loan agreement and the second promissory note (together "the Second Transaction") were not authorized by LIR in that the loan agreements and the promissory notes varied substantially from the resolutions approving the loans. Further, and in any event that the then shareholders of LIR (CJP and Mr. Hickox) could not ratify those transactions under the Duomatic principle. This was on the basis that at all relevant times, CJP was in breach of the Pledge Agreement and therefore by virtue of clause 3 of that agreement had automatically lost its rights to exercise the voting rights in the LIR shares granted to it by that agreement. Additionally, that in any event the First and Second Transactions were voidable at the option of LIR because they offended against the rule against self-dealing as Mr. Hickox was a director at the time and did not make the required disclosure of his interests to LIR's Board.
- [7] However, the learned trial judge found that most of the monies secured by the Promissory Notes had in fact been advanced to LIR by Mr. Hickox and she gave judgment for Mr. Hickox on the basis of restitution even though Mr. Hickox had not

made an express claim for restitution and she had refused an oral application by him during the course of the trial to amend his pleadings to claim restitution. In deciding on the remedy of restitution the learned trial judge relied on section 19 of the **Eastern Caribbean Supreme Court (Anguilla) Act**.¹

[8] The learned judge therefore determined that LIR should repay to Mr. Hickox US\$7,019,646 being the principal sums claimed under the first and second promissory notes totaling US\$7,962,830 less the five pre-23rd August 1988 advances totaling some \$943,184.00 which she found were contributions by Mr. Hickox to capital or equity in CJP and not loans to LIR.²

[9] In addition, the trial judge awarded interest on a commercial basis at the rate of 15% per annum in respect of advances which formed the subject of the first promissory note less the sum of \$943,184.00 payable as from the date of demand namely 30th April, 1997. On monies due under the second promissory note, she awarded interest on a commercial basis at the rate of 12% per annum from the date of issue of the claim, namely 2nd October 1998. And, finally, she ordered that each party bear his own costs.

The appeal and cross-appeal

[10] Both parties appealed. In my opinion, it would neither be practical nor would it serve any useful purpose to refer, in full, to all the grounds of appeal and cross-appeal in order to decide this appeal and I would not venture to do so. LIR appealed on the basis that the learned trial judge had no jurisdiction to order restitution or alternatively that she was wrong in law in ordering interest at the rates and periods that she did.

¹ c. E15 of the Revised Statutes of Anguilla. Section 19 provides: "The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act shall in every cause or matter pending before the Court grant either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of **any legal or equitable claim or matter** so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided" (my emphasis)

² At para. 107 of the judgment

[11] Mr. Hickox's cross appeal is lengthy but the main challenges to the trial judge's rulings can be condensed and addressed under these subject headings: (1) the proper construction of clause 3 of the Pledge Agreement; (2) the validity of the First and the Second Transactions; (3) whether the First and Second Transactions were ratified by the shareholders of LIR; (4) whether the First and Second Transactions were voidable at the option of LIR because they offended against the rule against self-dealing; (5) the effect of clause 9 of the Settlement Agreement; (6) the binding effect of the decision of Saunders J.; and (7) the effect of the undue delay in handing down the said judgment.

[12] I will consider the main issues canvassed on the cross-appeal first as the subject of the appeal, restitution, will only arise if the cross-appeal fails.

Cross-appeal

[13] I will consider the issue relating to the construction of clause 9 of the Settlement Agreement first as if Mr. Hickox is successful, LIR would be estopped from challenging the loans, their appeal would fail and his cross-appeal would succeed.

The effect of Clause 9 of the Settlement Agreement

[14] The learned trial judge held³ that Mr. Hickox was bound by the ruling of both the New York mediator and the New York bankruptcy court on the effect of clause 9(b) of the Settlement Agreement⁴. The gist of the mediator's ruling was that clause 9(b) did not prevent Mr. Friedland from challenging the Hickox loans as it only applied to situations where the LIR shares were sold to a third party. The learned judge found that although Mr. Hickox was not a party to the Settlement Agreement he participated in the mediation in New York which gave rise to the ruling and also took part in the proceedings before the New York bankruptcy court which on 18th April 2002 confirmed the ruling of the mediator. The learned judge therefore held

³ At paragraphs 14 – 15 of the judgment

⁴ Clause 9 (b) provides:- "With the exception of the Loan Adjustment, the Friedland Group shall not challenge the validity or extent of the Hickox Loans to the Resort Entities to the extent such loans are reflected on the Resort Entities "audited financial statements

that Mr. Hickox can be said to have adopted the Settlement Agreement even though he was not a party to it in his personal capacity but only as a member of CJP. It was also found that Mr. Hickox was bound by the ruling of the foreign bankruptcy court applying the principle of res judicata by issue estoppel elucidated in **Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No.2)**.⁵ In any event, the learned judge held that Mr. Hickox could not at the same time say that he is not a party to the agreement but yet seek to obtain the benefit of the agreement.

[15] Learned counsel for Mr. Hickox, Mr. Henriques, QC, submits that having regard to clause 9(b) it is not open to LIR (now controlled by Mr. Friedland) to challenge the loans made to LIR by Mr. Hickox. Further, he contends, the learned trial judge was wrong to hold that Mr. Hickox was bound by the rulings of the mediator and the bankruptcy court, as essentially, he was not a party to the Settlement Agreement.

[16] It is uncontroverted that clause 9(b) was construed by the New York mediator who had jurisdiction under the Settlement Agreement to resolve disputes including disputes arising on the interpretation of the agreement; and that his ruling, which was confirmed by the New York Bankruptcy, was as found by the learned trial judge. That court also held that Mr. Hickox was bound by that ruling.

[17] Having regard to the findings of fact of the learned judge which were not seriously challenged, and to the principles on res judicata by issue estoppel for foreign judgments enunciated in **Carl Zeiss** which were correctly applied by the trial judge, I have no hesitation in accepting the submissions of learned counsel for LIR, Mr. Phillips, Q.C, and endorsing the views of the learned judge. Therefore, this ground of appeal must fail.

The proper construction of Clause 3 of the Pledge Agreement

[18] Essentially, the learned judge accepted the arguments of Mr. Phillips, QC for LIR and held⁶ that clause 3 of the Pledge Agreement was an independent clause to be

⁵ [1967] 1 A.C. 853

⁶ At paras. 22-23 of the judgment

read without regard to clause 5 thereof. Accordingly, that on a proper construction of clause 3, CJP upon default, automatically lost the right given to it under clause 3 to exercise the voting rights and all other rights attaching to the LIR shares and that:

“...the operation of clause 3 made good commercial sense by the provision of pressure and thus the incentive for the Buyer to make the payments when due if he was to retain the benefit of the voting rights to the shares.”⁷

- [19] The trial judge found⁸ that it was common ground that there was a default under the terms of the Stock Purchase Agreement (“SPA”) after 14th October 1989, as CJP did not pay the installment due on the purchase price to the Friedland Group on that date, and that this default continued until the Settlement Agreement in May 1996.
- [20] The effect of the learned judge’s ruling is that as CJP was in default since the 14th October 1989, it, from that date, **automatically** lost its voting rights in the LIR shares which **automatically** reverted to the Friedland Group. The result is that only the Friedland Group, as shareholders of LIR, had ultimate control and management of LIR and CJP had no authority to conduct the affairs of LIR as of that date.
- [21] Mr. Phillips, QC, relied on all his arguments before the lower court to support this ruling. In brief, he submitted that clause 3 of the Pledge Agreement is a free standing clause and operates independently of clause 5 and must be construed as such. Further, that this construction makes good commercial sense as even if the Friedland Group chose not to exercise their clause 5 rights nevertheless the sanction of the default would continue to bite and so keep pressure on CJP to remedy the default. Mr. Henriques, QC, in short submitted that clause 3 had to be read in conjunction with clause 5 as that was the only commercially sensible construction.

⁷ At para. 22 of the judgment

⁸ At para. 21 of the judgment

- [22] This issue is clearly a matter of construction of the terms of a written, commercial contract. The courts have developed a commonsense approach to interpreting commercial contracts and this court is in as good a position as the learned trial judge to determine the meaning of the clause.
- [23] The relevant clauses of the Pledge Agreement are referred to hereunder.
- [24] Clause 1 is to the effect that that the Buyer (CJP) deposits the shares (stock) in LIR with the Pledge Agent, Peter Venison (one of the Friedland Group) as security for the prompt payment of all monies due under the SPA and grants to the Friedland Group, "the ownership interests evidenced thereby." The clause states further:
- "The Pledge Agent, on behalf of the Shareholders [the Friedland Group], and their successors and assigns, shall have the right to have and to hold the Stock, together with any rights, titles, interests, privileges and preferences granted to the Shareholders [the Friedland Group] hereunder forever; **subject, however to the terms, covenants and conditions herein as set forth.**"
- [25] Clause 2 deals with representations warranties and covenants which are not strictly relevant.
- [26] Clause 3 (Voting Rights; Dividends) states:
- "So long as no Event of Default or event which, with the giving of notice or the lapse of time, or both, would become an Event of Default, shall have occurred and be continuing:
- (a) the Buyer [CJP] shall be entitled to exercise any and all voting and/or consensual rights and powers relating or pertaining to the Stock or any part thereof for any purpose not inconsistent with the terms of this Pledge Agreement or the Stock Purchase Agreement; and
- (b) the Buyer shall be entitled to receive and retain any and all ordinary cash and/or stock dividends payable on the Stock not inconsistent with the terms of this Pledge Agreement or the Stock Purchase Agreement."

- [27] Clause 4 defines events of default and provides, inter alia, that any failure to make payments due or to perform any other obligation under the SPA if such default is not cured within 10 days of written notice of default is an event of default.
- [28] Clause 5 (Remedies) states:
- “If any event of default shall have occurred and be continuing or there shall be a breach of any representation, warranty or covenant contained in this Pledge Agreement, then each Shareholder may direct the Pledge Agent to do either of the following on such Shareholder’s behalf:
- (a) exercise all voting and/or other rights and powers relating or pertaining to their shares of the Stock for any purpose whatsoever, or
- (b) upon ten (10) days prior written notice to the Buyer, sell any of their shares of Stock. The Buyer, at the request of any of the Shareholders, agrees to execute all such documents and to do all such other acts and things as are necessary, in the sole opinion of such Shareholder or Shareholders to transfer any such ownership interests.”
- [29] Clause 10 provides that the Buyer agrees to do any further acts and to execute and deliver such additional conveyances, assignments, agreements and instruments as the Shareholders may request in connection with the administration or enforcement of the agreement or the SPA “in order better to assure and confirm unto the Shareholders their rights, powers and remedies hereunder.”
- [30] Clause 11(b) provides that the governing law is the internal laws of the State of New York.
- [31] First, I note that with respect to clause 11(b) the court has not been alerted to any amendments thereto and that neither party relied on this clause, as New York law was not pleaded. Therefore, this contract falls to be construed in accordance with Anguilla law which is the same as English common law.
- [32] It may do well at this stage to be reminded of the relevant common law principles relating to the construction of commercial contracts which, happily, are well established. These principles are fully explored in the cases of **Mannai**

Investments Co Ltd v Eagle Star Life Assurance Co. Ltd.⁹ and **Investors Compensation Scheme Ltd. v West Bromwich Building Society (No. 1)**¹⁰ which Mr Henriques, Q.C. relied on.

[33] In **Mannai Investments**, Lord Steyn explained that in commercial contracts the law favors a commercially sensible construction as it is one more likely to give effect to the intention of the parties rather than an overly technical and semantic approach. His Lordship said:

“In determining the meaning of the language of a commercial contract and unilateral contractual notice, the law therefore favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them and the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.”¹¹

[34] Lord Hoffman in **Investors Compensation Scheme Ltd.** elucidated:

“... interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract...” “If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense it must be made to yield to business common sense.” - Lord Diplock in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201.”¹²

[35] In brief, the court must seek to ascertain the parties’ intentions having regard to the express words used in the context of the contract as a whole and to the factual matrix and to give a meaning which would make commercial sense to a reasonable commercial person.

[36] I have had regard to the factual matrix as found by the trial judge and in particular the fact that both the SPA and the Pledge Agreement were entered into on the

⁹ [1997] AC 749

¹⁰ [1998] 1 WLR 896

¹¹ Op. cit. n.11, p.771

¹² Op. cit. n.11, p. 912

same day and that they represented one transaction - the sale and transfer of the LIR shares to CJP and the charge of the share by CJP back to the Friedland Group to secure the obligations under the SPA. On the signing of the SPA all the directors of LIR (the Friedland Group nominees) resigned and thenceforth the directors were nominees of CJP – Mr. Ricketts and Mr. Hickox who were also the only two shareholders. I have also had regard to the Pledge Agreement as a whole to try to ascertain the meaning of the disputed clause 3.

[37] Now to clause 3 itself. On its face, it gives CJP the right to exercise all voting rights attaching to the shares including the right to dividends, as long as CJP is not in default. Does this mean that once CJP is in default it **automatically** loses that right or does that the clause have to be read in conjunction with clause 5 so that the Friedland Group is required to take steps under clause 5 to trigger the operation of clause 3 and so assert their clause 3 rights?

[38] In my view, if clause 3 is a “stand alone clause” which took effect automatically on default, then it would mean that as from 14th October 1989 CJP could not properly continue to carry on the affairs of LIR and that LIR existed in a vacuum from that date until the Settlement Agreement as the Friedland Group is not required to exercise any of its remedies under clause 5 one of which is to direct the Pledge Agent to vote the shares. One of the inevitable results of this scenario would be that the business of LIR would grind to a halt and the very shares which were meant as security would be put in jeopardy by a possible diminution in value. Is that what the parties intended?

[39] In my judgment, the only commercially sensible construction which can be given to clause 3 having regard to the factual matrix, the Pledge Agreement as a whole and to the clause itself is that canvassed by Mr. Henriques, QC. To my mind, clauses 3 and 5 were intended to supplement each other and were not meant to operate as independent clauses. Specifically, clause 3 was not meant to operate automatically. If this were so it would mean simply that the Friedland Group could determine that an event of default had occurred, serve notice of default under

clause 4 and then do nothing to exercise their self-help remedies under clause 5 to take control of the shares and years afterwards declare that CJP had no right to vote the shares etc. during that period and so nullify all actions taken by LIR in the interim which they did not like. This, in my judgment, would be a palpably absurd result to the reasonable commercial person. The big stick approach favoured by counsel for LIR makes little commercial sense as is seldom untrue of big sticks. And, in fact, Mr. Phillips, QC. himself admitted that it did not work here.¹³ This to my mind puts paid to the very argument advanced by counsel for LIR as to the commercial prudence of the construction he favoured.

[40] Furthermore, I note that the proviso to clause 5 obliges CJP to execute all documents and to do all such other acts and things in the sole opinion of the Friedland Group to transfer ownership interests in the shares. Thus, the parties clearly contemplated that more might be needed to make the remedies granted by clause 5 effective. This no doubt takes into account the nature of the rights in question, that is, the voting rights attached to the LIR shares. In law, only the registered owner of a share can vote at meetings even if, as is often the case, the registered owner is not the beneficial owner. Therefore, simply saying that one has the right to vote the shares or that one loses the right on default is not enough, without more. This bolsters my view that clause 3 was not intended to operate automatically but was a declaration of the Friedland Group's rights on default, which rights had to be enforced in accordance with clause 5 and steps taken as provided therein to actually divest CJP of the voting rights.

[41] In summary therefore, clause 3 is a declaration of CJP's right to exercise voting rights and collect dividends once it is not in default and clause 5 enables the innocent party (the Friedland Group) to assert and enforce its rights in the event of default by taking active, practical and unequivocal steps to divest CJP of the voting rights. This construction would eliminate any mystery as to who is in control of LIR

¹³ The learned trial judge noted at para. 23 that Mr. Phillips said that the clause 3 pressure did not work as it should have in this case because Mr. Hickox and CJP were advised in 1989 by their attorneys and believed in reliance on that advice that the Pledge Agreement was void and therefore unenforceable.

and no hiatus in the affairs of LIR would result. Therefore, I would set aside the ruling of the learned judge on this issue.

- [42] I note in passing that the Friedland Group by letter of 17th October 1989 from its solicitors, Baker & McKenzie, gave notice of default and intimated that unless the default was cured within 10 days as provided in the Pledge Agreement that the Friedland Group would exercise all rights and remedies in the Pledge Agreement, specifically, that they would take title to and commence the necessary steps to sell the pledged shares. However, they took no such steps as CJP apparently challenged the validity of the Pledge Agreement. Instead, they commenced legal action in New York to obtain the monies due.¹⁴ I also note that they did not take any steps to seek an injunction to restrain CJP from continuing to carry on the affairs of LIR. It seems that the Friedland Group was content to let CJP conduct the affairs of LIR in the interim. They cannot now be heard to say that CJP was acting unlawfully as they could not vote the shares.

Was the First Transaction authorized by LIR?

- [43] The learned trial judge held¹⁵ that LIR did not have authority to enter into the First Transaction. This was on the basis of her finding that there were material differences between what was authorized at the 23rd August 1988 meetings of LIR's directors and shareholders and the documents comprising the First Transaction, that is the loan agreement dated 31st July 1990 and the first note also dated, 31st July 1990 which purported to give effect to the resolutions passed at those meetings.
- [44] The learned judge found that both the directors and the shareholders meetings of 23rd August 1988, as per the minutes, authorized a \$4 million future or **prospective** loan/loans from one or more of the partners of CJP. Such loans were

¹⁴ This they were entitled to do as the agreement did not detract from any other remedies available to them at law.

¹⁵ At para.40 of the judgment

to bear 15% simple interest and to be in the form of the draft loan agreement tabled and approved at both meetings.

- [45] The learned judge found that the loan agreement which was executed by Mr. Ricketts on behalf of LIR contained substantial changes from that which was approved. It provided for the \$4 million to include advances **already made** by Mr. Hickox to LIR and capitalized interest of \$1,082,826.53 with the loan to bear 15% compound interest and provided for 17% compound default interest. The first note which was issued by Mr. Hickox as director acting on behalf of LIR to himself reflected those changes and was for US\$ 5,082,826.52.
- [46] Further the trial judge held that Mr. Ricketts had no authority to make substantial changes to the said draft loan agreement as the said minutes (by resolution two),¹⁶ although permitting an officer to make changes to the draft, did not allow for substantial/material changes.
- [47] The main question arising is whether Mr. Ricketts, on behalf of LIR, entered into a loan agreement which was in accord with that authorised by the resolutions. I have considered the minutes and the documents comprising the first loan agreement and the submissions of both counsel. The learned judge's finding that directors of LIR (Mr. Ricketts and Mr. Hickox) met on 23rd August 1988 in New York and passed the resolution cannot be faulted.¹⁷
- [48] Subject to my view on the question of compound interest, I am also of opinion that the trial judge's findings that the First Transaction differed significantly from what was approved and that neither Mr. Rickets nor Mr. Hickox had authority to make these changes cannot be disturbed. Patently, resolution two cannot be construed as giving any officer of LIR authority to depart in such significant terms from the substance of the resolutions.

¹⁶ Resolution two stated: "Resolved that the terms of the Loan Agreement in substantially the form described at the meeting be approved, with such changes as any officer... may subsequently approve such approval to be conclusively evidenced by such officer's signature thereto."

¹⁷ This issue was fiercely contested before Saunders J. but he found that the meeting did take place as recorded in the minutes and this finding the trial judge properly held was binding on her as that was one of the matters intrinsic to the determination of the issues before Saunders J.

[49] I now turn to the issue of compound interest. In clause 3 of the first loan agreement, provision was made for interest on overdue amounts. Was that an unauthorised change?

[50] In this respect I agree with the submissions of Mr. Henriques, QC. The draft loan agreement itself authorized compound interest by reference to the words in clause 3 thereof, “the amount of accrued interest that is not paid shall be added to the principal balance outstanding and shall itself bear interest....” This is a classic formula for compound interest. In **Consolidated Fertilizers Limited v Deputy Commissioner of Taxation**¹⁸ compound interest was defined as:

“the interest eventually paid on a principal periodically increased by the addition of each fresh amount of interest as it becomes due and remains unpaid”.

[51] It follows from my findings, that except for the compound interest provision, that the First Loan Transaction went beyond the scope of the minutes and therefore the learned judge’s finding that the First Transaction is voidable must be upheld. Contrary to Mr. Henriques QC’s submissions, the offending parts cannot be severed as doing so would unduly truncate the First Transaction documents and render them incomplete and unenforceable.

Did the Shareholders of LIR subsequently ratify the First Transaction?

[52] In brief, the trial judge held, having regard to Mr. Hickox’s evidence in particular, that the First Transaction could not be ratified as Mr. Hickox, as the only other shareholder, did not have informed consent for the purposes of applying the Duomatic principle. This is because he testified that he did not know how the amendments to the first loan agreement relating to compound and default interest came about.¹⁹

¹⁸ [1992] FCA 224 at para.15.

¹⁹ See paragraph 41 of the judgment

[53] The learned judge relied on ratification under the Duomatic principle which principle was stated by Buckley J. in **Re Duomatic Ltd.**²⁰ It is well to first look at the law on ratification in general.

[54] **Palmer's Company Law**²¹, explains the doctrine of ratification further:

“If it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, then it has often been held that that assent is as binding as a resolution in general meeting would be. [Re Duomatic Ltd.]...This will not apply, however, if the assenting shareholders could not have validly constituted a quorum for a formal meeting, or if all the relevant shareholders have not indicated their assent ...”

The company will usually be bound even though the assent by the shareholders was not given at a meeting of the company, i.e. the doctrine of unanimous informal assent does not merely cure irregularities in the calling of meetings but has the effect of enabling the company to be bound even in the absence of any meeting at all.

[55] In addition, **Chitty on Contracts**²² describes ratification of an unauthorized act of an officer as follows:

“...where the directors merely exceed their authority the shareholders may ratify their act, or they may, by acquiescence in the act of the directors be estopped from objecting to its validity. The test of acquiescence...is whether the shareholders had notice of the way in which the affairs of the company were being conducted and were content not to oppose those acts which they knew were being done.”

[56] The issue as I understand it lies not with the learned judge's statement of the principle, but with her application of it.

[57] Mr. Phillips, QC sought to support the learned judge's ruling. He submitted that ratification under the Duomatic principle was not possible for two reasons. First, that Mr. Hickox was wholly unaware of all the changes which had been made to

²⁰ [1969] 2 Ch 365

²¹ Volume 2, para. 7.417

²² Chitty on Contracts, 29th Edition, Volume 1, p. 636, para. 9-040.

the First Transaction documents and which were not in keeping with the resolutions passed at the meeting on 23rd August 1988, and so was incapable of giving informed consent.

[58] Secondly, he relied on his construction of clause 3 of the Pledge Agreement which I have held to be incorrect, so I need not examine that argument further.

[59] It may do well to bear in mind that at the time of the LIR meetings in 1988 authorizing the First Transaction that Mr. Hickox and CJP (acting through Mr. Ricketts) were the only shareholders of LIR and likewise they were the only directors. Two years later when the First Transaction documents which allegedly gave effect to the decisions taken at those meetings were drawn up, Mr. Ricketts in his capacity as director of LIR, executed the loan agreement and Mr. Hickox, as lender, signed it. Further, Mr. Hickox, in his capacity as director of LIR, signed the promissory note. How then can it be said in such circumstances that Mr. Hickox did not have the requisite knowledge of the First Transaction to allow him to ratify it together with Mr. Ricketts simply because he testified that he did not know how the default interest provisions came about? One might not be aware of the genesis of a thing but this does not mean that on becoming aware of the existence of that thing that one cannot consent to it. Having regard to the fact that they both signed the First Transaction documents in law they are deemed to know the contents. Further, from the evidence which the trial judge accepted there can be no doubt that the shareholders knew of the loans and treated them as valid. In my judgment therefore, both Mr. Ricketts and Mr. Hickox had knowledge of the changes and what is more, both treated the First Loan Transaction as valid and therefore they can be deemed to have ratified the First Transaction.

[60] The learned judge held further²³ that the minutes of subsequent meetings relied on by Mr. Hickox could not be prayed in aid to ratify the First Transaction as the earliest minutes only expressly ratified the acts of the directors for the previous year immediately preceding the meeting. Thus, the minutes of the meeting of 2nd

²³ At para.43 of the judgment

October 1992 only extended retrospectively to 2nd October 1991 and therefore did not capture the First Transaction which was implemented on 31st July 1990. That, in my view, was correct.

- [61] The learned judge also held that the failure of the shareholders to raise any questions concerning the loans made by Mr. Hickox at subsequent meetings of LIR cannot be relied on to establish ratification. That does not accord with the doctrine of unanimous informal assent explained in **Palmer's**²⁴ as follows:

“...In exceptional circumstances members are treated as having assented if, with knowledge of the assent of the others, they stood by without protesting and by their conduct created the impression that they did not intend to object; their attitude constitutes an estoppel by conduct.”

- [62] Here, the shareholders were fully aware of the difficulties faced by LIR in constructing Cap Juluca; they authorized the directors to obtain loans from all of the members of CJP which included Mr. Hickox; they subsequently attended meetings at which the auditors' reports documenting the loans were tabled; they approved the reports and they were aware that construction was continuing. Yet they asked no questions about the loans neither did they object to them. These factors to my mind constitute exceptional circumstances from which one can say categorically that the shareholders (always CJP acting through Mr. Ricketts and Mr. Hickox) had all requisite knowledge of the loans and their terms and assented to them. The First Transaction though voidable initially for lack of authorization was thus ratified informally by the shareholders and is valid and binding on LIR.

Was the Second Transaction authorized by LIR?

- [63] The learned judge held²⁵ that the Second Transaction was likewise voidable as it was not authorized. In the court below, counsel for LIR accepted, based on the evidence adduced of all the various meetings and discussions and on the fact that the accounts were to be confirmed by LIR's accountants, that all shareholders and directors of LIR met and agreed the terms of the Second Transaction at the

²⁴ Op.cit. cited at para..54

²⁵ At paras. 46 – 48 of the judgment

meeting of 9th January 1995. The learned judge confirmed that this would have been sufficient for the court to find that the transaction had been ratified in accordance with the Duomatic principle. However, the learned judge went on to hold that the shareholders had no power to exercise the voting rights of the LIR shares in light of the continuing default under the Pledge Agreement and the automatic effect of clause 3, with the result that they could not ratify the Second Transaction, which was accordingly void.

- [64] Having regard to my interpretation of clause 3 of the Pledge Agreement this last ruling cannot be upheld. The shareholders had the power to vote the LIR shares and they ratified the Second Transaction in the manner found by the learned judge. Therefore, the Second Transaction would be valid in my view and I would set aside the learned judge's ruling that it was void.

Did Mr. Hickox in entering the First and Second Transactions offend against the rule against self-dealing?

- [65] The learned judge held²⁶ that in any event both the First and Second Transactions were void as Mr. Hickox, in entering into those agreements, offended against the rule against self-dealing. In relation to the First Transaction, the rationale was that prior to 20th December 1989 Article 57 of LIR's Articles contained a strict prohibition against self-dealing by directors and the shareholders did not amend that article when they passed the resolution to authorize the First Transaction, in August 1988. In relation to the Second Transaction, the basis was that Mr. Hickox could not rely on the purported amendment to the Articles (Article 94) made on 20th December, 1989 as that amendment was not validly passed since by then CJP being in default, had lost the shareholders' right to vote, and so had no right to ratify. Further, that in any event Mr. Hickox had not disclosed his interest in the Second Transaction to the Board as required by Amended Article 94 which incorporated section 91 of the **Companies Act** c. C65.

²⁶ At paras 56 to 60 of the judgment

- [66] The learned judge found²⁷ that LIR's Articles adopted Table A of the **Companies Act** and that Article 57 thereof provided: "the office of director shall be vacated... if he is concerned in or participates in the profits of any contract with the company". Further, that it was common ground that this article contained an absolute prohibition against self-dealing which applied until the Articles were amended.
- [67] The amended Article 94, purportedly passed on 20th December 1989 provides in sub-paragraph (a) that any director may vote and be counted in a quorum at any directors meeting in respect of any contract with the company whether or not such director is directly or indirectly interested in such contract; and (b) that a director who has a direct or indirect interest in a contract shall declare his interest at a meeting of directors **in accordance with the law**.
- [68] Section 91 of the **Companies Act** provides that a director who has an interest in a material contract with a company must disclose his interest in writing or request to have his interest entered in the minutes; and that such disclosure must be made at the meeting at which a proposed contract is first considered.
- [69] In relation to the First Transaction, does it follow that the shareholders could not ratify Mr. Hickox's failure to make formal disclosure without first amending this Article? Clearly, as the learned judge found, the shareholders did not expressly or indirectly amend the Articles at the meeting of 23rd August 1988. But, the shareholders at that meeting authorized a loan from among others, Mr. Hickox, whom they knew was a director. They were subsequently made aware of all relevant documentation and LIR made full use of the monies advanced by Mr. Hickox. In so doing it can be said that the shareholders waived compliance with Article 57 and ratified the First Transaction?
- [70] **Euro Brokers Holdings Ltd v Monecor (London) Ltd**.²⁸, which was not cited to the court, shows the extent to which the Duomatic principle has developed, is

²⁷ At para.54 of the judgment

²⁸ [2003] B.C.C. 573(English Court of Appeal)

helpful on this issue. The court stated²⁹ that the relationship forged by the Articles of Association between a company and its shareholders is a contractual one. Therefore, the shareholders have authority to waive compliance with articles or other provisions which govern internal procedure or exist for their protection.

[71] The court said:

“I see nothing in the circumstances of the present case to exclude the Duomatic principle. It is a sound and sensible principle of company law allowing the members of the company to reach an agreement without the need for strict compliance with formal procedures, where they exist only for the benefit of those who have agreed not to comply with them. What matters is the unanimous assent of those who ultimately exercise power over the affairs of the company through their right to attend and vote at a general meeting. **It does not matter whether the formal procedures in question are stipulated for in the articles of association, in the Companies Acts or in a separate contract between the members of the company concerned. What matters is that all the members have reached an agreement. If they have, they cannot be heard to say that they are not bound by it because the formal procedure was not followed.** The position is treated in the same way as if the agreed formal procedure had been followed. ... As Neuberger J said in *Re Torvale Group Ltd* [2000] BCC 626 at p.636C–D: “The articles constitute a contract, and if the parties to that contract, or if the parties for whom the benefit of a particular term has been included in that contract, are happy unanimously to waive or vary the prescribed procedure for a particular purpose, then ... it seems to me that there is no good reason why it should not be capable of applying”.

[72] Here, the shareholders knew all the relevant information about the loans and Mr. Hickox’s interest in the transactions and must be taken to have ratified the First and Second Transactions and impliedly waived compliance with Article 94. To put too much of an artificial construct on the requirements of Article 94 in these circumstances and so render it iron clad and incapable of being waived by the very persons for whose benefit it was introduced, would lead to manifest injustice.

[73] In relation to the Second Transaction, having regard to my ruling on the meaning of clause 3 the shareholders of LIR had authority to amend the Articles in December 1989. The amendment effected was therefore properly passed. Again,

²⁹ *Id.*, para. 62

applying **EuroBroker**, the shareholders did have power to waive strict requirement with section 91 and must be taken to have done so.

- [74] I would therefore set aside the learned judge's ruling and declare that both the First and Second Transactions are valid and do not offend against the rule against self-dealing.

The binding effect of Saunders J.'s judgment

- [75] I will only deal here with the aspect of the pre-23rd August 1988 advances as the only relevant issue under this head. The learned trial judge found that the advances totaling US\$943,184 which she identified at para.107 of her judgment were not made to LIR and so were not recoverable. She also held, contrary to Mr. Henriques QC's submissions, that she was not precluded by the judgment of Saunders J. from determining that issue at trial.

- [76] The reasons given by the learned trial judge cannot be faulted. It is abundantly clear that Saunders J. left open the question of the pre-23 August 1988 advances to be determined at trial and the learned trial judge correctly proceeded to consider the evidence and make her determination on this aspect of the matter in favour of LIR. Her findings that those monies were advanced to CJP as capital and not to LIR cannot be faulted.

Whether the judge erred in refusing to grant Mr. Hickox leave to amend his claim to plead restitution

- [77] This was an alternative argument on behalf of Mr. Hickox. However, having regard to my ruling that the First and Second Transactions are valid and binding on LIR it is not necessary for the disposal of this matter to address this issue. Suffice it to say that in my view the learned judge's refusal to allow Mr. Hickox to amend his claim at the commencement of closing submissions so as to plead restitution as an alternative claim was correct as **CPR 20.1(3)** only permits amendments to pleadings after the first case management conference if the applicant can "satisfy

the court that the change is necessary because of some change in circumstances which became known after the date of case management conference.” Thus, grounds 3.25 and 3.26 of Mr. Hickox’s cross-appeal have no merit.

Undue delay in the delivery of judgment

- [78] Strictly speaking this is not necessary for the determination of the cross-appeal but delay in handing down judgments must be a matter of concern to everyone involved in the due administration of justice and ought not to go unmentioned.
- [79] Mr. Henriques, QC alluded to this ground in his written submissions and Mr. Phillips, QC likewise responded in writing. Neither counsel made oral submissions on this issue and Mr. Henriques, QC did not withdraw that ground. I cannot see that I can properly say that the ground was abandoned merely because of the absence of oral submissions.
- [80] Mr. Henriques, QC submitted that the actual trial lasted 10 days; written submissions were lodged a year afterwards (I remark that **CPR** 39.3 gives a trial judge discretion to allow written submissions instead of or in addition to closing speeches within 7 days of the conclusion of the trial or such shorter period as the judge directs) and then oral submissions made even later.³⁰ Thus, counsel contended the judgment was handed down on 8th July 2008, some 2 years and 2 months after the trial concluded on 19th May 2006 and some 1 year and 3 months after the written submissions (and only after representations by the Bar Association). This, counsel submitted, led to a manifest injustice.
- [81] I am aware of the guidelines on timeframes for handing down decisions as given by the Chief Justice. Three months is acceptable for High Court decisions and six months for Court of Appeal decisions. If those time frames cannot be met then the judge is required to give an explanation. Here, the learned trial judge gave no explanation for this undue delay in delivering her judgment but counsel for LIR attributed it to difficulties in obtaining a transcript.

³⁰ He did not state the date

[82] The principles governing undue delay in handing down judgments were enunciated by the Privy Council in **Cobham and Frett**³¹ and more recently in **Citco Banking Corporation N.V. v. Pusser's Limited and Charles S Tobias**.³² In the first case, the court was concerned with a delay of 1 year after trial and in the second case, with a delay of five years after trial.

[83] In **Cobham v Frett** the court held:

“... where an appeal was based on excessive delay between the conclusion of a trial and the delivery of judgment, the appellate court should consider the quality of the judge's notes of the evidence and of the advocate's submissions and carefully scrutinize his findings of fact and his reasons for his conclusions but should not allow an appeal on that basis unless the judgment below contained errors probably or possibly attributable to the delay sufficient to satisfy the appellate court that the judgment was unsafe and that to allow it to stand would be unfair to the party complaining of the delay ; that although a lapse of twelve months between the conclusion of trial and the giving of judgment would normally constitute excessive delay , the judge's notes had been of a high quality and it was impermissible to conclude merely from the delay that he had had difficulty in remembering the demeanour of witnesses ; that the complaints made about his judgment were unfounded and that there was no reason to doubt the correctness of his the conclusions or for supposing that he had forgotten or overlooked any material evidence.”

[84] In **Pussers** Lord Hoffman stated:

“The judgment as delivered offers the parties no explanation for the delay ... But their Lordships feel bound to observe that such delays are completely unacceptable. Besides being a violation of the constitutional right of the parties to a determination of their dispute within a reasonable time, they are likely to be detrimental to the interests of the British Virgin Islands as a financial centre which can offer investors efficient and impartial justice”.

[85] I will only add that I understand that Anguilla like the British Virgin Islands is a British Overseas Territory and also an offshore centre.

³¹ [2001] 1 WLR 1775

³² [2007] UKPC 49

[86] Having regard to those governing principles, although the judgment was woefully late and no explanation justifying the delay was given by the learned trial judge in her judgment or otherwise, Mr. Henriques, QC did not point to any error by the trial judge which could be attributable to the delay. Accordingly, this ground must fail.

[87] This now leaves the issues raised on the appeal.

The appeal - restitution

[88] The issues raised on the appeal challenge the learned judge's decision to grant relief to Mr. Hickox by resorting to section 19 of the **Eastern Caribbean Supreme Court (Anguilla) Act** c. E15. It is evident that the learned judge was concerned to arrive at a just result having found that Mr. Hickox did in fact advance most of the monies claimed.

[89] Having regard to my view that the First and Second Transactions are valid and binding on LIR it is not necessary to address the issue as to whether the learned judge was correct to resort to section 19 of the Act.

Conclusion

[90] For the foregoing reasons, I agree that the outcome of the appeal should be as stated by my sister Edwards JA at paragraph 120 of her judgment. In conclusion, I cannot help but comment that this litigation was brought about because, as Saunders J. so insightfully remarked, Mr. Friedland did not appreciate when he bought back all the LIR shares at auction that he was also buying all the debts of LIR.

Postscript

[91] In keeping with what I said at paragraph 81 above I must perforce apologise for the undue delay in handing down this judgment. The court heard oral arguments in March 2009. I reverted to my substantive duties shortly thereafter and was constrained to substantive duties shortly thereafter and was constrained to give

priority to those duties. Furthermore, I was on special assignment in one of the other territories at the end of July and after that proceeded on vacation which had to be extended until mid-September because of urgent family matters when again I was constrained to give priority to my substantive duties.

Rita Joseph-Olivetti
Justice of Appeal [Ag.]

[92] **EDWARDS, J.A.:** I have read the draft judgment of my learned sister Joseph-Olivetti J.A. [Ag.]. I agree with most of the conclusions in her judgment on the issues raised in Mr. Hickox's cross-appeal relating to:

- (1) the proper construction of the Pledge Agreement (grounds 3.1 and 3.2);³³
- (2) lack of authority for the First Transaction (grounds 3.5 to 3.6);³⁴ I do not agree that the compound interest provision should be excepted since it also went beyond the scope of the minutes. The fact that Mr. Hickox signed the First Loan Agreement as lender and not as shareholder, and also that Mr. Ricketts was not present at the meeting on the 21st May 1990 does not prevent the **Duomatic** principle from operating in my view since there is no requirement for the shareholders assent to take place at a meeting. All that is required is that Mr. Hickox and Mr. Ricketts were the shareholders who could validly constitute a formal meeting of the shareholders, and that they knew that the First Loan Agreement contained the questioned provision on compound interest;

³³ At paras. 39 - 42.

³⁴ At para. 51 and Ratification of the First Transaction at paragraph 61.

- (3) lack of authority for the Second Transaction (grounds 3.7 to 3.8);³⁵
- (4) whether the First and Second Transactions are void by reason of the rule against “self-dealing” (grounds 3.11 to 3.12);³⁶ I wish to add here my view that the shareholders may be deemed to have been aware of the existence of Article 57 which governed LIR’s internal and formal procedures, and which also existed for the protection of the shareholders. Applying the law in **Eurobroker**, since at the material time the shareholders of LIR knew all the relevant information about the loans and Mr. Hickox’s interest in the transactions, and reached the agreement contained in the First Transaction without compliance with Article 57, LIR and its current shareholders cannot be heard to say that they are not bound by the First Transaction;
- (5) the effect of the Settlement Agreement (grounds 3.15 to 3.16);³⁷
- (6) the advances made before 23rd August 1988 (grounds 3.21 to 3.22);³⁸
- (7) whether LIR is estopped from denying that advances made before 23rd August 1988 were made to it (grounds 3.23 to 3.24);³⁹ and
- (8) whether the learned judge erred in refusing the application of the respondent Mr. Hickox to amend by adding a claim for restitution (grounds 3.25 to 3.26)⁴⁰.

[93] I note that Joseph-Olivetti J.A. [Ag.] did not specifically address the following grounds in Mr. Hickox’s cross-appeal except for ground 3.33 so I wish to state my views on them.

³⁵ At paras. 63 - 64

³⁶ At paras. 72 - 73

³⁷ At paras. 16 - 17

³⁸ At paras. 74 - 75

³⁹ At paras. 74 - 75

⁴⁰ At para. 77

- (1) Waiver of any right to rely upon the Pledge Agreement (grounds 3.3 to 3.4). Considering that clause 11(e) of the Pledge Agreement specifically provided for its provisions to be modified or waived only by an instrument or instruments in writing signed by all the parties, the learned trial judge's finding that the Friedland Group did not waive any rights that it might have had to rely upon clause 3 of the Pledge Agreement would be unimpeachable in my view. In any event, having regard to Olivetti J.A.'s conclusions on grounds 3.1 and 3.2 which I endorse, this ground has no merit.
- (2) Whether LIR had not lost its right to avoid the First and Second Transactions by virtue of the operating default under the Pledge Agreement (grounds 3.13 to 3.14). Having regard to the conclusions of Olivetti J.A. on grounds 3.1 and 3.2; and that the First and Second Transactions were ratified, these grounds are otiose and not deserving of a finding.
- (3) Whether the learned judge erred in finding that any failure on the part of Mr. Hickox to disclose his interest in the First and Second Transactions was not a mere technicality which could be overlooked (grounds 3.17 and 3.18). Having regard to Olivetti J.A.'s conclusions for grounds 3.9; 3.10; 3.11 and 3.12 there is no need to address these grounds.
- (4) Whether the learned judge erred in not finding that the delay by LIR in attempting to avoid the First and Second Transactions was fatal (grounds 3.19 and 3.20). These grounds are also otiose in light of Olivetti J.A.'s conclusions which I agree with.
- (5) Ground 3.33 complains about the delay of the trial judge in handing down the judgment; ground 3.34 complains about the findings of the trial judge that the evidence of the witnesses called at the hearing of the preliminary issues was inadmissible; and ground 3.35 contends

that the trial judge erred in holding that she was bound only by the those findings of Saunders J. which were essential to the determination of the preliminary issue. Having regard to how the cross-appeal was argued by Mr. Henriques, QC, no oral arguments were advanced for several grounds in Mr. Hickox's cross-appeal. I formed the view at the hearing that these grounds were not being pursued by Mr. Hickox. In any event concerning the delay in handing down the judgment, the legal representatives of the parties who were in Anguilla would have been aware that the learned trial judge was absent from office on sick leave for a part of the period in question. Taking into account the arguments advanced by Mr. Henriques, QC, the manner in which the appeals were prosecuted, and the outcome of the appeals, in my judgment, it cannot reasonably be said that the 15 month delay in delivering the judgment in this complex litigation proceedings, though unsatisfactory under our Code of Ethics, caused any real hardship and injustice to the respondent. Although no explanation for the delay was stated in her judgment, it would not be unusual for the trial judge to proffer orally an explanation to counsel and the parties at the time the judgment is handed down. In the absence of any proof that the learned trial judge gave no explanations for the delay on the 8th July 2008 when she delivered her judgment I would refrain from making any further pronouncements.

- (6) Grounds 3.30 to 3.32 question the learned judge's findings and conclusions relating to the First, Second and Third Charges. These grounds were not pursued at the hearing, and no skeleton arguments addressed them I have concluded therefore that they were abandoned.
- (7) There is also a ground relating to costs which challenges the decision of the learned trial judge not to award costs to the respondent on an indemnity basis. This was addressed in the skeleton arguments filed

on behalf of Mr. Hickox on the 13th February 2009, but not in the submissions filed on the 23rd March 1999. No oral arguments were advanced by either Queen's Counsel before us although the written submissions of Mr. Phillips, QC filed on the 17th March 2009 did address this ground. In the event that this ground was not abandoned as I believed, I agree with the submissions of Mr. Phillips, QC and the learned trial judge's finding that indemnity costs on a contractual basis must be specifically pleaded. Mr. Hickox did not specifically plead this and in my judgment is not entitled to it.

- [94] The learned trial judge's decision to order LIR to pay Mr. Hickox by way of restitution those advances which were the subject of the first and second promissory notes with interest, less the pre-August 1988 advances, is also the subject of Mr. Hickox's cross-appeal. LIR has appealed this decision as well. Although the conclusions of Joseph-Olivetti J.A. [Ag.] seem to render the determination of this issue unnecessary, in my view it should be determined in the event that the conclusions of the learned trial judge are subsequently found to be correct. In dealing with this issue I will also state my thoughts on the trial judge's refusal of Mr. Hickox's application to amend by adding a claim for restitution.

The power to grant restitution

- [95] At paragraph 107 of her judgment the learned judge held that the amounts of US\$383,184; \$180,000.00; \$60,000.00; \$240,000.00 and \$80,00.00 (being one half of the \$160,000.00 dated 4th December 1988) totaling \$943,184.00 were advances made before the 23rd August 1988 by Mr. Hickox to the US partnership entity called Cap Juluca Partners ("CJP") and not to LIR. The learned judge stated further:

"These contributions to CJP do not as a matter of law amount to good consideration moving from Mr. Hickox to LIR for the delivery or making of the First Promissory Note. To this extent, I agree with counsel for LIR that in respect of the First Note there is partial failure of consideration...LIR

and Mr. Hickox are the immediate parties to the First Promissory Note and the amounts are liquidated and ascertainable.”

[96] Having made that finding, the learned judge stated at paragraph 108:

“...it follows that by way of restitution LIR would be obliged to repay Mr. Hickox the remainder of the advances comprised in the First Promissory Note and the advances comprised in the Second Promissory Note together with interest thereon.”

[97] The learned judge also found that there was want of authority on the part of LIR to enter into the First and Second Transactions “which also includes the First and Second Promissory Notes;” and the consequence flowing from this was that the first and second promissory notes are void. She continued at paragraph 108: “As such, Mr. Hickox’s claim as pleaded up to the date of trial being an action brought solely upon the First and Second Promissory Notes will have failed in its entirety.”

[98] Thereafter, she considered Mr. Hickox’s application for an amendment to his case made at the commencement of closing submissions so as to plead restitution as an alternative claim. She concluded that despite the overriding objective **CPR 20.1 (3)** did not permit her to grant the amendment. Against this background, the learned judge decided as follows:

“[111] The circumstances of this case strikes me as an occasion however, where the strict application of this rule does not sit well with the overriding objective of CPR. I trust I am forgiven for resorting to s19 of the Eastern Caribbean Supreme Court (Anguilla) Act 41 in striving to arrive at a just result....I consider that this provision empowers me to grant relief to the Claimant Mr. Hickox in the nature of restitution. LIR does not oppose the grant of this relief and from the onset has reiterated over and again that there is no desire by LIR to obtain a windfall at the expense of Mr. Hickox by virtue of the manner in which he chose to plead his case. I would accordingly order that LIR repays to Mr. Hickox those advances which formed the subject of the First and Second Promissory Notes save and except the five pre- 23rd August 1988 advances...”

[99] Grounds 2 and 3 of the notice of appeal complain that the judge was wrong in law to hold that section 19 of the **Eastern Caribbean Supreme Court (Anguilla) Act**

⁴¹ See paragraph 25 of Olivetti JA’s judgment.

c. E15 (“**the Supreme Court Act**”) gave the court power to grant Mr. Hickox restitution notwithstanding that a claim for restitutionary relief had not been pleaded.

[100] Grounds 3.25 and 3.26 of the Mr. Hickox’s cross-appeal allege that the learned judge erred in finding that she did not have jurisdiction to permit Mr. Hickox’s application to amend to add a claim for restitution. Mr. Hickox contends that the overriding objective of the **CPR** permits such amendment and LIR was not prejudiced in any way by the amendment since it did not oppose the grant of such relief and had clearly indicated that it did not desire to obtain a windfall at Mr. Hickox’s expense. Ground (1) of LIR’s notice of appeal asserts that the learned judge correctly ruled that the court had no power to permit the late amendment and the consequence of that ruling is that there was no pleaded claim for restitution before the court.

[101] The courts in England have now come to accept the equitable principle of unjust enrichment as an independent cause of action giving rise to restitution. Lord Clyde explained that unjust enrichment:

“...is equitable in the sense that it seeks to secure a fair and just determination of the rights of the parties concerned in the case. But it is not a principle which is entirely discretionary in its application so as to enable a court in any case to withhold a remedy where all the necessary elements for its satisfaction have been established, although there may be circumstances where on grounds which may be described as grounds of public policy a remedy may be refused. Without attempting any comprehensive analysis, it seems to me that the principle requires at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss. The loss may be an expenditure which has not met with the expected return. The remedy may vary with the circumstances of the case, the object being to effect a fair and just balance between the rights and interests of the parties concerned. The obligation to provide the remedy does not rest on any contractual basis but on the general principle of the common law and it may find its expression in a variety of circumstances.”⁴²

⁴² Per Lord Clyde in *Banque Financiere de la Cite v Parc (Battersea) Ltd and Others* [1999] A.C. 221 at 237

Lord Hutton further stated that:

“[T]he plaintiff does not need to prove that the defendant was guilty of misconduct. In order for a claim for unjust enrichment to succeed at common law the plaintiff does not have to prove a wrong committed by the defendant against him.”⁴³

[102] Goff and Jones assert however that:

“... the unjust enrichment claim may nonetheless fail *in limine* if the facts fall within one of the limiting principles which form the boundaries of the restitutionary claim...The principal limits of the restitutionary claim are: (1) the claimant conferred the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant; (2) the claimant entered into a compromise or made a payment meaning to waive all inquiry into it; (3) the claimant conferred the benefit while performing an obligation (other than under compulsion of law) which he owed to a third party, or otherwise while acting voluntary in his own self-interest; (4) the claimant acted officiously in conferring the benefit; (5) the defendant cannot be restored to his original position or is a bona fide purchaser; (6) public policy precludes restitution”.⁴⁴

[103] **Blackstones Civil Practice 2009** points out⁴⁵ that the restitutionary claim is for repayment of the benefit received by the defendant and not the loss suffered by the claimant and that one of the most common claims in restitution are for repayment of money where there has been a total failure of consideration.

[104] As the learned judge found, Mr. Hickox did not expressly claim or specify the remedy of restitution. The writ of summons with the endorsed statement of claim was filed in 1998 under the old rules, and the action was based solely on the 2 promissory notes. In January 2001, LIR filed its Re-Amended Defence and Counterclaim in which it denied that it made or authorized the making of the disputed notes and agreement⁴⁶ and counterclaimed for declarations regarding this want of authority. In Mr. Hickox’s “Reply to Re-Re-Amended Defence” dated 10th May 2005 it was pleaded:

⁴³ Per Lord Hutton op cit. at p. 243

⁴⁴ See Goff & Jones The Law of Restitution 7th ed. (2000) at paras. 1-061

⁴⁵ At para. 4.20

⁴⁶ At paragraph 88 to 92

“86. The Plaintiff says that the issues raised herein by the Defendant through its present shareholders and directors are *male fides* and without any merit in an endeavour to enrich unjustly the Defendant and themselves. Having had the benefit of the Plaintiff’s loans and advances to construct the Resort, they are now raising issues lacking in *bona fides* of matters which they were well aware of at the time to deprive the Plaintiff of the advances to the Defendant by seeking to avoid the legal obligations of the Defendant to repay the loans in accordance with the Agreements and Notes in an endeavour to have the Resort at no cost to the Defendant and thereby enriching themselves.

87. The Plaintiff says that the defence herein is an abuse of the process of the Court as it raises issues which are not justiciable or sustainable issues...[and] which have been already raised and adjudicated on in favour the Plaintiff and is wholly ... seeking to re-litigate same in an endeavour to pursue an unlawful an unlawful course to enrich themselves unjustly at the expense of the Plaintiff.”

[105] Further, in Mr. Hickox’s “Defence to Amended Counterclaim” of the same date the following was pleaded:

“89. ...The only person who has sustained any loss is the Plaintiff who has financed the construction of the Resort and as a condition of the Barclay’s Standby Loan Agreement, had to make further advances to ensure the completion of the Resort and is still a guarantor under that Loan Agreement.

90. It is the Plaintiff’s loans and advances that have funded the construction of the Resort ... and the Defendant has never contributed any funds for the construction of the Resort. The Defendant has therefore benefited from the Plaintiff’s loans and advances as it had a Resort Hotel and other tourist facilities constructed on the lease land without any payment therefore by the Defendant.”

[106] The opportunity arose from 2001 for the claimant to seek to amend his claim and statement of claim accordingly since under **Civil Procedure Rules 2000** a claim for restitution based on unjust enrichment cannot be dealt with in a Reply or Defence to Counterclaim.⁴⁷

[107] Section 19 of the **Supreme Court Act** does not admit the interpretation placed on it by the learned judge in my respectful view because that provision states that the

⁴⁷ See CPR 8.6; 8.7 and 10.5

remedies as any of the parties may appear to be entitled to must be remedies “**in respect of any legal or equitable claim.**” Section 19 must be interpreted within the context of sections 13 and 16 of the **Supreme Court Act** in my view. Section 13 states that:

“If a plaintiff...claims to be entitled to any equitable ...right or to relief on any equitable ground against any ...claim whatsoever asserted by any defendant in the cause or matter, or to any relief founded upon a legal right which before the 1st day of November, 1875 could in England only have been given by a court of equity, the Court or judge shall give to the plaintiff...the same relief as would be given by the High Court of Justice in England in a suit or proceeding for the same or a like purpose.”

Section 16 of the **Supreme Court Act** requires the Court to:

“...take notice of all equitable...rights and all equitable duties and liabilities appearing incidentally in the course of any cause or matter in the same manner in which the High Court of Justice in England would recognize and take notice of the same in any suit or matter duly instituted therein.”

[108] Mr. Hickox made no legal or equitable claim for unjust enrichment in his claim and statement of claim and the remedy of restitution does not hang by itself in suspense.

“A claimant must be able to point to an established ground of recovery. ...it cannot be said ‘that there is a free-standing claim of unjust enrichment in the sense that a Claimant can get away with pleading facts which he says leads to an enrichment which he says is unjust...’”⁴⁸

Applying section 19 of the **Supreme Court Act** in the absence of any legal or equitable claim was not an option in the existing circumstances.

[109] The learned judge correctly relied on the decision of this court in **Ormiston Ken Boyea et al v East Caribbean Flour Mills Ltd.**⁴⁹ in ruling as she did against the last minute application to amend the statement of claim. The governing rule, **CPR** 20.3, prohibits such an amendment unless the respondent could “satisfy the court

⁴⁸ See Goff & Jones supra at para 1-015 citing at fn 99 Mann J., in *Charles Uren v First National Home Finance Ltd.* [2005] EWHC 2529 Ch at para 16 following Lord Browne Wilkinson at paras 196 to 197 in *Woolwich Equitable Building Society v First National Home Finance Ltd.* [1993] AC. 70.

⁴⁹ *Saint Vincent and the Grenadines Civil Appeal No. 3 of 2004* (unreported) para. 8.

that the change is necessary because of some change in circumstances which became known after the date of ... [the first] case management conference.” Mr. Hickox definitely could not pass this test. The overriding objective would be of no assistance to Mr. Hickox in his application since it cannot be used to widen or enlarge what **CPR** 20.1(3) forbids.⁵⁰ Moreover, even if the court were to consider exercising its case management power under **CPR** 26.1(6)⁵¹ the very nature of a claim for unjust enrichment demands that Mr. Hickox make it clear that he was relying on this fall-back claim well in advance of trial, even where the central facts of both causes of action may be the same or based on substantially the same facts. Prior notice to LIR before trial would be necessary in the instant case so that LIR may have the opportunity to answer the claim, having regard to the limiting principles which form the boundaries of such a claim and the available defences. Granting the amendment would have been contrary to the overriding objective as such an amendment would have prejudiced LIR in my view even where LIR was not expressly opposing the grant of restitution.

The outcome of the appeal

[110] LIR would succeed on grounds 1, 2 and 3 of the notice of appeal. The other 3 grounds: (4) to (6) relate to the interest awarded to Mr. Hickox and challenge the reasoning and conclusions of the learned trial judge in awarding a rate of interest by way of restitution reflecting the risk of the venture in which the monies had been vested. In light of my conclusion on grounds 1 to 3 of LIR’s notice of appeal, and Olivetti J.A.’s conclusions that the shareholders ratified the First and Second Transactions, which along with the 2 promissory notes specifically provided for compound interest, I am of the view that grounds 4 to 6 of LIR’s appeal would succeed.

⁵⁰ See **Ormiston Ken Boyea** supra at para. 30

⁵¹ CPR 26.1(6) states: “ In special circumstances on the application of a party the court may dispense with compliance with any of these rules.”

[111] LIR sought to have paragraphs 3, 4, and 7 of the order dated July 8, 2008 set aside, dismissal of the claim, payment of the defendant's costs of the action to be assessed in detail on a standard basis if not agreed. In the alternative, that the figures of 15% and 12% in paragraphs 3 and 4 of the order be deleted and replaced by such figures as the court of appeal determines to be appropriate. The court was not asked to exercise any additional specific power.

[112] In order to determine the result of the appeal it is necessary to set out the terms of the order of the learned trial judge. She made the following declarations and orders:

- “(1) The First and Second Transactions are void for want of authority.
- (2) The pre- 23rd August 1988 advances, being the sums \$383, 184; \$180,000; 60,000; 240,000; and 80.000 (being one half of the \$160, 000 advance dated 4/12/88) all together totaling **US\$943.184** were not loans to LIR but rather contributions to the partnership CJP in respect of partnership units or interests.
- (3) LIR shall repay by way of restitution to Mr. Hickox, those advances which formed the subject of the First Promissory Note save and except those advances set out in subparagraph (2) hereof. The advances to be repaid shall bear interest at the rate of 15% per annum as from the date of demand namely 30th April 1997, to date of judgment.
- (4) LIR shall repay to Mr. Hickox by way of restitution all of the advances forming the subject of the Second Promissory Note said advances to bear interest at the rate of 12% per annum payable as from the date of issue of the claim namely 2nd October 1998 to date of judgment.
- (5) The registration of the First and Second Charges by Mr. Hickox over the Leasehold interest of LIR in and around January, 1997 is hereby set aside and the Registrar of Lands is hereby directed to cancel the said entries in respect thereof appearing on the Land Register in respect of LIR's leasehold interest.
- (6) The Registration of the Third Charge is hereby deemed to be effectively registered only as from the date following the sale of the LIR shares pursuant to the Settlement Agreement, namely as from 16th September 1997.

(7) Each party shall bear their own costs.”

[113] Mr. Hickox sought the following orders in his cross-appeal:

- “4.1 Paragraphs 1, 2, 3, 5, 6 and 7 [be] set aside.
- 4.2 There be judgment for the Respondent in the sums set out in paragraphs 5 and 8 of the Statement of Claim plus compound interest thereon at 17% and 12% respectively to the date of payment.
- 4.3 The Appellant shall pay the Respondent’s costs of the action to be the subject of a detailed assessment on an indemnity basis pursuant to contract if not agreed.
- 5. The Court is not asked to exercise any additional specific power, save to the extent that issues relating to a stay of execution may arise.”

[114] The first loan agreement and first promissory note stipulated respectively:

“3. **Interest on Overdue Amounts.**

Any amount in respect of the Loan or the Note not paid when due (whether at maturity, upon acceleration or otherwise), and all other overdue amounts due under this Agreement, shall bear interest from the due date therefore until the date of actual payment (after as well as before judgment) at : the rate of fifteen percent (15%) per annum, plus, to the extent permitted by law, two percent (2%) per annum (computed on the basis of a year of 360 days and the actual number of days elapsed). Interest on such overdue amounts shall be payable to Lender on demand therefore.”

“The Borrowers promise to pay interest, on demand, on any overdue principal and, to the extent permitted by law, overdue interest from their due dates at the rates determined as set forth in the Loan Agreement.”

[115] The Second Loan Agreement and Second Promissory Note provided for interest payments respectively as follows:

“4. **Interests on Overdue Amounts.**

Any amount in respect of the Loan or the Note whether principal or interest which is not paid when due (whether at maturity, upon acceleration or otherwise), and all other overdue amounts due under this Agreement, shall bear interest from the due date thereof until the

date of actual payment (after as well as before judgment) at the highest rate permitted by applicable law. Interest on such overdue amount shall be payable to Lender on demand therefore.”

“The Borrowers promise to pay interest, on demand, on any overdue principal and, to the extent permitted by Law, overdue interest from their due dates at the rates determined as set forth in the Loan Agreement.”

- [116] I agree with the learned trial judge’s statement of the law at paragraph 112 of her judgment where in considering whether the advances should bear automatic compound interest, or only on demand she stated:

“It is trite law that compound interest is not the norm and is only allowed by agreement expressed or implied by well established custom or usage.”⁵²

- [117] In the absence of any known statutory provision in Anguilla prohibiting the accrual of compound interest in relation to any debt upon which interest is payable by virtue of an agreement, the provisions for compound interest payments in the first and second loan agreements and promissory notes ought to prevail. I also note that in keeping with **CPR** 8.6 Mr. Hickox’s statement of case expressly claims interest and states the basis of entitlement.

- [118] Mr. Hickox would therefore be entitled to US\$4,000,000 in aggregate principal for amounts of advance to the respondent less the pre- August 1988 advances to CJP totaling US\$943,184, being the subject of the first promissory note dated 31st July 1990 and capitalized interest to be assessed by the court below if not agreed on by the parties in accordance with clause 3 of the first loan agreement dated 31st July 1990.

- [119] Mr. Hickox would also be entitled to US\$3,962,830.41 being the subject of the second promissory note dated 1st January 1995 and interest to be assessed by the court below if not agreed on by the parties in accordance with clause 4 of the second loan agreement dated 1st January 1995.

⁵² The learned judge referred to Halsbury’s Laws, Vol. 32, p. 126

- [120] While LIR has technically succeeded to some extent on its grounds of appeal, this is a pyrrhic victory for it has won the battle, but lost the war. It is Mr. Hickox who has won the war and should be awarded judgment in terms of paragraphs 116 and 117 above.
- [121] Regarding costs, our rules contain no provisions for indemnity costs and establish its own regime for awarding costs which is different from the regime under the English Civil Procedure Rules, and therefore not applicable. The learned judge ordered each party to bear their own costs having found that LIR had succeeded for the most part in its defence. The general rule is that the unsuccessful party pays the costs of the successful party unless the court orders otherwise because of any of the reason(s) set out in **CPR** 64.6 (3) to (6). The judgment of the trial judge does not disclose that she exercised her discretion in accordance with **CPR** 64.6 (3) to (6). I would direct that the parties file submissions in relation to the court's discretion under these rules in order for a proper determination to be made on the question of costs in the court below and on the appeal, if the parties cannot agree on costs. The submissions are to be filed within 30 days of a determination by the court below, or within 30 days of the date that the parties file a consent agreement, as to the interest payable to Mr. Hickox on each promissory note. This interest should be computed up to the date of the assessment by the court below, or up to the date the consent agreement on accrued interest is filed.
- [122] The outcome of this appeal would be that LIR's appeal is allowed to the extent that paragraphs 3, 4 and 7 of the order of the learned trial judge is set aside. Mr. Hickox's cross-appeal is allowed and paragraphs 1, 3, 4, and 7 of the order is set aside. There be judgment for Mr. Hickox in the sums and on the terms set below:

- (1) The appellant, Leeward Isles Resorts Limited, shall pay to the respondent, Charles Hickox, US\$4,000,000 in aggregate principal for amounts of advance by the appellant to the respondent less the pre-August 1988 advances to CJP totaling US\$943,184, being the subject of the First Promissory Note dated 31st July 1990 and capitalized

interest to be assessed by the court below if not agreed on by the parties, in accordance with clause 3 of the First Loan Agreement dated 31st July 1990.

- (2) The appellant, Leeward Isles Resorts Limited, shall pay to the respondent, Charles Hickox, US\$3,962,830.41 being the subject of the Second Promissory Note dated 1st January 1995 and interest to be assessed by the court below if not agreed on by the parties, in accordance with clause 4 of the Second Loan Agreement dated 1st January 1995.
- (3) There be an assessment by the High Court of the interest accruing to the respondent on the principal sums due under the First and Second Promissory Notes in accordance with paragraphs 1 and 2 of this order up to the date of assessment; or the parties are to file a consent agreement as to the interests accruing under the Promissory Notes.
- (4) The respondent and the appellant are to file and serve submissions on the court's exercise of discretion in relation to costs under **CPR** 64.6 (3) to (6) within 30 days of the assessment of interest by the High Court, or within 30 days of the date the consent agreement as to accrued interest has been filed in order for a proper determination to be made on the question of costs in the court below and on the appeal.

Ola Mae Edwards
Justice of Appeal

[123] I have read the judgment of both of my sisters and agree with the reasoning, conclusions and decision of Edwards J.A.

Michael Gordon, QC
Justice of Appeal [Ag.]