Trinity Term

[2015] UKPC 30

Privy Council Appeal No 0083 of 2014

JUDGMENT

Hickox and others (Appellants) v Brilla Capital Investment Master Fund SPC Limited and others (Respondents) (Anguilla)

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

before

Lord Neuberger

Lord Mance

Lord Carnwath

Lord Toulson

Lord Hodge

JUDGMENT GIVEN ON

22 June 2015

Heard on 2 June 2015

Appellants (Charles Hickox, Linda Hickox and Cap Juluca)	Respondent (Brilla Capital Investment Master Fund SPC Limited)
Allan S Wood QC	Robert Levy QC
Tana'ania Small Davis	Edward Knight
	Ravi A Bahadursingh
(Instructed by MA Law (Solicitors) LLP)	(Instructed by Seymours Solicitors (London))

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LORD NEUBERGER:

1.
This appeal is brought by Charles and Linda Hickox ("Hickox") against a decision of the Eastern Caribbean Court of Appeal (Pereira CJ, and Blenman and Michel JJA) of 25 April 2013, allowing an appeal against a decision of Jaques J of 30 April 2012, which authorised the joint liquidators of Leeward Isles Resorts Ltd ("the Company") to sell certain property to Hickox rather than to Brilla Capital Investment Master Fund SPC Ltd ("Brilla").

The basic facts

2.
The factual background is quite complicated, but for present purposes, it is possible, and therefore appropriate, to summarise what occurred before April 2012 very briefly. The Hickox held three fixed charges over approximately 179 acres of the Resort lands (on which are $14^1/_2$ villas) securing three loans made by Hickox to the Company. Following extensive litigation over 12 years, the Company was ordered to pay Hickox around US$140m. In October 2010, Hickox entered into a settlement agreement with the Company, its sole shareholder, Cap Juluca Holdings Limited and its parent company, Cap Juluca Properties Limited, for the payment of the judgment debt. The Company defaulted on payment on the Hickox loans. Shortly thereafter, on 7 November 2011, William Tacon and Stuart Mackellar ("the liquidators") were appointed as joint liquidators of the Company pursuant to a voluntary liquidation. In order to raise working capital, the liquidators, on behalf of the Company, borrowed some US$3m from Hickox, who were provided with security in the form of 3.5 villas ("the property") at Maunday's Bay, which were owned by the Company. Hickox exercised their powers of sale under their charges, as a result of which the bulk of the Company's assets were due to be sold by public auction, which was scheduled to take place on 2 May 2012.

3.
The liquidation of the Company (and of an associated company) gave rise to a number of disputes, which were referred to Jaques J (Ag). The disputes largely concerned a large resort, of which the property formed part, the business carried on there, and the chattels located there. Those applications included claims by the liquidators for leave to sell the business, the property and the chattels by private treaty, or alternatively to cease to carry on the business and to sell the property and the chattels. While these applications were pending, the liquidators were negotiating with potential purchasers of various assets. In particular, the liquidators were negotiating to sell the property to Brilla, an unsecured creditor of the Company, on certain terms.

4.
One of the liquidators' applications listed before Jaques J was an application for leave to sell the property by private treaty ("the Application"). In the Application, the liquidators emphasised the need for a speedy resolution, as the public auction of the bulk of the Company's assets was due to take place on 2 May 2012. By the time that that Application first came before Jaques J, 19 April 2012, the liquidators had received an offer for the property from Brilla, an unsecured creditor of the Company, on 11 April, in the sum of US$8.25m, subject to the approval of the court and conditional on completion by 30 April. The hearing of the Application was continuing on 24 April, when Hickox

submitted an offer of US$9.25m, and the following day the Application was stood out to enable the liquidators and Hickox to negotiate heads of terms.

5.
On 27 April, the Application was mentioned to the judge to remind him of the need for a contract by 2 May and of the fact that Brilla's offer was due to expire on 30 April. This was particularly significant as 29 and 30 April were, respectively, a Sunday and Monday, and 1 May was a bank holiday. The judge accordingly indicated that he would sit on 30 April, and fixed a time of 9.00 am for a hearing, if the liquidators had not agreed terms for the sale of the property by then. On 29 April, the matter was mentioned even though it was a Sunday; the judge was told that the liquidators intended to accept Brilla's offer, and he permitted Hickox to put in further evidence for the following morning's hearing. He indicated that each party would have 45 minutes to make submissions, whereupon he would give judgment at 10.30 am.

6.
Shortly after the hearing of 29 April had ended, the liquidators emailed Brilla and Hickox informing them of this, and invited best offers by 7.00 pm that day, 29 April. At 6.59 pm, Brilla emailed an offer of US$10.018m, on the basis that it would be confidential until the hearing.

7.
At the hearing of 30 April, after having been told what had happened, Jaques J was critical of the liquidators in two respects. First, he did not think that they should have imposed a cut-off of 7.00 pm for offers the previous evening. He considered that, having restarted the bidding process, the liquidators should have left the opportunity to bid "open until the hearing". He also made it clear that he was surprised by the fact that the bidding had been reopened at all, although that was not apparently intended to be a criticism.

8.
Secondly, Jaques J considered that the liquidators had been wrong in offering terms to Hickox which were materially more onerous than those offered to Brilla. Indeed, he said that "[t]he whole thing reeks of a desire by the joint liquidators to sell these assets to Brilla", and that the liquidators wanted "to do everything in their power to ensure that whoever gets the property is not Mr Hickox". He also said that the way that the bidding had been closed the previous evening "conveniently had the Brillas as first past the post". The judge then made it clear that the terms on which the property was offered to the two parties should be either the terms previously proposed to Brilla or the terms previously proposed to Hickox, or at any rate the same terms. The judge rose at 12.10 pm, saying that he would return at 1.15 pm.

9.
The liquidators, Brilla and Hickox then entered into discussions outside court. There is little evidence as to the contents of those discussions. Four things, however, are clear. First, at 1.10 pm, with the agreement of Hickox and Brilla, the liquidators sent a message asking the judge whether he would defer resuming the hearing from the original date of 1.15 until 1.30 pm, to which he agreed. Secondly, at 1.26 pm, the liquidators finally produced to Brilla and to Hickox the revised written terms on which the property was to be sold ("the Terms"). Thirdly, two minutes later, at 1.28 pm, Hickox unconditionally offered the liquidators US$10.3m for the property, which offer was also notified to Brilla by email. Fourthly, Brilla made an offer of US$10.4m, subject to obtaining instructions, at 1.32 pm.

10.

The hearing resumed ten minutes later than the judge had expected, at 1.40 pm. On being told of the Hickox offer, counsel for Brilla asked for an opportunity to take instructions, to which the judge agreed, albeit only on a very attenuated basis. This opportunity resulted in an offer from Brilla to purchase the property for US$10.4m, and this was immediately communicated to the judge. After some further argument he decided that the best offer which had been communicated by 1.30 pm that day was the offer which the liquidators should be authorised to accept, and that was the Hickox offer of US$10.3m. The judge also indicated that if there was to be any further argument, it should be raised that afternoon as time was pressing due to the imminent auction on 2 May.

11.
There was then some further argument, but the judge adhered to his view, and in due course, a fairly detailed order ("the 30 April Order") was drawn up authorising the liquidators to sell the property to Hickox for US$10.3m on specified terms, including the Terms which had been communicated at 1.26 pm outside court on 30 April.

12.
In fact, no agreement was executed between Hickox and the liquidators by 1 May. On the morning of 2 May, the Application came back before Jaques J, and he expressed surprise that contracts had not been exchanged for the sale of the property. He was told that Brilla had increased its offer to US$11m. There was some argument about the precise terms of the contract between the liquidators and Hickox, and about the sale of certain chattels. At the end of the hearing, Jaques J confirmed that he would authorise the sale of the property to Hickox for US$10.3m, and set out his thinking as to why he had reached that decision.

13.
He explained that he had expected "the cut-off point to be 9.00 am" on 30 May, but, as the liquidators had "decided for their own reasons [that] the process should only be available till 7.00 pm the night before", he had decided that he "would sit at 1.15 to then deal with what the best offer was because there has to be a cut-off point". He then explained that he "was then asked to make the final time 1.30 which I did", and that he "wasn't brought into court until 1.40". As he said, at that point the highest bid was Hickox's US$10.3m, and, although Brilla had subsequently offered US$10.4m, "that was too late". For the same reason, Brilla's offer of US$ 11m was "also too late".

14.
Accordingly, Jaques J adhered to the order he had proposed around 2.00 pm on 30 April, namely that the liquidators be authorised to sell the property to Hickox for US$10.3m. The 30 April Order was drawn up, and the sale of the property was formally agreed and the transfer was then completed, although the property is not yet formally vested in Hickox as the sale has not yet been registered.

15.
Brilla appealed against the decision of Jaques J, and the Court of Appeal, as already observed, unanimously allowed the appeal and set aside the 30 April Order. Hickox now appeals to Her Majesty.

The issues

16.
On the face of it, the property was sold to Hickox by the liquidators in accordance with a valid court order, which was not obtained illegitimately, and it is therefore convenient to identify the grounds upon which it is argued that the 30 April Order was flawed to such an extent that it should be set aside.

17.
The grounds advanced on behalf of Brilla by Mr Levy QC in his submissions can, the Board considers, be identified as follows. First that the 30 April Order was unfairly made because the judge failed to give proper notice that he would authorise a sale of the property by reference to the best offer which had been made by 1.15 (later extended to 1.30). Secondly that the 30 April Order was unfairly made because it was unreasonable to impose a 1.30 pm cut-off date when the terms of sale ("the Terms") had only been communicated to the potential buyers four minutes earlier. Thirdly, that the 30 April Order merely authorised, but did not require, the liquidators to sell the property to Hickox for US$10.3m, and, in the circumstances, they ought not to have acted on it.

18.
These grounds are somewhat different from those on which the Court of Appeal relied, when they allowed the Brilla's appeal and set aside the 30 April Order. First, they considered that the circumstances in which that order had been made were "mired in controversy and uncertainty". Secondly, they concluded that in making the 30 April Order the judge had acted in a way that no reasonable judge could, in the circumstances, could have acted. Thirdly, they considered that the 30 April Order should be set aside because the judge had given no reasons for making it.

19.
The Board will first discuss the grounds raised on behalf of Brilla for setting aside the 30 April Order, and will then turn to the grounds relied on by the Court of Appeal. Before doing so, it is perhaps right to mention that there must be real uncertainty as to what, if any, effect the order made by the Court of Appeal would have as between the parties to this appeal, namely Brilla and Hickox. As Mr Levy sensibly accepted, when they were executed, the agreement by the liquidators to sell the property to Hickox and the subsequent transfer (albeit not completed yet by registration) of the property to Hickox were validly made pursuant to a court order (albeit that it was subsequently set aside). It is therefore by no means apparent whether the fact that that order was subsequently set aside would either undermine that agreement or transfer, or would benefit Brilla or prejudice Hickox in any other way. However, as Mr Levy said, that is not a point which is before the Board on this appeal.

Was the 30 April Order unfair because it was made without warning?

20.
The primary issue here is whether the judge made it clear before he adjourned the hearing on 30 April 2012 at 12.10 pm that, when he came back at 1.15 pm (which was later extended to 1.30 pm), he would, at least in the absence of good reasons to the contrary, effectively accept the best offer which had by then been made for the property to the liquidators. If he did, then, subject to any other points, it would be hard to say that it was unfair to proceed as he did, namely to accept the offer made by Hickox at 1.28 pm, as that was the highest (and, therefore unsurprisingly, the most recent) bid. By the same token, if the judge did not make it clear before he adjourned at 12.10 pm that this was his intention, it would have been unfair on Brilla to have made the 30 April Order.

21.
The answer to this question inevitably turns on what was said, particularly by the judge, during the hearing of 30 April before 12.10 pm. Mr Wood QC focussed on two passages in the discussions which took place before 12.10 pm, both of which were observations of Jaques J himself.

22.
The first was in a passage, where, having stated that he was "going to deal with the matter on the basis that the parties have another opportunity to make competitive bids", the judge said "I propose

to rise now and I will sit again at 1.00 pm. And I think what is likely to happen is that the highest offer is one that I would be willing to sanction subject to the sale process which has been conducted to date".

23.
A little later, having been persuaded to resume at 1.15 pm rather than 1.00 pm, the judge said "I shall rise until 1.15 and then we'll see where we are". He then said that he did not "intend to hear endless arguments", but that he "intend[ed] to be told who's got the highest bid and if there's any reason why the highest bid shouldn't get it, then, shortly, I can be told that". He immediately added that "contracts have got to be exchanged today".

24.
Earlier, there had been discussion as to the time by which a definitive decision was needed, and the judge referred to the fact that "after 2 o'clock nothing may be able to happen", on the basis that this was when the banks closed. He also said, around 11.30 am, that, given that the bidding process had been reopened, the parties had to keep their submissions before he rose short, as "something is going to have to be done today and it's going to have to be done within the next 30 minutes". A little later, he said that the parties had "agreed to have exchange of contracts before 2 May; today in fact". He also said, when he was being asked to extend the adjournment from 1.00 pm to 1.15 pm that he was "not willing to go anywhere near 2 o'clock".

25.
In the Board's view, particularly when one bears in mind the judge's persistent emphasis on the need for a speedy resolution of the issue of which bid was to be accepted in the passages mentioned in para 24 above, he did make it clear before he adjourned at 12.10 pm that, when he resumed at 1.15 pm (as was then intended), he proposed to authorise the liquidators to accept the highest bid made by then, unless a good argument to the contrary was raised on behalf of the unsuccessful party.

26.
In the passage quoted in para 22 above, he said that, when he resumed after the adjournment, it was "likely" that he would "sanction" what he described as "the highest offer". In other words, he was not absolutely committing himself, but the parties were being warned that the highest offer would be accepted; that must naturally have been intended and understood to mean the highest offer that had been made during the period of the adjournment. That is the natural meaning of those words in their context, especially because the parties were adjourning to discuss the bids, and because of the judge's concern that matters be disposed of well before 2.00 pm. The fact that, with the benefit of hindsight, his concern in that connection may have been somewhat exaggerated or groundless, is nothing to the point.

27.
This conclusion is strongly reinforced by what the judge later said, as quoted in para 23 above. In that passage, he first said that, when he resumed, he would be told "who's got" the highest bid – a clear indication that he envisaged that bids would be made during the adjournment. He immediately then said that he expected to be told "if there's any reason why the highest bid shouldn't get it": in other words, he anticipated holding that the liquidators should accept the highest bid, whoever had made it, unless he was given a good reason (obviously from the opposing party) as to why he should not do so. That fits entirely with his earlier indication that he was "likely" to "sanction" "the highest offer".

28.

Of course, one always has to be careful before holding that a statement, even an apparently clear statement which is entirely consistent with, and supported by, another apparently clear statement, was in fact clear or even conveyed what it appears to mean when read on its own, without considering in its overall verbal, commercial and factual context. In this case, there is no doubt what was said, by whom and when as there is a verbatim transcript. Of course, a transcript does not encompass factors such as tone of voice, verbal emphasis, body language and facial expression, which would all have been part of the context. However, even allowing for that, it appears clear to the Board that, having considered everything else that was said in the transcript, and the commercial and factual context, there is nothing that calls into question the conclusion that, in the passages quoted in paras 22 and 23 above, the judge made it clear to the parties before he rose at 12.10 pm on 30 April that, when he resumed at 1.15 pm, he would accept the highest bid made by that time, unless he was given a good reason for not doing so.

29.
Mr Levy contended that, after the hearing of the Application resumed at 1.40 pm, both the liquidators and Brilla challenged the notion that the judge had indicated before he rose at 12.10 pm that, when he resumed, he would, at least in the absence of good reason to the contrary, accept the highest offer which had been made. The Board accepts that, when it comes to interpreting what was said orally, it is not illegitimate to take into account how those present understood what was said (see per Lord Hoffmann in Carmichael v National Power Plc [1999] UKHL 47; [1999] 1 WLR 2042). However, in this case, (i) as already mentioned, the Board has the benefit of a full contemporaneous transcript, (ii) Jaques J himself and Hickox clearly understood the judge to have said that he expected to accept what was then the highest bid, (iii) it is by no means clear from the exchanges in court after 1.40 pm that the liquidators took a different view (for instance their counsel agreed around 1.50 pm with the judge's suggestion that she had appreciated that the bidding process "was not going to continue after I re-sat"), and (iv) it was self-evidently in the interest of Brilla (and, in view of their dislike of Hickox, perhaps the liquidators) to argue before the judge that they had understood what he had said differently from what he had intended.

30.
The Board accordingly concludes that Brilla's first attack on the 30 April Order fails.

Was the 30 April Order unfair because of delay in communicating the Terms?

31.
On the face of it, there is great force in the argument that it cannot have been reasonable for the judge to have allowed a mere four minutes for final bids to be made from the moment when the Terms were first communicated to the interested parties. As Mr Levy says, even if those Terms had been the same as those which had been originally proposed by the liquidators to Brilla, it would have been reasonable, at any rate at first sight, to expect Brilla and its advisers to have the opportunity to check that there had been no change before deciding whether it wanted to bid for the property and if so at what figure.

32.
Accordingly, this ground of attack on the 30 April Order seems very strong at least on the face of it. However, the attack has, of course, to be assessed by reference to the facts of this particular case. There are a number of factors which, when taken together, establish to the satisfaction of the Board that there is, on the unusual facts of this case, nothing in this attack.

33.

First, it is worth remembering that a successful bid by 1.30 pm on 30 April would not automatically have given rise to a binding contract, even once the judge had decided what order to make. Accordingly, even before one considers any other relevant material, it is worth bearing in mind that the Hickox's case does not on any view mean that Brilla was obliged to commit itself to purchasing the property before it knew enough about the terms on which it was to be sold.

34.
Secondly, as already explained, the adjournment at 12.10 pm was on the basis that (i) it was to be for a short time (little more than an hour), (ii) Brilla and Hickox were to make bids which would very probably be final, (iii) all parties knew that the Terms had yet to be finalised, and (iv) time was pressing. It is striking that at no time before the judge rose at 12.10 pm was anything said to suggest that there would be a difficulty about proceeding as he proposed because the Terms had not been finalised. Indeed, in the discussion before 12.10 pm, Brilla's counsel had said to the judge that, as he understood it, "Brilla is under no less of onerous obligations than the Hickoxes are. It's now a matter of price. That is my understanding. … This is also my instruction", and that was not challenged.

35.
Thirdly, it is also material to mention what happened immediately after Jaques J returned to court at 1.40 pm. When he was told by counsel for the liquidators about the US$10.3m offer from Hickox and the fact that Brilla's counsel "was awaiting instructions", the judge replied: "Well there had to be a finish. … I said the finish was to be 1.15. So we've passed 1.15". Counsel for Brilla then asked for "a minute to go outside" and, "since the contract has just been sent and we'd like to just make sure that the changes – I understand it's a small change but we don't know what it is yet" – the first reference on behalf of Brilla to the late provision of the Terms. The judge then said he would give him a minute, saying "I'll sit here and count 60 seconds". Counsel then went out and shortly returned and spoke to the liquidators' counsel who told the judge that Brilla "have increased their offer to $10.4m". The judge said he had "made it quite clear that [he] would sit at 1.15 and consider the final offers, not a quarter to 2". Brilla's counsel said that Brilla "heard there was [an offer of $]10.3[m] literally six minutes ago, and we also heard there was a change in the contract. We have done our utmost best" – the second reference on behalf of Brilla to the late provision of the Terms.

36.
Fourthly, there are the submissions which were then made to the judge. Counsel for Hickox then said that her instructions to bid US$10.3m came in at "about 1.25", which was why the extension of the adjournment from 1.15 pm to 1.30 pm had been requested, as the adjournment had been granted "to allow bids to come in", a proposition with which counsel for the liquidators agreed. The judge then said he would hear from counsel for Brilla, as it "might be affected by it more than anyone". Counsel then made the following points: (i) Brilla only heard of Hickox's US$10.3m bid at 1.28 pm, (ii) Brilla had now made a bid of US$10.4m, (iii) Brilla was aware that the court would be resuming at 1.30 pm. The judge then asked who wanted to speak "before I make a decision".

37.
The liquidators' counsel then mentioned the circulation of the Terms and suggested that "would have been a reason for the delay", and made some submissions which were not always entirely clear but which ultimately accepted that the issue of how to proceed was for the judge. Counsel for Hickox then addressed the judge said that the effect of his indication prior to 12.10 pm, coupled with the extension of the adjournment to 1.30 pm was that only offers made before 1.30 pm "or at the very latest … up to the moment when you sat on the bench ought to be considered", and that any "bids outside of the time that your Lordship came to the bench ought to be ignored".

38.
The judge indicated that he agreed with counsel for Hickox, and that he proposed to make an order permitting the liquidators to sell to Hickox, subject to hearing from counsel for Brilla, and then asked counsel if he had “anything to say”. Counsel for Brilla then made the following points: (i) the purpose of “the exercise has been to get the very highest bid possible”, (ii) Brilla had talked to the liquidators “to clarify whether it was their understanding that they would also be taking bids in court” and “they were not clear”, (iii) there was now a “higher bid”, namely Brilla’s US$10.4m, (iv) counsel for Brilla had understood that the bidding would “keep going until one person said enough”, but (v) he also accepted that the judge had said the decision could not be delayed beyond 2.00 pm.

39.
Jaques J then said that he would make an order along the lines which he had indicated. He then sought and obtained confirmation from counsel for the liquidators that a relatively penal term included in the terms originally proposed to Hickox, but not to Brilla, was not part of the Terms, on the basis that “the bidding was to be on level terms”. The judge then confirmed that the order would be made that afternoon, but if any party “want[ed] to mention anything” they could do so, an invitation which he repeated twice thereafter.

40.
It appears to the Board from what was said – and not said – after the judge resumed the hearing at 1.40 pm on 30 April, that Brilla was not relying on the fact that it was not provided with the final Terms until about 1.26 pm as a reason for not having been able to bid for the property between 12.10 pm and 1.30 pm. It is true that reference was made by Brilla’s counsel on two occasions to the late provision of the Terms (see para 35 above), but on neither occasion was it expressly submitted that it was unfair on Brilla if it was to be treated as losing the opportunity to bid for the property before it had had the opportunity to study the Terms. The Board accepts that it is arguably possible to draw such an inference from what was said on the two occasions, at least if what was said is read on its own. However, such a reading is undermined by the subsequent submissions of Brilla’s counsel, when invited to state his position by the judge – see paras 36 and 38 above. Although he made a number of points to support his case that Brilla should not be prevented from making a bid after 1.40 pm on 30 April (and indeed on 2 May), counsel never suggested that it was unreasonable of the judge to have expected Brilla to make a bid between 12.10 pm and 1.30 pm on 30 April because the Terms were unknown.

41.
This is not surprising. It appears likely that Brilla did not regard the late provision of the Terms as a problem. It seems pretty clear that the liquidators had previously imposed unusually unfavourable terms on Hickox but not on Brilla, and that the effect of the judge’s requirement of a level playing field would have been expected to result in both potential bidders being offered the terms originally only offered to Brilla – especially as the highest bid at the time was that made by Brilla at 6.59 pm on 29 April. The notion that Brilla was unconcerned about not receiving the Terms is supported by what its counsel said to the judge before 12.10 pm, namely that it took the view that the terms did not present a problem – see the para 34 above. Further, given that there were discussions between the parties after 12.10 pm on 30 April, Brilla had the opportunity of checking with the liquidators that the Terms would, at least substantially, be the same as had been offered to Brilla originally.

42.
In all these circumstances, the Board is unpersuaded that it was unfair of the judge to have deprived Brilla of the opportunity to make a bid for the property after 1.30 pm on 30 April. Jaques J had

indicated that he would permit a sale to the highest bidder as at 1.15 pm (later extended to 1.30 pm), and Brilla should have realised that this meant that there could be no bids after that time. Although it is now (and was before the Court of Appeal) said by Brilla to be unfair to deprive it of the opportunity to bid after 1.30 pm, Brilla did not ask for an extension of time, and never specifically raised the point that it would be unfair for the judge to permit the liquidators to go ahead with Hickox's US$ 10.3m offer – even though the judge had said that he would have to be given reasons for not accepting the highest bid.

The liquidators did not have to proceed with the sale to Hickox

43.
Brilla's third point, that the liquidators were not obliged by the 30 April Order to sell to Hickox, can be dealt with shortly.

44.
First, the point goes nowhere. The fact remains that the liquidators were authorised by the 30 April Order to sell the property to Hickox for US$10.3m, and therefore there was a valid and effective sale, and there is no ground for setting it aside (unless, of course, any other ground exists).

45.
Secondly, the 30 April Order was close to a requirement to the liquidators to sell to Hickox for $10.3m. The judge had correctly formed the view that the liquidators were not being even-handed between the two potential purchasers and had therefore effectively taken over the conduct of the sale. He had laid down a procedure, and it produced what he regarded as definitive result. As at present advised, at any rate, the Board would accept that, even after the hearing on 2 May had ended, the liquidators were not obliged to sell the property to Hickox for US$10.3m. However, in the very unusual circumstances of this case, one can well understand them feeling that they could well be criticised by the court if they had not done so (unless of course it was due to some default on the part of Hickox).

46.
However, the Board cannot see how that can help Brilla's current claim. Probably the most telling way this argument can be put is to contend that the judge overlooked the fundamental duty of the liquidators, which was to get as much money as they properly could for the company's assets, when he authorised (or almost required) them to proceed with a US$10.3m offer, even after there was a US$10.4m offer, and then a US$11.0m offer. However, that contention overlooks the point that the liquidators had to act "properly". Where, as effectively happened in this case between 12.10 and 1.40 pm on 30 April, property is marketed by a method, which can objectively be expected to lead to a conclusive offer, then the liquidators, indeed the court, can normally safely proceed to complete a sale once that method has produced such an offer.

47.
This should not be taken as indicating that the liquidators, or indeed the court, in this case could not properly have changed tack and reopened the bidding after receiving the US$10.4m offer and/or the US$11.0m offer from Brilla. That is not a point which it is necessary to decide, or on which the Board heard argument.

48.
In the event, therefore, Brilla's third ground is also rejected.

The Court of Appeal's reasons for discharging the 30 April Order

49.
The notion that the hearing on 30 April was "mired in controversy and uncertainty" seems to the Board to be rather unfair on the judge and on the parties. There is no doubt that the hearing must have been fraught, partly because of the view that time pressure was very great, partly because there was an intense commercial fight which was coming to a head, and partly because there was apparently some personal animosity between some of the parties.

50.
However, the important point is that, as already explained, the judge made his intentions clear to the parties before he rose at 12.10 pm on 30 April, and that, when deciding to make the 30 April Order, he was adhering to those intentions. Of course, during the hearing, things were said which, at least when read in the transcript, are not easy to understand – and may well have been confusing at the time. But, if that was always a reason for setting aside an order made during, or at the end of, the hearing, there would not be many disputed orders which would survive an appeal. Of course, there will be cases where the hearing is so confused that the resultant order should be set aside, but they will be rare, and this is certainly not one of them.

51.
As to the Court of Appeal's view that the 30 April Order was one which no reasonable judge could have made, the Board's reasons set out above for rejecting the grounds raised by Brilla suffice to explain why this view cannot, with respect, be sustained.

52.
The final ground of attack on the 30 April Order is the absence of a reasoned judgment. The importance of a reasoned judgment in most cases has been emphasised in too many appellate decisions to need repetition, and in many cases where the judge has failed to give a judgment, his order will be set aside as a result. However, there is nothing in the point in this case. A reasoned judgment will almost always either include the terms of the order the judge is proposing to make or it will immediately precede his announcement of those terms. The point of such a judgment is that it will, or at least should, contain the judge's reasons for making the order in those terms. That is important because (i) the parties are entitled to know his reasons, and (ii) without those reasons, it is often not sensibly possible for a dissatisfied party to appeal, or for an appellate court to consider satisfactorily how to dispose of an appeal.

53.
A reasoned judgment should be given even in an interlocutory dispute, such as that in the instant case, where the judge has made his views, and therefore his reasons, clear during a fraught hearing where time is pressing. After all, any judgment does not need to be long or detailed. However, if, as is the position in this case (as may be appreciated form what is said in paras 4-10, 22-24 and 35-39 above), it is obvious from what was said in argument why the judge made the order that he did, it would be a triumph of form over substance to set aside the order simply because there was no formal judgment. Furthermore, it appears to the Board well arguable that the Jaques J actually gave a judgment on 2 May explaining his reasons for making the 30 April Order – see para 13 above.

54.
Accordingly, the Board concludes that the Court of Appeal's grounds for setting aside the 30 April Order cannot be sustained.

Conclusion

55.
The Board will accordingly humbly advise Her Majesty that this appeal should be allowed and the 30 April Order restored.

56.
The Board is provisionally of the view that Brilla should pay Hickox's costs before the Board and in the Court of Appeal on the standard basis, but if either party wishes to submit that a different order be made as to costs, they have 14 days from the date on which this judgment is handed down to make written submissions to the Board (with a copy to the other party).

57.
The Board would like finally to add that, although the order made by Jaques J is being upheld, there are lessons to be learnt from the procedure which he adopted. Although it was lawful and fair, it was not optimal. It appears to the Board that, if, as in this case, a judge has decided to take ultimate de facto control of a contested bidding process, he would normally be well advised to adopt one of two processes. He should either (i) set the rules for an auction and then conduct the auction himself or arrange for someone else to do so, or (ii) have a sealed bid arrangement. Option (i) would have involved Brilla and Hickox bidding openly against each other around 1.15 or 1.30 pm on 30 April, with the liquidator's representative taking the bids, until one or other them pulled out. Option (ii) would have involved Brilla and Hickox each deciding on their best offer, without knowing what the other was bidding, and each of them communicating their respective offer to the liquidators or the judge in a sealed envelope by 1.30 pm on 30 April, and the highest bid being successful. Of course, the circumstances of a particular case may mandate a different procedure, but normally one of these two well-established procedures should at least be seriously considered, as they are simple, familiar, fair as between the potential purchasers, and well suited to achieve the best price.