

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2010/CLE/gen/FP/00158

BETWEEN

PORT GROUP LIMITED
Plaintiff

AND

RICHARD HAYWARD
Defendant

BEFORE The Honourable Mrs Justice Estelle Gray-Evans

APPEARANCES: Mr Philip McKenzie along with
Ms. Olivette Missick for the plaintiff
Mr David Thompson for the defendant

HEARING DATE: 2012: October 1

CLOSING 2012: 16 November (Defendant)

SUBMISSIONS: 2012: 21 December (Plaintiff)

JUDGMENT

Gray Evans, J.

1. This has not been an easy case. One of the reasons being that although the plaintiff is a limited liability company, I am of the view that the dispute is really between a father, Sir Jack Hayward ("Sir Jack"), and his son, Richard "Rick" Hayward, the defendant.
2. The plaintiff, a company beneficially owned 50/50 by Sir Jack and Lady Henrietta St George is the legal owner of Lot #10, Block #14, Unit #4, Fortune Bay Subdivision, Freeport, Grand Bahama ("the said property") and brings this action against the defendant for payment to the plaintiff of funds collected by the defendant as rent from a tenant of the said property. The plaintiff claims that the defendant is holding the said funds as constructive trustee on behalf of the plaintiff.
3. In support of its contention, the plaintiff relies on an indenture of conveyance dated 24 February 2003 made between Colin M. McDonald of the one part and the plaintiff of the other part and recorded in the Registry of Records of the said Commonwealth in volume 8863 at pages 403 to 410 inclusive.
4. The defendant does not dispute that legal ownership of the said property is vested in the plaintiff and he admits that he collected and has retained the said funds. However, he says he is entitled to do so because the said property is beneficially owned by him and his children and that the plaintiff is a constructive trustee thereof on their behalf.
5. In support of that contention the defendant relies on an inter-office memorandum dated 5 July 2006 and written by Sir Jack ("the said memorandum"), which he says confirmed the position that existed since 2003 when Sir Jack gave him the keys to the said property. The contents of the said memorandum are set out hereunder:

"INTER-OFFICE MEMO

Date: 5th July, 2006

To: Lady Henrietta St George
Mr Rick Hayward

cc: Mr Ian O. Barry

From: Sir Jack A. Hayward

Subject: Spanish Main Cottage Complex

Ian Barry has been pressing for some time for a resolution of the responsibilities of the Spanish Main Cottages.

I fully agree with the enclosed plan and think we should divide up responsibilities accordingly.

It would be ideal to find a couple to occupy the cottage known as Eddie's. The lady to do the cleaning, the man to do managing and security.

Caroline should pay a fair rent for the cottage occupied by the nanny.

Rick and the grandchildren should decide what they want to do with Colin McDonald's house – either use it for overflow or sell it and put the proceeds towards the upkeep of Rick's complex. I do not know what the state of the Colin McDonald's house is, but I would think it is worth at least \$800,000.00.

To sum up, Henrietta would look after and pay the bills for her complex, and Rick would do the same for his complex. The Company will look after and fund the upkeep for the joint area for important visitors for the Company.

Sir Jack A. Hayward
JAH/lg
Enclosure”

6. In addition to being equal shareholders, Sir Jack and Lady Henrietta St. George are also directors of the plaintiff company and Mr. Ian Barry was apparently the plaintiff company's then Vice-President and Chief Financial Officer.

7. Between February 2003 and February 2009, the defendant had full use of the said property without any interference from the plaintiff.

8. In February 2009, the said property was leased by the defendant with the assistance of the plaintiff's legal counsel to one Mr Graham Sutherland at a rent of \$2,500.00 per month. The rent and security deposit therefor was paid to and retained by the defendant until February 2010.

9. In March 2010 when Mr Sutherland did not pay the rent to the defendant as agreed, the defendant made inquiries and was told that the tenant had been instructed not to pay the rent to him, but instead to pay it to Sir Jack's Butler.

10. By a letter dated 11 May 2010 from Mr Andre Feldman, as Sir Jack's attorney in The Bahamas, and addressed to Mr. Mark Payne and the defendant, Mr Feldman wrote:

“Dear Mr Payne and Mr Richard Hayward

Re: Spanish Main Property - House No. 10 Spanish Main Drive

I am writing to you both as Sir Jack Hayward's attorney in The Bahamas. Sir Jack has been contacted by Mr. Graham Sutherland who is the tenant in the above mentioned property owned by Port Group Limited (PGL). Mr. Sutherland reports to us that Richard Hayward has been making demands and more recently threats against Mr. Sutherland and his wife concerning the tenancy and rent arrangements. At the request of Sir Jack I have received and reviewed both the property and landlord tenant files from PGL. The General Counsel for PGL Mr. Tyrone Fitzgerald and the PGL President Mr. Ian Rolle, along with Sir Jack, are copied here with a request for additional action from them.

At the present time the legal and beneficial owner and landlord of the property rented by Mr. Sutherland and his wife on Spanish Main is PGL. The terms of the lease with PGL while not contained in a formal lease agreement are contained in a mutually signed agreement of terms and conditions dated February 24th 2009.

Mr. Rick Hayward has no right to trouble the Sutherlands or to make any demands. Mr. Hayward has no office or standing with PGL or any other Port Authority Company and no authority whatsoever to give any instructions on behalf of that company or on behalf of Sir Jack. Further, neither Mr. Rick

Hayward nor any of his siblings or children have any legal or beneficial interest in this property, nor do they have any legal or beneficial right to receive or interest in monies owned to PGL under the lease terms.

Sir Jack Hayward demands that Mr. Rick Hayward shall immediately cease and desist from troubling the Sutherlands or meddling in the affairs of PGL or any other Port Authority Company. Any further telephone calls or threats against the Sutherlands will result in an official complaint being filed against Mr. Rick Hayward with the police. Further, it is demanded that Mr. Rick Hayward immediately return the rental money which he took delivery of and which belongs to PGL alone. Failure to return these monies within 14 days will result in the filing of legal proceedings against Mr. Rick Hayward, as well as other appropriate actions.

For the sake of absolute clarity Sir Jack Hayward has requested that PGL take whatever legal or other actions as needed to ensure that the Sutherlands enjoy a peaceful occupation of the leased property and that the monies received by Mr. Richard Hayward are returned forthwith.

Yours sincerely

Andre J. Feldman

Attorney

cc: Mr. Tyrone Fitzgerald
Mr. Ian Rolle
Sir Jack Hayward
Mr. Graham Sutherland"

11. That letter was followed by a letter dated 12 May 2010 from Mr Tyrone L.E. Fitzgerald, the plaintiff's then General Counsel, addressed to Mr David C. Thompson, counsel for the defendant, in which he wrote as follows:

"Dear Mr. Thompson

Re: Spanish Main Property – House #10, Spanish Main Drive

We write to you with regards to the above mentioned matter.

Enclosed please find herewith Mr. Andre Feldman's letter dated the 11th May 2010 addressed to your client, Mr. Richard ("Rick") Hayward, which is self explanatory.

We have been instructed and hereby demand repayment of all the rent monies paid by Mr. and Mrs. Graham Sutherland and collected by your client, but due and owing to Port Group Limited, as the Landlord and legal owner of the subject property, within Fourteen (14) days of the date of this demand letter.

Failure to remit the requested rent monies within the aforementioned time will result in further legal action taken on behalf of Port Group Limited forthwith.

Should you require additional information regarding our demand or wish to discuss the matter in person or via teleconference, please do not hesitate to contact the undersigned at your soonest.

Yours sincerely

PORT GROUP LIMITED
Tyrone L. E. Fitzgerald
General Counsel
Enclosure
cc: Sir Jack Hayward
Mr. Ian B.A. Rolle
Mr. Andre Feldman”

12. To which Mr Thompson responded by letter dated 14 May 2010:

“Dear Mr. Fitzgerald

RE: Spanish Main Property – House #10 Spanish Main Drive

Receipt is acknowledged of your letter dated 12th May 2010 with regards to the above-mentioned matter and also of a copy of Mr. Andre Feldman’s letter dated the 11th May 2010 addressed to our client, Mr. Richard (“Rick”) Hayward.

The contents of the said letter including your threat to commence further legal action on behalf of Port Group Limited in this matter is duly noted. However, we have been instructed by our client that he has always acted based on an Agreement made by Sir Jack A. Hayward with Lady Henrietta St. George (50% beneficial owner of the Port Group) and himself that authorized Richard Hayward and his children to decide what they wanted to do with the subject property and either use it for their own purposes or sell it and put the proceeds of sale towards the up-keep of Rick’s house on the Spanish Main Complex, Freeport. Your demand for re-payment of all the rent monies paid by Mr and Mrs Graham Sutherland and collected by our client therefore appears to be against the express agreement between Sir Jack and Rick.

In accordance with the express intent of Sir Jack we hereby request that the legal and beneficial ownership of the subject property be now conveyed to Rick Hayward and his children as Joint Tenants and that you forward to us a Draft Conveyance for our perusal and approval thereof by response.

I have requested a meeting with Mr. Ian Rolle of the Port Group Limited to discuss these matters in person and await his response.

Please note I have also requested Rick Hayward to await the outcome of attempts by me to settle this matter and in the meanwhile not to in any way disturb the quiet enjoyment by the tenants of the property.

We await your response.

Yours faithfully
DAVID THOMPSON & CO
David C. Thompson JP”

13. Thereafter there were exchanges of correspondence between the parties, culminating in the following letter dated 26 May 2010 from Mr Fitzgerald to Mr Thompson:

"Dear Mr. Thompson

Re: Spanish Main Property – House #10, Spanish Main Drive

We acknowledge receipt of your letter of the 19th May 2010, and a copy of your letter to the Board of Directors of Port Group Limited dated 14th May, 2010 regarding the above-captioned matter.

Whilst the copy of the Inter-Office Memorandum, dated the 5th July 2008 [sic], written by Sir Jack Hayward and sent to Lady Henrietta St. George and Mr. Rick Hayward (with copy to Mr. Ian Barry) does make reference to the Spanish Main Cottage complex generally and supposedly proposes a recommendation for the maintenance, use, and upkeep of the property it demonstrates only the intention or the wishes of one of the principals of Port Group Limited ("PGL"), the legal and beneficial owner of the subject property, and may not be considered an Agreement with Rick Hayward for the lease of the property.

Sir Jack had no legal capacity to contract or lease the property, unilaterally, without obtaining the requisite authorization from PGL to act as its agent in the collection of rent monies but merely an arrangement to occupy the subject property with his wife and children, Rick Hayward is considered, in our opinion, a constructive trustee for PGL, the legal and beneficial owner, for the rent monies that he received for the lease of the subject-property to the Sutherlands, to date.

Kingly note that receipts issued to the Sutherlands, as tenants, by Mr. Hayward, for payment of rent monies were issued in the name of PGL, for which he had neither the legal capacity nor authority.

Since Sir Jack had no legal or beneficial ownership of the subject property, no valid trust was created for the benefit of Rick Hayward and his children, based upon the principles of Bahamian trust law.

Furthermore, if my learned counsel asserts that there was in fact some trust arrangement [with no legal transfer of title to the property from PGL or Sir Jack], the aforementioned Inter-Memorandum from Sir Jack would be considered, in trust law, a letter of wishes, which has no legal effect.

The mere request/demand by counsel to the Board of Directors of PGL to now convey the subject property to Rick Hayward is proof of our assertion.

We wish to advise that none of the persons to whom the Inter-Memorandum was addressed or referenced, responded in any way to Sir Jack's recommendations; therefore, the proposals of Sir Jack were never implemented. To the best of our knowledge Rick Hayward has never at any time contributed to the maintenance and upkeep of the Spanish Main Cottage Complex, and has lived rent free for many years.

We hereby demand that all monies due and owing to PGL, by Rick Hayward, as constructive trustee, in the sum of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), be paid immediately to PGL or we will commence legal proceedings against Mr. Hayward forthwith.

Yours sincerely
PORT GROUP LIMITED
Tyrone L. E. Fitzgerald
General Counsel

cc: Sir Jack Hayward
Mr. Ian B.A. Rolle
Mr. Andre Feldman"

14. The defendant did not pay the moneys demanded by the plaintiff's general counsel and the plaintiff commenced this action by a specially indorsed writ of summons on 8 June 2010.

15. The plaintiff alleges that at all material times the defendant and his family were tenants at will of the plaintiff having been granted permission and allowed to reside at the said property upon the recommendation of Sir Jack Hayward. The plaintiff alleges further that without its authorization the defendant collected the sum of \$37,500.00 representing a security deposit in the sum of \$2,500.00 and rental income at the rate of \$2,500.00 per month for the period February 2009 to June 2010 from the tenant, Graham Sutherland. The plaintiff also alleges that despite its repeated demands for repayment of the aforesaid funds the defendant has refused to repay or account to the plaintiff for the same. The plaintiff contends that the defendant holds the said funds as its constructive trustee and, therefore, claims payment of the sum of \$38,898.13 being the aforesaid sum of \$37,500.00 together with interest thereon at the rate of 1.25% per quarter to 7 June 2010 and costs.

16. In his defence and counterclaim filed 9 July 2010, the defendant admits that the legal title to the said property is held by the plaintiff. He also admits having collected the sum of \$37,500.00 as rent from Mr Graham Sutherland, the tenant of the said property. However, he denies that he collected those funds for, or that he is holding the same as constructive trustee on behalf of, the plaintiff. Instead, the defendant alleges that since July 2006, by virtue of the said memorandum, the plaintiff has held the said property as constructive trustee for the defendant and his children.

17. The defendant alleges further that in reliance on the said memorandum, he has expended his personal funds in renovating, maintaining, repairing and furnishing the said property. He alleges further that because the plaintiff always acknowledged that the property belonged to the defendant and his family, the plaintiff never contributed to any part of the costs for renovating, maintaining, repairing and or furnishing the same.

18. The defendant contends further that, contrary to what is alleged in the statement of claim, at no time did he and his family ever reside in the said property and that any "occupation" or "possession" resulted from him being the beneficial owner thereof, as established by the constructive trust set up by the plaintiff by the aforesaid memorandum.

19. The defendant, therefore, counterclaims against the plaintiff for the following relief:

- 1) A declaration that he is entitled to a conveyance of the property and an order that the property be conveyed to him or as he decides and directs.
- 2) Payment of all rents collected by the plaintiff from the property from 1 March 2010 and continuing.
- 3) An order that the defendant receive all rents from the property until such time as the property is legally conveyed to the defendant.
- 4) Interest on all sums collected by the plaintiff and costs.

20. In its reply and defence to counterclaim, the plaintiff denies the defendant's counterclaim; puts the defendant to strict proof thereof and avers at paragraphs 4 through 10 as follows:

- a. The defendant [sic] denies paragraph 20 of the Counterclaim and avers that notwithstanding the fact that Sir Jack was a shareholder and Director of the plaintiff, he had no legal capacity to grant permission or lease the property, singly and/or unilaterally, to the defendant and his family, without obtaining the requisite authorization and resolution from the Board of Directors of PGL, in accordance with the Articles of Association of the Company.
- b. The plaintiff denies paragraph 21 of the Counterclaim and repeats paragraph 4 hereof. The plaintiff further avers that at no time did the plaintiff give the property to the defendant or authorize the same to be given to the defendant and puts the defendant to strict proof of the same.
- c. The plaintiff denies paragraph 22 of the counterclaim and avers that at no time did the plaintiff ever become or acted as a constructive Trustee of the defendant and puts the defendant to strict proof of the same.
- d. The plaintiff denies paragraph 23 of the Counterclaim and repeats paragraph 4 hereof. Further the plaintiff avers that as Sir Jack had no authorization to grant the property to the defendant the rent monies received pursuant to the Lease was and always belonged to the plaintiff.
- e. The plaintiff denies that it granted or agreed to grant to the defendant the property. The defendant in its defence and counterclaim acknowledges that the plaintiff did not grant the property to the defendant.
- f. The plaintiff denies paragraphs 25 of the counterclaim and puts the defendant to strict proof of the same.
- g. The plaintiff denies paragraphs 25 of the counterclaim and puts the defendant to strict proof of the same. The plaintiff avers that it had no agreement with the defendant with respect to the property and as such any monies if in fact spent by the defendant cannot be considered consideration with respect to the property.

21. At the trial the Court heard from Mr. Andre Feldman on behalf of the plaintiff and the defendant on his own behalf, each of whom filed a witness statement which he adopted as his evidence in chief.

22. In his witness statement filed 1 October 2012 Mr. Feldman deposed as follows:

- 1) That I am the Personal Attorney and Representative of Sir Jack Hayward, a Director of the Plaintiff herein, Port Group Limited ("PGL") ("hereinafter referred to as the Company").
- 2) That the contents of this Witness Statement are made from information obtained by me in my capacity as personal Attorney and Representative of Sir Jack Hayward aforementioned and I verily believe the same to be true and correct to the best of my knowledge information and belief.
- 3) That I have had sight of the title deeds to 'McDonald House' being Lot No. 10, Block, 14, Unit 4, Fortune Bay Subdivision Freeport, Grand Bahama and received information in relation thereto as Sir Jack Hayward's Attorney.

- 4) That I can confirm that the said property known as 'McDonald House' is owned by the Plaintiff, PGL and that at no time did the Plaintiff, PGL, ever transfer title of the said property to Sir Jack Hayward.
- 5) That from my review of the title documents and relevant files provided to me by attorneys for the Company, I also confirm that to the best of my knowledge from the information I have reviewed I cannot see where the Board of Directors of the Plaintiff, PGL, ever agreed to transfer the subject property to the defendant, Richard Hayward.
- 6) That at the relevant time, to the best of my knowledge and from the information provided to me by the management of the Company, the Board of Directors of the Plaintiff, PGL comprised of at least Sir Jack Hayward, Lady Henrietta St. George, Hannes Babak, Sir Albert J. Miller, W. Albert Gray, Derek H. Harrington and Ian O. Barry. That I confirm that from information received by me as Sir Jack's Attorney, that the Defendant, Richard Hayward never paid Sir Jack Hayward any money or consideration for the property in question.
- 7) That Sir Jack informed me of his recommendation for the Defendant, Mr. Richard Hayward to be responsible for the use, maintenance and upkeep of McDonald House.
- 8) That the said recommendation was reduced to an Inter-Office memorandum dated the 5th July 2008 [sic] and was sent to Lady Henrietta St. George and the defendant, Mr. Richard Hayward.
- 9) That the said recommendation was merely his personal wishes and not binding on any of the other principals of the Plaintiff, PGL.
- 10) That he became aware of the Defendant harassing the tenants of McDonald House concerning their tenancy and rental arrangements.
- 11) That Sir Jack also confirmed to me that the Defendant was not an Officer, Director, servant or agent of the Plaintiff and therefore not authorized to act on behalf of the Plaintiff.
- 12) That Sir Jack further informed me that the Defendant had collected rental money for the said McDonald House purportedly on behalf of the Plaintiff however, the funds were never turned over to the Plaintiff.
- 13) That by letter dated the 11th May 2010, I wrote a demand letter to the Defendant requesting the return of rental moneys he collected to the Plaintiff and that he cease and desist from interfering with the tenants of McDonald House as well as the affairs of the PGL.
- 14) That the contents of this Affidavit are correct and true.

23. Under cross examination Mr Feldman admitted that he was not an officer or director of the plaintiff company. He was neither the author nor an addressee of the said memorandum. He had never represented, nor did he at the date of the trial represent, the plaintiff in relation to this matter. He knew there was a tenant on the said property but did not know who was responsible for putting the tenant there. He did not know who owned the said property at the date of trial, although he believed it had been sold. He did not know who provided moneys to purchase the said property. He was not aware of

whether the keys to the said property were given to the plaintiff or to the defendant by Sir Jack nor did he know whether Sir Jack purchased the said property for the defendant's use, benefit and sale. He was not aware at any time prior to 2010 that the plaintiff asserted any interest or right or claim or act of ownership in the said property. He was, however, aware that between 2009 and 2010 there was a falling out between Sir Jack and his family resulting in certain court actions against the defendant. Mr Feldman did not know who was sent to collect the rent from the tenant. He did not know of the "specifics of collection of rent" in relation to the said property prior to 2010 but said that his instructions were that subsequent to the "falling out", the plaintiff collected the rent. To his knowledge the defendant and his family were never called tenants of will of the plaintiff.

24. As for the said memorandum, Mr Feldman's "impression" was, in his words: "What Sir Jack is saying here, in my opinion, is that Rick should be able to use the cottage for his family members when he needed more space and if that is not going to be the case, that he should sell the property on behalf of the company."

25. Mr Feldman confirmed that at all relevant times Sir Jack was the paid Executive Chairman of the plaintiff working out of the office of the plaintiff.

26. In his witness statement filed 25 January 2012, the defendant deposed as follows:

- 1) I am the Defendant named in this Action.
- 2) Sometime in the year 2002 Sir Jack Hayward, my father, and his partner Mr. Edward St. George, now deceased, between them negotiated the purchase of the house ("the Property") then owned by Colin McDonald the subject of this action. Mr. St. George provided the purchase price for the property and on the instruction of Sir Jack the property was conveyed to the Port Group Limited with the understanding that the property was for the beneficial ownership of me and my children as Sir Jack's son and his grandchildren. This transaction was part of the negotiated separation of the Hayward's properties and the St. George's properties in Freeport. The Port Group Limited (PGL) was always the trustee only of the property for me and my children.
- 3) Prior to the Conveyance of 25th February 2003 I had taken physical possession of the property and undertaken the maintenance and repair of same. I paid for all the work that was needed and which was done and all the bills for the property which remained vacant except when used by my friends visiting from abroad from time to time.
- 4) By Inter-Office Memorandum dated 5th day of July 2006 from PGL written by PGL to Lady Henrietta St. George (hereinafter called "Lady Henrietta") a 50% shareholder and Director of PGL and to me PGL in the said Inter-Office memorandum stated "Rick and the grandchildren should decide what they want to do with Colin McDonald's house – either use it for overflow or sell it and put the proceeds towards the upkeep of Rick's complex". Sir Jack never as alleged in the Statement of Claim proposed or recommended for me and my family "to reside on the property for the maintenance use and upkeep of the property as an expression of his intention or wishes". This would have made no sense as I have at all relevant times had and lived in my own house down the street from the property. It was my decision to lease the property to a tenant and it is now my decision to have the property conveyed to me and the grandchildren of Sir Jack so that we now

hold the legal estate as well as the beneficial interest in the property and not have to rely on the constructive trust created by PGL as a result of the said Inter-office Memorandum.

- 5) Sir Jack in his capacity as a 50% Shareholder and Executive Chairman of the Board of Directors in accord with Lady Henrietta the other 50% Shareholder and Director of PGL had the legal capacity to issue the said Inter-office Memorandum on behalf of and for PGL. At no time was Sir Jack as wrongly stated in the statement of claim acting in his personal capacity and he never granted permission personally for a Lease of the property, singly and/or unilaterally, to me or my family. PGL has always held Sir Jack out to me as having the requisite authorization of PGL and its Board of Directors in accordance with the Articles of Association of PGL to do what was done in my favour for me and my children.
- 6) At no time was I, my wife or children tenants at will or otherwise of Lot Number Ten (10) in Block Number fourteen (14) Unit Number four (4) Fortune Bay Subdivision lying on the East of Freeport in the island of Grand Bahama (herein referred to as "the Property") as alleged by the Plaintiff and at no relevant time was I granted permission and allowed to reside at the property upon the recommendation of Sir Jack Hayward my father. At all relevant times Sir Jack acted in his capacity as the Executive Chairman of the Board of Directors of the Plaintiff and a 50% Shareholder and Director of the Port Group Limited and at no time expressed or implied he was acting in a personal capacity in this matter except as related to wanting to ensure that my children and I owned and benefitted from the property as his son and grandchildren.
- 7) The Plaintiff had no arrangement with me for me to occupy the subject property with my wife and the children. I never acted as a constructive Trustee for PGL and am not a constructive Trustee for PGL. The rental monies that I received from the Lease of the subject property from the Tenant are mine.
- 8) Except where otherwise stated all statements made herein are made from my own knowledge information and belief. Where otherwise stated such statements are believed by me to be true.

27. The defendant explained under cross examination that sometime in 2002 the late Mr St George wanted to use a piece of property owned by the Grand Bahama Development Company Limited to build the house currently used by Lady Henrietta; that Mr St George valued the land at \$2M; that as the Grand Bahama Development Company Limited was beneficially owned as 50/50 between Mr St George and Sir Jack, Mr St George gave Sir Jack \$1M, being his half share of the aforesaid value, and Sir Jack used a portion of the \$1M money to purchase the said property. According to the defendant, he got that information from both the late Mr St George and Sir Jack.

28. The defendant said that since the property was purchased in 2003, the plaintiff understood that it held the same on trust for him and his children and so did Sir Jack and Ian Barry; that the purchase of the said memorandum was to put "it in writing and to make sure everyone had the ownership responsibilities."

29. Under cross examination, the defendant said that after he was given the keys by his father he spent approximately \$105,000.00 for renovations and furnishings for the said property; that he alone was responsible for the maintenance and upkeep thereof, as well

as the payment of all utility bills with respect thereto. He said he did not ask for nor did he receive funds from his father or the plaintiff to assist with those costs.

30. The defendant said that by virtue of the said memorandum, he had the express written authorization to act and or negotiate in the name of the plaintiff for his benefit the rent and or lease of the said property to a tenant or third party. That pursuant thereto, in 2009, he decided to rent the property so as to more easily maintain it and to slow its decline by remaining vacant; that he discussed the matter with Mr. Ian Rolle, President of the plaintiff company, who referred him to Nekcarla Grant, the then legal counsel for The Grand Bahama Port Authority Limited to assist him with preparing the lease agreement for execution by Mr. Graham Sutherland, the tenant whom he had found; that at all relevant times the plaintiff was acting on the defendant's instruction and all rents were undisputedly paid to the defendant for his use and benefit.

31. The defendant admits that although all receipts for such rent were issued by him to the tenant, such receipts referenced the name of the plaintiff as arranged with the plaintiff. However, he said that the funds were retained by him and no request was made for such funds to be paid to the plaintiff or anyone else on its behalf until there was a falling out between himself and Sir Jack when he, the defendant, decided to go against Sir Jack in a much publicized court action involving Lady Henrietta St. George.

32. The defendant said that between 2003 and 2010 when this action was commenced, neither Sir Jack nor the plaintiff had ever asked him to return the keys or the house and that he collected and retained the rent until February 2010. He said that when he realized in March 2010 that the rent had not been paid into his bank account by the tenant, as usual, he called the tenant who informed him that "Sir Jack's Butler" had come and collected the rent and had told him not to pay rent to the defendant anymore. This, the defendant says, was done without notice to himself or to the plaintiff and that he has received no rent nor gone onto the said property since then - pending the Court's determination of this matter.

33. The defendant admitted that his father had always been very generous with him. He maintained that the funds for the purchase of the said property were Sir Jack's personal funds. However, the defendant says that the plaintiff was aware, by virtue of the said memorandum, that it held the property on trust for the defendant and his children, Sir Jack's grandchildren.

34. The defendant admitted that he did not pay any moneys towards the purchase of the said property. He admitted that he was never told by the directors of the plaintiff company that the plaintiff held the said property in trust for him and they never said that the plaintiff held the property in trust for Sir Jack. However, he said that the shareholders, Sir Jack and Lady Henrietta, told him that the plaintiff held the property in trust for him.

35. Counsel for the plaintiff submitted that the plaintiff as the legal and beneficial owner of the said property permitted the defendant the use of the same, including the rental thereof to others. Consequently, counsel submits, the defendant having admitted that he collected and retained the said rent, judgment should be entered for the plaintiff as pleaded.

36. As for the defendant's claim that the plaintiff held the said property on trust for the defendant and his children, counsel for the plaintiff made the following observations and or submissions:

- a. The defendant led no evidence that anyone other than the plaintiff provided the moneys to purchase the said property, and, therefore, he has failed to show that the plaintiff held the said property on trust for him and his family.
- b. There is no evidence that the plaintiff held the said property as trustee for Sir Jack; or that it ever agreed with the defendant or anyone acting on behalf of the defendant to grant or convey the property to the defendant.
- c. There is no evidence that the defendant and the plaintiff had any agreement as to the ownership of the said property at the time of its acquisition or at any time thereafter.
- d. The defendant does not assert that the said memorandum was issued by or after a properly constituted meeting of the plaintiff's board of directors
- e. The defendant led no evidence that he made any investments in the said property or acted to his detriment or that if he did, such was done by the instigation of the plaintiff or with the plaintiff's consent.
- f. The receipts for the payment of utility charges and other personalities produced by the defendant cover expenses which are traditionally paid by tenants and in any event, the evidence before the court is that the defendant benefitted from his occupation of the said premises and did not suffer any loss.
- g. On the other hand, the plaintiff's evidence, as led by Mr Feldman, is that the plaintiff provided the purchase price for the acquisition of the said property and did not, at the time of acquisition or subsequently, agree to transfer its interest therein to the defendant.
- h. The plaintiff has asserted that at all material times, it was the fee simple owner of the subject property and claimed that the said memorandum was not a proposal or a decision made or taken by it; that at best, the said memorandum represented the views of an employee and director of the plaintiff to another employee and director of the plaintiff.
- i. At all material times, the plaintiff was the only party capable of making a declaration of trust as required by section 7 of the Statute of Frauds.
- j. The said memorandum could not create a declaration of trust in favor of the defendant because it did not satisfy the requirements of the Statute of Frauds in that:
 - i. it is not a declaration but a proposal.
 - ii. it was written to Lady Henrietta St George who did not participate in the acquisition of the subject property.
 - iii. At the date thereof, the property was absolutely vested in the plaintiff, which remained a stranger to the said memorandum.
- k. Furthermore as Sir Jack, by the defendant's admission, did not acquire any interest in the said property, his expressions in the said memorandum could not constitute a declaration of trust of the said property, whatever his wishes were at the relevant time.

- i. In English law constructive trusts are imposed only in certain well-established contexts, such as:
 - i. Where a fiduciary makes a profit from his position.
 - ii. Where a stranger to the trust knowingly receives trust property.
 - iii. Contribution to the acquisition or improvement of property. *Hussey v Palmer* [1972] 3 All E.R. 744; *Jessamy v Babb* (1999) High Court, Barbados, No. 222 of 1993 (unreported), Blackman, J.
- m. No such conditions apply in this case.

37. Mr Thompson for the defendant pointed out that the defendant's evidence in regard to the acquisition of the said property is undisputed and that it is unlikely that Sir Jack would have used his personal funds to purchase property for the use and benefit of the plaintiff, beneficial ownership of which was shared jointly with the late Mr St George. In counsel's submission, it was more probable than not, that although the property was placed in the plaintiff's name, it was to be beneficially owned by Sir Jack, who alone had the authority to say what should happen with the same.

38. In that regard, counsel for the defendant pointed out that the defendant's evidence is that Sir Jack told him that the said property was purchased for him and his children and that Sir Jack "gave" the property to him, although title was taken in the name of the plaintiff. Counsel for the defendant conceded that at the time the property was acquired, neither Sir Jack nor the plaintiff gave the defendant anything in writing stating that the said property was being held in trust for him and his children. However, he argued, the "trust" was confirmed by the said memorandum.

39. Mr Thompson also made the following additional observations and/or submissions on behalf of the defendant:

- a. As a general rule, resulting trusts are imposed by courts when a person receives property, but the transferor did not have the intention for them to benefit.
- b. In this case, Sir Jack, who provided the funds for the purchase of the said property, never intended that the plaintiff, to whom the property was conveyed, was to benefit. This is expressed by the plaintiff in the said memorandum under the hand of Sir Jack.
- c. The plaintiff as constructive trustee for the defendant should be ordered to give a deed or the proceeds of sale to the defendant. See *Bannister v Bannister* [1948] 2 All ER 133.
- d. This is a case where the plaintiff should be precluded from revoking the said memorandum as the doctrine of "equitable estoppel" is applicable. The plaintiff as the party making the assurance should not be permitted to act inconsistently with it and be allowed to alter its position to the detriment of the defendant. *Canadian Pacific Ry. V.R.* (1931) A.C. 414 at page 429.
- e. This is also a case where the doctrine of proprietary estoppel is applicable. See *Crabb v Arun District Council* [1975] EWCA Civ. 7, *Taylor Fashions v Liverpool Victoria Trustees* [1982] 1 Q.B. 133 and *Dillwyn v Llewelyn* [1862]

EWHC Ch J67, Pascoe v Turner [1979] 1 WLR 431, Jennings v Ricde [2002] EWCA Civ 159, Thorner v Majors [2009] UKHL 18

- f. There was no need for the defendant to provide “consideration” for the said memorandum to be upheld in his favour as promissory estoppel can be used not only as a defence but can also be found to be a cause of action as in the counterclaim of the defendant herein. See Crabb v Arun District Council *supra*.
- g. Further, the plaintiff, from the date of the deed to it, has never, until now, interfered with the use of the property by the defendant. The plaintiff has taken instructions from the defendant with respect to the said property without question and the plaintiff never attempted to get possession from the defendant or to rent out or lease the said property.
- h. Consequently, the defendant, believing he was the beneficial owner of the said property, to his detriment since 2003 spent his money to improve the property and to furnish it at his expense.
- i. On the evidence and the authorities, the defendant is entitled to the relief sought in his counterclaim.
- j. If all else fails, the defendant should be paid by the plaintiff the \$105,000.00 in improvements and repairs spent by him on the property.

40. A trust is defined as: “An equitable obligation binding a person (trustee) to deal with property over which he has control (trust property), for the benefit of persons (beneficiaries or cestuis que trust), of whom he may himself be one, and any one of which may enforce the obligation.” Underhill, Law of Trusts and Trustees, 14thedn, 1987, p.3.

41. Trusts are either (i) express, that is, trusts created expressly or impliedly by the actual terms of some instrument or declaration; or (ii) arise by operation of law.” See Halsbury’s Laws of England, 4th edn., volume 28, paras 523 and 524.

42. Section 4 of the Statute of Frauds, chapter 154 Statute Laws of The Bahamas 2000 Revised Edition, provides that no action shall be brought upon any contract or sale of land, tenements and hereditaments or any interest in or concerning them unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the parties to be charged therewith.

43. Section 7 of the Statute of Frauds provides that all declarations or creations of trust of land must be in writing and signed by the party who is by law enabled to declare such trust.

44. Resulting, implied and constructive trusts, however, arise by operation of law and not by reason of the expressed or implied intention of the parties: Commonwealth Caribbean Trusts Law, Kodilinye and Carmichael, 2nd edn., p. 129. The principle is that where a person who holds property in circumstances in which in equity and in good conscience it should be held or enjoyed by another, he will be compelled to hold the property on trust for that other. See Hanbury & Martin, Modern Equity, 15thed, Sweet & Maxwell.

45. In Gissing v Gissing [1970] UKHL 3 Lord Diplock opined as follows:

“A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.”

46. Edmund Davies, L.J. in the case of *Carl Zeiss Stiftung v Herbert Smith & Co.* [1969] 2 Ch 276 at p. 300 said:

“English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.”

47. According to the learned authors of *Halsbury’s Laws of England*, 4th edition, at para 524, page 285:

“A constructive trust is automatically imposed in circumstances where it is unconscionable or contrary to fundamental equitable principles for the owner of a particular property to hold it purely for his own benefit. (*Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL). It is imposed irrespective of the intentions of the persons concerned, although it may coincide with their original intentions where the person who had agreed to hold property as express trustee subsequently relies on the absence of the requisite statutory formalities to claim the property as sole beneficial owner”.

48. Equitable estoppel arises where, by his words or conduct, one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it. (See *Canadian Pacific Ry. V.R.* (1931) A.C. 414 at page 429).

49. Proprietary estoppel arises when A purports to give but fails to effectively convey, or promises to give property to B while being generally aware that B will expend money or otherwise act to his detriment in reliance on the supposed or promised gift, so much so that it would be “unconscionable” not to enforce the expectation.

50. As counsel for the defendant pointed out, although called as a witness for the plaintiff, Mr Feldman did not purport to give evidence on behalf of the plaintiff, but rather, he made it clear that he was the personal attorney and representative of Sir Jack and that his evidence was given from information obtained by him in such capacity; that he was giving evidence as instructed by Sir Jack personally and in no other capacity.

51. Having heard both witnesses, I see no reason why I should not accept the defendant’s evidence as to the acquisition of the said property and the dealings therewith from the time of acquisition until the commencement of this action.

52. In that regard, I accept the evidence of the defendant that the funds for the purchase of the said property were provided not by the plaintiff company, but by Sir Jack; that Sir Jack told the defendant that the said property was for him and his children; that notwithstanding title thereto having been taken in the name of the plaintiff, Sir Jack “gave” the said property to the defendant and his children when he handed the keys to

the defendant prior to or shortly after the said property was acquired. The defendant's testimony in that regard is unchallenged.

53. Neither Sir Jack nor anyone representing the plaintiff said otherwise. Mr Feldman did not dispute how the property was acquired. Indeed, he said he did not know. To my mind, if the defendant was being untruthful or was mistaken, it was a simple matter for Sir Jack to go into the witness box and "set the record straight". It was certainly open to the plaintiff to send one of its officers or directors to give evidence to refute the defendant's allegations and claims.

54. Further, I accept the defendant's evidence that contrary to what is pleaded in the statement of claim, he and his family never resided in the said property as they already had a home in the area, known as Rick's Complex. In that regard, I note that at paragraph 2 of the statement of claim, the plaintiff pleads that "at all material times the defendant, his wife, and children were tenants at will of the said property having been granted permission and allowed to reside at the property, upon recommendation of Sir Jack, father of the defendant, and a shareholder and director of the Port Group Limited." However, at paragraph 5 the plaintiff avers that "notwithstanding the fact that Sir Jack was a shareholder and director of [the plaintiff] he had no legal capacity to grant permission or lease the property, singly or unilaterally, to the defendant and his family, without obtaining the requisite authorization and resolution from the Board of Directors of [the plaintiff] in accordance with the articles of association of the company."

55. It is, therefore, reasonable in my view, to assume that since Sir Jack did grant permission to the defendant and his children to reside in the said property, that he had the requisite authorization to do so.

56. The plaintiff at paragraph 3 of its statement of claim avers that at all material times the defendant had no position as a shareholder, director, officer, employee, agent or representative of [the plaintiff] and did not have any capacity, right, responsibility, obligation or authority to negotiate, transact or conduct any business whatsoever on behalf of and for the benefit of [the plaintiff]", yet the defendant was able to collect rental income from a tenant of the said property for one year without interference by the plaintiff and without any request from the plaintiff for the rental proceeds to be paid to it, that notwithstanding the plaintiff's allegation at paragraph 9 of the statement of claim that the defendant did not have any authorization from the plaintiff to act as its agent in the collection of rent monies but merely an arrangement to occupy the subject property with his wife and children."

57. It seems to me that the plaintiff did not really know what was going on with the said property.

58. Curiously, it was Mr Feldman, in his capacity as Sir Jack's attorney in The Bahamas, who wrote to the defendant that "Sir Jack demands that [the defendant] immediately cease and desist from troubling the [tenant]...that [the defendant] immediately return the rental money which he took delivery of and which belongs to [the plaintiff] alone" and notifying the defendant that failure to return the moneys would result in filing of legal proceedings against the defendant.

59. Mr Feldman concluded his letter with the following paragraph:

"For the sake of absolute clarity Sir Jack Hayward has requested that [the plaintiff] take whatever legal or other actions as needed to ensure that the Sutherlands enjoy a peaceful occupation of the leased property and that the monies received by [the defendant] are returned forthwith."

60. I am, therefore, inclined to agree with counsel for the defendant that Mr Feldman's testimony, coupled, I say, with the aforesaid pleading and correspondence, clearly illustrate that this action was being personally conducted, controlled, directed and prosecuted by Sir Jack

61. In the circumstances, I accept the defendant's evidence that after being given the keys to the said property and taking physical possession thereof, in the belief that the said property belonged to him and his family, he carried out and/or paid for all renovations, maintenance and repairs thereto, without any input, interference or contribution, financial or otherwise, from the plaintiff; that he purchased furnishings for the said property without assistance from the plaintiff; that he paid all the utility bills with respect thereto and that when the said property was not being used by his friends visiting from abroad, it remained vacant. Further, that in February 2009, he arranged to lease the said property to Mr Sutherland, in connection with which, the plaintiff's legal counsel took and followed his instructions. I also accept the defendant's evidence that since he arranged to lease the said property to Mr Sutherland, until shortly before the commencement of this action, neither the plaintiff nor anyone on its behalf ever requested him to pay to the plaintiff the rental income or any part thereof.

62. Further, I accept the defendant's evidence, which is not disputed by the plaintiff, that at no time since he was given the keys to the said property by Sir Jack, until shortly before the commencement of this action, some seven years later, did the plaintiff or anyone on its behalf, including Sir Jack, interfere with his use and enjoyment of the said property.

63. Furthermore, the said memorandum which was addressed to the Lady Henrietta St George and the defendant, clearly stated that the decision as to what to do about the said property was the defendant's. However, even if, as counsel for the plaintiff contends, the said memorandum was a mere expression of Sir Jack's intention, and, therefore, not binding on the plaintiff, the defendant's uncontroverted evidence is that neither the plaintiff nor Sir Jack interfered with his use and enjoyment of the said property for more than seven years.

64. Consequently, on the basis of the defendant's unchallenged evidence, which I accept, whether or not a constructive trust was created by the said memorandum or otherwise in favour of the defendant, it would, in my judgment, be unjust to order the defendant to pay the said sum of \$37,500.00, or any part thereof, plus interest, to the plaintiff in circumstances where the plaintiff for more than seven years allowed the defendant to treat the said property as his own, to permit him to lease the said property to a third party, and to collect and use the rental proceeds therefrom, for more than a year, without requiring the defendant to pay over or account to the plaintiff therefor. Clearly, in my view, the plaintiff is, at the very least, guilty of acquiescence.

65. In the circumstances, I have no hesitation in dismissing the plaintiff's claim for payment of the sum of \$38,898.13 with costs to be paid by the plaintiff to be taxed if not agreed.

The counterclaim

66. Notwithstanding the parties hereto, in reality this is, in my view, simply a family dispute between a father and his son, who appear to have had a "falling out".

67. As indicated I accept the defendant's evidence as to how the said property was acquired. Further, although legal title to the said property was placed in the plaintiff's

name, I am persuaded that the plaintiff knew that it was not the beneficial owner thereof. In that regard, even if the plaintiff does not concede that the said property was beneficially owned by the defendant and his children, in my view, the plaintiff accepted that the property was beneficially owned by Sir Jack, who had the authority to do with the said property as he wished.

68. That would, no doubt account for the plaintiff's averment in the statement of claim that the defendant and his family were granted permission and allowed to reside at the property upon Sir Jack's recommendation; and also for why there is no evidence of the plaintiff interfering with the defendant's use and enjoyment of the said property until 2010, when, according to the evidence, there was a falling out between the defendant and Sir Jack, who threatened via a letter from Mr Feldman to the defendant, to request the plaintiff to take "whatever legal or other action" against the defendant as needed in connection with the rental income from the said property.

69. Sir Jack apparently made good on the threat as that letter was followed by the 12 May 2010 and 26 May 2010 letters from the plaintiff's general counsel to counsel for the defendant demanding repayment of all moneys collected from the tenant of the said property and subsequently the commencement of this action.

70. In my view, the evidence all points to an intention on the part of Sir Jack to have the defendant and his children benefit from the said property and I accept the defendant's evidence that when the said property was acquired, he was told by Sir Jack, who handed him the keys to the said property, that it belonged to the defendant and his children.

71. The defendant admits that he did not contribute any portion of the purchase price for the said property. He also admits that he was not given anything in writing by Sir Jack or the plaintiff when he was handed the keys and told by Sir Jack that the property belonged to him and his children. However, the defendant contends that the fact that he and his children were beneficial owners of the said property and that the plaintiff held the same as trustee on their behalf, was confirmed by the said memorandum in which Sir Jack wrote, inter alia:

Rick and the grandchildren should decide what they want to do with Colin McDonald's house – either use it for overflow or sell it and put the proceeds towards the upkeep of Rick's complex.

72. Further, I accept the defendant's evidence that the said memorandum was prepared as a result of an attempt by Mr Ian Barry, the Vice President of the plaintiff company, after the death of the late Mr St George, to document for the plaintiff's records not only the division of the responsibilities of the Spanish Main Cottages, but also the beneficial ownership thereof, between the two families then headed by Lady Henrietta St George and Sir Jack, notwithstanding legal title thereto was held by the plaintiff. To my mind, that was a clear indication that the plaintiff knew that although it held legal title, it was not the beneficial owner thereof. Why else would it be necessary for the Vice President of the plaintiff company to be told how responsibilities for its properties were to be divided and why would the defendant who was neither a shareholder nor an officer or director of the plaintiff company be given responsibilities, including the responsibility of deciding whether to use the said property "for overflow or sell it", as well as looking after and paying the bills for, the plaintiff's property?

73. I am persuaded, notwithstanding counsel for the plaintiff's argument that the defendant does not assert that the said memorandum was issued by or after a properly

constituted meeting of the plaintiff's board of directors, that Sir Jack had, and was held out to the defendant as having, the requisite authorization of the plaintiff and its board of directors not only to write the said memorandum on behalf of the plaintiff, but also to direct the plaintiff as to what was to be done with respect to the said property.

74. The defendant contends, and I accept, that by virtue of the said memorandum, the plaintiff acknowledged and confirmed on the record that it held the said property for the "use" and or "sale" thereof to benefit the defendant and his children and clearly was not held for the plaintiff's use or benefit. If this were not the case, a representative of the plaintiff and or Sir Jack could have taken the stand and say so. Counsel's submission that the plaintiff never approved of or consented to any arrangement whereby it was being divested of the legal or beneficial ownership of the subject property is not evidence.

75. As for counsel's submission that Sir Jack and Lady Henrietta were mistaken as to what was necessary to give effect to the proposed family agreement, I accept the submission of counsel for the defendant that Sir Jack, as Executive Chairman, director and one of two equal shareholders of the plaintiff, no doubt had the legal capacity to issue to Lady Henrietta St. George and the defendant the said memorandum and to give the defendant the authority, responsibility and right to negotiate, transact and conduct business related to the said property and its use for the benefit of the defendant and his children and to ensure, by copying Ian Barry, that the records of the plaintiff reflected on whose behalf the plaintiff held the said property.

76. I am persuaded that the plaintiff accepted that the property was to be beneficially owned by the defendant and acquiesced until Sir Jack's intervention in or about May 2010, shortly before the commencement of this action and that the prosecution of this action is, as the defendant contends, being driven by Sir Jack and not the plaintiff. This is, in my view, evident from the final paragraph of the aforesaid letter dated 11 May 2010 from Sir Jack's attorney to the defendant, in which Mr Feldman wrote:

"For the sake of absolute clarity Sir Jack Hayward has requested that PGL take whatever legal or other actions as needed to ensure that the Sutherlands enjoy a peaceful occupation of the leased property and that the monies received by Mr. Richard Hayward are returned forthwith".

77. That statement, to my mind, is also evidence that Sir Jack had the requisite authority, not merely to recommend but also to direct what was to be done with the said property and by the said memo he so directed.

78. Furthermore, I am of the view that had Sir Jack not directed the plaintiff to commence these proceedings, they would not have been commenced. The lack of participation on the part of the plaintiff's officers and or directors is further evidence, in my view, that these proceedings are not being driven by the plaintiff.

79. In my judgment, Sir Jack having given the keys to the said property to the defendant immediately after it was purchased, coupled with the fact that the defendant and his family were permitted to use the said property as their own without any interference by Sir Jack, the plaintiff or anyone on its behalf for more than seven years after its acquisition, along with the said memorandum are, in my judgment, sufficient to enable me to find that the plaintiff held the said property on a constructive trust for the benefit of the defendant and his children. Moreover, the plaintiff having stood by for three years prior to the date of the said memorandum and four years thereafter, while the defendant renovated, maintained, repaired and furnished the said property, use the

same for friends visiting from abroad, as well as facilitating the defendant's lease of the said property to Mr Sutherland and permitting the defendant to collect and retain the rental proceeds therefrom for more than a year, without interference by the plaintiff, it would, in my judgment, be unconscionable to permit the plaintiff and or Sir Jack to go back on the arrangement.

80. In my judgment, the circumstances of this case are such that in equity and in good conscience the said property should be held or enjoyed by the defendant and his children, and the plaintiff ought to be compelled to hold the same on trust for the defendant and his children for the purpose set out in the said memorandum, that is: "for overflow or sell it and put the proceeds towards the upkeep of Rick's complex".

81. The defendant says that he instructed the plaintiff, in accordance with the said memorandum, to convey the legal ownership of the said property to the defendant and his children and to deliver a conveyance thereof to them or to sell the said property and pay the proceeds of sale to the defendant.

82. In a letter dated 11 September 2012 addressed to Mr David C Thompson, counsel for the defendant, by Miss Olivette P Missick, counsel for the plaintiff, Miss Missick wrote:

"Dear Mr Thompson:

Re: Common Law and Equity Action 158 of 2010 –
Port Group Limited and Richard Hayward

We acknowledge receipt of your letter dated the 5th September 2012 and received by us on the 6th September 2012 and duly note the contents therein with respect to the above-captioned matter.

We confirm that the McDonald House property being Lot No. 10, Block No. 14, Unit No. 4, Fortune Bay Subdivision, Freeport, Grand Bahama, has been sold to Cape Hope Investments Limited on the 19th July 2012.

We advise that our clients were the legal beneficial owner of the subject lot and there was no Court Order or Injunction which restricted our client's ability to use or right to dispose of the said property.

Consequently, there was no need for our client to seek the consent of your client or the court to proceed with a sale thereof.

Sincerely yours
Davis & Co.
Olivette P. Missick, LLB (Hons)
Cc: Mr Tyrone Fitzgerald, Port Group Limited"

83. Counsel for the defendant submits, therefore, that in the event the property has in fact, been sold, the defendant is entitled to be paid the proceeds of sale therefor.

84. In light of the foregoing, and having heard and considered the submissions of counsel and reviewed the authorities cited, although not referred to specifically in this judgment, I grant the following relief:

- a. A declaration that the plaintiff holds or held the said property as constructive trustee on behalf of the defendant and his children, who were the beneficial owners thereof.
- b. A declaration that the defendant and his children, as beneficial owners, are entitled to all rents collected by the plaintiff from 1 March 2010 with respect to the said property.
- c. A declaration that the defendant and his children are entitled to collect the rent from the said property with immediate effect.
- d. That the plaintiff do pay to the defendant all rents collected from the tenant of the said property since March 2010.

85. Further, in the event the said property has been sold, then I find that the plaintiff holds the proceeds of sale thereof as constructive trustee for the defendant and his children on trust to be used for the upkeep of Rick's complex.

86. The plaintiff is to pay the defendant's costs to be taxed if not agreed.

DATED this 31st day of May A.D. 2013

Estelle G. Gray Evans
Justice