

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2005/CLE/GEN/FP33**

IN THE MATTER OF THE TRUSTEES ACT, 1998

**AND IN THE MATTER OF THE DEED OF APPOINTMENT
DATED OCTOBER 17, 2001, BETWEEN BAHAMIAN HILLS
LIMITED AND BENJAMIN FRANKLYN SANDS, JANET
ALBURY, ANDRE CARTWRIGHT, LAWRENCE PALMER,
PHILIP JOHNSON, REVEREND SOBIG KEMP**

**(1) GRAND BAHAMIAN HILLS LIMITED
(2) DENISE DEGREGORY-LUCKS**

Plaintiffs

AND

**(1) BENJAMIN SANDS
(2) LAWRENCE PALMER
(3) REV. SOBIG KEMP
(4) PHILIP JOHNSON**

(As Trustees of The Royal Bahamian Estates Subdivision)

Defendants

BEFORE The Honourable Mrs Justice Estelle G. Gray Evans
APPEARANCES: Mr Robert K. Adams and Mr Dwayne Fernander for the plaintiffs
Sir Cyril S. S. Fountain and Mrs Janet Fountain for the defendants
2011: 12 April; 8 November
2012: 9 February; 3 May

JUDGMENT

Evans, J.

1. Grand Bahamian Hills Limited ("GBHL") is the developer of the Royal Bahamian Estates Subdivision, Freeport, Grand Bahama. Denise deGregory-Lucks is the owner of a lot in the Royal Bahamian Estates Subdivision and therefore a beneficiary under the trust hereinafter mentioned. The defendants are trustees of the Royal Bahamian Estates Subdivision.

2. By conveyances in the form of the conveyance referred to in the originating summons ("the first conveyances"), GBHL as vendor/developer granted and conveyed to the purchasers of land in the Royal Bahamian Estates Subdivision a right of way over and along the private roads within the parameters of sections A and B of the Royal Bahamian Estates Subdivision ("the said roads"), subject to the payment of a fair proportion of the expenses of maintaining and keeping the same in repair. Each of the purchasers of such land agreed to pay a proportion of the costs and expenses (calculated in accordance with the formula set out in the first conveyances) "actually and bona fide incurred" by the vendor/developer or the trustees in the maintenance and repair of the said roads.

3. By the first conveyances, GBHL as vendor declared that it held the said roads upon certain trusts. The first conveyances also provided that when the vendor (GBHL) retired from the trusts, at least three persons were to be appointed in its stead, one of whom "shall at all times be a person nominated by the Grand Bahama Port Authority, Limited, so long as that company is in existence." The power of appointing new trustees was by the first conveyances vested in the "president for the time being" of the vendor (GBHL) and thereafter the statutory power of appointment was to apply.

4. The aforesaid power of appointment was exercised in a deed of appointment dated 17 October 2001 between "Bahamian Hills Limited" as developer and the defendants along with Andre Cartwright and Janet Albury as appointees.

5. Although the deed of appointment is said to be made between "Bahamian Hills Limited" (not GBHL) and the appointees, it is actually "signed sealed and delivered by Vilma Dann" as "President of the developer" and the operative clause reads as follows:

"Now therefore this deed witnesseth that in consideration of the premises and in exercise of the powers conferred upon him by the numerous deeds of conveyances and of every other power enabling the President of the Developer hereby appoints [the defendants along with Andre Cartwright and Janet Albury] to be Trustees pursuant to and for the purpose stated in the first conveyances more particularly paragraphs 8 and 9 thereof." [emphasis added]

6. Paragraphs/clause 8 and 9 of the first conveyances are set out hereunder:

Clause 8 The Purchaser so as to bind so far as may be the said hereditaments to whosoever hands the same may come and so that this covenant shall be for the benefit and protection of all lots in the Royal Bahamian Estates Subdivision hereby covenants with the Vendor and also with the owners for the time being of all other lots in the said Subdivision and each of them respectively that the Purchaser admits successors in title and assigns the owner or owners for the time being of the said hereditaments will contribute and pay a proportion (calculated as

hereinafter provided) in respect of the said hereditaments of all costs and expenses which shall from time to time and at all times hereafter be actually and bona fide incurred either by the Vendor or the Trustees for the time being of the trust referred to in clause 9 hereof in or about the maintenance and repair of the private roadways in Section A and B of the said subdivision as shown on the respective plans thereof referred to above and thereon coloured brown and the maintenance repair cleansing and renewal of all and any pipes drains conduits cables wires poles and supports which are already constructed and installed in the said subdivision or which may within twenty-one years from the date hereof be constructed or installed in the said subdivision for the supply of electricity water telephone gas or other utilities to or for the provision of sewerage facilities for the common use convenience and advantage of the owners and occupiers for the time being of all lots in the said subdivision and of all accounting auditing legal and administrative costs and expenses in connection therewith AND it is hereby agreed and declared that the proportion of such costs and expenses which shall be payable by the Purchaser and the successors in title under the provision thereof shall be that proportion of the total amount of the said costs and expenses which the number One shall bear to the total number of all lots in the said subdivision FURTHER that such monies shall become payable on demand upon presentation to the Purchaser or its successors in title by the Vendor or the Trustees for the time being of the trust referred to in Clause 9 hereof an account in writing stating the total amount of such costs and expenses the proportion thereof payable by the Purchaser or its successors in title and an address within the Commonwealth of the Bahamas where the original receipts and vouchers for the same may be inspected.

Clause 9 The Vendor hereby declares that the Vendor is seized of the private roads in sections A and B of the Royal Bahamian Estates Subdivision as shown and delineated on the respective plans thereof referred to above upon trust to permit and suffer the same at all times forever hereafter to be left open and unbuilt on and to be freely used and enjoyed by the respective owners and occupiers for the time being of all lots in Section A and B of the said Subdivision and that upon the retirement of the Vendor from the trusts hereof the power of appointing new trustees of this trust shall be vested in the President for the time being of the Vendor and that thereafter the statutory powers of appointment shall apply Provided that after the retirement of the Vendor as aforesaid there shall at all times be not less than three trustees hereof, one of whom shall at all times be a person nominated by the Grand Bahama Port Authority Limited so long as that Company is in existence.

7. The plaintiff, GBHL, commenced this action by originating summons on 23 February 2005, seeking the following relief:

- 1) An Order that the defendants be removed as Trustees of the Royal Bahamian Estates Subdivision and the following persons appointed as Trustees of the

Royal Bahamian Estates Subdivision, namely: Denise deGregory of Lot 1, Block 7, Royal Bahamian Estates; Frederick Riger of Lots 4 and 5, Block 19 Royal Bahamian Estates and Burton Miller of the Grand Bahama Port Authority Limited;

- 2) An Order that the defendants be directed to transfer property now consisting the "trust estate" into the name of the newly appointed trustees, including any and all bank accounts pertaining to the Royal Bahamian Estates Subdivision along with all property owners' records and contracts for work to be carried out, if any.
- 3) That provision may be made for costs of this application.
- 4) Further or other relief as to the Court may seem fit in accordance with Trustees Act 1998.

8. The originating summons was, on 21 May 2009, amended with leave to add Denise deGregory-Lucks as a plaintiff; and on 8 November 2011, the plaintiffs sought and were granted leave to amend the originating summons further by adding the following as its primary prayer for relief:

A declaration that the Trust purportedly created by virtue of paragraph 9 of the First Conveyances of lots in Royal Bahamian Estates Subdivision by Grand Bahamian Hills Limited as appears by the Indenture of Conveyance dated 24 August 1979 between Grand Bahamian Hills Limited and Savoy Industries Inc. now of record in the Registry of Records in volume 3159 at pages 316 to 323 and referred to in the Deed of Appointment dated 17 October 2001 and made by Grand Bahamian Hills Limited in favour of the Defendants is void and, as a consequence, the Defendants are not Trustees of the Royal Bahamian Estates Subdivision.

9. The original prayer for removal of trustees was, by that amendment, put in the alternative.

10. The originating summons, as amended and re-amended, was supported, inter alia, by the affidavits of Vilma Dann filed 14 March 2005, Denise deGregory-Lucks filed on 17 December 2007 and 18 August 2009 and Tiffany Dann, filed on 6 May 2009, all of whom testified at the trial.

11. In her said affidavit Mrs Dann avers as follows:

- 1) That by a deed of appointment dated the 17 October 2001, the Defendants were appointed trustees for the roadways of the Royal Bahamian Estates Subdivision in accordance with the conveyance from the Grand Bahama Port Authority to the plaintiff.
- 2) That since the execution of the deed of appointment the Defendants have abused their powers as Trustees and breached the terms of the trust by:
 - a) Demanding of property owners within the said Subdivision payment of sums of money for service charges beyond the amount of \$150.00 per annum from the year 2000 as agreed.

- b) Attempting to collect service charges above and beyond works affected, when in accordance with the conveyance herein, the same should be a contribution of portion of the funds expended within the Community along with the reasonable expenses incurred, per the aforementioned Conveyance.
 - c) Threatening to repossess the lots of property owners of the subdivision for failure to pay such sums in full knowledge that they do not have the power to do so.
 - d) Failing and/or refusing to retire as trustees after a two year period as agreed between the parties.
 - e) Failing and/or refusing to co-operate with the plaintiff in accordance with the terms of the conveyance with respect to adding the representative of the Grand Bahama Port Authority Limited as a Trustee; namely, Mr. Burton Miller.
 - f) The Trustees have failed and or refused to co-operate with Attorneys or Real Estate agents in facilitating the sales of individual lots, owned by individuals within the Subdivision, as illustrated by exhibited correspondences aforesaid.
- 3) That the plaintiff considers that the continuation of the defendants to serve as trustees would be most detrimental to the owners of Royal Bahamia Estates, to their interests under the trust, for the defendants have throughout taken up a hostile attitude towards the plaintiff, as developer, has ignored the legal position of the trust responsibilities and has failed and or refused to institute any work within the Subdivision itself, but has continued to press the beneficiaries for funds for work not effected and without the reference of records from the Developers on the lots.
- 4) In the circumstances hereinbefore set forth I humbly submit that the Trustees, as is, be dissolved and this Honourable Court appoints trustees of the Subdivision and directs the defendants to transfer all trust property of the same to the newly appointed.
- 5) That the contents of this Affidavit are correct and true to the best of my knowledge, information and belief.

12. Under cross examination, Mrs Dann said that no moneys for service charges were received by the plaintiff company after the trustees took over; that she, representing Grand Bahamian Hills, appointed the defendants as trustees to work along with the company to develop the Royal Bahamian Estates Subdivision; that they were appointed because of their connection to the Subdivision and because of their knowledge of business. She admitted that an agreement was made at some point between GBHL and the trustees that the service charges amount would be \$150.00 per annum.

13. When confronted with copies of letters exhibited to her affidavit purportedly as evidence that the trustees "had demanded of property owners payment of sums of moneys for service charges beyond \$150.00 per annum from the year 2000" as alleged in her said affidavit, Mrs

Dann conceded that none of those letters contained a claim for service charges for more than \$150.00 per annum. She was also unable to say whose lots the trustees had threatened to repossess for failure to pay service charges.

14. As regards the allegation in her witness statement that the defendant trustees have breached the trust by failing to retire as trustees after a two-year period as agreed, under cross examination, Mrs Dann admitted that there was no such agreement but said that "it was to be discussed."

15. And with respect to her claim that the trustees were not cooperating with the appointment of the Grand Bahama Port Authority Limited's nominee for trustee and with attorneys and real estate agents in facilitating sales of lots in the Subdivision, Mrs Dann acknowledged that none of those issues was the responsibility of the trustees, although she was of the view that as trustees "they had a duty to cooperate."

16. Mrs Dann was also unable to name anyone whom the trustees were pressing for funds for work not effected.

17. In her affidavit filed 18 August 2009, Denise deGregory-Lucks deposed as follows:

- (1) That I make this affidavit based upon my personal knowledge and in support of the plaintiffs' originating summons herein.
- (2) That I am the owner in fee simple of Lot 21, Block 7, Section B, of the Royal Bahamian Estates Subdivision within the City of Freeport aforesaid.
- (3) That I wish to state that I have never received from the defendants any accounting as to the costs and expenses actually incurred by them and bona fide incurred by them: (a) in conjunction with the repair and maintenance of the private roadways; (b) maintenance, repair, cleansing, and renewal of pipes, drains, conduits, cables, wires, poles already installed for the supply of electricity, water, telephone, gas sewerage or other utilities; or (c) the accounting, auditing, legal or administrative costs connected therewith.
- (4) In addition thereto, the defendants have never provided to me any information or accounting as to the proportions of the costs and expenses I am required to bear as a lot owner of Royal Bahamian Estates Subdivision and they have failed to provide any notification of any kind as to where the original receipts and vouchers to support the costs and expenses incurred by them, if any, may be inspected.
- (5) Therefore, I wholly support the application by the plaintiffs to have the trustees removed on the ground that they have failed to perform the duties as trustees of the said subdivision and maintain the subdivision for the benefit of the lot owners of the subdivision.

18. Although her 17 December 2007 affidavit was sworn in support of her application to be joined as a plaintiff in this action, Mrs deGregory-Lucks, in addition to the aforesaid complaints in her 18 August 2009 affidavit also avers at paragraphs 6 and 7 of the 17 December 2007 affidavit as follows:

- "6. The defendants have been derelict in the discharge of their obligations as "trustees" appointed under the said deed of appointment and the defendants

have abused their position as trustees by making demands of various lot owners of Royal Bahamian Estates Subdivision for the payment of exorbitant sums of money as service charges which are not calculated by reference to the discharge of their duties as "trustees" or calculated by reference to the costs and expenses actually incurred by the defendants in the maintenance of the (1) roadways (2) utility pipes conduits, cables, drains, poles or (3) the accounting, legal or administrative costs of Royal Bahamian Estates Subdivision.

7. I therefore wholly support the request of Grand Bahamian Hills for an order that the defendants be removed as "trustees" and I hereby confirm that I consent to being added as a plaintiff in this action."

19. Under cross examination Mrs deGregory-Lucks said she became an owner of a lot in the Royal Bahamian Estates Subdivision in August 2005. She does not live there, although she says she plans to build a house on the property. She has never paid service charges to Mrs. Dennison; she has not spoken to any of the defendant trustees; she has never requested anything from the defendant trustees and she did not know whether or not there were any arrears of service charges for the land she owns. As a co-plaintiff she has never asked for nor received the consent of Mr. Miller or Mr. Riger to be made a trustee of Royal Bahamian Estates Subdivision. She acknowledged that in neither of her affidavits did she state that she had consented to be a trustee, although she supported the application and the appointment. When confronted with what she actually said in her affidavit, Mrs. deGregory-Lucks responded. "It doesn't actually say it but I guess it was implied."

20. No reliance was made by either side on Mrs Dennison's evidence.

21. Although each of the defendants had filed an affidavit, none of them testified at the trial and their counsel indicated that they were content to rely on the cross examination of the plaintiffs' witnesses to support their contention that the request for their removal as trustees was far from satisfactory or substantial to warrant their removal.

22. Consequently, counsel for the defendants submits that the circumstances on which this Court must rely to warrant removal of the defendants as trustees should be restricted to the evidence of Mrs Dann and Mrs deGregory-Lucks, neither of whose evidence, in his submission, was of any evidential value to support the application for the removal of the defendant trustees.

23. As I understand their position, the plaintiffs contend that:

- 1) The trust created at clause 9 aforesaid is void. Therefore, the defendants are not trustees of the Royal Bahamian Estates Subdivision.
- 2) Even if the trust is not void, the power of appointment granted in the first conveyance has not become exercisable and, therefore, the defendants have not been validly appointed as trustees of the Royal Bahamian Estates Subdivision.
- 3) If the trust is not void and the power of appointment did become exercisable, and the defendants have been validly appointed as trustees of the Royal Bahamian Estates Subdivision, they should be removed and new trustees should be appointed in their stead.

24. In support of the plaintiffs' position, counsel for the plaintiffs makes the following observations and/or submissions:

- 1) Prior to 31 December 2011, and at the date of the trust instrument, the subject of these proceedings, it was required that all legally valid trusts not offend the common law rule against perpetuities, which required that at the time of the creation of a trust the subject matter of the trust had to vest within the "perpetuity period", that is a period which is not greater than a life in being plus twenty-one years. See *Air Jamaica Limited v Joy Charlton et al* [1999] UKPC, para 29-39.
- 2) GBHL, in purporting to constitute itself as trustee of the private roads of the Royal Bahamian Estates Subdivision sections A and B for a period described as "at all times forever hereafter", plainly vested the equitable estate of the trust property in a class of beneficiaries for a period of time greater than the lives in being plus 21 years, thereby offending the common law rule against perpetuities.
- 3) The trust purportedly established by GBHL at clause 9 aforesaid is therefore void and of no legal effect with the consequence that the defendants could not lawfully claim to have been validly appointed as trustees of the Royal Bahamian Estates Subdivision.
- 4) Even if the trust is valid (which is not conceded), the defendants are not validly appointed trustees because GBHL did not retire as trustee and no one was nominated by the Grand Bahama Port Authority, Limited to be appointed as trustee.
- 5) Since GBHL has not retired and none of the trustees was nominated by the Grand Bahama Port Authority, Limited, the purported exercise of the power of appointment by the president of GBHL was "premature, substantially defective and legally ineffective" and therefore, the defendants were not validly appointed "trustees" of the trust. See *Snells on Equity* 30th edition, para 37-03 to 37-09.
- 6) Even if (which is not conceded) the trusts are valid and the defendant trustees were validly appointed, they ought to be removed as trustees for the following reasons:
 - (a) The defendants' appointment as trustees was subject to the expressed condition that "at all times" a person nominated by the Grand Bahama Port Authority Limited would be serving as a co-trustee.
 - (b) The defendants may not lawfully purport to exercise the powers of trustees of the Royal Bahamian Estates Subdivision" without one of their number having been nominated by the Grand Bahama Port Authority Limited as this is expressly required by the terms of the trust.
 - (c) The defendants have been purporting to act as trustees, including purporting to bill and collect service charges from lot owners within the Royal Bahamian Estates Subdivision knowing that none of them was nominated by the Grand Bahama Port Authority Limited to be trustee.

(d) The defendants' conduct in that regard amounts to a flagrant breach of the terms of the trust as the trust was never intended to be operated in this manner. At all times one of their number must be a person nominated by the Grand Bahama Port Authority Limited.

(e) Mrs deGregory-Lucks' evidence confirms that the defendants have failed to furnish an account in writing stating the total amount of the costs and expenses actually incurred in the maintenance and repair of the private roadways of the subdivision and other facilities in accordance with the obligations imposed on them in clause 8 of the conveyances.

(f) In that respect, Mrs deGregory-Lucks' evidence is uncontested and stands unchallenged.

(g) In light of the defendants' breach of the terms of the trust, in the alternative, the court ought to exercise its power to remove the defendants as "trustees" and replace them as prayed.

25. Although counsel for the defendants says that he has not been instructed by the defendants to argue the merits or demerits of the validity or invalidity of the trusts, he, nevertheless, makes the following observations and/or submissions as counsel for the defendants as well as amicus curiae, for which the court is grateful:

- 1) This action was brought under the jurisdiction of the Trustees Act, 1998. The plaintiffs are, therefore, bound by the basic jurisdiction assumption under which they initiated these proceedings and are estopped from denying the validity of the trust upon which they come before this Court.
- 2) There is no provision in the Trustees Act, 1998, that deals with declaring that the trust under it is void. The assumption is that there is a valid trust before the Court.
- 3) The procedural issue is whether the plaintiffs had pleaded the issue of void trust. Since the affidavits were to be the evidence in chief, such other evidence given viva voce, must support the declaration being sought.
- 4) The originating summons was amended to include the prayer for a declaration that the trusts are void after the plaintiffs' witnesses, Vilma Dann and Denise deGregory-Lucks, had given evidence and none of them, nor Tiffany Dennison who gave evidence afterwards, in their witness statements or otherwise, gave evidence that the trusts were void or that the appointment of the defendant trustees was invalid.
- 5) The prayer in an originating summons is not a pleading. *Harrison-Broadley et al v Smith* [1964] 1 All ER 867.
- 6) The raising of a plea as to the validity of any trust is a plea that can only be raised as a defence and the defendants have not pleaded the defence that the trusts are void.

- 7) A determination that the trusts are invalid is likely to affect hundreds of lot owners in the Royal Bahamian Estates Subdivision, particularly those who have improved their lots and have been living there for upwards of ten years.
- 8) The Court should, therefore, not entertain the question whether a trust is valid or void without all the parties affected being given the right to be represented and their views heard, if they so wish. Such parties include the hundreds of property owners of lots in the Royal Bahamian Estates Subdivision, as beneficiaries under the trust, as well as the Grand Bahama Port Authority, Limited, since the property concerned is within the boundaries of the "Freeport area".
- 9) The Court should not decide a question with potentially such repercussions as a side wind on an application for the removal of current, and the appointment of new, trustees.

26. In response to the plaintiffs' submissions on the issue of the removal of the defendant trustees, counsel for the defendants makes the following observations and/or submissions:

- 1) The plaintiffs' contention that the defendants may not lawfully purport to exercise the powers of "trustees of the Royal Bahamian Estates Subdivision" unless one of them was nominated by the Grand Bahama Port Authority Limited, gives no answer to the question whether there are circumstances sufficient to warrant the removal of a trustee.
- 2) The mere ipsi dixit of Mrs Dann that the defendants' conduct amounted to a flagrant breach of the terms of the trust, is no authority for the conclusion that the trust was "never intended to operate that way".
- 3) The evidence of Vilma Dann after being tested by cross examination does not support her conclusion that the defendant trustees' conduct amounted to a flagrant breach of trust.
- 4) Mrs Dann's final answers to cross examination on the allegations made in her witness statement were that there was no factual truth in any of her six allegations.
- 5) The defendants contend that the true reason for applying to have them removed was the personal hostility held by Mrs Dann against Mr Benjamin Sands for alleged rudeness by Mr Sands to her deceased husband.
- 6) Mrs deGregory-Lucks' statements were, on cross examination, found to have no basis in fact or truth as against the defendant trustees either individually or collectively. She admitted quite unequivocally that she did not know the trustees and that she had no dealings whatever with them relating to their administration of the trust.
- 7) On the other hand, Mrs Dennison, without authority, interfered in the administration of the estate, by thereby becoming herself a trustee de son tort, and the Court ought to order that she provide a true and correct accounting for all moneys collected.

- 8) The rule that if, in an action for administration, the plaintiff by his pleading alleges willful default and proves one instance of it, the court will direct on the footing of willful default, does not apply to the case of a breach of trust. *Harrison-Broadley et al v Smith* [1964] 1 All ER 867.
- 9) In an administration action, the court has jurisdiction at any time to remove a trustee if it considers such removal necessary for the preservation of the trust estate or the welfare of the cestui que trust.

27. Consequently, counsel submits, the plaintiffs have provided no evidence as to the requirements necessary for the Court to decide whether or not to remove the defendant trustees.

28. The issues that arise for consideration include the following:

- (1) Is there a valid trust? If so,
- (2) Did the power of appointment become exercisable by the president of GBHL? If so,
- (3) Were the defendant trustees validly appointed? If so,
- (4) Should the defendant trustees be removed?
- (5) Whether Denise deGregory-Lucks, Frederick Rigers and Burton Miller should be appointed trustees?

29. Although by the last amendment the plaintiffs put the prayer for removal of the defendants as trustees in the alternative, it is, in my view, clear that the removal of the defendants as trustees is really the primary reason for the plaintiffs commencing this action. I note here that the application for leave to amend the originating summons to include the prayer for the aforesaid declaration was made after all of the plaintiff's evidence was in. I say that because although affidavits had been provided by other persons on behalf of the plaintiffs, the contents of those affidavits were almost identical to that of Mrs deGregory-Lucks' August 2009 affidavit and in the end, none of those persons was not called to give evidence at the trial. Could it be, as suggested by counsel for the defendants, that once the plaintiffs realized the weakness of their case for removal of the defendant trustees, they sought to challenge the validity of the trust as well as the appointment of the defendants as trustees in a last ditch effort to have the defendant trustees removed?

30. Whether that be so or not, and even if Mr Adams is correct and the trust is void as it offends the rule against perpetuities, having considered the submissions of counsel for the defendants, I am persuaded that I ought not to make a determination that the trusts created by clause 9 of the first conveyances are void and that consequently the defendants are not trustees of the Royal Bahamian Estates Subdivision or, indeed, even to assume jurisdiction to hear the application at this time. As counsel pointed out, other owners of lots in the Royal Bahamian Estates Subdivision, who are likely to be affected by such an order, ought to be given an opportunity to be heard. Mrs Dennison's evidence is that there are 804 of them. In any event, I have doubts whether it is open to the plaintiffs to complain about the validity of the trusts.

31. It seems to me that counsel for the defendants is correct when he submits that the plaintiffs, having brought this action under the provisions of the Trustees Act, are estopped from denying the validity of the trust upon which they ground their application for relief. Further, although I understood Mr Adams to have suggested that even if GBHL was estopped from denying the validity of the trust, Mrs deGregory-Lucks was not and she could, therefore, in effect, hold a position different from GBHL, I agree with Sir Cyril that co-plaintiffs cannot hold

opposing positions against the defendants – that is, GBHL cannot pursue the claim on the basis of a valid trust, while Mrs deGregory-Lucks its co-plaintiff, argues that the trust is void.

32. As for the plaintiffs' challenge to the exercise of the power of appointment by Mrs Dann in the deed of appointment on the grounds that firstly, there is no evidence that GBHL had retired or even expressed a desire to retire from the trusts; and secondly, there is no evidence that any of the trustees was a nominee of the Grand Bahama Port Authority, Limited as provided for in clause 9 aforesaid, the evidence is that it was the plaintiff company that established the trust and it was Mrs Dann, as president of the plaintiff company, who, by the deed of appointment, appointed the defendant trustees. To my mind, Mrs Dann, as the directing mind behind GBHL, would be well aware of whether GBHL was desirous of retiring and did in fact retire from the trust and the lack of such "desire" being evidenced in the deed of appointment or other "deed" is not, in my view, fatal to the defendants' appointment. Nor in my view, is the lack of an apparent "formal nomination" by the Grand Bahama Port Authority Limited, particularly in view of the fact, on the plaintiffs' evidence, that Andre Cartwright, one of the persons named in the deed of appointment as trustee agreed to act as "consultant" on behalf of The Grand Bahama Port Authority, Limited.

33. Again it seems to me that that is also a position that the plaintiffs ought to be estopped from taking against the defendant trustees.

34. In the result I shall, as invited by counsel for the defendants, express no opinion as to the validity of the trusts created by clause 9 of the first conveyances or on the validity of the appointment of the defendants as trustees pursuant to the power of appointment granted to the president of the plaintiff company by clause 9 of the first conveyances.

35. So, assuming, without deciding, that the trusts and the appointment are valid, the issue then is whether there exists such circumstances as to warrant a removal of the defendants as trustees of the Royal Bahamian Estates Subdivision.

36. The court has an undoubted discretion whether or not to remove a trustee.

37. Section 48 of The Trustees Act provides that:

"The Court may, whenever it is expedient to appoint a new Trustee and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee."

38. Gilbert Kodilyne MA, LL.M, in his treatise Caribbean Law of Trusts at pages 224 to 226 states, inter alia:

"The Court in addition to its statutory jurisdiction has an inherent power to remove a trustee...Under the principle in *Letterstedt v Broers* [1884] 9 App. Case 371 which is that a trustee may be removed if his continuance in office would be prejudicial to the due performance of the trust and so to the interests of the beneficiaries."

39. Then Snell's on Equity, at para 10-29 states:

"Apart from statute, the court has an inherent jurisdiction to remove a trustee...and to appoint a new one in his place. As the interests of the trust are of paramount importance to the court, this jurisdiction will be exercised whenever

the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. See *Letterstedt v Broers*..."

40. Osadeby J (Ag), as he then was, in case of *Corso v Chase Manhattan Corp.* [1994] BHS J No. 24, in considering the issue of whether sufficient reason existed for removing a trustee took guidance from the judgment of the House of Lords delivered by Lord Blackburn in the case of *Letterstedt* at pages 385 to 386 where His Lordship quoted the following passage from *Story's Equity Jurisprudence*, section 1289:

"But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty; or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

41. And continued:

"It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising under the circumstances indicated by *STORY* is merely ancillary to its principal duty - to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. Therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the court might consider that in awarding costs, yet, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

The reason why there is so little to be found in the books on this subject is probably that suggested in argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give the trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported."

42. Counsel for the plaintiffs says that even if the trusts are valid and the trustees validly appointed, the defendant trustees should nevertheless be removed because they are guilty of a "flagrant breach of the terms of the trust" in that, as I understand him, they have been purporting to act as trustees without one of them having been nominated by the Grand Bahama Port Authority, Limited. I confess that I do not understand this submission and see it as further evidence that the plaintiffs really want the defendants removed and that submission is, in my,

view, evidence of the plaintiffs pulling out all of the stops to ensure that the defendants are indeed removed.

43. However, I accept counsel for the defendants' submission that one of their number not having been nominated by the Grand Bahama Port Authority, Limited, is not an answer to the question whether there are circumstances sufficient to warrant the removal of the trustees.

44. Other reasons given by the plaintiffs for the removal of the defendant trustees are set out in Mrs Dann's affidavit of 14 March 2005 and Mrs deGregory-Lucks' affidavits of 17 December 2007 and 18 August 2009.

45. Mrs Dann alleged that the defendant trustees have abused their powers and breached the terms of the trust in the manner set out in her said affidavit. However, I agree with counsel for the defendants that at the end of the day, Mrs Dann failed to prove any of those allegations. For example, she was unable to identify those persons from whom she alleges the defendant trustees had demanded payment of moneys for service charges beyond the sum of \$150.00 per annum, which sum the evidence shows the developer and the trustees had agreed would be the amount of the annual service charges to be paid by owners of lots in the Royal Bahamian Estates Subdivision. Nor could Mrs Dann identify those persons from whom she alleges the defendant trustees attempted to collect service charges above and beyond works effected; or those whose lots in the Royal Bahamian Estates Subdivision the defendant trustees had threatened to repossess. As for her allegation that the trustees failed and/or refused to retire after two years as agreed, under cross examination and when confronted with the copy minutes on which she relied as proof of such agreement, Mrs Dann resiled from that position and said that: "it was to be discussed." In any event, as pointed out by counsel for the defendants, the deed of appointment, which was executed several months after the date of the aforesaid minutes, contained no such agreement or provision, as one would have expected, had there been an agreement.

46. On the other hand, Mrs deGregory-Lucks alleges that the defendants' breach is their failure to perform the duties as trustees of the said subdivision and maintain the subdivision for the benefit of the lot owners of the subdivision in that they have not:

- 1) Provided her with any accounting of the costs and expenses incurred by them in maintaining the roads and infrastructure in the Royal Bahamian Estates Subdivision;
- 2) Provided her with any information and/or accounting regards the costs and expenses to be borne by her as a lot owner in the Royal Bahamian Estates Subdivision;
- 3) Notified her as to where original receipts and vouchers to support the costs and expenses incurred by them, if any, may be inspected.

47. Counsel for the plaintiffs submit that Mrs deGregory-Lucks' evidence in that regard is "uncontested and stands unchallenged."

48. As indicated, the defendants rely on their cross examination of the plaintiffs' witnesses to support their contention that the plaintiffs' request for their removal was far from satisfactory or substantial to warrant such removal.

49. Under cross examination, Mrs deGregory-Lucks admitted that she did not know the defendants and had had no dealings with them relating to their administration of the trust. Indeed, the evidence is that Mrs deGregory-Lucks did not become the owner of a lot in the Royal Bahamian Estates Subdivision until August 2005, approximately six months after this

action commenced in February 2005. That may very well account for why she had never received any information and/or accounting from the defendant trustees and it also calls into question Mrs deGregory-Lucks' ability to speak to what the defendants did or did not do during the period leading up to the commencement of this action, when she was not yet the owner of a lot in the Royal Bahamian Estates Subdivision. It is also unclear, in those circumstances, how she can aver that the defendants have been derelict in their duties.

50. In any event, even if, as alleged by Mrs deGregory-Lucks, the defendant trustees have not complied with the terms of the trust in the manner stated, there is no evidence that the defendants were requested by Mrs deGregory-Lucks or anyone else, so to comply, but nevertheless failed or refused to, and as opined by Story *supra*, on the question of removal of trustees:

"It is not indeed every mistake or neglect of duty; or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

51. In that regard, I agree with counsel for the defendants that the mere allegation by Mrs Dann that the defendants' actions endanger the trust property is not enough to warrant the trustees being removed. There is no allegation of dishonesty made against the trustees; there is no allegation that they lack the capacity to perform their duties; nor is there any allegation of lack of reasonable fidelity to the trust or the beneficiaries.

52. In the circumstances, I find that the plaintiffs have provided no substantial evidence that would warrant this court ordering the defendant trustees removed because they have abused their powers and/or breached the trust of which they have been appointed trustees.

53. Having said that, there is still a question of whether or not the trustees ought nevertheless to be removed.

54. Counsel for the defendants suggests that the true reason for the plaintiffs seeking to have the defendant trustees removed is because of the discord between Mrs Dann and Mr Benjamin Sands, who apparently serves as chairman, as a result of the latter's alleged rudeness to Mrs Dann and her deceased husband and although Mrs Dann denied that that is the reason for this application, it appears that there may be some truth to that suggestion. Under cross examination, Mrs Dann said that, in addition to being "rude with [her] husband who died", Mr Sands had also been hostile to her personally and in her said affidavit, she alleges that "the defendants have throughout taken up a hostile attitude towards the plaintiff as developers."

55. Mrs Dennison also alleged that in addition to being hostile to her parents, Mr and Mrs. Dann, Mr Sands has also been hostile towards her.

56. "Friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees" although "it will not be disregarded by the court when grounded on the mode in which the trust has been administered". Ultimately, it is the interests of the trusts that are of paramount importance and the jurisdiction to remove a trustee and appoint new trustees will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. Per Lord Blackburn in *Letterstedt* at page 888.

57. Consequently, Lord Blackburn concluded that once all questions of character had been settled and it was clear that the continuance of the trustee would be detrimental to the execution

of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the settlor to give the trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so and if he refuses to do so, without any reasonable ground, the court might remove him.

58. There is no evidence that the trustees have offered to resign, or, indeed, that they have been asked to resign but refused to do so, as was the case in *Mercado v Cititrust (Bahamas) Ltd* [1987] BHS No. 32; 1986 No. 1252 Bahamas Supreme Court, Equity Side, relied on by counsel for the defendants.

59. In *Mercado*, counsel for the applicants had argued that the relationships between the income beneficiaries and the trustee were not what they should be in a trust of "that nature", and that it was in the interest of the beneficiaries that the trustees should be removed. Georges, C.J. concluded that although he found that the allegations of incompetence and possible breach of trust had not been substantiated, he was satisfied that in the interest of the welfare of the beneficiaries that there should be a change and he acceded to the request to remove the trustees and appoint new trustees in their stead.

60. In this case, I have found that the allegations of abuse of powers and breach of trust against the defendants have not been substantiated and while I understand the need for the trustees to have resisted those allegations by defending this action, I cannot see what profit it would be to the defendants continuing to be trustees and as such coming into continual conflict with the plaintiffs, one of whom is the developer of the subdivision, whose president was responsible for their appointment. It seems that the defendants should be glad to get out of such an "onerous and disagreeable position", which Sir Cyril describes as "onerous and thankless" and as Lord Blackburn opined, "it must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate..."

61. I agree with Mrs Dann that in a trust of the nature of the trust herein, there is a need for cooperation between the developer, its principals and the trustees. Mrs Dann's evidence is that there is no cooperation.

62. I am satisfied that the relationship between the trustees and the plaintiff company as developer/settlor and its principals is such that in the interest of the welfare of the beneficiaries there should be a change and I, therefore, order that the defendants be removed as trustees of the Royal Bahamian Estates Subdivision.

Appointment of New Trustees

63. The plaintiffs ask that Denise deGregory-Lucks, Frederick Riger and Burton Miller be appointed as new trustees.

64. It was established in *Re Tempest* (1866) 1 Ch App 485 that, in exercising its discretion whether or not to appoint a new trustee, the court must:

- (1) Consider the wishes of the author of the trust expressed in or plainly deduced from the instrument creating it;
- (2) Not appoint a person with a view of the interest of some of the cestui que trusts in opposition to others;
- (3) Have regard to the question whether the appointment will promote or impede the execution of the trust.

65. And Petitt on Equity and the Law of Trusts, says that qualities to be looked for, when making an appointment, include "integrity, a willingness to spend time and trouble on the trust affairs, the ability to get on with co-trustees and beneficiaries, and knowledge of financial matters, business acumen and common sense." (6th edn, 1989, p 295).

66. Except for the statement in the originating summons that Mrs deGregory-Lucks and Mr Rigers are owners of lots in the Royal Bahamian Estates Subdivision and Mr Burton Miller is the Grand Bahama Port Authority, Limited's nominee, nothing else is evidenced about the proposed new trustees.

67. Further, no "consent to act as trustee" has been provided on behalf of any of them, although Mrs deGregory-Lucks says that by agreeing to be added as a co-plaintiff to the action, her consent is implied. I accept that due to the onerous nature of the job, the court will not appoint a person as a trustee without that person's consent, and that such consent will not be implied but must be "clear and unambiguous."

68. I also accept that before appointing persons as trustees, the court ought at least to be satisfied as to the fitness and willingness of the persons to act as trustees.

69. So, although I have concluded that the defendants ought to be removed as trustees, I am not minded to appoint new trustees until I am satisfied that the persons proposed to be appointed have at least consented to such appointment. After all, this matter has been going on now for more than seven years.

70. I would, therefore, order that the defendant trustees be removed as trustees of the Royal Bahamian Estates Subdivision and that they transfer to the new trustees the property consisting the trust estate, including bank accounts pertaining to the Royal Bahamian Estates Subdivision, along with all property owners' records and contracts for work to be carried out, if any.

71. However, I would suspend the execution of that order pending the appointment of new trustees.

72. The defendants are entitled to their costs to be taxed and paid on a solicitor and own client basis, fit for two counsel, from the trust fund.

Delivered this 21st day of November A.D. 2012

Estelle Gray Evans
Justice

