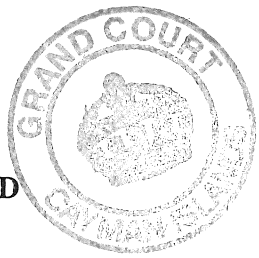
C795/97

8.7.98

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF A DEED OF SETTLEMENT DATED 16TH JANUARY 1979 AND MADE BETWEEN DAVID GRAHAM BIRD AND THE BANK OF NOVA SCOTIA TRUST COMPANY (CAYMAN) LIMITED AS AMENDED BY A DEED OF AMENDMENT DATED 24TH SEPTEMBER 1984 AND MADE BETWEEN JOHN P. HALL AND SHERRILL KREADY HALL



AND IN THE MATTER OF BEACH HARBOUR COMPANY AND OF SOUND HARBOUR LIMITED

AND IN THE MATTER OF THE COMPANIES LAW (1995 REVISION)

BETWEEN:	**(1)**	**JOHN P. HALL II**	
	(2)	**HEATHER HALL FRIEL**	**APPLICANTS**
AND:	**(1)**	**MELISA HALL-AQUITANIA**	
	(2)	**KIMBERLY LAINE HALL**	
	(3)	**KRISTOPHER JOHN HALL**	
	(4)	**TOREN JOHN HALL** (***a minor, by his guardian ad litem,*** **SHERRILL HALL)**	
	(5)	**KYRIE HALL** (***a minor, by her guardian ad*** **litem SHERRILL HALL, on** ***her behalf and on behalf of all minor and remoter beneficiaries of the Settlement known as the Hall Children*** **C.I. Trust)**	
	(6)	**JOHN PHILLIP HALL**	
	(7)	**BARBARA BRADLEY**	**RESPONDENTS**

BEFORE GRAHAM J.

APPEARANCES

Mr. Anthony Trace Q.C. and Mr. Jeremy Walton for the 1st and 2nd applicants instructed by Ritch & Conolly

Mr. Neville Levy of Neville & Associates for the 4th and 5th respondents

Mr. Morris Garcia for the 6th & 7th respondents

JUDGMENT

1. This matter first came before me on the 28th May when, inter alia, I was informed by the sixth respondent, John Phillip Hall (H 1) that his attorneys Messrs. C.S. Gill & Co. intended to come off the record (they later did so on the 1st June 1998). H1 asked me for my leave to order that his legal costs of defending this application be paid out of the trust fund. In view of the allegations of bad faith made against him I decided not to make that order and so informed him. I told him that he must either finance the case from his resources or appear in person. He then asked me to adjourn the matter for some months, setting out his need to instruct another attorney. This application was opposed by the attorneys for the applicant as the matter had been set down for the 8th of June, for one week. Overseas counsel had been engaged and the matter had been set down for some time. I decided not to break the fixture. To assist H1 I requested Mr. Jeremy Walton, Junior counsel for the applicants to cause his leader Mr. Anthony Trace Q.C. to prepare a summary of his case in plain language to enable the sixth and seventh respondents to understand the

case made against them. He was to fax the summary to H1's address in America. That request was duly complied with. H1 then referred me to an affidavit sworn on the 10th May 1998, which I had not seen before, in which he set out that which is now his case. In that affidavit, he claims at paragraphs 44-66 that a document dated the 24th September 1984 and entitled "Deed of Amendment" to the trust deed dated the 16th January 1979 was a forgery perpetrated him, and that both the first and second applicants, his son and daughter had either taken part in the forgery or had acquiesced in its making and/or use. As was clearly my duty at that stage, I pointed out to H1 that, as the alleged forgery had taken place in the Cayman Islands, affecting a Cayman trust, then it appeared that a criminal offence might well have taken place and it would be my duty to warn him that I was likely to inform the Attorney General of it. He asked me for a definition of forgery which I gave him.

2. The matter then came on before me for trial on the 8th of June 1998. Although I sat unrobed the proceedings were conducted in open court. Mr.Morris Garcia appeared for H1 and sought an adjournment of the matter. H1 did not himself appear

in Court and his attorney told me that he was in the United States. Mr. Garcia had received his instructions late on the Friday, that is to say, the Friday before the 8thJune 1998 which was a Monday. He told me that H1 had an expectation of being in funds in three weeks time. Knowing from the papers that he was an undischarged bankrupt in the United States, and on the verge of being sentenced for a serious bankruptcy fraud, I discounted the accuracy of the instructions which had been given to Mr. Garcia and refused to grant an adjournment. I then invited submissions from leading counsel for the applicants as to a possible conflict of interest on the part of Messrs. Ritch & Conolly who he had alleged had acted for him in other proceedings. H1 has made a series of allegations in this regard in his affidavit. (various of these are scandalous and I ordered them to be struck out. I had in mind the case of ***Al Sabah v. Maples & Calder 1994/5 C.I.L.R. p. 471.*** I had given notice to the applicants before the hearing of the matter that I wished to hear submissions on this aspect of the case (and a detailed skeleton argument was put in on the point. I heard them and I was reassured that there was no conflict of interest and in any event no possible prejudice could accrue to H1 due to Ritch & Conolly having acted on

behalf of the Trust in Cause 207 of 1995 ***Lawrence P. Frank v. John Pl Hall and ors*** vide page 20. The relevant affidavit in those proceedings is a public document and available to any attorney or litigant. I was fortified in that conclusion by the submissions of Mr. Neville Levy, who has appeared throughout the hearing for the minor beneficiaries of the Trust, Toren John Hall and Kyrie Hall. He also submitted to me that no possible prejudice could accrue to H1 and I accordingly so ruled. I therefore directed the hearing of the matter to continue. Mr. Garcia then withdrew telling me that it was his instructions that his client would seek to appeal my decision in due course. I then asked Mr. Trace Q.C. if he would, in the course of the submissions, draw to my atention all arguments and matters which H1 might have relied upon if he had attended. He was punctillious in doing so. I found that of great assistance.

3. The originating summons dated the 26th November 1997 brought by John P. Hall II (hereinafter H2) and his sister Heather Hall Friel, respectively the first and

second applicants, sought determination of the following questions and the following relief:-

1. that the fifth respondent or some other person may be appointed to represent all minor and unborn persons who might have a beneficial interest or might hereafter become beneficially interested under the terms of the Trust. (That order was made prior to the hearing and Mr. Levy appeared for those persons throughout).

Issue of Trusteeship

2. whether on a true construction of the Trust and in the events which have happened, the first applicant is currently a trustee of the Trust.

3. if the first applicant is a trustee of the Trust, whether on a true construction of the Trust and in the events which have happened, the second applicant is currently a co-trustee of the Trust.

4. if the first applicant is not a trustee of the Trust, whether on a true construction of the Trust and in the events which have happened, the seventh respondent is currently a trustee of the Trust.

5. if the seventh respondent is not a trustee of the Trust, such directions, such directions as may be necessary for the appointment of a trustee of the Trust in accordance with the Trust and in the events which have happened.

6. an order that the sixth respondent do furnish proper particulars and accounts of his management of the business of the assets of the Trust and of his actions relating to the Trust in his capacity as protector of the Trust.

Status of Beach Harbour Company

7. a declaration that, on a true construction of the trust and in the events which have happened, the shares and the capital of Beach Harbour Company now standing in the name of the applicants are held upon the trusts of the Trust.

8. a declaration that in the events which have happened, the applicants and the third respondent have been validly appointed as directors of Beach Harbour Company.

9. a declaration that in the events which have happened the sixth respondent has been validly removed as a director of Beach Harbour Company.

Status of Sound Harbour Limited

10. a declaration, that on the true construction of the Trust and in the events which have happened, the shares in the capitalsof Sound Harbour Limited now standing in the name of Beach Harbour Company and the first applicant are held by Beach Harbour Company and the first applicant upon the trusts of the Trust.

11. a declaration, that in the events which have happened, the applicants and the third respondent have been validly appointed as directors of Sound Harbour Limited.

12. a declaration, that in the events which have happened ,the sixth and seventh respondents have been validly removed as directors of Sound Harbour Limited.

13. an order that henceforth the proceeds of sale of properties registered in the name of Sound Harbour Limited be paid into a bank account in the name of "Hall Children CI Trust" alternatively in to a bank account

in the name of Beach Harbour Company, alternatively into Court or otherwise to the satisfaction of the Court that such proceeds will be in a position to be applied to the benefit of the beneficiaries of the Trust.

Distribution of Funds

14. directions as to the proper basis for distribution of both capital and income from the Trust in accordance with the spirit and intendment of Clause 5 (C) of the Deed of Amendment.

15. a declaration that the applicants are alternatively the first applicant is, entitled to advance up to 50% of the presumptive or vested share or interest of each beneficiary in the Trust funds under Section 30 of the Trusts Law.

16. alternatively an order that the applicants, alternatively the first applicant, be at liberty to exercise the power of appointment conferred by the Trust by appointing that the entirety of the Trust assets be henceforth held upon the trusts declared in a Deed of of Appointment, to be drafted and executed under the direction of the Court.

17. alternatively, that the Court by order approve on behalf of the fourth and fifth respondents an arrangement varying the Trust in the terms of a deed of variation, to be drafted and executed under the direction of the Court.

18. an order that the applicants, alternatively the first applicant, be at liberty in any event to advance US$20,000 forthwith to each of the applicants and to the first to third respondents, alternatively to each beneficiary out of the Trust funds.

There then appeared a prayer for costs.

The principal issues to be decided therefore were:-

I. the scope of the trust.

ii whether or not the "Deed of Amendment" dated the 24th September 1984 was a true document or a forgery made by H1 to deceive the US Federal Court in bankruptcy proceedings and/or the Internal Revenue Service of the United States.

iii. in the event that that document were to be demonstrated to be a forgery what implied trusts arose from the conduct of the parties and in particular that of H1 in respect of the 1979 Trust.

iv. whether the "Deed of Revocation" dated the 6th July 1984 was a genuine document and/or had the legal effect of enabling H1 to recover control over the assets of the trust which are now worth US$1.5 million.

4. In deciding the many bitterly disputed matters of fact in this case I have had to remind myself that both the two applicants and the other beneficiaries of the Trust have a pecuniary interest of their own to serve. Those obvious pecuniary interests might have implications for their veracity and credibility. They contend that they remain beneficiaries under the 1979 Trust, and in pursuance of the Deed of

Amendment, have exercised their powers as trustees to advance themselves and the other beneficiaries, including the minor children, certain sums. They seek the Court's approval of those advancements. I refer in particular to H2and his sister Heather Hall Friel. The respondents numbering one to five are all beneficiaries if the 1979 Trust subsists as a result of this judgment. Both H2 and his sister Heather are persons of good character who have given sworn evidence before me. H1 on the other hand has not chosen to give evidence before me. I am satisfied on the evidence I have received, including affidavit evidence from H1, of the following matters:-

i. On the 8th May 1991, H1 was declared bankrupt in the United States.

ii. From the evidence of H2, supported by evidence from H1 himself in his affidavit, H1 has been convicted of what in the Cayman Islands would be termed arson, wire fraud, wholesale theft from his father and bankruptcy fraud. He received sentences of 4 and 6 months in prison and 2 years' probation for the first three matters and awaits sentence for the other matter. The evidence of his conviction for arson , fire fraud and the theft from his father has been given to me by his son H2 and is admissible in evidence as that person was present in Court when his father was sentenced. H1 concedes that he is to appear before a U.S. Federal Court for sentencing for the bankruptcy fraud. I am told that the likely sentence will be 5 years imprisonment.

iii. On the evidence of H2 and Heather it has been H1's boast that, when appearing in Court as a witness in the many items of litigation he has been involved in, he would produce false aides memoires and false diary entries. When challenged on a particular event it was his habit to produce the diary and pretend that the entries were made at the time of the events in question. I have listened both to his son and daughter giving evidence to that effect and I am satisfied on the balance of probabilities that they are telling me the truth about that. Accordingly I accept that H1 is a person who is capable of manufacturing false documents and more than capable of giving false evidence on oath to Courts in the United States or elsewhere. I specifically direct myself as to the dicta of **Lord Nicholls of Birkenhead *in Re H. Minors* [1996] A.C 563** as to the standard of proof required when serious allegations are made in non-criminal proceedings and I accept the evidence given by H2 and Heather.

iv. On the evidence of both H2 and Heather, when each of them has been involved in motor accidents, he has incited both of them to commit perjury (although, I am glad to hear, without success).

H1 has not come to Court to be cross-examined upon his affidavit nor to rebut the sworn evidence of his two children.

In the light of these findings of fact I now consider the history of the matter.

5. The 1979 Trust

Using the alias "Dr. John Phillip Tyson" (one of a number of aliases which have been used by this gentleman) a Trust was created by H1 on the 16th January 1979, in which he, his wife, children, brother and sisters and their children were appointed

beneficiaries of the Trust. The trustees were given a power of advancement under Clause 4 (a). They were charged in Clause 16 (c) with the duty of keeping proper accounts and, of critical importance in this case, Clause 19(c) provided that in the event that one of them became bankrupt, a trustee is automatically dismissed. Clause 22 (1) contains the power to amend the Trust and powers of revocation are reserved to the settlor in Clause 22 (2). Attached to the deed of settlement was a deed of gift, of even date, in which the trust assets became Beach Harbour Company shares and a US$643,020 loan was made to that company. The trustee appointed was the Bank of Nova Scotia Trust Company (Cayman) Limited ("the Bank of Nova Scotia") as the "trustees from time to time of the trust". The validity of that Trust is not questioned by H1 in any of his affidavits. It was drafted by W.S. Walker & Co., a well-known firm of local attorneys. This was a classic discretionary trust designed to benefit H1 and his dependants and close family. It fulfills the requirements of the three certainties. The subject matter of the Trust is certain and the objects or persons intended to have the benefit of the Trust are clearly ascertainable. It is not suggested by anything in the various affidavits filed by H1 or his co-habitee Barbara Bradley,

the seventh respondent, that the 1979 Trust was other than a lawfully executed trust. It is not suggested that until 1984 there was anything in the conduct of the parties which could have brought about the revocation of the Trust. It operated as it was intended to operate, and I so find.

7. The Deed of Amendment

This document is dated the 24th September 1984, and it refers to the trust deed of the 16th January 1979. It appointed Melisa Hall-Aquitania as trustee until John Tyson II (i.e. H2) became 21. The critical change was that by Clause 16 that which was a discretionary trust became an "unirrevocable trust". It recites the deed of gift of the Beach Harbour Company shares and the loan of US$643,020 and explains that the Trust wholly owns Sound Harbour Limited and thereby owned the parcels of land in the Cayman Islands as shown on the registry map as Parcel 23C21, 23C24, 23C18, 23C76. 23C77. 23C80, 12A63. These were parcels of land in the South Sound, Prospect and Seven Mile Beach areas of Grand Cayman. It is to be noted that the Prospect properties are still owned by the Trust. I observe that the document, although signed by H1 and his wife, is not witnessed, though on the face of it, a space

for the signature of the witness is set out. From what I am told in evidence by H2 and Heather the handwriting amendment at page 7 is in the handwriting of H1 where he inserts words in manuscript "protector and wife set their hand and seal". As a matter of law this deed, if not a forgery, is a valid amendment of the 1979 Trust. Even though it is not witnessed its terms are quite clear. See ***Paul v. Constance [1977] 1 ALL.E.R. 195, Hunter and Moss [1994] 3 ALL.E.R. 215***. There is clear evidence from the language used in the document that H1 sought to make the Trust created in 1979 irrevocable in the interest of his children, and their descendants. This was done at a time when the family was united and was to benefit the Hall children at the expense of H1 and his wife. She apparently signed the deed. I note that the document entitled "probate" sworn before a Notary Public in New Jersey on the 24th September 1984 is not witnessed. Despite the fact that it appears to have been so sworn H1 chooses now to denounce it as a forgery. He claims to have forged that document in George Town Grand Cayman, yet the probate document is dated the same day as the Deed and witnessed by the New Jersey Notary Public on the same date. I see no credible explanation for that fact in the many averments on this topic in

his most recent affidavit. I have had put before me a letter to Ritch & Conolly from W.S. Walker & Co. dated the 31st October 1995 which inter alia says "as regards the purported Deed of Amendment dated the 24th September 1994 we have no information whatsoever". I do not know how far that letter takes the matter. As I have indicated above, I find that on the balance of probabilities it was executed in New Jersey on the 24th September 1984. In this context I note a memorandum in H1 's handwriting under the title "Review January 16th, 1979 (Trust) Deed Settlement. Review 1984 Deed of Settlement (draft July 6th, 1984 Carole O'Keefe September 24, 1994)". Carole O'Keefe is the name of the Notary Public who, on the face it, witnessed the Deed on the 24th Septmeber 1984. The letter I have referred to from W.S. Walker & Co. indicates that all their records were handed over to Ian Boxall & Co. in 1994 and that they believe that the Bank of Nova Scotia retained the original of the 1979 Trust Deed. I do not regard that letter as in any way strengthening the allegation that the Deed of Amendment was in any way a forgery. I have also before me a fax sent from W.S. Walker & Co to Mrs. Bradley dated the 18th August 1997 in which W.S. Walker & Co say that they had no knowledge of a 1984 Deed of

Amendment and " do not accept that they took any part in drafting it." I had already observed that by the time they sent that fax they had handed over all their papers to Ian Boxall & Co. I have read the copy letter from H1 to Simon Stephens, then an associate of W.S. Walker & Co. dated the 19th of September 1984 In my judgment it appears to be a self-serving forgery. I do not know whether the original of that letter ever reached its intended or purported recipient. Those three letters were drawn to my attention by Mr. Trace as they are relied upon by H1 in his affidavit. In the context of this part of the case a letter from Mr. Stevens on the 21st September 1984 speaks in terms of receiving "the notarised Deed of Settlement" and "I would like to discuss the matter in its entirety on the telephone prior to effecting any change in the trust structure." It is plain that the writer envisages that there is to be a change of significance by H1 (but that no change has yet taken place) and he does not want the document to be released without advice. This letter is dated 3 days before the notarisation of the deed in New Jersey and is addressed to Mr. Hall at a New Jersey address. There is no hint whatsoever that a Deed of Revocation has already taken

place on the 6th July 1984. That is supposed to have been effected by Mr. Loudon of the same firm!

8. The corporate history

Beach Harbour Company ("BHC") was incorporated on the 19th May 1977. On the 21st May 1977, BHC incorporated a wholly owned subsidiary, Sound Harbour Limited (SHL). On the 16th January 1979, the Hall Children CI Trust was set up. The registered office of BHC was changed to the Bank of Nova Scotia and there was an assignment to H1 of the amounts due to BHC from SHL. A Deed of Gift assigned H1's interest in the share capital of BHC and loans to the Bank of Nova Scotia as a trustee of the Trust. The Bank Nova Scotia then took possession of bearer shares certificate from H1. After the Deed of Amendment on the 24th September 1984 the bearer shares of BHC were cancelled and new BHC shares registered in the name of Cayhaven Corporate Services Limited (later to be renamed Caledonian Bank and Trust Limited , the financial arm of W.S. Walker & Co.) On the 23rd March 1995, BHC and SHL shares were transferred to International Management Services

("IMS"). On the same date IMS executed two nominee declarations declaring that the shares in SHL were held as nominees for BHC and that the shares in BHC were held as nominee *for H2 as trustee of the Trust*, that is to say, the Trust which is said no longer to exist.

9. What other assistance is to be derived from the correspondence and from the acts of the parties since 1984

i. Letter dated the 18th August 1993.

This is addressed to H2 as a trustee (this can only refer to the 1984 Deed of Amendment). In it H2 seeks compensation for his stewardship since 1979 and asked for a loan of $200,000 over 10 years at 4%! This event took place after H1 was made a bankrupt. (It is to be assumed that he would not have wished the trustee in bankruptcy in the United States to have seen the contents of that letter).

iii Letter dated the 25th August 1994

In this letter H1 describes himself as the "manager and protector" and refers to his son as the trustee. I remind myself of the handwritten amendment in the Deed of September 1984 which on the evidence is the handwriting of H1. In that letter he acknowledges that H2 is the trustee of that Trust. It can only refer to the supposedly forged 1984 Deed of Amendment.

iii. An undated letter to Mr. David Bird of the Caledonian Bank & Trust

From Mr. Bird's letter, it must have been received by him on or before the 23rd March 1995. He refers to the Deed of Amendment and its notarisation on the 24th September 1984 in New Jersey. In paragraph 5 it sets out that he and his wife were removed

as beneficiaries (because of "U.S. Grantor- Beneficiary potential conflict"). This is clear evidence of the confirmation of the disputed deed as recently as the 23rd of March 1995.
Mr. Bird wrote back under the heading "to whom it may concern" On the 24th March 1995, including the words "the shares of Beach Harbour Company ought to have been issued to the trustees for the time being of the trust established by deed of settlement made on the 16th January 1979 as subsequently amended."

iv. A letter dated the 24th March 1995 from H1 to H2. It speaks of a 1979 Deed and a 1984 Deed of Amendment. It does not mention the Deed of Revocation. (I have had evidence from H2 that he never received this letter),

v. A letter dated 21st August 1995 a letter from H1 to his daughter Melisa Hall- Aquitania. It refers to the 1979 Deed of Trust and the 1984 Deed of Amendment.

vi. Letter dated the 22nd August 1995 from H1 to H2. I have had evidence from H2. that he had never seen that letter, but in any event it refers to the 1979 Trust and the 1984 Deed of Amendment.

vii. A lettter dated the 8th August 1997 Barbara Bradley to Ritch & Conolly. It makes an express reference to the 1979 Trust and to the 1984 Deed of Amendment.
I noted of course that H1 claims that she was kept in the dark upon all these matters until recent times. A similar letter from Mrs. Bradley is written on the 11th August 1997 to the children, referring only to the 1979 Trust and the 1984 Deed of Amendment. On the

21st August 1997, a letter from Barbara Bradley to Ritch & Conolly refers expressly to the 1979 Trust and the 1984 Deed of Amendment. This is the lady who has taken a most active part in propagating the affairs of H1.

viii. A telephone message left by H1 on Heather Hall Friel's answering machine on the 11th February 1998.
She was spoken to on the telephone by H1. In that conversation he confirmed the execution of the 1979 Trust and the Deed of Amendment..

ix. A letter fromH1 to his wife Sherrill Hall on the 19th March 1998 . Express reference is made to to the 1979 Trust and 1984 Deed of Amendment.

"When I set up the 1979 Trust, it was revocable in in my sole discretion, and I had you and me included as beneficiaries along with our children. After taking estate planning advice in 1983 - 1984 (emphasis supplied) it was my intention to remove you and me as beneficiaries to make the Trust more "arms' length". In a document styled "1984 Deed of Amendment" the validity of which is in contest in the Cayman Court, you and I were purportedly removed as beneficiaries and that Trust made irrevocable. For years now you have known of the 1979 Trust."(emphasis supplied).

This letter was written approximately 3 months before the affidavit in which H1 first raised the allegation that the 1984 Deed of Amendment was a forgery and that the 1984 Deed of Revocation was a true Deed.

x. The letter to the children dated 3rd March 1998. It contained a litany of complaints and threats. The five eldest children were offered $US20,000 each to get them out of the difficulty that they were experiencing in the "Sherri John-Hall: case. This was a case in which the children were being sued as partners in one of H1's former companies. There was a veiled threat that the applicants in this Cause did not possess all the relevant documents and that they would receive their $US20,000 each, in return for discontinuing the Cayman proceedings. There was no hint whatsoever that the 1979 Trust nor its amendment did not still exist. If both of the applicants knew that the Deed of Amendment in 1984 was a fraud it was astonishing that there was no hint of that in that letter in view of its menacing tone.

xi I have already referred at the beginning of this judgment to what was termed the "Larry Frank" litigation. That was Cause No. 207 of 1995 entitled Lawrence C. Frank v. John P. Hall and others. An affidavit sworn in that suit dated 12th June 1995 by H1 reads as follows:-

> "I have been in the practice of placing assets in trust for my children over the years, and the 1979 Cayman Islands Trust is no exception;..... beginning in 1984, further estate planning advice was taken by me and the Cayman Islands Trust was amended".

It goes without saying that H1 has either perjured himself in that affidavit or in the affidavit sworn in this suit on the 10th May 1998.

xii. On the 30th September 1996, a promissory note came into existence. It reads as follows:-

> "John Hall, trust protector and manager and John P. Hall II ex rel Cayman Trust do hereby promise to make available and pay the sum of $US50,000 against the accrued and future attorneys fees" and it is signed, "John P. Hall, Manager and Protect or" and signed by his son, "John P. Hall II ex rel Cayman Islands Trust" and then in handwriting "to be paid by the Trust and not by me personally."

That is in the handwriting of H2. Here is an example of H1 acquiring money from the Trust on the basis that he acknowledges the valid appointment of his son as trustee under the Deed of Amendment. The Trust is put in a weaker position by reason of that matter because of course they have paid money out to H1. The Trust has altered its position by reason of that payment out to the benefit of H1 and to its detriment.

xiii. A letter dated 21st May 1997 from H1 to H2 in which H1 has admitted in his affidavit forging H2's signature and referring to the 1979 Trust. The fact that H1 has forged that signature is another matter which I have regard to in deciding whether I believer anything he says to me. It is H1's case in his affidavit that H2 gave his consent for his signature to be imitated. H2 denied that on oath and I accept his denial.

10. The Deed of Revocation

This document is purportedly dated the 6th July 1984 and is said to have been prepared by Mr. Loudon, then a partner with W.S. Walker & Co. I have not had sight of the original nor is there a supporting affidavit from Mr. Loudon. Although Mr. Loudon is no longer a partner of W.S. Walker & Co, there is no evidence before me that he has died. There is no date on the probate page and no correspondence or attendance notes exhibited from W.S. Walker & Co. Such supporting documentation might be expected to exist in the event of such a dramatic change in the nature of the Trust. There is no evidence of any letter written to thwarted beneficiaries or the like. There was no hint of its existence until it was produced like a rabbit out of the hat in the affidavit of the 10th May 1998. It purports to re-assert control over the Trust assets. This vital document is said to be the work of "Mr. AJN Loudon LL. B" It reads as follows:-

2. "By Clause 22 (ii) of the Deed it was provided that the Deed shall be revocable by the settlor by Deed delivered to Scotia Trust and that the said David Bird, as Settlor, as aforesaid, ***irrevocable*** thereby nominated and constituted Tyson as his attorney with full power to revoke the Deed and to execute any such Deed of Revocation and to receive the trust funds from Scotiatrust to give receipts therefore and to grant discharges to Scotia Trust.

3, Tyson has determined to execute this Deed of Revocation.

> NOW THEREFORE THIS DEED WITNESSETH that Tyson does hereby pursuant to the power in that behalf conferred upon him by the Deed ***does*** hereby revoke the trusts declared in the Deed and ***does DIRERT*** Scotia Trust to pay transfer and transmit the trust fund held upon the trusts of the Deed."

I find it odd that before Mr. Loudon asked his client to execute this Deed, he did not check the wording and spelling in paragraph 2 and 3. I would be astonished if such an illiterate and ill-spelt Deed is truly the product of Mr. Loudon's professional services. On the other hand, anyone who has read H1's affidavit will observe his shaky command of English grammar and sytnax, even allowing for transatlantic solecisms! The probate page is marked "approved Sherrrill Kready Tyson". That of course, is supposed to be Mrs. Hall, his then wife. The probate page is said to be signed by Mr. Loudon as a witness but it was clear that the typescript on the probate page is quite different from the typescript in the Deed of Revocation itself. Mr. Loudon's signature and that of "Dr. John Phillip Tyson" is not signed by a Notary Public. I remind myself that forgery is one of H1's many skills. On the other hand,. Mrs. Hall is said to have signed anything put in front of her by H1.

10. It is H1's case, in his most recent affidavit, that the forgery of a Deed of Amendment was forced upon him by the United States Federal Court when it had jailed him or was about about jail him for contempt of court. That Court was carrying out an enquiry into his assets and had briefly imprisoned H2 as a trustee of the Cayman Trust. This has led to his brief resignation as trustee. H1 claims motives of altruism in favour of his children in the protection of trust assets for his obduracy before the American Court and his forgery of the Deed of Amendment. That claim is to be seen in its true light. The real circumstances were an attempt to resume total control of the Trust by the production of a false Deed. It is clear to me that his real motivation is a desire to get his hands on moneys which were once his own property. Being a bankrupt, he had no other legitimate source of income, and was desperate to engage attorneys who might ameliorate his forthcoming sentence in the U.S Federal Court and to have assets with which to make a fresh start upon his release from prison.

12. Both the first and second applicants gave evidence before me on their oaths. I repeat that I had to warn myself that each of them might have their own interest to serve and I had to be very careful in accepting what they said in the absence of sworn evidence contradicting them. I had to consider the many allegations made against them, and in the particular H2 and Heather in purported exercise of the power of trustees, advanced to themselves and to the other beneficiaries (including the minor beneficiaries) US$40,000 each. That was to settle the 'Sherri John Company" litigation. As I have indicated before, that was the company set up by H1 with his children (and not himself) as general partners. The original claim was for US$ 750.000 and was settled for $US75,000, a settlement greatly in the interest of the Trust. The $US40,000 was assessed to cover legal costs, damages and contingency amounts. The minor children of the family, each had their $US40,000 as well. I have had to balance that expenditure, which I regard as the proper exercise of the powers of discretion of the trustees, against H1's patent desire to get his hands on the $1.5 million assets of the Trust. H2 told me that he had briefly been forced to resign from his trusteeship, on advice, when faced with a motion for committal for contempt of

court in his father's bankruptcy proceedings. He was advised to sever all connections with the Cayman Trust. He was properly re-appointed after that matter had been disposed of, that is to say, validly re-appointed, and remains so appointed, if I were to conclude that the 1984 Deed of Amendment was valid and not a forgery as alleged. He told me a great amount about his father's character. The lengths H1 would go to deceive courts by forging diary entries and producing false aides memories and his delight in boasting of his successes in Court based upon false documentary evidence. H2 told me that, when a friend of his was fatally injured as a result of negligent driving he discovered that the vehicle owned by his father's company was not insured. H2 was told H1 to say that a high wind had blown the motor car off the road to claim an act of God in order to escape liability. He declined to give such false evidence either to a Court or to an insurance company. In the event he was made bankrupt as a result of those civil proceedings on the 31st March 1992. He told me that he had been advised by an attorney that he need not disclose the fact that he was a trustee/beneficiary of the Cayman Trust in those proceedings. He told me that he was unhappy with the advice that he was given, but, as a 19 year old, he accepted it. I

pressed him strongly on the point and I believe his account of the matter. I have to say that it does not sound like honest advice to me but I am not, of course, an American lawyer. H2 was quite frank about the advice he had had, and his concerns. I believed him. He told me that from an early age he was taken regularly to the Cayman Islands around Christmas time and was shown plots of land by his father. He was told that they had been bought for the children. He described meeting a gentleman who can only be Mr. William Walker (he was described as a ruddy faced jovial gentleman with white hair). When in Grand Cayman in the summer of 1993 and 1994 he was told by H1 that he was a beneficiary of the Trust although he saw no documents. He denied in the most emphatic terms that he knew that the 1984 Deed of Amendment was a forgery or that he had gone along with the deception in order to assist in cheating the United States Federal Court. He is employed by the distinguished firm of Merrill Lynch & Co. and struck me as a decent intelligent young man. It is obvious that he found his father's behaviour of great embarrassment over the years. He is seeking to live that down and establishing a career in his own right.

Having warned myself of the dangers of accepting his evidence when no one is present in Court to contradict him, I nevertheless do so.

His sister, Heather Hall Friel, confirmed her brother's decription of the character of their father. She too was present in Court when he was sentenced, and indicated to me that she expects him to receive a sentence in the region of five year's imprisonment when he is finally dealt with for his bankruptcy fraud. She told me that she had had a minor motor car accident as a teenager, and that he had incited her to claim that she had suffered a whip lash injury of her neck in order to deceive the insurance company and gain some dishonest money from them. She refused. She denied that she knew of the forgery or that she approved of it. She is a young woman who for charitable reasons takes part in running a community trust. She struck me as a decent young woman who was embarrassed and concerned by her father's behaviour and who gave me evidence which I wholly accept. The result of my accepting the evidence of the two Hall children is that I reject the account given in the affidavit sworn by H1 and accept that of his children H2and Heather Hall Friel.

13. I now make the following findings having again directed myself on the burden and standard of proof in civil cases where serious allegations mounting to criminal offences are made:-

1. I am quite satisfied that the Deed of Amendment made on the 24th September 1984 is a valid document and is not a forgery. I note that the probate section was not witnessed as required by Section 3 of the Probate of Deeds Law. That is a matter of form and not of substance, and does not detract from the validity of the Deed if its intent is set out in plain words. If I am wrong in that finding of fact, then the plain words of the Deed fulfill all the criteria for an informal declaration of trust. I again refer to ***Paul v. Constance [1977] 1 A.E.R. 195 and Hunter v. Moss [1994] 3 A.E.R. 215*** I would therefore declare a trust in terms of the words of the Deed giving it a benevolent construction where necessary.
2. If I am still incorrect in either of my first two findings then I find that the conduct of H1 as set out in this judgment creates an equitable estoppel. He should not be permitted to renege on the representations made over the years both verbally and in writing to the trustees and potential beneficiaries which confirmed the existence of the 1979 Trust as amended by the 1984 Deed of Amendment. I have found a number of instances where the trustees have acted on his representations to their detriment and and to the advantage of H1. Accordingly I make a finding of fact that an equitable estoppel would in those circumstance come into being. An equitable estoppel arises by reason of the words or conduct of one person to a transaction freely made to the other party of a transaction in terms of an unambiguous promise or assurance which is intended to affect the legal relations between them.

If that other party then acts upon it and alters his position to his detriment, in that event the party making the promise or assurance will not be permitted to act inconsistently with it. The real question is therefore whether the conduct of H1 in relation to the Hall Children Trust of 1979 and the Deed of Amendment creates those criteria. I find that it does. (If the concept of detriment arises in the case of a promissory estoppel then it does so from the line of authority dating from at least the Northern Irish case of ***Morris v. Carty [1957] N.I. p. 175***. In the case of ***WJ Alan & Co. Limted v .El . Nasr Export and Import Company [1972] 2 Q.B. 189*** the then Master of the Rolls, Lord Denning, rejected the concept of detriment as necessary for the operation of the doctrine. The most recent case ***Gillett v. Holt*** is reported, so far, only in The Times of the 18th June 1998 in which Carnwath J, dealing with a case of propriety estoppel, said -

"it was the persons's knowledge of the detriment being suffered in reliance of his promise which made it unconscionable for him to go back on it. The party to be bound therefore was aware that the other party was acting to his detriment in reliance of expectation created or encouraged by the party alleged to be bound."

If " detriment " is necessary in a case of promissory estoppel, which I doubt on the authority *of* ***WJ Alan CO. Ltd v. El Nasr Co.,*** then the promissory note and the payment of funds to H1 as manager are excellent examples of the Trust suffering a detriment on the basis that the 1984 Deed of Amendment was valid and proper. Accordingly there is ample justification for holding H1 to the terms of that Deed of Amendment and I so find. See also ***Pascoe v. Turner [1979] 2 ALL.E.R. 945 and Grant v. Edwards [1986] 2 ALL.E.R. 426.***

3. I am satisfied that the "Deed of Revocation" dated the 6th July 1984 and the "Deed of Settlement" dated 24th September 1984. are themselves forgeries. I am satisfied that H1 is the author of these forgeries and I propose to inform the Attorney General of these findings of fact.

4. In the event of any vagueness in the 1979 Trust or the 1984 Deed of Amendment, I find that it is appropriate that a "benign" construction be given to the obvious intention of the real settlor so that it can be carried out in the interest of the beneficiaries. See ***IRC v. McMillan [1980] 1 ALL.E.R. page 890 and Steel v. Paz Ltd [1995] B.O.C.M. Vol. 1 p. 338 at p. 392-394(an Isle of Man case).*** This was reflected in the orders which I made on the 12th June 1998 and which I now give reasons for:-

The orders I made were as follows:-

1. That the trusts declared by the Deed of Settlement dated 16th January 1979 and made between David Graham Bird and the Bank of Nova Scotia Trust Company (Cayman) Limited ("the 1979 Trust") were validly constituted and have not been revoked, and that the trusts purportedly declared by the Deed of Settlement purported dated 24th September 1984 and made between Dr. John Phillip Tyson (an alias of the sixth respondent) on the one hand and Dr. John Phillip Tyson and Mrs. Sherrill Kready Tyson (the then wife of the sixth respondent) on the other hand are of no effect.

2. That, on a true construction of the 1979 Trust in the events which have happened, the 1979 Trust was validly amended on the terms of the Deed of Amendment dated 24th September 1984 ("the 1984 Deed"), such that

   (i) the sixth respondent and Sherrill Kready Hall are not beneficiaries under the 1979 Trust (as amended);

(ii) the only beneficiaries of the 1979 Trust (as amended) are the the children and remoter issue of the sixth respondent, whenever born;

(iii) the sixth respondent has no power to remove and appoint beneficiaries under the 1979 Trust (as amended), save for his residual power as Protector to appoint replacement trustees, and then only in the events specified in Clause 4(f) of the 1984 Deed;

(iv) the 1979 Trust (as amended) is irrevocable;

save that it is directed that the trustees of the 1979 Deed (as amended) shall not apply provisions (a) to (c) of Clause 5 of the 1984 Deed relating to distribution and shall apply instead the provisions of the 1979 Trust in that regard.

3. That the fifth respondent be and is hereby appointed to represent all minor and unborn persons who might have a beneficial interest or who might hereafter become beneficially interested under the trusts of the 1979 Trust (as amended).

4. That the sixth respondent has not acted in good faith within the meaning of Clause 15 of the 1984 Deed, such that the trustees of the 1979 Trust (as amended) are not obliged to hire or retain his services to manage the business of the assets of the 1979 Trust (as amended), and that the trustees would be in breach of their fiduciary duties so to hire or retain him.

5. That, on a true construction of the 1979 Trust (as amended) and in the events which have happened, the first applicant is validly a trustee of the 1979 Trust (as amended).

6. That, on a true construction of the 1979 Trust (as amended) and in the events which have happened, the second applicant has validly been appointed as a co-trustee of the 1979 Trust (as amended).

7. That, in the events which have happened , the seventh respondent is not and has never been a trustee of the 1979 Trust (as amended).

8. That the sixth respondent does within 7 days of today [12th June 1998] swear and serve on the applicants anaffidavit furnishing proper particulars and accounts of his management of the business of the assets of the 1979 Trust (as amended) and of his actions relating to the 1979 Trust (as amended) in his capacity as Protector of the 1979 Trust (as amended).

9. That the sixth and seventh respondents do within 7 days of today [12th June 1998] deliver up to the applicants copies of all documents belonging to the 1979 Trust (as amended), including copies of all documents created in the sixth respondent's capacities as manager and Protector of the 1979 Trust (as amended) and all those files referred to in the seventh respondent's affidavit sworn on 26th May 1998.

10. That, on a true construction of the 1979 Trust (as amended) and in the events which have happened, the shares in the capital of Beach Harbour Company now standing in the name of the applicants are held upon the trusts of the 1979 Trust (as amended).

11. That, in the events which have happened, the applicants and the third respondent have been validly appointed as directors of Beach Harbour Company.

12. That, in the events which have happened, the sixth respondent has

been validly removed as a director of Beach Harbour Company.

13. That, on a true construction of the 1979 Trust (as amended) and in the events which have happened, the shares in the capital of Sound Harbour Limited now standing in the name of Beach Harbour Company and the first applicant are held by Beach Harbour Company and the first applicant upon the trusts of the 1979 Trust (as amended).

14. That, in the events which have happened, the applicants and the third respondent have been validly appointed as directors of Sound Harbour Limited.

15. That, in the events which have happened, the sixth and seventh respondents have been validly removed as directors of Sound Harbour Limited.

16. That henceforth the proceeds of sale properties registered in the name of Sound Harbour Limited be paid into a bank account in the name of "Hall Children CI Trust", and that the trustees of the 1979 Trust (as amended) shall be joint sole signatories of the account.

17. That the applicants were entitled to decide on 30th April 1998 to make a distribution of US$40,000 to all present living beneficiaries, and were and are entitled to put such decision into effect, but that in any event, pursuant to Section 64 of the Trusts Law (1996 Revision), the applicants are hereby relieved from any personal liability in respect of such decision and any distribution made thereafter.

18. That the applicants do establish a custodial account for the fourth and fifth respondents, of which the applicants shall be the sole joint signatories, for the purpose of receiving and all distributions

made to the fourth and fifth respondents out of the funds of the 1979 Trust (as amended); and, for the avoidance of doubt, it is declared that the sixth and seventh respondents shall not be entitled to any of the funds held in the said custodial accounts, or any access to those funds, notwithstanding that the sixth respondent may be the legal or other form of guardian of the fourth and fifth respondents.

19. That the applicants are entitled to be and shall be indemnified out of the assets of the 1979 Trust (as amended) against all costs of and incidental to these proceedings and all other steps taken on their behalf by Messrs. Ritch & Conolly for the protection and preservation of the assets of the 1979 Trust (as amended).

20. That this matter was fit for Leading and Junior Counsel appearing for the applicants to be so instructed.

21. That the costs of the guardian ad litem for the fourth and fifth respondents of and incidental to these proceedings be paid out of the assets of the 1979 Trust (as amended) on an indemnity basis, to be taxed if not agreed, and paid forthwith thereafter.

22. That the sixth and seventh respondents jointly and severally do pay four fifths of the applicants' said costs, to be taxed if not agreed, and paid forthwith thereafter.

Insofar as I have not specifically recited my reasons for making any part of the above order, I confirm that I was satisfied on the evidence and materials before me that I should so order.

8th July 1998

The Hon. Mr. Justice Graham
Judge of the Grand Court