COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT
Common Law and Equity Division
CLE/gen 1071 of 2014

Between

WHALE CAY GROUP LIMITED
Plaintiff

AND

THE PRIVATE TRUST CORPORATION LIMITED
Defendant

Before:	**The Hon. Madam Justice Rhonda P. Bain**
Appearances:	**Mr. Ferron Bethell with Ms. Camille Cleare for the Plaintiff**
	Mr. John Wilson with Mr. Lamarque Campbell and Ms. Erin Turnquest for the Defendant

4 May 2015, 11 June 2015, 6 October 2015,
2 November 2015 and 4 November 2015

(Ruling No. 2)

(1) The Plaintiff, Whale Cay Group Limited, is the Mortgagor under a mortgage dated 20 January 2010 and a mortgage dated 15 May 2012 made between the Plaintiff as Mortgagor and the Defendant, Private Trust Corporation Limited, as the Mortgagee.

(2) By Originating Summons filed 28 July 2014 the Plaintiff seeks the determination of the court on the following reliefs under Order 77 Rule 1(1) (b), (c), (e), (f) and (g) of the Rules of the Supreme Court and under the inherent jurisdiction of the court, namely–

> "1. A declaration that the Defendant is not entitled to foreclose on the mortgaged property or exercise its power of sale;
>
> 2. A declaration that the Mortgage, dated 20 January, 2010, is of no effect and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed;
>
> 3. And/or in the alternative, declaration that there is no debt owing to the Defendant by the Plaintiff under the Mortgage, dated 20 January 2010, and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed;
>
> 4. A declarations that at the time of the transfer of Mortgage from Leadenhall Bank and Trust Company Limited to the Defendant on 23 November, 2010, there was no debt owing to Leadenhall bank and Trust Company Limited;
>
> 5. A declaration that the Mortgage, dated 2 August, 2000, has been extinguished and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed;
>
> 6. A declaration that the Supplemental Indenture of Mortgage, dated 13 June, 2002, has been extinguished and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed;
>
> 7. An Order directing the Defendant to reconvey the properties secured by the Mortgage to the Plaintiff;
>
> 8. Further or other relief;
>
> 9. Costs."

(3) The Originating Summons was supported by the Affidavit of David Casoria filed 28 July 2014.

(4) The Defendant relied on the First Affidavit of Adrian Crosbie-Jones filed 16 December 2014 and the Second Affidavit of Adrian Crosbie-Jones filed 8 October 2015. Counsel for the Plaintiff objected to paragraphs 11 and 21 of the Second Affidavit of Adrian Crosbie-Jones.

(5) The court in a separate Ruling (No. 1) made a determination with respect to paragraphs 11 and 21 of the Second Affidavit of Adrian Crosbie Jones filed 8 October 2015.

Background

(6) The Plaintiff is a company incorporated under the laws of The Bahamas. The shareholders of the Plaintiff are a group of American investors who established the Plaintiff for the purpose of acquiring and developing the larger portion of Great Whale Cay Island in the Berry Islands. To finance the acquisition and development the Plaintiff obtained loans from American Investment Properties Inc. ("AIP) and secured these loans by mortgages granted to Leadenhall Bank and Trust Company Limited (Leadenhall) until Leadenhall went into liquidation. In 2012 the Plaintiff obtained another loan from AIP secured by a mortgage granted to the Defendant. The loans were also secured by Promissory Notes made in favour of AIP.

(7) The Plaintiff has produced copies of mortgages and Promissory Notes and other documents. Other documents were produced by the Defendant. In order to determine the issues between the Plaintiff and the Defendant it is necessary to review all the documents executed by the Plaintiff with respect to the funds advanced.

(8) By mortgage dated 2 August 2000 ("the Original Mortgage") (also referred to the "Principal Indenture") and made between the Plaintiff ("Mortgagor") and Leadenhall Bank and Trust Company Limited ("Leadenhall") ("the Mortgagee") the hereditaments were granted and conveyed to Leadenhall to hold the same unto and to the use of Leadenhall in fee simple subject to the proviso for redemption. The hereditaments were described in the Schedule as –

"ALL THAT Island or Cay known as Great Wale Cay in the berry islands of the commonwealth of The Bahamas EXCEPTING THEREOUT the following Lots of land contained in the Subdivision of a part of the said Island known as "THE GREAT HOUSE DEVELOPMENT PHASE 1" as shown on a Plan registered in the Registry of Records in Volume 2550 at pages 132 to 139;

1,2,3,5,6,7,8,9,10,11,12,13,14,15,16,18,19,20,21,22,24,27,28,29,30,31,32,33,34,35,36,37,38,39,40,41,42,45,46,47,48,49,50,52,53,54,55,56,57,59,60,61,62

AND EXCEPT THEREOUT the following Lots of land contained in the Subdivision of a part of the said Island known as "THE GREATHOSUE DEVELOPMENT PHASE 1" as shown on a plan registered in the said Registry of Records in Volume 3060 at pages 462 to 472;

104,114,116,117,118,137,138,139,140,144,145,146,147

AND ALSO EXCEPT THEREOUT the following Lots of land as shown on the said Plans

4,17,15,26,43 and 135,136,148, and 108,109,115,119,120 and 44,131,132,133,134 and 105,107,110,111,113 and also 51 and 58"

(9) The Recitals of the Original Mortgage state, inter alia –

"(B) American Investment Properties Inc., a company incorporated under the laws of the State of Florida one of the United States of America (hereinafter called "the Lender") has lent or otherwise advanced money to or on behalf of the Mortgagor to purchase the said hereditaments including the settlement of certain debts or other obligations which the Mortgagor has incurred or assumed to a present total of Three million Four hundred and Sixty-three thousand dollars in the currency of the United States of America aforesaid (US$3,463,000.00) (hereinafter collectively called "the said advances").

(C) The Mortgagor has agreed that the said advances shall be secured and payable with interest by a Promissory Note in favour of the Lender (hereinafter called "the Note") and a Mortgage of the said hereditaments.

(D) The Lender has requested the Mortgagor to grant such mortgage to the Mortgagee."

(10) AIP appointed Leadenhall as trustee of its interest in the mortgage in 2000. The 2000 Trust Deed was referred to in other documents but the 2000 Trust Deed was not produced.

(11) The Original Mortgage provides –

> **"2. PROVIDED ALWAYS that if the Mortgagor shall pay to the Mortgagee the amount secured by the Note with interest at the rate provided by the Note together with all other monies (if any) due to the Mortgagee under these presents the Mortgagee will at the request and cost of the Mortgagor reconvey the said hereditaments to the Mortgagor or as it shall direct."**

(12) Clause 4 (2) of the Original Mortgage provides –

> **"(2) That no neglect or omission on the part of the Mortgagee to take advantage of or enforce any right or remedy arising out of any breach non-observance or non-performance of any covenant or condition herein contained or implied shall be deemed to be or operate as a general waiver of such covenant or condition or prejudice the right of the Mortgagee in effecting or taking advantage thereof whether original or recurring."**

(13) In Clause 4 (11) of the Original Mortgage the terms Mortgagee and Mortgagor were defined –

> **"(11) The expression "the Mortgagor" shall include its successors in title to the said hereditaments the expression "the Mortgagee" shall include the holder or holders for the time being of the Note and other its assigns or successors in title to the said hereditaments and the expression "the said hereditaments" shall include each and every part thereof." (Emphasis added)**

(14) The Original Mortgage was executed by William Schmidt, the President and a Director of the Plaintiff. This Original Mortgage is recorded at Volume 7877 at pages 37 to 45. A copy of the Original Mortgage was produced by the Plaintiff. A copy of the recorded Original Mortgage was produced by the Defendant.

(15) At the time of the execution of the Original Mortgage the Plaintiff executed a Promissory Note to AIP for the lending. A Promissory Note ("the Note") was executed on 2 August 2000 with respect to the Original Mortgage to secure the sum of $3,463,000.00. This Note was referred to in the Original Mortgage. This Promissory Note was not produced.

(16) On 13 June 2002 the Plaintiff and Leadenhall entered into a supplemental mortgage ("the Confirmatory Mortgage and Collateral Mortgage") (also referred to as the "Supplemental Indenture"). By the terms of the Confirmatory and Collateral Mortgage the amount secured by the Original Mortgage was revised to US$3,934,171.00 and additional hereditaments were added by way of security. The additional funds advanced were secured by a Promissory Note ("the Revised Note") in favour of the AIP in replacement of the Note.

(17) The additional hereditaments included in the Confirmatory Mortgage and Collateral Mortgage were Lot 51, Lot 54 and Lot 140 in the Subdivision called and known as "The GREAT HOUSE DEVELOPMENTS PHASE ONE situate on Great Whale Cay in the Berry Islands.

(18) In all other respects the Original Mortgage was expressed to continue in full force and effect. Clause 6 of the Confirmatory Mortgage and Collateral Mortgage provides –

> **"6. For the evidence (*avoidance*) of doubt the Principal Indenture and these presents shall constitute a valid binding and enforceable mortgage of the said hereditaments the first further hereditaments the second further hereditatments and the third further hereditaments pursuant to the terms thereof to the intent that the revised advances together with interest thereon shall be due and payable to the Lender and secured by the Principal Indenture and these presents and that all such hereditaments shall be and remain liable for the payment of the revised advances and interest notwithstanding any defect in or unenforceability of the Revised Note."**

(19) The Confirmatory Mortgage and Collateral Mortgage was executed by William Schmidt, the President and a Director of the Plaintiff. This Confirmatory Mortgage and Collateral Mortgage was stamped at $10.00 and is recorded at Volume 8475 at pages 72 to 79. A copy of the Confirmatory Mortgage and Collateral Mortgage was produced by the Plaintiff. A copy of the Recorded Confirmatory Mortgage and Collateral Mortgage was produced by the Defendant.

(20) The Revised Promissory Note ("the Revised Note") was executed on 13 June 2002 to secure the revised sum of $3,934,171.00. The Revised Note was referred to in the Confirmatory Mortgage and Collateral Mortgage. The Revised Note was not produced.

(21) By an Affidavit of Loss Note executed by Kevin Muller, Vice-President of AIP on 24 June 2004 Kevin Muller stated inter alia–

> "4. American Investment Properties, Inc., a Florida corporation owns and holds the First Mortgage (a/k/a the "Principal Indenture"), and Promissory Note referred to therein as a result of the Loan, and such Note was, to the best of Affiant's knowledge, executed and delivered by William Schmidt, as Director of WCG in the original principal amount of Three Million Four Hundred Sixty Three Thousand ($3,463,000.00) Dollars and 00/100 ("Note"), as modified by that certain Revised Note referred to in the Indenture of Confirmatory Mortgage and Collateral Mortgage in the amount of Three Million Nine Hundred Thirty Four Thousand One Hundred Seventy One and xx/100 ($3,934,171.00) dollars.
>
> 5. The Note and Revised Note have been lost subsequent to their execution and are not within the custody or control of American Investment Properties, Inc. Diligent search for the Note and Revised Note has been made, but neither can be found.
>
> 6. Affiant knows of no parties other than American Investment Properties, Inc. interested in the reestablishment of the Note and/or Revised Note, and Affiant states that neither the Note nor the Revised Note has not been sold, pledged, hypothecated, transferred or otherwise assigned to any party.
>
> 7. AIP has agreed to waive all accrued interest on the Note and/or Revised Note in exchange for a total compromise amount contained in the Revised and Restated Balloon Promissory Note of $5,750,000.00."

A copy of the Affidavit of Loss Note was produced by the Plaintiff.

(22) On 13 June 2002, Leadenhall executed a Declaration of Trust in favour of AIP. The Recitals to the Declaration of Trust stated that the Deed was Supplemental to (i) Indenture of Collateral Mortgage dated 2 August 2000 (the Original Mortgage) made between the Plaintiff and Leadenhall (ii) a Trust Deed dated 2 August 2000 by the Trustee in favour of AIP and (iii) an Indenture of Confirmatory Mortgage and Collateral Mortgage dated 13 June 2002 between the Plaintiff and Leadenhall.

(23) The Trust Deed acknowledged that Leadenhall as Trustee held the property under the mortgage as trustee for AIP.

(24) The Deed provides –

> **"NOW THIS DEED WITNESSETH that the Trustee hereby declares that it holds all the said properties in the said Collateral Mortgage and the said Confirmatory Mortgage and Collateral Mortgage in trust for and separately to the order of the said American Investment Properties Inc. in fee simple and hereby agrees that it will at the request and cost of the said American Investment Properties Inc. transfer the said Mortgages to the said American Investment Properties Inc. or such other person or corporation at such time and in such manner or otherwise deal with the same as the said American Investment Properties Inc. shall so appoint."**

(25) Even though this Declaration of Trust was made on 13 June 2002 it was not lodged for recording until 5 August 2011.

(26) Attached to the Recorded Declaration of Trust was a Permit dated 29 March 2010 and issued by the Investments Board under the International Persons Landholding Act 1993 to AIP to hold the property specified in the Permit for development and sale. The Permit specifically states that -

"Permit validates the "Declaration of Trust" dated 13 June 2002"

(27) The Declaration of Trust was stamped for $10.00 and recorded in Volume 11423 at pages 126 to 131. A copy of the Declaration of Trust was produced by the Defendant.

(28) On 25 June 2004 the Plaintiff executed a Collateral Further Charge ("the Collateral Further Charge") in favour of Leadenhall as Mortgagee. In this document the amount to be secured by the Original Mortgage and the Confirmatory Mortgage and Collateral Mortgage was increased to US$5,750,000 payable to AIP pursuant to the terms of the Second Revised Note.

(29) This Collateral Further Charge also made reference to a second mortgage and a Promissory Note in favour of Peter Casario –

> **"B. By a further Indenture of Mortgage (hereinafter called "the Second Mortgage") dated the Second day of August A.D. 2000 made between the same parties as are parties hereto and in the same order and now of record in the said Registry of Records in Volume 7877 at pages 46 to 55 the said hereditaments contained in the Principal Indenture were also mortgaged to the Mortgagee to secure the sum of Two million Two hundred and Fifty-eight thousand One hundred and Forty dollars in the said currency (U.S. $2,258,140.00) (hereinafter called "the second advances") pursuant to a Promissory Note in favour of Peter Casoria (hereinafter called "the Second Lender") subject to the Principal Indenture and the said advances and interest thereby secured and by a further Indenture of Confirmatory Mortgage and Collaterals Mortgage (hereinafter called "the Second Confirmatory Mortgage") dated the Thirteenth day of June A.D. 2002 also made between the said parties as are parties hereto and in the same order and now of record in the said Registry for Records in Volume 8475 at pages 80 to 89 the second advances and the security of the Second Mortgage were subordinated and postponed to the revised advances."**

(30) This Collateral Further Charge provided –

> **"1. In pursuance of the said agreement and in consideration of the premises the Mortgagor as Beneficial Owner hereby declares that all the said hereditaments comprised in the Principal Indenture and the Collateral Mortgage and remaining subject thereto shall henceforth by a security for and be charged with the payment of the revised further advances and the amount secured and payable with interest by the Second Revised Note in lieu of the revised advances and the Revised Note and the interest thereon and that no part of the same shall be redeemable until the full amount of the Second Revised Note with interest thereon shall be fully repaid to the Vendor.**
>
> **2. All the powers and provisions contained in the Principal Indenture and the Confirmatory Mortgage (except the amounts thereby respectively secured) shall be applicable for securing the payment of the revised further advances and the amount secured and payable with interest by the Second Revised Note and for enforcing and defining the notes of the parties under the security hereby constituted as if the amount of the Second Revised Note and the interest thereon had comprised the principal money and the interest thereon payment whereof is secured by the Principal Indenture and the Collateral Mortgage.**
>
> **3. The Mortgagee with the consent and agreement of the Second Lender hereby covenants and agrees with the Mortgagor that the revised further advances and interest thereon shall be charged on the said hereditament remaining subject to the Principal Indenture and the Confirmatory Mortgage in priority to the second advances and interest thereon and that the second advances and interest thereon and the security of the Second Mortgage and the Second Confirmatory Mortgage shall be subordinated and postponed to the revised further advance and interest thereon and the security of the Principal Indenture and the Confirmatory Mortgage.**

(31) By the terms of the Collateral Further Charge certain of the hereditaments were released from the security of the Original Mortgage and the Confirmatory and Collateral Mortgage.

(32) This Collateral Further Charge was executed by Peter Casoria Jr., the Managing Director of the Plaintiff. This Collateral Further Charge was stamped for $10.00 and is recorded in Volume 9257 at pages 184 to 195. A copy of the Collateral Further Charge was produced by the Plaintiff. A copy of the recorded Collateral Further Charge was produced by the Defendant.

(33) On 25 June 2004 the Plaintiff executed a Revised and Restated Balloon Promissory Note ("the Second Revised Note") in favour of AIP in the sum of US$5,570,000.00 with a maturity date of 1 June 2009.

(34) By the terms of the Second Revised Note -

> "1. **Promise to Pay:**
> **FOR VALUE RECEIVED, the undersigned, WHALE CAY GROUP, limited ("WCG"), A Corporation established under the laws of the Commonwealth of The Bahamas (Hereinafter referred to as "Maker"), hereby promises to pay to the order of AMERICAN INVESTMENT PROPERTIES, INC. ("AIP"), a Florida corporation (hereinafter referred to as "Holder" which term shall include any subsequent holder hereof), the sum of Five Million Seven Hundred Fifty thousand and no/100 ($5,750,000.00) dollars payable in such coin or currency of the United States of America as shall be legal tender for the payment of public and private debts at the time of payment at the offices of AMERICAN INVESTMENT PROPERTIES, INC., A Florida corporation located at 3300 S.W. 14th Place, Unit 3, Boynton Beach, FL 33426 (or at such other place as Holder may designate), with interest from the date hereof at a fixed percentage rate per annum equal to eight (8.0%) percent.**
>
> 2. **Repayment Terms:**
> **Commencing on December 1, 2004, Maker shall pay to the Holder installments of simple interest only, bi-annually, on June 1st and December 1st of each year, throughout the term of this Loan, until a final balloon payment shall become due and payable on June 1, 2009.**
>
> 3. **Prepayment:**
> **Maker shall have the right to prepay this Note at any time in whole or in part, without premium or penalty, with interest to the date of prepayment.**

In order for maker to obtain credit for a prepayment, any amounts prepaid must be clearly designated as prepayment amounts.

4. <u>Security:</u>
This Note is secured by (i) a First Mortgage on real property located on the Island or Cay known as Great Whale Cay in the Berry Islands in the Commonwealth of The Bahamas (the "Principal Indenture") now of record in the Registry of Records in the City of Nassau in Volume 7877, Pages 37 – 45, and (ii) an Indenture of Confirmatory Mortgage and Collateral Mortgage now of record in the Registry of Records of the City of Nassau in Volume 8475, Pages 72 – 79 ("Confirmatory Mortgage"); and, (iii) an Indenture supplemental to the Principal Indenture, dated of even date herewith, modifying and restating certain terms and conditions contained in the Principal Indenture and Confirmatory Mortgage. Holder is entitled to the benefit of this security. Notwithstanding, the Principal Indenture, as modified of even date herewith, contains a partial release schedule whereby Holder has agreed to release certain lands, pursuant to the formula contained therein, from the charge of the Principal Indenture, as modified."

(35) The Second Revised Note provided in Clause 5 that –

> **"5. If any installment of principal or interest is not fully paid within thirty days after the sum becomes due and payable or if any other monetary obligation due under this Note is not paid within thirty (30) days after the same becomes due and payable; or if any non monetary term, covenant, agreement or stipulation of this Note, the Mortgage or of any other instrument securing the Note is not promptly or fully performed within thirty (30) days after written Notice, or upon assigning for the benefit of creditors or the commencement of any bankruptcy, insolvency or reorganization proceedings, the entire indebtedness (including principal and accrued interest) remaining unpaid, shall at the option of Holder, become immediately due, payable and collectable, and while in default, this Note and any deferred interest shell bear interest at the rate of eighteen (18%) percent per annum."**

(36) The Second Revised Note was executed by Peter Casario, the Managing Director of the Plaintiff. A copy of the Second Revised Note was produced by the Plaintiff.

(37) By an Assignment of Note dated 21 June 2005, AIP assigned the Second Revised Note dated 25 June 2004 to Alice B. Muller and Ralph P. Muller. A copy of the Assignment of Note was produced by the Plaintiff.

(38) By an Assignment of Mortgage dated 21 June 2005, AIP assigned the Collateral Further Charge dated 25 June 2004 by the Plaintiff in favour of Leadenhall as nominee for AIP to Alice B. Muller and Ralph P. Muller. A copy of the Assignment of Mortgage was produced by the Plaintiff.

(39) On 3 October 2005 Leadenhall went into liquidation and Craig Gomez was appointed as liquidator.

(40) By an Assignment of Note dated 26 May 2006, Alice B. Muller and Ralph P. Muller assigned the Second Revised Note dated 25 June 2004 to R & D Muller Ltd., a Florida limited partnership. A copy of the Assignment of Note was produced by the Plaintiff.

(41) By an Assignment of Mortgage dated 27 November 2006 Alice B. Muller and Ralph P. Muller assigned the Collateral Further Charge dated 25 June 2004 to R & D Muller Ltd., a Florida Limited partnership. A copy of the Assignment of Mortgage was produced by the Plaintiff.

(42) Counsel for the Plaintiff submits that no notice of the assignments was given to the Plaintiff.

(43) On 1 June 2009 the Plaintiff executed a Renewed, Amended and Restated Balloon Promissory Note ("the Renewed Note") (also referred to as the "Replaced Note") in favour of AIP, in the sum of US$5,570,000.00.

(44) According to the terms of the Renewed Note –

> **"Commencing on June 1, 2009 Maker shall pay to the Holder installments of simple interest only, quarterly, on the 1st day of September, the 1st day of December, the 1st day of March and the 1st day of June in each year, throughout the term of this Note.**
>
> **Commencing during the 2011 calendar year, the outstanding principal balance of this Note shall be reduced by at least $250,000.00 per year (the minimum reduction**

> **requirement") with such determination to be made as of December 31st of the given year, based on payments received during the period between January 1st of that year and December 31st of that year. Any sum so received by the Holder shall be applied first to any accrued and outstanding interest, if any and then to reduce the outstanding principal balance of this Note.**
>
> **All unpaid principal, accrued interest and unpaid costs shall be due and payable on June 1 2014 (the "Maturity Date") unless sooner accelerated pursuant to the Loan Documents. Maker and Holder hereby acknowledge that, as of the date hereof, no past accrued interest exists on the Principal amount of this Note."**

(45) Clause 15 of the Renewed Note provided –

> **"RENEWAL AND REPLACEMENT**
> **This Note renews, amends, replaces and supersedes that certain Revised and Restated Balloon Promissory Note dated June 25, 2004 executed by Maker and made payable to the order of Holder in the original principal amount of $5,750,000.00 (the "Original Note"). It is the intention of the Maker and Holder that while this Note renews, amends, replaces and supersedes the Original Note, it is not in payment or satisfaction of the Original Note, but rather is the substitution of one evidence of debt for another without any intent to extinguish the old. Should there be any conflict between any of the terms of the Original Note or of this Note the terms of this Note shall control. The Original Note is attached hereto and shall only be negotiated with this Note."**

(46) The Renewed Note was executed by David Casoria. A copy of the Renewed Note was produced by the Plaintiff. The Defendant produced a copy of the Renewed Note showing that the Note was stamped for $69,000.00.

(47) By an Assignment of Note dated 17 December 2009 R & D Muller Ltd assigned the rights and interests in the Second Revised Note dated 25 June 2004 to AIP. A copy of the Assignment of Note was produced by the Plaintiff.

(48) On 20 January 2010 AIP executed a Management Agreement with the Defendant as agent. In this Agreement the Recital stated –

> **"WHEREAS AIP is desirous of appointing the Agent to act as mortgagee under a certain first legal mortgage ("the First Mortgage") of real estate situate at Great Whale Cay one of the Berry Island Group of Cays in the said Commonwealth of The Bahamas owned by Whale Cay Group Limited ("WCG") another Company incorporated under the laws of the said Commonwealth of The Bahamas and its**

present shareholders as collateral security for amounts payable under an Amended Revised Restated Balloon Note ("the Note") dated as of June 1, 2009 issued by WCG in favour of AIP and such First Mortgage is in the process of being fully and properly executed, delivered and transferred as the case may be to the agent and the Agent has consented to accepting same thereto, in its capacity as Agent for AIP."

(49) By the terms of the Management Agreement the Defendant was empowered to, inter alia –

> **"1. Generally to do and perform all such matters and rights for the preservation of the security under the First Mortgage and for enforcing the covenants and provisions on the part of WCG and the shareholders being the Mortgagor under the First Mortgage.**
>
> **3. Generally to exercise any and all powers of a mortgagee that may be conferred by common law equity or statute."**
>
> **4. Generally to execute and perform any other act deed or thing whatsoever relating to all or any of the properties secured by the First Mortgage as fully and effectually to all intents and purposes whatsoever as AIP itself could do if it were the mortgagee thereunder, AIP hereby agreeing to ratify and confirm whatever the Agent shall lawfully do or cause to be done in relation thereto; and**

(50) Further the Management Agreement provided –

> **"AND without prejudice to the generality of the foregoing the Agent will act as trustee for AIP in respect of the First Mortgage and will account to it for any monies or other benefit received by it thereunder and hereby agrees that it will, at the request of AIP, at the cost of AIP if the request is at the discretion of AIP and not as a result of agent being unable or unwilling to continue in its capacity as Agent, with the written consent of WCG, which consent shall not be unreasonably withheld, transfer the First Mortgage to a Substitute Agent or such other person or corporation at such time and in such manner or otherwise deal with the same as AIP shall so appoint, always with the written consent of WCG as above provided."**

(51) Even though the Plaintiff was not a party to the Management Agreement they acknowledged the Management Agreement by executing the Management Agreement. The Management Agreement was executed by David Casoria, the Vice President of the Plaintiff.

(52) The Management Agreement was amended on 20 January 2010. This Deed was made between AIP, the Defendant as Agent and the Plaintiff. The amendment provided –

> **"NOW THEREFORE, AIP, the Agent and WCG agree and confirm that the proper description of the First Mortgage is that as described in Endorsement NO. 5 attached to First American Title Insurance Company Loan Policy No. EA-31-383182, a copy of which is attached hereto and incorporate as Exhibit A."**

(53) This Amendment Agreement was executed by AIP, the Defendant, and the Plaintiff, David Casoria, the Vice President. The Management Agreement and the Amendment Agreement were produced by the Plaintiff.

(54) By mortgage dated 20 January 2010 ("the January 2010 Mortgage") the Plaintiff executed a mortgage in favour of the Defendant. This mortgage stated that it was supplemental to the following mortgages –

1. Collateral Mortgage dated 2nd August 2000 Whale Cay Group Limited to Leadenhall Bank and Trust Company Limited Recorded in Volume 7877 at pages 37 to 45. ("the Original Mortgage")

2. Confirmatory Mortgage and Collateral Mortgage dated 13 June 2002 Whale Cay Group Limited to Leadenhall Bank and Trust Company Limited Recorded in Volume 8475 at pages 72 to 79. ("the Confirmatory Mortgage and Collateral Mortgage")

3. Collateral Further Charge dated 25 June 2002 Whale Cay Group Limited to Leadenhall Bank and Trust Company Limited Recorded in Volume 9257 at pages 184 to 195. ("the Collateral Further Charge").

The Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage and the Collateral Further Charge are collectively referred to as ("the Mortgages").

(55) The January 2010 Mortgage provided –

> **"1. In consideration of the premises the Mortgagor as BENEFICIAL OWNER hereby declares that ALL the said hereditaments comprised in the Mortgages and remaining subject thereto shall henceforth be a security for and be charged with the payment of the amount secured and payable with interest by the Replaced Note in lieu of the amount presently owing under the said Promissory Notes and that no part of the same shall be redeemable until the full amount of the Replaced Note with interest shall be fully paid to the Lender.**
>
> **2. All the powers and provisions contained in the Mortgages (except the amounts thereby respectively secured) but including the provisions for release from the security of the same shall be applicable for securing the payment of the amount secured and payable with interest by the Replaced Note and for enforcing and defining the rights of the parties under the security hereby constituted as if the amount of the Replaced Note and the interest thereon had comprised the principal money and interest thereon payment whereof is secured by the Mortgages.**
>
> **3. The provisions hereof shall relate back to the date of the Replaced Note and shall take effect accordingly."**

(56) This January 2010 Mortgage referred to the Promissory Notes which were executed by the Plaintiff in favour of AIP. Additionally in the Recital the January 2010 Mortgage stated that –

> **"B. The said Promissory Notes have now been replaced by a Renewed, Amended and Restated Balloon Promissory Note dated June 1 2009 in favour of the Lender in the amount of Five Million Seven Hundred and Fifty Thousand dollars in the currency of the United States of America (US$5,750,000.00) hereafter called "the Replaced Note")."**

(57) The January 2010 Mortgage was executed by David Casoria, the Vice President and Secretary of the Plaintiff. A copy of the January 2010 Mortgage was produced by the Plaintiff.

(58) By order of Turner J dated 11 June 2010 and filed 10 August 2010 it was ordered inter alia –

> **"2. The court is satisfied that the assets requested to be transferred, to wit, that certain Collateral Mortgage between Whale Cay Group Limited and Leadenhall Bank & Trust Company Limited (American Investment Properties, Inc., as Lender) dated the 2nd day of August, A.D., 2000 and recorded in the Registry of Records ("the Registry") in the City of Nassau**

in Volume 7877 at pages 37 to 45, and that certain Confirmatory Mortgage and Collateral Mortgage between Whale Cay Group Limited and Leadenhall Bank & Trust Company Limited (American Investment Properties, Inc., as Lender) dated the 13th day of June, A.D., 2002 and recorded in the Registry in Volume 8475 at pages 72 to 79, and that certain Collateral Further Charge between Whale Cay Group Limited and Leadenhall Bank & Trust Company Limited (American Investment Properties, Inc., as Lender) dated the 25th day of June, A.D., 2004 and recorded in the Registry in Volume 9257 at pages 184 to 195 and that certain Collateral Mortgage between Whale Cay Group Limited and Leadenhall Bank & Trust Company Limited (Peter Casoria, Jr., as Lender) dated the 2nd day of August, A.D., 2000 and recorded in the Registry in Volume 7877 at pages 46 to 55, and that certain Confirmatory Mortgage and Collateral Mortgage between Whale Cay Group Limited and Leadenhall Bank & Trust Company Limited (Peter Casoria, Jr., as Lender) dated the 13th day of June A.D., 2002 and recorded in the Registry in Volume 8475 at pages 80 to 89 (collectively referred to as "the Assets') do not form a part of the estate of the Leadenhall Bank & Trust Company (In Liquidation) and therefore, would authorized the transfer of the Assets to The Private Trust Corporation Limited, for the sole benefit of American Investment Properties, Inc., and Peter Casoria, Jr., respectively.

3. **The court authorizes Leadenhall Bank & Trust Company Limited and the Liquidator to execute any and all reasonable documents necessary to effectively accomplish the transfer of the Assets set forth above, including but not limited to: -**
   a. **Appointment of New Trustee; and**
   b. **Any Affidavits required to clear title to the property encumbered by the Assets."**

A copy of the Order of Turner J. was produced by the Plaintiff.

(59) On 23 November 2010, by Order of Turner J, Leadenhall Bank and Trust Company Limited, in liquidation and Craig A. Gomez, the liquidator of Leadenhall Bank and Trust Company Limited executed a Transfer of Mortgage to the Defendant ("the Transfer of Mortgage"). The Transfer of Mortgage stated that it was supplemental to the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage, the Collateral Further Charge and the Note, the Revised Note and the Second Revised Note. The Transfer of Mortgage provided –

"1. In pursuance of the said agreement and in consideration of the premises the Mortgagee as Mortgagee hereby grants and conveys unto the Transferee ALL THAT the said hereditaments comprised in and assured by the Principal Indenture the Confirmatory Mortgage and the Collateral Mortgage and the Collateral Further Charge or such of the same as remain vested in the Mortgagee subject to redemption by virtue of the Principal Indenture TO HOLD the same unto and the use of the Transferee in fee

> **simple with all such powers rights and remedies but subject to such right or equity of redemption as are now respectively subsisting in respect of the said hereditaments by virtue of the Principal Indenture and the Confirmatory Mortgage and the Collateral Further Charge.**
>
> **2. The Liquidator hereby covenants with the Transferee that he has not done or knowingly suffered or been party or privy to any act or thing whereby the Mortgagee is prevented from transferring the said hereditaments hereinbefore transferred in manner aforesaid."**

(60) This Transfer of Mortgage was stamped for $10.00 and recorded in Volume 11423 at pages 95 to 101. A copy of the Transfer of Mortgage was produced by the Plaintiff and the recorded copy of the Transfer of Mortgage was produced by the Defendant.

(61) By instrument dated 23 November 2010 Leadenhall, as Retiring Trustee, and Craig A Gomez, as liquidator and the Defendant, the Defendant was appointed the new Trustee ("Deed of Appointment"). The Recitals to the Deed of Appointment provided –

> **"A. This deed is supplemental to FIRST a Deed of Trust dated the Second day of August A.D. 2000 (hereinafter called "the First Trust Deed") by the Retiring Trustee of certain property situate at Great Whale Cay in the Berry Islands in the said Commonwealth of The Bahamas mortgaged to the Retiring Trustee pursuant to an Indenture of Collateral Mortgagee of even date thereof made between Whale Cay Group Limited of the one part and the Retiring Trustee of the other part and recorded in the Registry of Records in the said City of Nassau in volume 7877 at pages 46 to 55 as collateral security to a Promissory Note issued by the said Whale Cay Group Limited to Peter Casoria in the amount of Two million Two hundred and Fifty-eight thousand One hundred and Forty dollars in the currency of the United States of America (US$2,258,140.00) AND SECONDLY A Deed of Trust dated the Thirteenth day of June A.C. 2002 (hereinafter called "the Second Trust Deed") also by the Retiring Trustee of further property situate as aforesaid mortgaged to the Retiring Trustee pursuant to an Indenture of Collateral Mortgage of even date thereof made by the said Whale Cay Group Limited of the one part and the Retiring Trustee of the other part and recorded in the said Registry of Records in Volume 8475 at pages 80 to 89.**
>
> **B. The Retiring Trustee being a company in liquidation and incapable of continuing to act as trustee of the trusts in the First Trust Deed and the Second Trust Deed is desirous of appointing the New Trustee to be the trustee of the First Trust Deed and the Second Trust Deed in place of the Retiring Trustee."**

(62) Clause 1 and 3 of the Deed of Appointment provides –

> **"1. In exercise of the power conferred upon it by the Trustee Act 1998 and of every other power enabling it the Retiring Trustee hereby appoints the New Trustee to be the trustee of the First Trust Deed and The Second Trust Deed in place of the Retiring Trustee.**
> ...
>
> **3. Pursuant to the said appointment the Retiring Trustee as Trustee hereby grants and conveys unto the New Trustee ALL THAT the property comprised in the First Trust Deed and the Second Trust Deed or such of the same as remains vested in the Retiring Trustee subject to redemption by virtue of the said Indentures of Collateral Mortgage TO HOLD the same unto and to the use of the New Trustee in fee simple subject to the powers and provisions of the First Trust Deed and the Second Trust Deed."**

(63) Even though the Deed of Appointment was referred to in the Second Affidavit of Adrian Crosbie Jones and produced by the Defendant, this Deed referred to the Trust Deed executed by Leadenhall to Peter Casoria, and mortgage from Leadenhall to Peter Casoria and is not relevant to these proceedings.

(64) In 2011 the Plaintiff was unable to meet its payment obligations and agreed with AIP to provide for a partial moratorium of the interest payments.

(65) The Plaintiff executed a Letter of Understanding ("the Letter Agreement") addressed to AIP and R & D Muller Ltd. on 17 January 2011. This Letter Agreement was with respect to –

> **"Re: $5,750,000 loan (the "Loan") from American Investment Properties, Inc. ("AIP") to Whale Cay Group Ltd. ("Borrower") evidenced by that certain Renewed, Amended and Restated Balloon Promissory Note in the original principal amount of $5,750,000.00 made by Borrower in favour of AIP as of June 1, 2009, (the "Note"), as assigned by AIP to Ralph and Alice Muller, as subsequently assigned by Ralph and Alice Muller to R&D Muller, Ltd., and subsequently reassigned to AIP ("R&D"; AIP and R&D are collectively referred to herein as "Lender"), secured by that certain Collateral Mortgage dated August 2, 2000, from Borrower to Leadenhall Bank & Trust Company, Limited ("Leadenhall"), as trustee for AIP, recorded in Volume 7877 at pages 37 to 45, as confirmed by Indenture of Confirmatory Mortgage and Collateral Mortgage dated June 13, 2002, recorded in Volume 8475 at pages 72 to 79, as further charged by way of Collateral Further Charge dated June 25, 2004, recorded in Volume 9257 at pages 184 to 195, all of the Registrar's records of the Commonwealth of The Bahamas, all as subsequently assigned The Private Trust Company as Trustee ("Private Trust Company") (collectively, the "First Mortgage"), and the mortgage in favour of Leadenhall, as trustee for Peter Casoria as evidenced by that certain**

Collateral Mortgage dated August 2, 2000, from Borrower to Leadenhall, recorded in Volume 7877 at pages 46 to 55, as confirmed by Confirmatory Mortgage dated June 13, 2002, recorded in Volume 8475 at pages 80 – 89, all of the Registrar's records of the Commonwealth of The Bahamas, all as subsequently assigned to the Private Trust Company as Trustee (collectively, the "Second Mortgage") (the First Mortgage and Second Mortgage are sometimes referred to collectively as the "Mortgages")

(66) This Letter Agreement stated –

"This Letter Agreement (Agreement) will serve to establish the agreement between the parties regarding the outstanding issues to effectuate our request for a partial moratorium of the payment of interest along with our request for compensation for or payment of certain expenses related to various transactions and activities related to the Mortgages and will form the basis for the amendment of the First Mortgage and Note, the terms of such amendments to be agreed to by the parties in accordance with the provisions herein. We have now reached an agreement as follows:

1) **Commencing retroactively to December 1, 2010, the First Mortgage payment of One Hundred Fifteen Thousand ($115,000.00) USD per quarter, shall be reduced to a new quarterly payment of Seventy Thousand ($70,000.00) for the next four (4) quarters (i.e. December 1, 2010, March 1, 2011, June 1, 2011 and September 1, 2011). Thereafter, as of December 1, 2011, the quarterly payments shall be increased for the remainder of the term of the First Mortgage to the new regular quarterly payment as defined in the Amended Note to be executed in accordance with the terms of this Agreement. The Forty-five thousand ($45,000.00) deferment on each of the four quarters shall be added to the principal balance of the Note secured by the First Mortgage, resulting in a total increase at the end of the one year deferment period of One Hundred Eighty Thousand ($180,000.00) USD to the Note, for a new principal balance of Five Million Nine Hundred Thirty Thousand ($5,930,000.00) USD. The Note will be modified upon the signing of this Agreement to provide for the deferment of the interest, the addition of the deferred amount to the principal of the Note as each period arises, the revised interest based on the addition to the principal of the Note and any additional changes as necessary to effectuate the terms of this Agreement.**

2) **On an ASAP basis no later than fifteen (15) days from execution of this Agreement, AIP shall order its First Mortgagee Title Insurance Policy on the First Mortgage, and be responsible for the expenses to IDM, as agent for First American Title Insurance for same, which is estimated to cost approximately twenty-three thousand ($23,000.00) USD. The title premium, including the title charges, for this Policy ("Reimbursement of Title Costs") shall be reimbursed to AIP by WCG (without interest) at the Maturity date of the Note secured by the First Mortgage, unless the First Mortgage is paid off sooner, in which case the Reimbursement of Title Costs shall be paid as a precondition to the satisfaction of the First Mortgage. WCG and AIP, and its officers, partners or members agree to sign any and all documentation required by IDM or its underwriter to provide clear title.**

3) AIP agrees to pay WCG fifty (50%) percent of the total Higgs & Johnson attorneys' fees and costs which have been charged during the last approximately four (4) years (including on an ongoing basis any future billing), specifically related to, and only those related to, the Leadenhall Bank/Private Trust Company/First and Second Mortgage/Issuance of the First and Second Mortgagee Title Policies not to include any fees and costs beneficial to the Owner's Policy, up to a maximum cap of fifty (50%) percent of One Hundred Thousand ($100,000.00) USD, or Fifty thousand ($50,000.00) USD. This agreement to share in the fees is conditioned on the opportunity to review all billings from Higgs & Johnson during the periods for which contribution is requested. AIP shall pay Ten Thousand Dollars per quarter upon receipt of the quarterly, adjusted interest payment up to the amount agreed upon review of the invoices up to the maximum.

4) AIP and WCG agree to share on a 50% / 50% basis the Trustee fees of The Private Trust Company relating to the First Mortgage which are currently outstanding and on an annual basis as such Trustee fees are charged. Should there be any reimbursement of prepaid fees to The Private Trust Company upon AIP receiving approval to hold the First Mortgage as mortgagee by the Investment Board for the Commonwealth of The Bahamas, the reimbursement shall be shared in the same proportion as originally paid.

5) On an ASAP basis no later than fifteen (15) days from execution of this Amendment, WCG shall pay the entire Fifty-Seven Thousand Five Hundred ($57,500.00) USD Bahamian Stamp Tax due on the First Mortgage (if there are any penalties on the first Mortgage above $57,500.00 related to the payment of the Bahamian Stamp Tax on the first Mortgage, then the penalties only shall be divided equally 50% / 50% between AIP and WCG). AIP had previously been obligated under a previously executed Tax Indemnification Agreement to pay twenty-five (25%) of the Bahamian Stamp Tax due on the First Mortgage. WCG and AIP hereby agree that in consideration of WCG paying 100% of the Bahamian Stamp Tax hereunder, (excluding any penalties, if any), AIP's 25% portion as provided for under the Tax Indemnification Agreement shall instead be credited as payment in full to AIP of the monies otherwise owed from WCG to AIP for reimbursement of the prior overpayment by AIP of the Property Taxes.

6) WCG, through Peter and David Casoria, shall add an additional two (2) water front lots located on Whale Cay (Lots 108 and 109), free and clear of any liens or encumbrances, to the existing eleven (11) Casoria Lots (Lots 4, 17, 26, 43, 105, 107, 110, 111, 113, 132, 133, collectively the 13 total Lots shall be referred to as "Participation Lots") previously pledged to AIP under the Revenue Participation Agreement dated December 17, 2009 by amendment to the Revenue Participation Agreement. AIP agrees to be responsible for any and all costs associated with recording including legal fees to secure and/or obtain any approvals from the Bahamian Government in the event AIP in AIP's sole discretion requires additional legal protections beyond the terms and conditions of this Amendment. The Costs so paid by AIP shall be reimbursed to AIP by WCG (without interest) at the Maturity Date of the Note secured by the First Mortgage, unless the First Mortgage is paid off sooner, in which case the Reimbursements of the costs shall be paid as a precondition to the satisfaction of the First Mortgage.

> **In all other respects the First Mortgage, the Note and the Revenue Participation Agreement between the parties remain unchanged, in full force and effect and are hereby ratified by the parties below."**

(67) This Letter Agreement was amended on 11 May 2011 in paragraph 6 with respect to the additional Lots. Further the First Amendment provided –

> "Further it is agreed that the following parties are hereby added as parties to the Letter of Understanding by virtue of their ownership of the following participation Lots, and by their signature consent to the term and provision of the Letter of Understanding.
>
> a. Peter Casoria, Jr. as the owner of Lots 4, 17, 26 and 43;
> b. Patricia Casoria, as the owner of Lots 105, 107, 110, 111 and 113;
> c. Damaso W. Saavedra, as Trustee for PCD Investments CLC, a Florida Limited liability company, as the owner of Lots 2 and 5; and
> d. PCD Investments, LLC, a Florida Limited liability company, as the owners fo Lots 1 and 3."

(68) The Letter Agreement and the Amended Letter Agreement was executed by Peter Casoria Jr., the President of the Plaintiff. The Letter Agreement and the Amended Letter Agreement was produced by the Defendant.

(69) On 1 September 2011 the Plaintiff executed a Balloon Promissory Note ("the Balloon Note") in favour of AIP. This Note provides inter alia –

> **"Maker is also the maker of that RENEWED, AMENDED AND RESTATED BALLOON PROMISSORY NOTE (Renewed Note) dated as of December 1, 2009 in the original principal amount of Five Million Seven Hundred Fifty and 00/100 Dollars US ($5,750,000.00). This BALLOON PROMISSORY NOTE (Note) is to evidence the amount due from Maker to Holder as a result of the Agreement by Holder with Maker to forego certain interest payments due under the Renewed Note as follows:**
>
> > **Commencing with the interest payments due December 1, 2010 on the Renewed Note through the interest payment due September 1, 2011, Maker shall pay the sum of Seventy Thousand and no/00 ($70,000.00) with excess interest accrued and not paid for those four quarters along with the additional interest due on the accrued amount for the period not paid to be evidenced by a new note."**

(70) This Note was secured by the Original Mortgage, the Confirmatory and Collateral Mortgage, the Collateral Further Charge (collectively referred to as the "Mortgages"). It

was agreed that the Mortgages securing the Note shall be superior in right and title to the Second Mortgage made between the Plaintiff and Leadenhall as Trustee for Peter Casoria being a mortgage dated 2 August 2000 and a Confirmatory Mortgage dated 13 June 2002.

(71) By the terms of the Balloon Note –

> **"All unpaid principal, accrued interest and unpaid costs shall be due and payable on June 1 2014 (the "Maturity Date") unless sooner accelerated pursuant to Loan Documents."**

(72) This Balloon Note was executed by David Casoria, Vice President of the Plaintiff. A copy of the Balloon Note was produced by the Defendant.

(73) By a Reconveyance of Interest dated 19 September 2012, Ralph P. Muller, as Mortgagee, conveyed and transferred to AIP all his interest in the hereditaments contained in Exhibit A and Lot 54 the GREAT HOUSE DEVELOPMENTS PHASE ONE (1) SUBDIVISION Great Whale Cay, Berry Islands and –

> **"including any legal or equitable interest in the hereditaments described in the schedule of that certain collateral mortgage bearing the date of 25 June 2004 in favour of LEADENHALL BANK AND TRUST COMPANY LIMITED a Bahamian Company as nominee for AMERICAN INVESTMENT PROPERTIES INC. recorded in the public record of The Bahamas and currently having been transferred to THE PRIVATE TRUST CORPORATION LIMITED as nominee together with any and all interest in and to the Revised and Restated Balloon Promissory Note dated June 25 2004 as further amended."**

A copy of the Reconveyance of Interest was produced by the Plaintiff.

(74) Counsel for the Plaintiff pointed out that Ralph P Muller had no such interest to reconvey having already assigned such interest to R & D Muller Ltd. on 27 November, 2006.

(75) By a Reconveyance of Interest dated 20 September, 2012, R & D Muller Ltd., conveyed to AIP its interest in the hereditaments more particularly described in Exhibit A and Lot 54 the GREAT HOUSE DEVELOPMENTS PHASE ONE (1) SUBDIVISION Great Whale Cay, Berry Islands. This reconveyance also referred to the Collateral Mortgage dated 25 June 2004 in favour of Leadenhall as nominee for AIP currently being transferred to the Defendant as nominee together with any and all interest in and to the Revised and Restated Balloon Promissory Note dated June 25, 2004 as further amended. A copy of the Reconveyance of Interest was produced by the Plaintiff.

(76) By Reconveyance of Interest dated 8 January, 2013, Alice B. Muller reconveyed her interest to AIP in the hereditaments more particularly described in Exhibit A and Lot 54 the GREAT HOUSE DEVELOPMENTS PHASE ONE (1) SUBDIVISION Great Whale Cay, Berry Islands. This reconveyance also referred to the Collateral Mortgage dated 25 June 2004 in favour of Leadenhall as nominee for AIP currently being transferred to the Defendant as nominee together with any and all interest in and to the Revised and Restated Balloon Promissory Note dated June 25, 2004 as further amended. A copy of the Reconveyance of Interest was produced by the Plaintiff.

(77) A Collateral Further Charge dated 15 May 2012 ("the May 2012 Mortgage") was executed between the Plaintiff, as Mortgagor and the Defendant as Mortgagee. The Recitals stated that this mortgage was supplemental to -

(i) the Principal Indenture dated 2 August 2000, made between the Plaintiff and Leadenhall (the Original Mortgage);

(ii) the Confirmatory Mortgage and Collateral Mortgage dated 13 June 2002 made between the Plaintiff and Leadenhall; (the Confirmatory and Collateral Mortgage) and

(iii) the Collateral Further Charge dated 25 June 2004 made between the Plaintiff and Leadenhall (the Collateral Further Charge).

(78) The May 2012 Mortgage also referenced the Promissory Notes made by the Plaintiff in favour of AIP, the Note, the Revised Note and the Renewed Note. The May 2012 Mortgage also made reference to the Transfer of Mortgage dated 23 November 2010 made between Leadenhall as the Original Mortgagee, Craig Gomez as Liquidator, and the Defendant, as Mortgagee whereby the benefit of the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage and the Collateral Further Charge were transferred to the Defendant together with a conveyance of the said hereditaments and premises or such of the same as remained vested in Leadenhall subject to redemption by virtue of the Principal Indenture.

(79) The May 2012 Mortgage provided for the principal sum of $5,750,000.00 to be increased by a further amount of $185,497.50 ("the Further Advance") to be secured and payable with interest by a further Promissory Note dated 1 September 2011 (the Further Note) in favour of AIP and a further charge of the said hereditaments and premises remaining subject to the Principal Indenture, (the Original Mortgage), the Supplemental Indenture, the Confirmatory Mortgage and Collateral Mortgage and the Collateral Further Charge.

(80) Further the May 2012 Mortgage provided –

> **"1. The Mortgagor as Beneficial Owner hereby declares that all the said hereditaments and premises remaining subject to the security hereinbefore recited shall henceforth be a security for and be charged with the payment of the Further Advance and the amount secured and payable with interest by the Further Note.**
>
> **2. All the powers and provisions contained in the Principal Indenture the Supplemental Indenture and the Collateral Further Charge shall be applicable for securing the payment of the Further Advance and the amount secured and payable with interest by the Further Note as if the amount of the Further Note and the interest thereon with the Renewed Note had comprised the principal money and the interest thereon the payment whereof is secured by the Principal Indenture the Supplemental Indenture and the Collateral Further Charge."**

(81) The May 2012 Mortgage was executed by David Casoria, the Vice President and Director of the Plaintiff. This mortgage was stamped for $10.00 and recorded in Volume 11636 at pages 523 to 530. The May 2012 Mortgage was produced by the Defendant.

(82) On 1 July 2013 the Plaintiff and AIP entered into a Forbearance and Standstill Agreement For First and Collateral Mortgage encumbering Whale Cay ("Forbearance Agreement"). The Recitals to the Forbearance Agreement explain the reason for the Forbearance Agreement. These Recitals state –

> **"WHEREAS, Whale Cay has previously executed the Loan and Note as well as the Further Mortgage and Further Note; and**
>
> **WHEREAS, In October, 2012, AIP and Whale Cay did enter into an agreement ("Extension") providing for extended payment of the Interest payment due September 1, 2012, and December 1, 2012; and**
>
> **WHEREAS, in the Extension, the December 1, 2012 payment was agreed to be paid by Whale Cay on or before January 15, 2013; and**
>
> **WHEREAS, the payment due on or before January 15, 2013 was not paid timely by Whale Cay; and**
>
> **WHEREAS, the Note provided for a Two Hundred Fifty Thousand Dollar ($250,000.00) principal payment to be due January 1, 2013, which by the terms of the Note was past due on January 30, 2013; and**
>
> **WHEREAS, The Further Note provided for a minimum principal pay down of at least One Hundred Thousand Dollars ($100,000.00) due on January 1, 2013, and past due on January 30, 2013; and**
>
> **WHEREAS, neither principal pay down as required by the Note or Further Note have been made as of the signing of this Agreement; and**
>
> **WHEREAS, AIP did issue its Notice of Default, Notice of Demand for Payment, Notice of Intent to Enforce Right of Sale on January 16, 2013 ("Notice of Default"); and**
>
> **WHEREAS, Whale Cay shall now make payments in the amounts and on the dates as provided in this Agreement; and**
>
> **WHEREAS, In consideration of Whale Cay entering into this Agreement, AIP agrees to retract its Notice of Default; and**
>
> **WHEREAS, Whale Cay has requested additional time in which to: (i) locate a party to refinance the Loan and Further Note; (ii) to delay the partial payment of principal as required by the Note and Further Note; (iii) and to delay the payment of Interest as required by the Note and Further Note along with other consideration; and**

WHEREAS, AIP is willing to consent to such requests set forth above to provide such time to Whale Cay under certain terms and conditions which terms and conditions Whale Cay is willing to accept and agree to."

(83) According to the terms of the Forbearance Agreement –

"2. AIP agrees to retract its currently outstanding Notice of Default without prejudice to its right to reissue a New Notice of Default in the event of a further default or to exercise any other right and pursue any other remedies available under the terms and conditions set forth herein and in the loan and Note as well as the Further Mortgage and further Note except as modified herein.

3. AIP does hereby agree not to issue a New Notice of Default or to exercise its Power of Sale during the term of this Agreement provided Whale Cay does not default on the terms and conditions contained herein and in the Mortgages and Notes... AIP agrees to this extension in order to allow Whale Cay time in which to satisfy the Loan and Further Note. As a further condition of this Agreement, Whale Cay warrants that it shall provide AIP with detailed narrative updates no less frequently than quarterly, and as frequently as on a monthly basis upon request from AIP."

4. During the term of this agreement, all payments received by AIP shall be applied and credited as follows against the amounts by Whale Cay to AIP owed as follows:

(i) First applied toward the next due and owing interest only payment (to the extent one is due and owing in the subsequent twenty-four (24) months;
(ii) then to the default interest and late fee penalty set forth in Section 6 below;
(iii) and then against the principal balance then outstanding.

5. Pursuant to the terms of the Note and Further Note, there was an interest payment due March 1, 2013, in the amount of One Hundred Fourteen Thousand One Hundred Twenty-Four Dollars and Eighty-Eight Cents ($114,124.88). AIP hereby acknowledges and agrees that the Interest payment due March 1, 2013, was subsequently paid by Whale Cay and accepted by AIP. Under the terms of the Note and Further Note, the next upcoming interest payment would otherwise be due June 1, 2013, in the amount of One Hundred Sixteen Thousand Six Hundred Sixty Dollars' and Ninety-Nine Cents ($116,660.99). AIP further agrees that the interest payment which would otherwise be due June 1, 2013, may be paid by Whale Cay at any time on or before August 11, 2013. Unless triggered by the event set forth below and therefore modified as detailed in Section 8, thereafter, interest only payments in the amounts to be determined based on the outstanding principal balance due before the additions of amounts to principal as provided in this Agreement at the interest rate provided in the Note and Further Note for the number of days between payments shall be due on the following dates: November 11, 2013, February 11,2 014, May 11, 2014 with a final payment of interest and all accrued principal and other amounts due at the Maturity of the Loan and Further Note, to wit: June 24,

2014. There shall be a ten (10) day grace period for all interest only payments due as set forth herein. If any of the interest only payments set forth above are not received by the dates agreed (with a ten (10) day grace period thereafter), Whale Cay shall be in default of this Agreement, the Note, the First Mortgage, the Further Note and the Further Mortgage. In such event, all further interest and principal payments due under the Note and Further Note shall be due as provided in the Note and Further Note without further notice unless otherwise agreed to in writing by te parties.

6. Based on a Letter Agreement signed in October, 2012, AIP agreed to delay receipt of the interest payments' due September 1, 2012, and December 1, 2012. By the Letter Agreement, should there be default in either of the payments, default interest would be due. Attached as Exhibit "A" is a calculation of the default interest calculation through the date of full payment of the standard interest rate payments for September 1, 2012, and December 1, 2012, as well as the assessment of a late payment penalty. As a result of the default in thepayment of the interest as agreed in the Letter Agreement, there is default interest and late payment penalties due in the amount of Three Hundred Nineteen Thousand, Four Hundred, Fifty-Six Dollars and Twenty-Nine cents ($319,456.29). that amount shall be added to the principal of the Mortgage to be due and payable at the payoff of the Mortgage."

(84) The Forbearance Agreement was executed by Peter Casoria, the President of the Plaintiff and guaranteed by a number of guarantors including Peter Casoria and David Casoria. A copy of the Forbearance Agreement was produced by the Defendant.

(85) The maturity date for the Renewed Note and Balloon Note was extended to 24 June 2014. The Plaintiff did not comply and failed to pay the monies as agreed.

(86) On 3 July 2014 AIP, through their US attorney, Hinman, Howard & Kattell LLP issued a Notice of Default, Notice of Demand for Payment and Notice of Intent to Enforce Right of Sale. This Notice was issued pursuant to the Renewed Amended and Restated Balloon Promissory Note dated 1 June 2009 (The Renewed Note).

(87) This Notice was addressed to the Plaintiff, Peter Casoria and Patricia Casoria, Damaso Saavedra, Trustee and David Casoria and Lisa Casoria. This Notice made reference to the Promissory Notes, the Letter Agreement, and the Forbearance Agreement and stated that payment of interest, principal and additional items due June 24, 2014 were past due and owing.

(88) This Notice also made reference to other mortgages with Patricia Casoria, Damaso W Saavedra as Trustee for PCD Investments LLC. These mortgages are not relevant to these proceedings.

(89) The Notice demanded –

> **"DEMAND is hereby made for payment of the amount of $6,280,986.67 within seven days (7) of the date of this letter. Interest will continue to accrue from June 24, 2014 to date of payment at the rate of eighteen percent (18%) per annum. If not paid before July 9, 2014, a late payment penalty of $314,049.28 will also be due and owing. The per diem until payment is $3,097.47. The appropriate amount of additional interest must be included in the payment to the date of payment, if made. Should you default in the payment of this amount in the time specified, my client will exercise its power to sell the property together with all other rights under the Renewed Note, Balloon Note, mortgages and Guaranty Agreements, exercised according to the terms agreed to in the Forbearance Agreement."**
>
> **Demand is additionally made for the delivery of all deeds and documents relating to the property or to the title thereto pursuant to S 23 (7) of the Conveyancing and Law of Property.**

(90) The Plaintiff produced a copy of this Notice. As a result of this Notice the Plaintiff commenced the extant proceedings in the Supreme Court.

(91) After these proceedings were commenced, by letter dated 16 December 2014 the Defendant issued a Notice of Default, Notice of Demand for Payment, Notice of Intent to Enforce Right of Sale. This Notice was addressed to the Plaintiff, Peter Casoria and Patricia Casoria, Damaso Saavedra, Trustee and David Casoria and Lisa Casoria. This Notice made reference to the Mortgages, the Renewed Note, the Balloon Note, the Letter Agreement and the Forbearance Agreement. More specifically the Notice stated inter alia –

> **"Therefore, pursuant to the terms of the mortgages PTC hereby demands payment of the amount of $7,902,219.25 within twenty-one (21) days of the date of this letter. Interest will continue to accrue from December 1, 2014 to date of payment at the rate of eighteen percent (18%) per annum. The per diem interest until payment is $3,024.93. The appropriate amount of additional interest must be included in the payment to the date of payment, if made. Should you default in the payment of this**

amount in the time specified, PTC shall have the right to exercise its power to sell the property.

DEMAND is additionally made for the delivery of all deeds and documents relating to the property or to the title thereto pursuant to s. 23(7) of the Conveyancing and Law of Property Act of The Bahamas.

By this letter, notice is hereby give to all mortgagors of the intent of PTC to exercise its rights of sale, at the appropriate time in the future, of the properties encumbered if payment of the outstanding interest and late payment penalty due are not paid immediately. Please be advised that the exercise of the power of sale is not imminent. As such, there is no necessity for an ex parte application for an injunction restraining the same. In the event that such an application is made then, in keeping with the duty of full and frank disclosure, we would expect this letter and in particular this paragraph to be brought to the Court's attention.

PLEASE GOVERN YOURSELVES ACCORDINGLY"

(92) All the Promissory Notes contained a clause that the provisions are to be construed according to and are to be governed by the laws of Florida.

Submissions by Plaintiff and Defendant

(93) In the Affidavit of David Casoria, a Director of the Plaintiff, filed 28 July 2014 the deponent stated the basis of the claim.

"3. The genesis of this matter is a Mortgage (hereinafter referred to as the "First Mortgage") entered into between WCG and Leadenhall on 2 August, 2002, wherein certain properties owned by WCG (hereinafter referred to as "the said hereditaments"), and more particularized in the schedule to the First Mortgage, were mortgaged to Leadenhall. However, WCG received no monies from Leadenhall in consideration of the execution of the First Mortgage nor did it ever make any payments whatsoever to Leadenhall despite the express provisions of the First Mortgage requiring payments to be made to Leadenhall. WCG states that all monies received by it were lent by AIP, a company incorporated in Florida, and secured by a Promissory Note governed under the laws of Florida. All payments pursuant to this Promissory Note were made directly to AIP in Florida, or its assigns.

4. The aforementioned Promissory Note was lost by AIP and replaced with a Revised and Restated Balloon Promissory Note, dated 25 June 2004 (hereinafter referred to as "the Revised Note"). WCG continued to make payments directly to AIP, or its assigns, under the Revised and Restated Balloon Promissory Note.

5. Sometime in or about 2005 Leadenhall went into liquidation and the said hereditaments remained embroiled in the liquidation until the same were released by Order of Mr. Justice Bernard Turner on 11 June 2010.

6. On 1 June 2009 AIP procured a Renewed, Amended and Restated Balloon Promissory Note (hereinafter referred to as the "Renewed Note") on the pretext

that it was the Holder of the aforementioned Revised Note. However, at the time of the execution of the Renewed Note, AIP was not the Holder of the Revised or any Note from WCG.

7. On 20 January, 2010, WCG executed a Mortgage in favour of PTC (hereinafter referred to as the "PTC Mortgage"); however, at the time of the execution of the PTC Mortgage WCG did not receive any monies from PTC nor was it indebted in any way to PTC. Further, no property was conveyed to PTC at the date of the mortgage as the said hereditaments were still being held by Leadenhall.

8. By Indenture, dated 23 November, 2010, Leadenhall purported to transfer the First Mortgage to PTC. At the time of the purported transfer, no debt was owed by WCG to either Leadenhall or PTC, and no consideration was given by PTC to Leadenhall for the transfer of mortgage.

9. To-date, more than twelve (12) years after the date of the First Mortgage, WCG has never made any payments to Leadenhall or PTC under the First Mortgage or any mortgage and the First Mortgage is now extinguished. Further, WCG has never acknowledged any debt to Leadenhall or PTC.

10. On 3 July, 2014, WCG received a Notice of Default, Notice of Demand for Payment and Notice of Intent to enforce Right of Sale from AIP threatening to sell the said hereditaments pursuant to a power of sale. AIP is not a party to the First Mortgage, the PTC Mortgage or any mortgage and has no power of sale over the said hereditaments."

(94) The Plaintiff submits that the Mortgages to Leadenhall were unenforceable as Leadenhall never lent or advanced any funds to the Plaintiff at the time of the execution of the Mortgages or at all. Further the Plaintiff submits that no payments were made to Leadenhall under the terms of the Mortgages, whether by payments towards principal or interest.

(95) Further the Plaintiff alleged that at the time of the Transfer of Mortgage from Leadenhall to the Defendant in November 2010 the Plaintiff was not indebted to Leadenhall. The Plaintiff also alleged that the Mortgages did not contain a date of redemption. By the terms of the Mortgages the Plaintiff agreed to pay Leadenhall the amounts secured by Promissory Notes entered into between the Plaintiff and AIP. The Plaintiff submitted that the obligation to pay Leadenhall in satisfaction of a Note to AIP, in addition to all monies, monies to Leadenhall was a clog on the equity of redemption.

(96) Counsel referred to **Nooke & Co. Limited v Rue 1902 AC 24** where Earl of Halsbury LC stated at page 28 quoting Lord Lindley in **Sandley v Wilde 1899 2 CH** at 479 –

> **"... This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provisions to the contrary notwithstanding that in my opinion in the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void."**

(97) Counsel for the Plaintiff submitted that the words contained in the Original Mortgage whereby it was provided –

> **"The Mortgagor shall pay to the Mortgagee the amount secured by the Note with interest at the rate provided by the Note together with all other monies (if any) due to Mortgagee under these presents."**

was a clog on the equity of redemption.

(98) The Plaintiff maintains that there is no clause for redemption. Counsel for the Plaintiff submitted that a mortgage under the Conveyancing and Law of Property Act should have a fixed redemption date and there should be a fixed amount to repay over a period of years.

(99) The Plaintiff submitted that the Mortgages between the Plaintiff and Leadenhall and the Defendant are void and there is no evidence that Leadenhall or the Defendant advanced any funds to the Plaintiff so as to create a debt between the parties capable of sustaining the security and satisfying the ingredients of a valid mortgage.

(100) The Plaintiff submitted that the law with respect to mortgage is found in the Conveyancing and Law of Property Act which was based on the law in force in England prior to the 1925 Law of Property Act.

(101) Mortgage is defined in the Conveyancing and Law of Property Act as –

> **"any charge on any property for securing money or money's worth."**

(102) Counsel for the Plaintiff submitted that a mortgage must specify what debt is owing, must state an obligation by the mortgagor to pay the debt and the mortgage must contain a right for the mortgagor to redeem its equity. Counsel submitted that the date of redemption is either a fixed date or on demand. A mortgage should also contain a right of the mortgagee to exercise its power of sale where there has been breach of a condition of the mortgage.

(103) Counsel submitted that the Plaintiff borrowed money from AIP. The monies loaned were $3.463 million which was secured by a Promissory Note from the Plaintiff to AIP. This Note was lost and on 23 November 2004 Kevin Muller, Vice President of AIP swore an Affidavit of Lost Note.

(104) The Mortgages between the Plaintiff and Leadenhall confirm that money was lent to the Plaintiff by AIP and not Leadenhall. In the Original Mortgage it was provided.

> **"2. PROVIDED ALWAYS that if the Mortgagor shall pay to the Mortgagee the amount secured by the Note with interest at the rate provided by the Note together with all other monies (if any) due to the Mortgagee under these presents the Mortgagee will at the request and cost of the Mortgagor reconvey the said hereditaments to the Mortgagor or as it shall direct."**

(105) By Clause 1 of the Revised and Restated Balloon Promissory Note dated the 25 June 2004 the Plaintiff promised to pay to the order of AIP, the sum of $5,750,000 at the offices of AIP at 3300 SW 14th Place, Unit 3, Boynton Beach FL 33426 with interest from the 25 June 2004 at a fixed percentage rate per annum equal to eight (8%).

(106) Counsel pointed out that Section 88 of the Bills of Exchange Act of The Bahamas provided for presentment of Note for payment. Section 88 provides –

> **"88. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.**
>
> **(2) Presentment for payment is necessary in order to render the endorser of a note liable.**
>
> **(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an endorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the endorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.**

(107) Counsel submitted that there was no evidence that this Note was presented for payment either by AIP or by the Defendant at the address stated in the Note.

(108) Counsel for the Defendant submitted that the Promissory Notes provided that the Promissory Notes would be construed according to and are governed by the laws of the State of Florida. Counsel for the Defendant submitted that counsel for the Plaintiff produced no opinion on Florida Law and one cannot imply Bahamian law when the document specifically stated that it was governed by Florida Law. Counsel for the Defendant submitted that the Bill of Exchange Act did not apply.

(109) The Plaintiff submits that the Defendant did not have the power of sale under the terms of the Transfer of Mortgage.

(110) Further the Plaintiff submitted that the January 2010 Mortgage between the Plaintiff and the Defendant was void because at the time of the mortgage the hereditaments had been conveyed to Leadenhall. Further that no monies were ever advanced by Leadenhall and no debt was owed to Leadenhall therefore when the mortgage was transferred from Leadenhall to the Defendant the transfer of mortgage was improper and void.

(111) Counsel further submitted that the Transfer of Mortgage from Leadenhall to the Defendant did not state an amount owing to Leadenhall, the Defendant is estopped from contending that any amount is due under the mortgage.

(112) The Defendant filed the Affidavit of Adrian Crosbie Jones on 16 December 2014 in response to the Affidavit of David Casoria filed on 28 July 2014. Mr. Crosbie-Jones is the Managing Director of the Defendant.

(113) In his Affidavit Adrian Crosbie-Jones stated –

> "5. The Plaintiff has failed to give a full and frank disclosure of all of the relevant documents. There are numerous other relevant contractual documents other than those listed in paragraph 2 of the Casoria Affidavit. Immediately following is a list of the omitted relevant documents and the page numbers which they can be found at:
>
> (i) Letter of Understanding dated January 17, 2011 from WCG to AIP a true copy of which is now produced and shown to me and is exhibited hereto as "Exhibit 1".
>
> (ii) First Amendment to Letter of Understanding dated January 17, 2011 from WCG to AIP a true copy of which is now produced and shown to me and is exhibited hereto as "Exhibit 2".
>
> (iii) Balloon Promissory Note dated September 1, 2011 from WCG to AIP a true copy of which is now produced and shown to me and is exhibited hereto as "Exhibit 3".
>
> (iv) Collateral Mortgage dated May 15, 2012 between WCG and PTC a true copy of which is now produced and shown to me and is exhibited hereto as "Exhibit 4".
>
> (v) Forebearance & Standstill Agreement for First and Collateral Mortgage Encumbering Whale Cay dated July 1, 2013 between WCG and AIP a true copy of which is now produced and shown to me and is exhibited hereto as "Exhibit 5".

(114) Counsel for the Defendant acknowledged that the mortgages referred to by the Plaintiff were between the Plaintiff and Leadenhall. However counsel referred to Clause 4(11) of the Original Mortgage where the terms Mortgagor and Mortgagee were defined and **Mortgagee included the holder or holders for the time being of the Note**. The

court holds that AIP is the holder of the Promissory Notes and is therefore a Mortgagee under the Mortgages.

(115) The Defendant pointed out that this was another action brought by the Plaintiff with respect to the funds advanced by AIP. The other action was commenced in the Supreme Court in Freeport, Grand Bahama by Originating Summons filed 22 October 2014. ("the Freeport action")

(116) In the Freeport action the Plaintiffs were Whale Cay Group Limited, First Plaintiff; David Casoria, Second Plaintiff; Peter Casoria, Third Plaintiff; Lisa Casoria, Fourth Plaintiff; Patricia Casoria, Fifth Plaintiff; P & D Investments, LLC, Sixth Plaintiff; and PCD Investments, LLC, Seventh Plaintiff. The Defendant was American Investment Properties Inc. The Originating Summons was supported by the Affidavit of the Second Plaintiff, David Casoria, filed on 22 October 2014.

(117) The Freeport action was captioned inter alia –

> **"IN THE MATTER of a Renewed Amended and Restated Balloon Promissory Note dated 1 June AD 2009 and made between Whale Cay Group Limited as Maker and American Properties Investment Inc. as Holder.**
>
> **IN THE MATTER of a Balloon Promissory Note dated 1st September 2011 and made between Whale Cay Group Limited as Maker and American Properties Investment Inc. as Holder."**

(118) In the Freeport action it was alleged that Whale Cay Group Limited and American Investment Properties Inc. are parties to a Promissory Note dated 25 June 2004 whereby the Defendant lent to the First Plaintiff (WCG) the amount of $5,750,000.00. The Second through Seventh Plaintiffs executed guaranty agreement dated 22 June 2004 for the Promissory Note. The Second through Fifth Plaintiffs are all principals of WCG. The Sixth and Seventh Plaintiffs also guaranteed the Promissory Note.

(119) The Freeport action referred to the same Promissory Notes that are referred to in this present action.

(120) In the Freeport action the Plaintiff sought the following declarations –

> "1. A Declaration that the Defendant is not entitled to receive repayments in accordance with the Promissory Note(s) until permission is granted to the First Plaintiff by the Exchange controller.
>
> 2. A Declaration that in the absence of approval from the Controller under the Regulations, the repayment terms are incapable of performance by the First Plaintiff, having a Resident designation for Exchange Control purposes.
>
> 3. Further and/or alternatively, a Declaration that the condition precedent required for performance of the repayment terms was not satisfied so that the Defendant's Notice of Default under the Promissory Note(s) is premature, invalid and of no effect and that the First Plaintiff is entitled to make application for approval for permission to repay the Defendant in accordance with the Exchange Control Regulations.
>
> 4. An accounting of the transaction(s) between the Plaintiffs and Defendant.
>
> 5. A Declaration that there is neither any debt nor interest owing by the First Plaintiff to the Defendant under the Promissory Note(s).
>
> 6. Alternatively, a Declaration as to the manner in which the amounts paid by the First Plaintiff ought to be applied to the sums due and owing by the First Plaintiff to the Defendant, if any, on the true construction of the terms Promissory Note(s).
>
> 7. A Declaration that the Defendant is not entitled to enforce the Guaranty Agreements dated 22nd and 23rd June, 2004.
>
> 8. A Declaration that the Defendant's right to exercise its Modified Power of Sale has not yet accrued.
>
> 9. And for an order that the Defendant do pay the costs of and occasioned by this Application.
>
> 10. Such further or other relief as the court shall deem just."

(121) By Summons filed 1 November 2014 the Plaintiffs sought leave to issue an Originating Summons on the Defendant and to serve the Originating Summons on the Defendant in Boynton Beach, Florida. Leave was granted by Order dated 2 December 2014 for the Plaintiffs to issue and serve the Originating Summons on the Defendant at

3300 SW 14th Place, Unit 3 Boynton Beach, Florida 33426 – 9034 or elsewhere in the United States of America.

(122) By Summons filed 7 January 2015 the Defendant made application that the order made 2 December 2014 be discharged, service of the documents on the Defendant be set aside and for the action be dismissed.

(123) By Ruling dated 17 August 2015, Deputy Registrar Saunders set aside the order granting leave to serve the Originating Summons out of the jurisdiction. In her ruling the Deputy Registrar held –

> **"Having viewed the documentation put before this court, I am of the view that in essence the Plaintiffs seek to avoid paying the debt owed and delaying the inevitable I therefore set aside the service of the originating summons out of the jurisdiction as it was not a proper case for service out of the jurisdiction and dismiss the action with costs to the Defendant to be taxed if not agreed."**

(124) This action was filed in the Supreme Court in Freeport on 22 October 2014 after these proceedings were filed in New Providence 28 July 2014. There was no reference to the New Providence proceedings in the Affidavits filed in support of the Freeport action.

(125) Counsel for the Defendant submitted that the principles of res judicata and the issue of estoppels applied. According to counsel the issue raised in the present action should have been included in the Freeport action. The Nassau action challenged the mortgages, the Freeport action challenged the Promissory Notes. The Plaintiff gave no explanation to explain why proceedings were commenced in Freeport.

(126) The counsel for the Plaintiff was not counsel for the Plaintiff in the Freeport action. Counsel for the Plaintiff confirmed that the ruling of the Deputy Registrar in the Freeport action has been appealed.

(127) Even though the present action was filed first the Freeport action was heard before the present action. In the ruling by Deputy Registrar Saunders, the Deputy Registrar mentioned that there was also an action in the United States. This action in Florida was filed on 3 December 2014 and served on the Plaintiffs before the Plaintiffs in the Freeport action was able to serve their process on the Defendant. The Defendant in the Freeport action submitted that as a dispute is already pending in a foreign court which was the material and appropriate forum for the resolution of the dispute the matter should be dismissed.

(128) Counsel referred to the decision of Evans J in **Joseph B Elkin and the Private Trust Corporation Limited and Others 2010/CLE/GEN/00158** where Evans J held that the Plaintiff was estopped from bringing the action because this was a claim that should have been brought with the earlier litigation which have all been settled.

(129) In that case the Plaintiff brought an action touching on substantively the very same issues that were pleaded in an earlier action. The earlier action was dismissed by agreement and settled.

(130) Counsel for the Plaintiff submitted that res judicata did not apply as the Freeport action was brought by the Plaintiffs against AIP who was not a party to these proceedings.

(131) By Summons filed 15 December 2014 an application was made by AIP –

> "for an order that it be added as a defendant in this action and that the Originating Summons be amended accordingly by adding its name as a defendant and that it be at liberty to enter an appearance thereto and that the costs of and occasioned by this application be costs in the cause."

This Summons was not proceeded with.

(132) The court finds that the Freeport action dealt with the Promissory Notes made between the Plaintiff and AIP. These Promissory Notes are governed by the laws of Florida. The Promissory Notes are not challenged in the present action. The doctrine of res judicata does not apply even though the Promissory Notes are referred to in the present action. Additionally the Deputy Registrar heard submissions with respect to the application for leave to serve process on the Defendant out of the jurisdiction and not the substantive application.

(133) The court was advised that an appeal to a judge in chambers was filed by the Plaintiff and that the action has not yet been heard.

(134) Counsel for the Defendant maintained that the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage, the Collateral Further Charge and the January 2010 Mortgage and the November 2010 Transfer of Mortgage were all valid documents. Counsel submitted further that even if these mortgages were not valid these mortgages were consolidated in the May 2012 Mortgage.

(135) The May 2012 Mortgage was made on 15 May 2012 and was made between the Plaintiff and the Defendant. The particulars of this mortgage have been referred to above.

Analysis

(136) Counsel for the Defendant noted that the Plaintiff did not challenge the validity of the May 2012 Mortgage. Counsel further submitted that as the May 2012 Mortgage consolidated all the other mortgages, the properties pledged in the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage and the Collateral Further Charge cannot be redeemed without payment of all funds due under the May 2012 Mortgage.

(137) In **Pledge v White 1896 AC 187** the House of Lords held that where a mortgagee is entitled to consolidate mortgages, the mortgagee is also entitled to refuse to redeem one unless he receives payment on all. Counsel for the Defendant alleged

that the redemption of the previous mortgage cannot be ordered without payment on what is due on all consolidated mortgages.

(138) Before considering the prayers by the Plaintiff the court shall consider other submissions made by the counsel for the Plaintiff.

Payment of stamp duty

(139) Counsel for the Plaintiff pointed out that the Original Mortgage dated 2 August 2000, the Confirmatory Mortgage and Collateral Mortgage dated 13 June 2002, the Collateral Further Charge dated 25 June 2004, the Transfer of Mortgage dated 23 November 2010 and May 2012 Mortgage dated 15 May 2012 were all stamped pursuant to Item 54 of the Second Schedule to the Stamp Act at $10.00. Item 54 of the Second Schedule to the Stamp Act provided –

> **"54. Every instrument not otherwise provided for in this Act."**

(140) Counsel for the Plaintiff further pointed out that the Second Schedule to the Stamp Act in Item 24 provided for the stamping of mortgage and transfer of mortgage –

> **"24. Every mortgage or transfer of mortgage of realty or personalty or both, for every $100.00 or fraction thereof."**

(141) Counsel submitted that the mortgages were designed to defraud the Government of The Bahamas. Section 22 of the Stamp Act provides the penalty for defrauding the Government with respect to stamp duty. Section 22 provides –

> **"22. Any person who, with intent to defraud the Government of any duty —**
>
> **(a) executes any instrument in which all the facts and circumstances required by this Act to be set forth in such instrument are not fully and truly set forth;**

(b) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances;

(c) being employed or concerned in or about the preparation of any instrument, back-dates the same such that it purports to be executed prior to the commencement of this Act when in fact it was executed after the commencement of this Act;

(d) executes a back-dated instrument knowing the same to be back-dated;

(e) executes any instrument purporting to create a mortgage over any property in connection with the sale of any business or property knowing the same to be a sham,

shall be guilty of an offence against this Act and be liable to a penalty of five thousand dollars."

(142) Counsel for the Plaintiff submitted that the fact that there is no amount specified in the Mortgages and the fact that the Mortgages were stamped for $10.00 was indication of the fact that the Mortgages were never intended to be proper Mortgages. As a result counsel submitted that there could be no power of sale and no right to foreclose would arise from the Mortgages. Further counsel submits that the power of sale was given to the Mortgagee under the Mortgages and was not given to AIP.

(143) Counsel for the Defendant submitted that prior to the 2008 Amendment to the Stamp Act it was standard practice for Promissory Notes to be a dealt with behind the mortgage. After the Stamp (Amendment) Act 2008 it was necessary for any document evidencing the lending to be stamped at the same rate as the mortgage. Counsel pointed out that the Renewed, Amended and Restated Balloon Promissory Note ("the Renewed Note") dated 9 June 2009 was stamped for $69,000.00. There is no evidence that any of the other Promissory Notes were stamped. The May 2012 Mortgage was also stamped for $10.00.

(144) The court finds that pursuant to Section 14 of the Stamp Act it is the joint and several obligation of both the mortgagee and the mortgagor to cause the mortgage to be duly stamped. The Plaintiff who was a party to all of the mortgages and who had the obligation to stamp and record the mortgages cannot now assert that because the mortgages were stamped for $10.00 the mortgage is not valid. Counsel for the Plaintiff alleged that there may have been fraudulent transactions. If this is so, the Plaintiff was a party to the fraud and as the obligation to stamp the mortgage was that of the Plaintiff and Defendant if there was fraud it would have been perpetuated by the Plaintiff and the Defendant.

(145) The Letter Agreement dated 7 January 2011 contained a specific provision with respect to stamp duty on the Mortgages. Clause 5 of the Letter Agreement provides –

> **"5. On an ASAP basis no later than fifteen (15) days from execution of this Amendment, WCG shall pay the entire Fifty-Seven Thousand Five Hundred ($57,500.00) USD Bahamian Stamp Tax due on the First Mortgage (if there are any penalties on the First Mortgage above $57,500.00 related to the payment of the Bahamian Stamp Tax on the First Mortgage, then the penalties only shall be divided equally 50%/50% between AIP and WCG). AIP had previously been obligated under a previously executed Tax Indemnification Agreement to pay twenty-five (25%) of the Bahamian Stamp Tax due on the First Mortgage. WCG and AIP hereby agree that in consideration of WCG paying 100% of the Bahamian Stamp Tax hereunder (excluding any penalties, if any) AIP's 25% portion as provided for under the Tax Indemnification Agreement shall instead be credited as payment in full to AIP of the monies otherwise owed from WCG to AIP for reimbursement of the prior overpayment by AIP of the Property Taxes."**

There is no evidence that the Plaintiff complied with this provision and paid the stamp duty.

(146) The First Mortgage referred to in the Letter Agreement referred to the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage and the Collateral Further Charge.

(147) In his Affidavit filed 16 December 2014 Adrian Crosbie-Jones, the Managing Director of the Defendant stated –

> **"36. WCG gave AIP a promissory note ("the Note") for the amount lent by AIP. The Note was to be secured by a mortgage of WCG's land on Whale Cay. On the advice of Mr. Poitier, the mortgage was granted, not to AIP (which AIP was advised that as a non-Bahamian company it would require a permit from the Bahamas Investments Board if it were to own land in The Bahamas, as mortgagee or otherwise), but to a Bahamian trust company, Leadenhall."**

(148) Evidence was produced that on 29 March 2010, AIP obtained a Permit issued by the Investments Board under the International Persons Landholding Act 1993 to hold the hereditaments specified in the Original Mortgage. This Permit was recorded as a part of the Declaration of Trust in Volume 11423 at pages 126 to 131. The Permit confirmed that Leadenhall and the Defendant were holding the mortgage in trust for AIP.

(149) In the Originating Summons the Plaintiff prayed for certain declarations. The court shall analyse the prayers for declaration and determine if the declaration should be granted.

1. <u>A declaration that the Defendant is not entitled to foreclose on the mortgaged property</u>

(150) The Plaintiff has challenged the Original Mortgage dated 2 August 2000, the Confirmatory Mortgage and Collateral Mortgage dated 13 June 2002, the January 2010 Mortgage dated 20 January 2010 and the Transfer of Mortgage dated 23 November 2010.

(151) Counsel for the Plaintiff submitted that there is no power of sale given to any assigns of the mortgage. Counsel referred to **Halsbury Laws of England** where it was stated at paragraph 443.

> **"An express power of sale is exercisable only by the persons who are designated for that purpose by the power. Formerly the power was conferred on the mortgagee, his heirs and assigns, and could be exercised by his transferees, or, after his death, by his heirs or devisees; and a power so given is now exercisable, where the mortgagee has died since the 31st December, 1881, by his personal representatives; but a power not referring to "assigns" was not exercisable by a transferee or a devisee and an express power conferred on a mortgagee without mention of "heirs" is not even now exercisable by his personal representatives."**

(152) Counsel relied on the dicta in **Rumney v Smith 1897 2 CA 351**. The Headnote of that case states –

> **"A member of a building society mortgaged property to the trustees of the society to secure the repayment by instalments of an advance, and the mortgage deed empowered "the trustees or trustee for the time being of the society," in case of default, to sell the mortgaged property. The mortgage was afterwards, without the concurrence of the mortgagor, transferred to R., who was not a member of the society, and he put up the property for sale purporting to act under the power: -**
>
> **Held (assuming, but not deciding the validity of the transfer), that, upon the construction of the deed, the power of sale could not be exercised by any person other than the trustees or trustee for the time being of the society, and that the vendor could not make a good title to the property."**

(153) Counsel submitted that the Original Mortgage gave no right to any assigns and therefore Leadenhall could not assign a power of sale to the Defendant.

(154) In response to this submission counsel for the Defendant referred to the definition of mortgagee in the Conveyancing and Law of Property Act Chapter 138. Mortgagee was defined as –

> **"mortgagee includes any person from time to time deriving title under the original mortgagee.**

(155) Additionally mortgagee was defined in Clause 4 (11) of the Original Mortgage as–

> **"The Mortgagee shall include the holder as holder for the time being of the Note and other its assigns or successors in title of the said hereditatments."**

(156) Counsel for the Plaintiff submitted further that the Plaintiff was not a party to the Transfer of Mortgage. Counsel referred to **Fisher and Lightwood Law of Mortgage Fourth Edition** where it was stated in Chapter 14 –

> **"A mortgagee is entitled to transfer his security either absolutely or by way of sub-mortgage and without the concurrence of the mortgagor. It is, however, always desirable that the latter should be a party because in his absence, the transferee is bound by the state of accounts between the mortgagor and the transferor, whatever may have been the representations of the latter to the transferee, and though he has no notice of the discharge or any part of the debt."**

(157) Further the author stated –

> **"The transfer of a mortgage consists of the assignment of the debt, and the conveyance of the mortgagee's estate which is the security for the debt. Formerly these two parts of the estate were separate. Thus it was unusual in the deed of transfer first to assign the debt absolutely and then to convey the property subject to the equity of redemption."**

(158) Counsel for the Defendant submitted that the transfer of mortgage from Leadenhall to the Defendant was pursuant to an Order of Turner J and it was not necessary for the Plaintiff to be joined as a party to the transfer of mortgage.

(159) The Plaintiff does not challenge the May 2012 Mortgage between the Plaintiff and the Defendant. The May 2012 Mortgage specifically stated that it was supplemental to the Original Mortgage made 2 August 2000, the Confirmatory Mortgage

and Collateral Mortgage made 13 June 2004 and the Collateral Further Charge made 25 June 2004. The May 2012 Mortgage further recited the Transfer of Mortgage dated 23 November 2010 made between Leadenhall, Craig Gomez as liquidator of Leadenhall and the Defendant whereby the benefit of the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage and the Collateral Further Charge were transferred to the Defendant.

(160) Under the terms of the May 2012 Mortgage –

> **"all the powers and provisions contained in the Principal Indenture, the Supplemental Indenture and the Collateral Further Charge were applicable".**

(161) The Original Mortgage did not specifically provide for the exercise of the power of sale. The Original Mortgage provided –

> **"6. The powers herein contained are in addition to and without prejudice to and not in substitution for all other powers and remedies vested in the mortgagee by statute or common law or equity for recovering or enforcing payment of the monies hereby secured."**

(162) The power of sale by a mortgagee is provided by Section 21 of the Conveyancing and Law of Property Act. Section 21 provides –

> **"21. (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) —**
>
> **(a) a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to**

vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby;

(b) a power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money;

(c) a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof;

(d) a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract:

Provided that the power hereby given shall not include the power to cut or sell any fruit bearing trees.

(2) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were contained in this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4) This section applies only where the mortgage deed is executed after the commencement of this Act.

(163) Section 21 of the Conveyancing and Law of Property Act would apply to the Original Mortgage as this section was not specifically excluded.

(164) The Original Mortgage specifically stated in Clause 9 –

> **"(9) Section 22 of the Conveyancing and Law of Property Act shall not apply to this security but as between the parties hereto the Mortgagee shall not exercise its power of sale or appointing a receiver until the expiration of Seven (7) days after payment in respect of the Note has been demanded but this provision is for the protection of the Mortgagor only and a purchaser shall not be put upon inquiry whether such default has been made or not."**

(165) The Plaintiff has alleged that the Defendant was not entitled to foreclose on the mortgaged property or exercise its power of sale.

(166) Counsel for the Defendant maintained that where a mortgagor is seeking to challenge his mortgage or prevent the exercise by the mortgagee of his legal rights the court will not countenance such application until and unless the mortgagor first pays into court his mortgage debt.

(167) Counsel for the Defendant referred to **Citibank N.A v Major 2001 BHS J No. 6** where it stated by Ganpatsingh JA at paragraph 17 –

> **"17. The cases cited on the impeachment of mortgage securities, all show that unless there is a mortgage action in which is raised a serious question to be tried, involving either the validity of the mortgage transaction itself or fraud on or irregularity in the exercise of the power of sale, the Courts will not intervene to prevent a mortgagee from exercising his lawful rights under the mortgage deed. These proceedings were in every sense irregular, for there was no pending action in the equity jurisdiction of the Court claiming relief in the first instance for an unconscionable bargain, as a result of the Bank acting in a way which prevented the respondent from giving proper detached consideration to his independent interest in the mortgage transaction, and which involved substantial risk to him, making such conduct unconscionable: See *Bank of Credit and Commerce v Aboody (1989) 1 QB 923.* Any such claim of course would go to the root of the mortgage transaction. The deed however would not be set aside, unless it could be established that the mortgage was to the manifest disadvantage of the respondent."**

(168) Further Ganpatsingh stated at paragraph 25 –

> **"25. Now there is a general, though not an inflexible rule of practice, that the Court will not interfere to deprive a mortgagee of the benefit of his security, in the absence of fraud or irregularity, and a departure from the practice would normally attract the equitable principle, that the mortgagor pay into Court the amount outstanding or claimed or otherwise secure the mortgagee. This rule of paying in was itself not an inflexible one in the nature of a condition. Whether it applied or not depended on the nature of the fraud or irregularity. The Court's duty in every instance was to do equity between the parties."**

(169) Ganpatsingh concluded at paragraph 34 –

> **"In mortgage actions as I have indicated, the jurisdiction of the court goes to the unconscionability of the bargain which is to the manifest disadvantage of the mortgagor, or to correct a fraud on the power of sale, or forestall an improper threatening of the legal right to redeem, or if that is lost on default, to give protection in circumstances where there is notice of an intention to redeem, or at the very least there is a claim by the mortgagor that he is still entitled to the equity of redemption, for a mortgagee is precluded from disputing the title of a mortgagor claiming to redeem: See *Tasker v Small (1837) 40 ER 848.* In such a case he must in answer to the mortgagee's action, in the absence of fraud or irregularity, bring the outstanding balance into Court."**

(170) The Plaintiff has not alleged fraud or irregularity in the exercise of the power of sale. The Plaintiff submitted that the Defendant did not have a power of sale under the terms of the Transfer of Mortgage and therefore was not entitled to redeem the mortgage. The Plaintiff alleged further that there was no debt due to it under the Mortgages. The Plaintiff has not paid the balance outstanding on the Mortgages or the Promissory Notes. Counsel for the Plaintiff has acknowledged that monies are owed to AIP by the Plaintiff.

(171) Under the terms of the Original Mortgage and the subsequent Mortgages reference was made to the fact that funds were loaned by AIP and that Leadenhall and the Defendant were trustee for AIP. The recital to the Original Mortgage made

reference to the funds being advanced by AIP secured by a Promissory Note in favour of AIP. The Original Mortgage provided in Clause 2 –

> **"2. PROVIDED ALWAYS that if the Mortgagor shall pay to the Mortgagee the amount secured by the Note with interest at the rate provided by the Note together with all other monies (if any) due to the mortgagee under these presents the Mortgagee will at the request and cost of the mortgagor reconvey the said hereditaments to the mortgagor or as it shall direct."**

(172) In June 2004 the Revised and Restated Balloon Promissory Note was executed by the Plaintiff to AIP. By the terms of the Revised and Restated Balloon Promissory Note, the Plaintiff agreed that, commencing 1 December 2004, the Plaintiff would pay to AIP instalments of simple interest only biannually on 1 June and 1 December in each year throughout the term of the loan, until a final balloon payment shall become due and payable on 1 June 2009. The Revised and Restated Note further provided that –

> **"All unpaid principal, accrued interest and unpaid costs shall be due and payable on June 1, 2009 (the "Maturity Date"), unless sooner accelerated pursuant to the Loan documents."**

(173) In this action the Plaintiff has not challenged the Promissory Notes. As indicated earlier all the Promissory Notes provided for the Notes to be construed and governed by the laws of the State of Florida.

(174) Even though the Plaintiff is now alleging that no monies were lent by Leadenhall or the Defendant to the Plaintiff, the Plaintiff was a party to the Promissory Notes, the Letter Agreement, the First Amendment Letter Agreement and the Forbearance Agreement.

(175) The Letter Agreement and the Forbearance Agreement were executed to accommodate the Plaintiff who was in default of its payments under the Promissory Notes.

(176) The court holds that there was a debt due to the Defendant under the Transfer of Mortgage which was a valid document.

(177) The court holds that the Defendant is entitled to foreclose on the mortgaged property and exercise its power of sale.

2. A Declaration that the mortgage dated 20 January 2010 is of no effect and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed

(178) The January 2010 Mortgage was made between the Plaintiff and the Defendant and is not recorded. The Plaintiff alleged that this mortgage is of no effect because at the time of the mortgage the hereditaments had been conveyed to Leadenhall. Counsel for the Plaintiff further submitted in Clause 3 of the January 2010 Mortgage that the mortgage shall relate back to the date of the Replaced Note and shall take effect accordingly.

(179) The Replaced Note is the Renewed, Amended and Restated Balloon Promissory Note dated 1 June 2009 and earlier referred to as the Renewed Note. At 1 June 2009 the Mortgages were held by Leadenhall and had not been transferred. Leadenhall was in liquidation and was unable to effect any transfer without an order of the court. The order by Turner J for transfer of the mortgage from Leadenhall to the Defendant was not made until 9 July 2010. Pursuant to the Order of the Court, Leadenhall and Craig A. Gomez as liquidator transferred the Mortgages to the Defendant on 23 November 2010.

(180) The Plaintiff alleged that it was not a party to the Transfer of Mortgage dated 23 November 2010. The court finds that it was not necessary for the Plaintiff to be a party to the Transfer of Mortgage. The Transfer of Mortgage dated 23 November 2010 was made pursuant to an Order of the court.

(181) At the date of the January 2010 Mortgage to the Defendant, Leadenhall was still the Mortgagee and had not transferred the mortgage to the Defendant. There is no

evidence that the mortgage had been satisfied and therefore it was not in order for the Plaintiff to enter a new mortgage with the Defendant using the same property as security while there were still extant mortgages to Leadenhall. The property which was purportedly held as security by the January 2010 Mortgage to the Defendant was vested in Leadenhall by virtue of the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage and the Further Collateral Charge. The Mortgages were transferred to the Defendant in November 2010. The May 2012 Mortgage was executed between the Plaintiff and the Defendant.

(182) The court finds that the Plaintiff is not entitled to have the security of the mortgage released and the property redeemed. The court holds that the January 2010 Mortgage was superceded by the May 2012 Mortgage.

(183) The Plaintiff having benefitted from the funds advanced by the Promissory Notes which were secured by the Mortgages has now alleged that the January 2010 Mortgage is not valid. Counsel for the Defendant submits that the Plaintiff having executed the Original Mortgage, the Confirmatory Mortgage and Collateral Mortgage, the Collateral Further Charge, the January 2010 Mortgage and the May 2012 Mortgage the Plaintiff is estopped by Deed from denying or challenging the common understanding of the parties as to the structure of the Mortgages, the Promissory Notes and the covenant to repay.

(184) Counsel for the Defendant submitted that it would be unjust to permit the Plaintiff to depart from the shared understanding of the structure of the transaction which the Plaintiff has affirmed by executing all of the documents executed to in this matter and which they now allege are of no effect.

(185) The matter of estoppel by convention and deed was considered by the Court of Appeal in **Amalgamated Investment and Property Co. Ltd. (in Liquidation) v Texas Commerce International Bank Ltd. 1982 1 QB 84**. In this case Denning MR in discussing the doctrine of estoppel considered proprietary estoppel,

estoppel by representation of fact, estoppel by acquiescence and promissory acquiescence and stated –

> **"...All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or on law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."**

(186) The Plaintiff has acknowledged the understanding of the parties and have executed all the Mortgages and the Promissory Notes referred to. Even though the Plaintiff was not a party to the Management Agreement, between AIP and the Defendant, the Plaintiff executed the Management Agreement and the Amendment to the Management Agreement. Additionally the Plaintiff entered into the Letter Agreement and with AIP. The purpose of the Letter Agreement was stated as -

> **"This Letter Agreement (Agreement) will serve to establish the agreement between the parties regarding the outstanding issues to effectuate our request for a partial moratorium of the payment of interest along with our request for compensation for all payment of certain expenses related to various transactions and activities related to the mortgage and will form the basis for the amendment of the First Mortgage and Note, the terms of such amendments to be agreed to by the parties in accordance with the provisions hereto."**

(187) The Plaintiff also entered into the Forbearance Agreement with AIP providing for an extension of the payment of interest due which was not paid on time and to delay the partial payment of principal as required by the Note and Further Note along with other considerations. The Recitals in the Forbearance Agreement set out the reason for the agreement.

(188) In **Prime Sight Limited v Edgar Charles Lavarello 2013 UK PC 22** Lord Toulson considered recitals in a deed and stated at paragraph 31 –

> **"Once upon a time it was the law that mere recitals in a deed could not found an estoppel, but the law has long since changed. In *Carpenter v Buller (1841)* 8M & W 209, 212-213, Parke B said:**
>
> **"If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 352; and a recital in instruments not under seal may be such as to be conclusive to the same extent ... By his contract in the instrument itself, a party is assuredly bound, and must fulfill it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded to the deed, and wholly collateral to it, to dispute the facts so admitted, thigh the recitals would certainly be evidence."**

(189) Further Lord Toulson in considering estoppels by convention referred to **Spencer Bower on Estoppel by Representation** –

> **"The law is correctly analysed by Spencer Bower at page 197... an estoppel by convention need not involve any misleading of a representee by a representor, nor is it essential that the representee shall be shown to have believed in the assumed state for facts or law. The full facts may be known to both parties; but if, even knowing those facts to the full, they are shown to have assumed a different state of facts or law *as between themselves* for the purposes of a particular transaction, then a convention will be established. The claim of the party raising the estoppel is, not that he believed the assumed version of facts or law was true, but that he believed (and agreed) that it should be *treated* as true."**

(190) The court holds that the Plaintiff by its action and deed is estopped from alleging that the January 2010 mortgage is of no effect. The court holds further that the Plaintiff is not entitled to have the security of the mortgage released and the property redeemed.

3. **And/or in the alternative declaration that there is no debt owing to the Defendant by the Plaintiffs under the Mortgage dated 20 January 2010, and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed**

(191) The court has determined that there is a debt owing to the Defendant by virtue of the Transfer of Mortgage dated 23 November 2010 and the May 2012 Mortgage.

4. **A declaration that at the time of the transfer of mortgage from Leadenhall Bank and Trust Company Limited to the Defendant on 23 November 2010, there was no debt owing to Leadenhall Bank and Trust Company Limited**

(192) Counsel for the Plaintiff has submitted that there were no monies advanced by Leadenhall and no debt was owed by Leadenhall at the time of the transfer of the mortgage to the Defendant. Further counsel submitted that the Transfer of Mortgage dated 23 November 2010 did not state an amount owing to Leadenhall and as a result the Defendant cannot now allege that an amount is owing.

(193) Counsel for the Plaintiff submitted that a mortgage has been defined by Earl of Halsbury LC in **Nookes & Co. Limited v Rice 1902 AC 24** at page 28 as –

> **"A mortgage is a conveyance of land or an assignment of chattels as security for the payment of a debt, or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding."**

(194) Mortgage has been defined in Section 2 of the Conveyancing and Law of Property Act, Chapter 138 as –

> **"Mortgage" include any charge on ay property for securing money or money's worth."**

(195) The Plaintiff's claim is that no money was advanced by Leadenhall or the Defendant – the money was advanced by AIP.

(196) The Plaintiff was a party to the Mortgages and to the Promissory Notes. By the terms of the Mortgages reference was made to the Promissory Notes. The Original Mortgage provides –

> **"(B) American Investment Properties Inc., a company incorporated under the laws of the state of Florida one of the United States of America (hereinafter called "the Lender") has lent or otherwise advanced money to or on behalf of the Mortgagor to purchase the said hereditaments including the settlement of certain debts or other obligations which the Mortgagor has incurred or assumed to a present total of Three million four hundred and Sixty-three thousand dollars in the currency of the United States of America aforesaid (US$3,463,000.00) (hereinafter collectively called "the said advances").**
>
> **(C) The Mortgagor has agreed that the said advances shall be secured and payable with interest by a Promissory Note in favour of the Lender (hereinafter called "the Note") and a Mortgage of the said hereditaments.**

(197) In the Collateral Further Charge dated 25 June 2004 the sums advanced were increased to US$5,750,000.00 secured by the Second Revised Note.

(198) In the May 2012 Mortgage the advance of $5,750,000.00 was increased by a further amount of US$185,497.50 secured and payable by the Balloon Note dated 1 September 2011.

(199) The Plaintiff was a party to all the Mortgages and Promissory Notes. It was agreed by the Plaintiff that the sums were advanced by AIP and secured by the Promissory Notes and the Mortgages.

(200) The Plaintiff cannot now allege that they owed no debt to Leadenhall or the Defendant under the Mortgages. It was agreed in the Mortgages that the payments

under the funds advanced by AIP would be payable pursuant to the terms of the Promissory Notes.

(201) AIP as the holder of the Note was a Mortgagee under the terms of the Original Mortgage. All the Mortgages provided for the payment of the sums secured by the Note to be paid to the Mortgagees. Even though no funds were paid to Leadenhall and the Defendant they acknowledged that funds were paid to AIP as holder of the Note. The loan was not fully paid and the debt is outstanding.

(202) The court holds that at the time of the Transfer of the Mortgage on 23 November 2010 there was a debt owing to Leadenhall.

5. <u>A declaration that the mortgage dated 2 August 2000 has been extinguished and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed</u>

(203) The Plaintiff submits that the Original Mortgage provided for payment to be made by the Plaintiff to Leadenhall and that the Plaintiff had made no payments to Leadenhall whether by way of principal or interest. The Promissory Note referred to in the Original Mortgage was lost and in the Affidavits of Lost Note by Kevin Muller, Vice President of AIP, the deponent acknowledged the loss of the documents and stated –

> "7. AIP has agreed to waive all accrued interest on the Note and or Revised Note in exchange for a total compromise amount contained in the Revised and Restated Balloon Promissory Note of $5,750,000.00."

(204) In the Letter of Understanding dated 17 January 2011 from the Plaintiff to AIP the Plaintiff stated –

> **"This Letter Agreement (Agreement) will serve to establish the agreement between the parties regarding the outstanding issues to effectuate our request for a partial moratorium of the payment of interest along with our request for compensation for or payment of certain expenses related to various transactions and activities related to the Mortgage and will form the basis for the amendment of the First Mortgage and Note, the terms of such amendments to be agreed to by the parties in accordance with the provisions herein."**

(205) The Letter Agreement described the First Mortgage as –

> **"That certain Collateral Mortgage dated August 2, 2000 from Borrower to Leadenhall Bank and Trust Company Limited (Leadenhall) as trustee for AIP recorded in Volume 7877 at pages 37 to 45 as confirmed by Indenture of Confirmatory Mortgage and Collateral Mortgage dated June 13, 2002 recorded in Volume 8475 at pages 72 to 79, as further charged by way of Collateral Further Charge dated June 25, 2004 recorded in Volume 9257 at pages 184 to 195 all of the Registrar's records of the Commonwealth of The Bahamas, all as subsequently assigned the Private Trust Company as Trustee ("Private Trust Company") (collectively the "First Mortgage")."**

(206) The Plaintiff cannot now submit that as no payment was made under the Original Mortgage the mortgage has been extinguished. According to the evidence before the court and contained in the documents the increased advances in 2002 and 2004 were at the request of the Plaintiff. Further the Plaintiff executed the Letter of Understanding in 2011 and the Forbearance Agreement in 2013 requesting concessions from AIP because of the nonpayment under the Promissory Notes.

(207) The Plaintiff is unable to rely on its nonpayment as the basis for the extinguishment of the Original Mortgage.

(208) Counsel for the Defendant submitted that by agreeing to the repayment terms and the amended repayment terms the Plaintiff has expressly waived its right to rely on nonpayment to the Mortgagee as a basis to invalidate the mortgage.

(209) Counsel for the Plaintiff submitted that the Plaintiff had made no payment on the Original Mortgage or any of the other Mortgages and as a result the Defendant cannot recover any monies under the mortgage. Counsel referred to Section 32 of the Limitation Act which provided –

> **"32. (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover the proceeds of the sale of land, after the expiry of twelve years from the date when the right to receive the money accrued.**

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiry of twelve years from the date on which the right to foreclose accrued:

Provided that if after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in the mortgagee's possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which that possession was discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

(4) Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action.

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiry of six years from the date on which the interest became due:

Provided that —

- **(a) where a prior mortgagee or other encumbrancer has been in possession of the property charged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, that encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrances or damages in respect thereof, notwithstanding that the period exceeded six years;**
- **(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.**

(210) Counsel for the Defendant submitted that Section 32 of the Limitation Act only prevented a party from bringing an action after 12 years and that it did prevent a mortgagee from exercising his power of sale over the mortgage property. **In Imperial Life Assurance Co. of Canada v Kemp 2004 BHS J No. 463** Hepburn J stated –

> **"Sections 32 1) and 32(5) of the Limitation Act merely abridged the time within which Imperial Life could commence the action, it went only to the conduct of the suit; it left Imperial's life's right otherwise untouched in theory so that if Imperial Life had any mean of enforcing its claim other than by action, the Limitation Act and not prevent it recovering by those means."**

(211) In his Affidavit filed 28 July 2014, David Casoria, Director of the Plaintiff acknowledged in paragraph 3 that all payments under the Promissory Notes were made directly to AIP or its assigns. AIP as holder of the Notes was a Mortgagee and was entitled to payment of the sums advanced. Payment was made on the Promissory Notes. The Mortgages provided that the Mortgages shall be payable by a Promissory Notes in favour of AIP. The Note and the Revised Note were lost and in the Affidavit of Loss waived all accrued interest on the Note and/or the Revised in exchange for a total compromise amount contained in the Revised and Restated Balloon Promissory Note for $5,750.00.00.

(212) The Second Revised Note dated 25 June 2004 provided for all unpaid principal, accrued interest and unpaid costs to be due and payable on June 1, 2009.

(213) The Renewed Note dated June 1 2009 provided for a Maturity date of June 1, 2014. This date was extended by the Forbearance Agreement to June 24, 2014.

(214) As no payment was made on June 24 2014 a Notice of Default, Notice of Demand for Payment and Notice of Intent to Enforce Right of Sale was sent to the Plaintiff by the attorney for AIP on 3 July 2012.

(215) The court finds that the Mortgage dated 2 August 2002 has not been extinguished and the Plaintiff is not entitled to have the security of the mortgage released and the property redeemed.

6. <u>A declaration that the Supplemental Indenture of mortgage, dated 13 June 2002 has been extinguished and the Plaintiff is entitled to have the security of the mortgage released and the property redeemed</u>

(216) Same as above

7. <u>An Order directing the Defendant to reconvey the properties secured by the mortgage to the Plaintiff</u>

(217) The Plaintiff is a party to the Mortgages, the Promissory Notes, the Letter of Understanding and the Forbearance Agreement. The Plaintiff has acknowledged that funds were advanced to it by AIP. These funds were secured by Promissory Notes executed in The Bahamas and bound by the laws of Florida and Mortgages executed in The Bahamas and bound by the Laws of The Bahamas.

(218) The Plaintiff cannot now allege that the Mortgages are invalid and as a result the properties conveyed to the Defendant under the Mortgages should be released.

(219) The court finds that in bringing this action the Plaintiff is seeking to avoid paying the debt owed and delaying the Mortgagee commencing action for possession and leave to exercise its power of sale.

(220) The prayer for the Defendant to reconvey the properties secured by the mortgage to the Plaintiff is dismissed.

<u>Conclusion</u>

(221) The court finds that the Plaintiff is seeking an equitable relief but did not come to equity with clean hands.

(222) The Plaintiff has failed to bring to the attention of the court that they had commenced an action in Freeport with respect to the Promissory Notes and that this action was dismissed.

(223) The Plaintiff failed to bring to the attention of the court that there are ongoing proceedings in the State of Florida.

(224) Further the Plaintiff failed to bring to the attention of the court the Letter Agreement and the Forbearance Agreement, documents which were executed by the Plaintiff requesting an extension of time and waiver with respect to schedule of payment of the Loan by the Plaintiff.

(225) All the Mortgages, Promissory Notes, Letter Agreement, Forbearance Agreement were duly executed by the Plaintiff. There was no allegation of misrepresentation, fraud or duress or that the Plaintiff did not agree to the terms of the Mortgages or Promissory Notes.

(226) The court must be concerned to ensure that the essential requirements of a mortgage are observed. There is no evidence that the terms of the mortgages were oppressive or unconscionable and should not be enforced. The court should be reluctant to interfere with a contract made by the Plaintiff and the Defendant as a matter of business. The Plaintiff was a party to all the Mortgages and Promissory Notes and cannot now question the validity of these Mortgages and use the alleged invalidity of the mortgages as a reason for the Defendant not to exercise its power of sale. The Plaintiff has admitted that monies are owed to AIP. The court has determined that AIP is a Mortgagee having advanced the funds to the Plaintiff using the mortgage to Leadenhall and the Defendant who hold as Trustee for AIP and the Promissory Notes as security.

(227) The Originating Summons is dismissed with costs to the Defendant to be taxed if not agreed.

Dated this day of May 2016

Rhonda P. Bain
Justice