51/84

IN THE PRIVY COUNCIL No. 9 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN:

INVERUGIE INVESTMENTS LIMITED (Defendants) — Appellants

- and -

RICHARD HACKETT (Plaintiff) — Respondent

RECORD OF PROCEEDINGS

PHILIP CONWAY THOMAS & CO.
61 Catherine Place
London SW1E 6HB.

Solicitors for the Appellants

HERBERT SMITH & CO.
Watling House,
35-37 Cannon Street
London EC4M 5SD.

Solicitors for the Respondent

IN THE PRIVY COUNCIL No. 9 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN:

INVERUGIE INVESTMENTS LIMITED (Defendants) — Appellants

- and -

RICHARD HACKETT (Plaintiff) — Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

PART II

EXHIBITS

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

Description of Document	Date	
In the Court of Appeal		
Notice of Motion	22nd July 1982	
Affidavit of Cecil Vincent Wallace Whitfield	22nd July 1982	
Lease Myra Investments Ltd. to J. William Madden	1st January 1971	See Separate Bundle
Copy assignment Myra Investments Ltd. to Alliance Services Industrial & Commercial Corporation Ltd.	15th November 1969	See Separate Bundle

IN THE PRIVY COUNCIL No. 9 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN:

INVERUGIE INVESTMENTS LIMITED (Defendants) — Appellants

- and -

RICHARD HACKETT (Plaintiff) — Respondent

RECORD OF PROCEEDINGS

In the Supreme Court

No. 1
Writ of Summons - 6th March 1975

No. 1

Writ of Summons - 6th March 1975

Commonwealth of the Bahamas

In the Supreme Court 1975 No. 145

COMMON LAW SIDE

Between

RICHARD HACKETT Plaintiff

and

INVERUGIE INVESTMENTS LIMITED Defendant

Elizabeth II, by the Grace of God, Queen of the Commonwealth of the Bahamas and of her other realms and territories, Head of the Commonwealth.

To Inverugie Investments Limited
c/o Registered Office
Kendal Nottage & Co., Chambers
Merchantile Bank Building,
Freeport, Grand Bahama

We Command You That within fourteen days after service of this writ on you, inclusive of the day

In the Supreme Court

No. 1
Writ of Summons
6th March 1975
(cont'd)

of such service, you do cause an appearance to be entered for you in an action at the suit of

RICHARD HACKETT
SILVER POINT CONDOMINIUM
FREEPORT, GRAND BAHAMA

And take notice that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

Witness, the Honourable Sir Leonard Joseph Knowles, C.B.E. Our Chief Justice of the Commonwealth of the Bahamas the 6th day of March in the year of Our Lord One thousand Nine hundred and seventy-five

Sgd. Illegible
REGISTRAR

N.R. This Writ may not be served more than 12 calendar months after the above date unless renewed by Order of the Court.

No. 2

Statement of Claim - 6th March, 1975

1. The Plaintiff was at all material times seised and possessed of the leasehold premises known as apartments designated or numbered B101, B102, B103, B104, B105, B106, B107, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 situate in buildings A and B of Kismet Apartments, Freeport, Grand Bahama now known as Silver Sands Hotel by virtue of an Indenture of Lease dated the 5th day of June, A.D., 1970 and made between Myra Investments Limited of the one part and the Plaintiff of the other part for the term of ninety-nine (99) years commencing from the 5th day of June, A.D., 1970 (reference to which will be made by the Plaintiff at the trial of this Action to the said Lease for its full terms and true effects).

2. The Plaintiff by himself or his duly authorised agents or tenants pursuant to the said Lease on or about the 5th day of June, A.D., 1970 entered into and took possession of the leasehold premises and remained in continuous possession of the said leasehold premises until on or about the 25th day of November, A.D., 1974 without interruption or interference from anyone.

3. On or about the 25th day of November A.D., 1974 the Defendant its servants or agents unlawfully trespassed upon and took possession of all the said leasehold premises and unlawfully changed the looks thereof.

4. As from the 25th day of November, A.D., 1974 the Defendant its servants or agents has unlawfully and continuously denied the Plaintiff his agents or tenants access to any and all of the said leasehold premises.

5. The said leasehold premises comprise apartment units, being part of a hotel complex operated under independent management, whereby, with the consent of the Plaintiff, various apartments of the Plaintiff were rented from time to time.

6. The Plaintiff's apartments were so rented on daily or longer tenancies at an average rate of $14.00 per day. As a result of the said unlawful interruption of the Plaintiff's possession of the

said leasehold premises the Plaintiff has been deprived of rents and has suffered damage.

AND THE PLAINTIFF CLAIMS:

1. Possession of the premises comprising apartments numbered B101, B102, B103, B104, B105, B106, B107, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 of Silver Sands Hotel (formerly known as Kismet Apartments) in the City of Freeport. 10

2. Mesne Profits.

3. Damages for trespass and exemplary damages.

4. Costs.

5. Further or other relief.

Dated the 6th day of March A.D., 1975.

CALLENDERS, ORR, PYFROM & ROBERTS
Attorneys for the Plaintiff

No. 3

Third Party Notice to Alliance Services Industrial & Commercial Corporation Ltd.
19th March 1975

COMMONWEALTH OF THE BAHAMAS 1975

IN THE SUPREME COURT No. 145

Common Law Side

BETWEEN

RICHARD HACKET Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LTD. Third Party

AND

JOHN ENNIS Third Party

THIRD PARTY NOTICE

TO: Alliance Services Industrial & Commercial Corporation Ltd.
of Registered Offices,
Chambers of Messrs. Dupuch & Turnquest
Counsel & Attorneys-at-Law
Nassau, Bahamas

TAKE NOTICE that this action has been brought by the Plaintiff against the Defendant. In it the Plaintiff claims against the Defendant:

1. Possession of the premises comprising apartments numbered B101, B102, B103, B104, B105, B106, B107, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 of Silver Sands Hotel (formerly known as Kismet Apartments) in the City of Freeport.

2. Mesne Profits.

3. Damages for trespass.

4. Costs.

5. Further or other relief.

In the Supreme Court

No. 3
Third Party Notice to Alliance Services Industrial & Commercial Corpn. Ltd.
19th March 1975
(cont'd)

as appears from the Writ of Summons, a copy whereof is served herewith with the statement of claim indorsed thereon and dated the 6th day of March, A.D., 1975.

The Defendant claims against you and John Ennis, Esq. of No. 9 Deer Park Court, Toronto 7, Ontario, Canada to be indemnified against the Plaintiff's claim and the costs of this action on the grounds that by an Agreement dated the 28th day of October, A.D., 1974 and made between Alliance Services Industrial & Commercial Corporation Limited of the one part and Gleneagles Investment Company Limited of the other part the benefit of which was assigned to the Defendant by the said Gleneagles Investment Company Limited on the 4th day of November, A.D., 1974, the said Alliance Services Industrial & Commercial Corporation Limited together with the said John Ennis as Director thereof and also in his own personal capacity made certain representatations to the Defendant company which representations impliedly indemnified the Defendant Company against the Plaintiff's claim herein. The Defendant will refer to the said Agreement at the trial of this action for its full terms and effect.

AND TAKE NOTICE that if you wish to dispute the Plaintiff's claim against the Defendant, or the Defendant's claim against you, an Appearance must be entered on your behalf within Eight (8) days after service of this Notice upon you, inclusive of the day of service, otherwise you will be deemed to admit the Plaintiff's claim against the Defendant and the Defendant's claim against you and your liability to indemnify the Defendant and will be bound by any judgment or decision given in the action and the judgment may be enforced against you in accordance with Order 16 of the Rules of the Supreme Court.

Dated the 19th day of March A.D., 1975.

(Sgd) Kendal Nottage & Co.
KENDAL NOTTAGE & CO.
Attorneys for the Defendant.

No. 4

Third Party Notice to John Ennis - 19th March 1975

COMMONWEALTH OF THE BAHAMAS 1975

IN THE SUPREME COURT No. 145

Common Law Side

BETWEEN

RICHARD HACKETT Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LTD. Third Party

AND

JOHN ENNIS Third Party

THIRD PARTY NOTICE

TO: John Ennis, Esq.
No. 9 Deer Park Court
Toronto 7, Ontario
Canada.

TAKE NOTICE that this action has been brought by the Plaintiff against the Defendant. In it the Plaintiff claims against the Defendant:

1. Possession of the premises comprising apartments numbered B101, B102, B103, B104, B105, B106, B107,B109, B110, B111, B112, B113,B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, B405, A407, A411, B413, B403, of Silver Sands Hotel (formerly known as Kismet Apartments) in the City of Freeport.

2. Mesne Profits.

3. Damages for tresspass.

4. Costs

5. Further or other relief.

as appears from the Writ of Summons, a copy whereof

In the Supreme Court

No. 4
Third Party Notice to John Ennis 19th March 1975 (cont'd)

is served herewith the statement of claim indorsed thereon and dated the 6th day of March, A.D., 1975.

The Defendant claims against you and Alliance Services Industrial & Commercial Corporation Ltd. a Bahamian Company incorporated under the Laws of the Commonwealth of the Bahamas to be indemnified against the Plaintiff's claim and the costs of this action on the grounds that by an Agreement dated the 28th day of October, A.D., 1974 and made between Alliance Services Industrial & Commercial Corporation Limited of the one part and Gleneagles Investment Company Ltd. of the other part the benefit of which was assigned to the Defendant by the said Gleneagles Investment Company Ltd. on the 14th day of November, A.D., 1974, the said Alliance Services Industrial & Commercial Corporation Ltd. together with you, the said John Ennis a Director thereof and also in your own personal capacity made certain representations to the Defendant Company which representations impliedly indemnified the Defendant Company against the Plaintiff's claim herein. The Defendant will refer to the said Agreement at the trial of this action for its full terms and effect.

AND TAKE NOTICE that if you wish to dispute the Plaintiff's claim against the Defendant, or the Defendant's claim against you, an appearance must be entered on your behalf within Eight (8) days after service of this Notice upon you, inclusive of the day of service, otherwise you will be deemed to admit the Plaintiff's claim against the Defendant and the Defendant's claim against you and your liability to indemnify the Defendant and will be bound by any judgment or decision given in the action and the judgment may be enforced against you in accordance with Order 16 of the Rules of the Supreme Court.

Dated the 19th day of March A.D., 1975

(Sgd) Kendal Nottage & Co.

KENDAL NOTTAGE & CO.

Attorneys for the Defendant.

No. 5

Affidavit of Richard Hackett with Exhibits thereto - 15th April, 1975

COMMONWEALTH OF THE BAHAMAS 1975

IN THE SUPREME COURT No. 145

Common Law Side

B E T W E E N

RICHARD HACKETT Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED Third Party

AND

JOHN ENNIS Third Party

A F F I D A V I T

I Richard Hackett of Silver Point Condominium Apartments in the City of Freeport in the Island of Grand Bahama but presently of the City of Palm Springs in the State of California one of the United States of America make Oath and say as follows:-

1. By an Indenture of Lease dated the 5th day of June, 1970 made between Myra Investments Limited (hereinafter called "Myra") and myself and now recorded in the Registry of Records in the City of Nassau in Volume 2346 at Pages 510 to 531 I acquired title to the leasehold premises consisting of Thirty (30) apartment units, the subject of this Action and as more particularly described in the Lease, situate in Building "A" and "B" of Kismet Apartments in the City of Freeport in the Island of Grand Bahama. The said Kismet Apartments are now known as "Silver Sands Hotel".

2. The consideration I paid for the said apartments was Three hundred thousand ($300,000.00) dollars paid in cash as One hundred and fifty thousand ($150,000.00) dollars on the 7th day of June, 1970 and the balance during the course of that year in stage payment as the final building works progressed. I took possession of the various apartments comprising the leasehold premises as and when they were substantially completed.

3. My attention to the said Kismet Apartments was attracted initially by Mr. Z.W. Radomski, a Freeport property builder and developer with whom I had previously participated financially in other building projects in Freeport including that of Silver Point Condominium Apartments. Mr. Radomski had been a business associate and became a social acquaintance of mine as a result.

4. I learned from Mr. Radomski during 1969 that the building project which he had then started being the said Kismet Apartments, with a group of financial investors, had run into shortages of funds. At the time I was not financially involved in that project which was being carried out by Mr. Radomski and others through their Company Myra. I was advised by Mr. Radomski that the project would require approximately $300,000.00 to complete the buildings then underway and I was prevailed upon by him to provide the necessary funds which I agreed to do.

5. As a result of such agreement various meetings and letters of correspondence took place respectively between Mr. Radomski and his then attorney, Gerald N. Capps on behalf of Myra and Raymond S. Towers as an officer and as attorney on behalf of Alliance Services Industrial & Commercial Corporation Limited (hereinafter called "Alliance"), a Mortgage Lender, who had advanced a substantial part of the funds required for the said building programme and who held a First Mortgage charge on the subject property. The purposes of such meetings was to obtain the concurrence, consent and agreement of Alliance to a forbearance from taking action on calling-in the then overdue Mortgage or from realising the security thereof in consideration of the investment and injection by me of the said $300,000.00 in order to complete the buildings so that sales of apartment units could be realised.

6. In particular, there was a letter of the 2nd June, 1970 from Alliance to Myra acknowledging my intended purchase of thirty (30) apartments for the said sum of $300,000.00 by which Alliance required such moneys to be paid to their Attorneys to be used and dispersed by their Attorneys for the purpose of completing the said buildings, and I attach hereto a copy of the said letter together with a copy of a recent letter from Derek L. Higgs, the present Attorney for Myra to my Attorney dated the 20th February, 1975 referring to an endorsement appearing on Mr. Higgs' copy of the said earlier letter of the 2nd June, 1970. The same are marked by me as Exhibits "R.H. 1" and "R.H. 2" respectively.

7. Alliance at the time of my purchase of a Ninety-nine (99) year leasehold interest in the said Thirty (30) apartments, the subject of this Action, and at times subsequent in respect of other purchasers of similar leasehold interests in other apartments was aware that the purpose of the said building programme was the sale of leasehold interests on a long lease basis of the apartments to various purchasers and that Myra had granted, and were continuing to grant long term leases in the nature of building leases and generally to purchasers as the circumstances warranted. Alliance from time to time, during the term of the said Mortgage, requested and obtained from Myra as further security in respect of Alliance's advances assignments of the various purchase agreements entered into between Myra and various purchasers subject to completion of the said building works. Attached hereto and marked "R.H.3" by me is a copy of a letter from the said Gerald N. Capps on behalf of Myra dated the 25th June, 1971 addressed to Dupuch & Turnquest, the Attorneys for Alliance with reference to such an assignment.

The said Lease to me was made in consideration of Myras applying my said sum of $300,000.00 to the completion of the erection of the said apartments within five (5) years from the date of the Lease, which was done.

8. I therefore confirm that from the outset of my proposal to advance the funds necessary to complete the building works as referred to above, Alliance was informed of, was aware of, consented to and received the consideration paid for my said leasehold term in the thirty (30) apartments, the subject of this Action.

9. After the said buildings were completed and various of the apartments including my thirty (30) units furnished, Myra had by arrangement with various apartment owners rented the same out as hotel rooms on daily or other short term sub-tenancies for a management fee or commission on such rents received. My said apartments as from about the month of ~~January 1973~~ October 1970 up to recent times during 1974 had been so rented or made available for rent on this basis and was a means by which I was able to derive income of approximately $420.00 per month from each such unit.

10. During the month of November, 1974 I was advised that Alliance had sold or was apparently resorting to its powers of sale under the said Mortgage and was to sell or purported to sell the

subject land together with the buildings and the said apartments thereon free from any of the said leasehold terms granted to any and all purchasers of apartments who had all acquired ninety-nine (99) year leases thereon. The Purchaser, Inverugie Investments Limited, the Defendant herein, has since similarly disclaimed and denied the existence or effectiveness of any of the said leases having been granted.

11. This state of affairs continued during December, 1974 with some uncertainty as to just what had transpired until I was advised by my Attorneys Callenders, Orr, Pyfrom & Roberts that the purported sale had taken place in favour of the Defendant Company just recently but no one could seem to obtain copies of any documents to determine the exact position. Later in January, 1975 I requested a friend and banker, Lawrence M. Wynne to call in at Silver Sands Hotel in my absence from the Island and on my behalf obtain the keys to my said apartments. He apparently attempted to do so and I attach hereto a copy of a letter written by him to my Attorneys as a result of such attempt and the same is marked by me as Exhibit "R.H.4".

12. The Defendant has since the beginning of January, 1975 disclaimed and denied the existence or effectiveness of my said lease and apparently all of the leases granted to other purchasers of apartments in Silver Sands. By changing the locks of my said Thirty (30) apartments and denying me or my agents access to the same the Defendants have trespassed on my premises and have caused me losses and damages and are wrongly receiving income in the form of rents therefrom and have deprived me from the benefit of regular cash income therefrom which I had previously enjoyed.

13. As a result of these matters and at my request my said Attorneys have obtained and I now produce marked "R.H.5" and "R.H. 6" copies of the following documents:-

(1) Mortgage between Myra and Alliance dated the 15th November, 1969 and recorded in the Registry of Records, Nassau, in Volume 1543 at pages 185 to 194;

(2) Conveyance from Alliance to the Defendant dated the 5th November, 1974 and recorded in Volume 2325 at pages 521 to 529 in the Registry of Records, Nassau.

14. This Affidavit is made by me from my personal knowledge of the matters herein related and from

information and copies of correspondence and documents obtained by my said Attorneys on my behalf and provided to me.

SWORN TO this 15th)
day of April A.D.,) Sgd. R. Hackett
1975)

Before me,
Sgd. Norma Huber
British Vice-Consul
British Consulate-General
Los, Angeles, California.

Stamp British Consulate General, Los Angeles
15th APR 1975

Exhibit R.H.1. - Letter, Alliance Services Industrial & Commercial Corpn. Ltd. to Myra Investments Ltd. - 2nd June 1970

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED

P.O. Box F-2578
Freeport, Grand Bahama.

2nd June, 1970

Myra Investments Limited,
P.O. Box F427,
Freeport,Grand Bahama.

Dear Sirs,

Re: Alliance Services Industrial & Commercial Corporation Limited First Mortgage Loan to Myra Investments Limited

The above First Mortgage loan matures on 30th June 1970.

We are agreeable to extending the time for repayment of this First Mortgage by one (1) year from 1st July 1970 at an increased interest rate of 12% per annum payable monthly commencing 1st August 1970, provided however, that this extension is subject to the following strict conditions:

(1) That the sum of Two hundred thousand dollars $200,000 be paid to us on or by 1st September 1970.

(2) That any and all monies received by you on the sale of suites, whether before or after the date of this letter (save and except the 30 apartments being sold to Richard Hackett) is to be repaid directly to us in reduction of the First Mortgage.

(3) That on the purchase of the 30 Apartments by the said Richard Hackett for the sum of Three hundred thousand dollars ($300,000), that you direct him to make payment of the said sum of Three hundred thousand dollars ($300,000) on or by 15th ~~June~~ July 1970 to the order of Messrs. Dupuch & Turnquest, our attorneys herein, and this will be disbursed by our attorneys to bona fide sub-contractors, tradesmen, labourers, on proper written authorization of Z.W. Radomski.

We would again stress that the said sum of Three hundred thousand dollars ($300,000) is in no way being used to reduce our First Mortgage but is being allocated towards the completion of the Cooperative Apartment building.

Yours very truly,

ALLIANCE SERVICES INDUSTRIAL &
COMMERCIAL CORPORATION LIMITED

(Sgd) Illegible
RAYMOND S. TOWER
President

RST/cca

Receipt of the above letter acknowledged and agreement to the terms and conditions therein contained.

2 June 1970

MYRA INVESTMENTS LIMITED

by Sgd. Illegible

PRESIDENT

Exhibit R.H.2. - Letter, Dawson Roberts Higgs & Co. to Jerome E. Pyfrom - 20th February 1975

E. DAWSON ROBERTS, HIGGS & COMPANY
Counsel and Attorneys-at-Law,
P.O. Box F427
Freeport, Grand Bahama.

20th February, 1975

Jerome E. Pyfrom, Esq.
Callenders, Orr, Pyfrom & Roberts,
Chambers,
P.O. Box N 3950
NASSAU.

Re: Myra Investments Limited and Silver Sands Apartments

Dear Jerry:

This will acknowledge receipt and thank you for your letter of the 14th February last the contents of which have been duly noted.

At the outset we would confirm that our clients are prepared to cooperate to the fullest extent herein and we will be happy to supply you with any further information which might be required.

As requested we enclose herewith a copy of a letter dated 2nd June, 1970 from Alliance Services Industrial and Commercial Corporation Limited addressed to our client. I am advised that Mr. Radomski, the President of our client corporation, merely acknowledged receipt of the same and returned the original.

The acknowledgement reads as follows:-

"Receipt of the above letter is acknowledged and agreement to the terms and conditions contained therein.

2nd June, 1970
Myra Investments Limited

Sgd. Z.W. Radomski
President

We would greatly appreciate your keeping us advised as to the status of the litigation herein.

Yours faithfully,
Sgd. Derek L. Higgs
DEREK L. HIGGS

DLH/ir
Encl.
cc. Cecil V. Wallace-Whitfield, Esq.

In the Supreme Court

No. 5
Exhibit R.H.3.
Letter,
Gerald N.
Capps to
Dupuch &
Turnquest
25th June
1971

Exhibit R.H.3. - Letter, Gerald N. Capps to Dupuch & Turnquest - 25th June 1971

25th June, 1971

Dupuch & Turnquest,
Chambers,
Freeport.

Att: John Millican, Esq.

Re: Alliance Services Industrial & Commercial Corporation Limited First Mortgage Loan to Myra Investments Limited

Dear John:

I understand that Mr. Ennis had been in town for the last couple of days and unfortunately I have been out of the office and was not able to see him when he came over.

Both Mr. Spanton and Mr. Radomski are in Canada fishing and I will have to wait for their return to furnish you certain information as required. However, in the meantime I am returning to you the Amendment to the Mortgage which has been duly executed on behalf of Myra Investments Limited and I would be most grateful if you would return one executed copy to me for my files.

In respect to the Guarantee I again will have to wait for Mr. Spanton and Mr. Radomski to return in order to have the new Guarantee signed by all parties. However, I might note that Ronald K. Schaefer is no longer associated with the Company and has not been for some time and therefore I am returning the Guarantees to you for deletion of Schaefer from the new Guarantee.

I am making arrangements to locate all the share certificates in Myra Investments Limited and will be turning them over to you as soon as possible. I have no financial statement from Mr. Radomski nor myself but upon Mr. Radomski's return I shall endeavour to see if he can put one together for your clients.

In respect to the amended Assignment of all purchase and sale agreements, if you would be so kind as to draw an Amended Assignment I will attend to its execution on behalf of Myra Investments Limited. The only person who has an up to date list of the purchasers again in Mr. Radomski and I will have to get this from him upon his return and this

likewise pertains to the details of the First Insurance coverage on the property.

You shall be hearing from me again very shortly in respect to the above matters.

Yours faithfully,

GERALD N. CAPPS.

GNC/ir
Encs.

In the Supreme Court

Exhibit R.H.4. No. 5 Letter, Corporate Bank & Trust Co. Ltd. to Gwyn Williams 31st January 1975

Exhibit R.H.4. - Letter, Corporate Bank & Trust Co. Ltd. to Gwyn Williams - 31st January 1975

CORPORATE BANK AND TRUST COMPANY LIMITED

P.O. Box F-2748
Corporate Bank and Trust Company Limited Building,
Logwood Road, Freeport, Grand Bahama Island.
Bahamas.

January 31, 1975.

Mr. Gwyn Williams
Callenders Orr Pyfrom and Roberts
Resident Solicitors
26-27C Kipling Building
P.O. Box F-1248
Freeport, Grand Bahama.

Dear Gwyn:

Re: Silver Sands - Richard Hackett's Thirty (30) Apartments

Today I entered upon the premises of Silver Sands and requested the right to enter Richard Hackett's apartments to make a formal inspection in accordance with his wishes.

I presented myself to Mrs. Wright who is the manageress and requested Mr. Hackett's keys and was advised that the locks had been changed and that these were no longer Mr.Hackett's apartments. I was denied the right of access and entry. In view of these circumstances, and since they have failed to respond to your letter, I deem it advisable that you notify Mr. Callender in Nassau of this event and I feel that a writ should be served forthwith.

Yours faithfully,
CORPORATE BANK AND TRUST COMPANY LIMITED

Lawrence M. Wynne
President

LMW/yt
c.c. Mr. Richard Hackett

EXHIBIT "RH 5" - Reproduced at page 195 of this Record

EXHIBIT "RH 6" Reproduced at page 236 of this Record

No. 6

Reply and Defence to Counterclaim - 11th December 1975

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT 1975

Common Law Side No. 145

B E T W E E N :

RICHARD HACKETT Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED Third Party

AND

JOHN ENNIS Third Party

REPLY

1. The Plaintiff joins issue with the Defendants on its Defence.

DEFENCE TO COUNTERCLAIM

2. The Plaintiff repeats his Statement of Claim and his Reply to the Defendant's Defence set out above and says that he was not aware of and was not a party to or privy to the matters alleged by the Defendant in paragraphs 12, 13 and 14 of its Counterclaim.

3. The Plaintiff denies that the Defendant is entitled to a Declaration as counterclaimed or at all.

4. The Plaintiff denies that he has trespassed on the said premises and reiterates his allegations set out in his statement of claim.

Dated this 11th day of December,A.D., 1975.

Callenders, Orr, Pyfrom & Roberts
Mosmar Building, Queen Street
Nassau, Bahamas
Attorneys for the Plaintiffs.

TO: The Defendant or its Attorneys
Messrs. Kendall Nottage & Co. Chambers,
Kings Court, Bay Street, Nassau.

AND TO: Messrs. Dupuch & Turnquest, Chambers,
East Shirley Street, Nassau, N.P., Bahamas.

No. 7

Amended Statement of Claim - 11th May, 1977

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT 1975

Common Law Side No. 145

B E T W E E N :

RICHARD HACKETT Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED Third Party

AND

JOHN ENNIS Third Party

AMENDED STATEMENT OF CLAIM

1. The Plaintiff was at all material times seised and possessed of the leasehold premises known as apartments designated or numbered B101, B102, B103, B104, B105, B106, B107, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 situate in Buildings "A" and "B" of Kismet Apartments, Freeport, Grand Bahama and now known as Silver Sands Hotel by virtue of an Indenture of Lease dated the 5th day of June, A.D., 1970 and made between Myra Investments Limited of the one part and the Plaintiff of the other part for the term of Ninety-nine (99) years commencing from the 5th day of June, A.D., 1970 (reference to which will be made by the Plaintiff at the trial of this Action to the said Lease for its full terms and true effects).

2. The Plaintiff by himself or his duly authorised agents or tenants pursuant to the said Lease on or about the 5th day of June, A.D., 1970 entered into and took possession of the leasehold premises and remained in continuous possession of the said leasehold premises until on or about the 25th day of November, A.D., 1974 without interruption or interference from anyone.

3. On or about the 25th day of November, A.D., 1974 the Defendant its servants or agents unlawfully trespassed upon and took possession of all the said leasehold premises and unlawfully changed the locks thereof.

4. As from the 25th day of November, A.D., 1974 the Defendant its servants or agents has unlawfully and continuously denied the Plaintiff his agents or tenants access to any and all of the said leasehold premises.

5. The said leasehold premises comprise apartment units, being part of a hotel complex operated under independent management, whereby, with the consent of the Plaintiff, various apartments of the Plaintiff were rented from time to time.

6. The Plaintiff's apartments were so rented on daily or longer tenancies at an average rate of $14.00 per day. As a result of the said unlawful interruption of the Plaintiff's possession of the said leasehold premises the Plaintiff has been deprived of rents and has suffered damage.

7. In the alternative, the Plaintiff is entitled in Equity to a Lease similar in all respects to the said Lease of the 5th day of June, 1970 referred to in paragraph (1) above.

8. By a Mortgage dated the 15th day of November, 1969 and made between Myra Investments Limited of the one part (hereinafter referred to as "Myra") and Alliance Services Industrial & Commercial Corporation Limited of the other part (hereinafter referred to as "Alliance") Myra mortgaged to Alliance in fee simple inter alia the leasehold premises referred to in paragraph (1) hereof to secure the repayment by Myra to Alliance of the sum of Six Hundred and Ninety-five thousand ($695,000.00) dollars.

9. Myra defaulted in payments due to Alliance under the said Mortgage and Alliance exercised its power of sale contained therein under an Indenture of Conveyance made the 5th day of November, 1974 whereby Alliance sold to the Defendant the premises the subject of the said Mortgage.

10. The said Conveyance was made pursuant to an Agreement for Sale made the 28th day of October, 1974 between Alliance of the one part and Gleneagles Investment Company Limited of the other part the benefit of which Agreement was assigned to the Defendant by the said Gleneagles Investment Company Limited on the 4th day of November, 1974.

11. Clause 8 of the said Agreement of the 28th October, 1974 provided as follows:-

> "It is understood that certain parties may be claiming Leases on portions of the said hereditaments. The Vendor hereby represents that these Leases have never received the Vendor's previous written consent and are therefore in breach of the said Mortgage between the Vendor and the said Myra Investments Limited".

AND the Plaintiff says that the Defendant was thereby put on Notice and purchased with knowledge of or alternatively Notice of the Plaintiff's said equitable entitlement to a Lease of the subject premises. The said clause constituted adequate Notice to the Defendant of the Plaintiff's right in equity to be put in the same position as if his said Lease bound the said Alliance and the Defendant.

12. Further in the alternative the Plaintiff says that the Defendant is estopped in equity from denying the validity of the said Lease to the Plaintiff by reason of the following matters:-

(a) Subsequent to the date of the Mortgage referred to in paragraph (8) hereof and prior to the date of the Conveyance mentioned in paragraph (9) hereof the Plaintiff was induced by Myra and encouraged by Myra and Alliance to assist in the completion of the building encompassing the subject premises by accepting the said Lease for 30 apartments and paying therefore the sum of $300,000.00 which said sum was at the request of Alliance to be allocated towards the completion of the co-operative apartment buildings

13. In conformity with the request of such allocation of the said sum of $300,000.00 the Plaintiff accepted the said Indenture of Lease and thereafter paid by instalments the said sum of £300,00.00 towards the completion of the said co-operative apartment buildings.

14. The Plaintiff was as a result of his taking of the said Lease required by law to pay the Customs' duty applicable to the leasehold premises covered by the said Lease which amounted to $30,000.00 which the Plaintiff did pay. Further, the Plaintiff paid an additional sum of $60,000.00 towards the costs of furniture,

fixtures and equipment which were installed in or placed in the apartments comprising the leasehold premises.

15. Alliance requested and/or allowed the Plaintiff to spend the said sum of $390,000.00 towards the completion of the said co-operative apartment building in the expectation that he the Plaintiff would have such a Lease and that the expectation was created or alternatively encouraged by Alliance.

16. The said inducement and encouragements extended to the Plaintiff by Myra and Alliance took place during and subsequent to meetings held during late May and early June, 1970 attended by the Plaintiff and representatives and attorneys acting for Myra and Alliance where the said proposals for the Plaintiff's provision of the said sum of $300,000.00 to complete the building were discussed. The discussions culminated in the form of a letter dated the 2nd of June, 1970 written to Myra by Raymond S. Tower as President of Alliance. The Plaintiff will refer to the said letter at the Trial of this Action for its full terms and true effect.

17. Further in the alternative the Plaintiff is entitled to be given an equitable lien on the said premises conveyed to the Defendant under the said Conveyance of the 5th November, 1974 to secure the return of his said expenditure of the said $390,000.00 and is entitled to be treated as a mortgagee in possession in respect thereof.

AND THE PLAINTIFF CLAIMS:

1. Possession of the premises comprising apartments numbered B101, B102, B103, B104, B105, B106, B107, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 of Silver Sands Hotel (formerly known as Kismet Apartments) in the City of Freeport.

2. A Declaration that the Plaintiff is entitled to a Lease to be granted to him all respects similar to the said Lease of the 5th of June, 1970; or alternatively

3. An Order that Alliance Services Industrial & Commercial Corporation Limited is deemed to have consented to the grant of the said Lease to the Plaintiff; or alternatively

4. An Injunction to restrain the Defendant whether by itself or by its agent or servants or otherwise from doing the following acts or any of them, that is to say, trespassing on the said premises;

5. Mesne profits;

6. Damages for trespass and exemplary damages.

OR ALTERNATIVELY

7. An Order that the Plaintiff is entitled to and holds an Equitable Lien over the premises conveyed to the Defendant on the 5th day of November, 1974 to secure the repayment to him of:-

(a) the sum of B.$390,000.00; and

(b) interest thereon from the 5th day of June, 1970 to date at 6% per annum or at such rate as this Honourable Court may determine just and expedient

AND

8. Costs;

9. Further or other relief.

Dated this 11th day of May, A.D., 1977.

PYFROM & ROBERTS
Chambers,
Charlotte House,
Charlotte Street,
Nassau, N.P., Bahamas.

Attorneys for the Plaintiff.

No. 8

Amended Defence and Counterclaim - 20th June 1977

COMMONWEALTH OF THE BAHAMAS 1975

IN THE SUPREME COURT No. 145²

Common Law Side

B E T W E E N

RICHARD HACKETT Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

(By Original Action)

AND BETWEEN

the said INVERUGIE INVESTMENTS LIMITED Plaintiff

AND

the said RICHARD HACKETT

and

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED

and

JOHN ENNIS Defendants

(By Counterclaim)

AMENDED DEFENCE AND COUNTERCLAIM

AMENDED DEFENCE

1. The Defendant denies that the Plaintiff was at all material times seised and possessed of the premises known as Apartments Nos. B101, B102, B103, B104, B105, B106, B107, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 situate in Buildings A & B of Kismet Apartments, Freeport, Grand Bahama now known as Silver Sands Hotel (hereinafter referred to as "the said premises") as alleged in Paragraph 1 of the Statement of Claim filed herein.

2. The Defendant contends that it had no

knowledge of the alleged leases since the documents purporting to create the said leases were not recorded in the Registry of Records in and for the Commonwealth of the Bahamas, and the Defendant upon an inspection of buildings comprising the complex known as Silver Sands Hotel did not encounter on the said premises the Plaintiff, his agent or any person claiming to occupy the said premises for or on behalf of the Plaintiff or as tenant of the Plaintiff.

3. The Defendant will object that the purported indenture of lease dated the 5th day of June, A.D., 1970 and made between Myra Investments Limited of the one part and the Plaintiff of the other part for the term of Ninety-Nine (99) years commencing from the 5th day of June, A.D., 1970 (hereinafter referred to as "the purported lease") is invalid.

4. The Defendant will object that the purported lease is invalid on the ground that at the date of creation of the purported lease the Defendant Alliance Services Industrial & Commercial Corporation Limited held a mortgage over the said premises dated the 15th day of November, A.D., 1969 (hereinafter referred to as "the said mortgage"), and made between the said Myra Investments Limited as Mortgagor, and Alliance Services Industrial & Commercial Corporation Limited, as Mortgagee, an express term of which was that the "powers of leasing conferred on Mortgagors by S.20 of the Conveyancing & Law of Property Act shall not be exercisable by the Borrower without the consent in writing of the Lender", and, that the Plaintiff had notice of the said term the said mortgage having been recorded in the Registry of Records in and for the Commonwealth of the Bahamas in Volume 1543 at pages 185 to 194. The Defendant will refer to the said mortgage at the trial of this Action for its full terms and effect.

5. The said Alliance Services Industrial & Commercial Corporation Limited represented in Clause 8 of an Agreement dated the 28th day of October, A.D., 1974, and made between the said Alliance Services Industrial & Commercial Corporation Limited, of the one part and Gleneagles Investment Company Limited of the other part, the benefit of which was assigned to the Defendant by the said Gleneagles Investment Company Limited on the 4th day of November, A.D., 1974, that neither the purported leases or any other lease had received its previous written consent and that such agreement or lease was in breach of the said Mortgage. The Defendant will refer to the said

Agreement at the trial of this action for its full terms and effect.

6. The Defendant will object that in the purported lease the Mortgagor, Myra Investments Limited attempted to create an occupational Lease of the said premises for a term of Ninety-nine (99) years contrary to S.20 of the Conveyancing & Law of Property Act.

7. The Defendant states that it is seised of the said premises under an Indenture of Conveyance made the 5th day of November, A.D., 1974 between the said Alliance Services Industrial & Commercial Corporation Limited and the Defendant and recorded in the aforesaid Registry of Records in Volume 2325 at pages 521 to 529 wherein the said Alliance Services Industrial & Commercial Corporation Limited conveyed the freehold to the said premises to the Defendant under its power of sale as mortgagee aforesaid.

8. The Defendant denies that the Plaintiff was in occupation and continuous possession of the said premises until or about the 25th day of November, A.D. 1974 as alleged in paragraph 2 of the Amended Statement of Claim and puts the Plaintiff to strict proof thereof.

9. The Defendant denies the allegations contained in Paragraphs 3 and 4 of the Amended Statement of Claim and that its servants or agents has unlawfully and continuously denied the Plaintiff his agents or tenants access to the said premises or unlawfully changed the locks thereof or at all.

10. The Defendant denies paragraphs 5 and 6 of the Amended Statement of Claim and puts the Plaintiff to proof of his loss of revenue as alleged in Paragraph 6 of the Amended Statement of Claim.

11. The Defendant denies that the Plaintiff is entitled to a lease in equity or any lease as alleged in paragraph 7 of the Amended Statement of Claim.

12. The Defendant admits paragraphs 8 to 10 inclusive of the Amended Statement of Claim.

13. As to paragraph 11 of the Amended Statement of Claim the Defendant admits that clause 8 of the Agreement of the 28th October, A.D., 1974 provided as therein set out but denies that the

same gave any notice or furnished any knowledge of the Plaintiff's alleged entitlement to a lease.

14. As to paragraphs 12 to 16 inclusive of the Amended Statement of Claim the Defendant admits that the Plaintiff paid the sum of Three Hundred thousand ($300,000.00) dollars which was expended towards the completion of the said premises. The Defendant further admits the letter dated the 2nd day of June, A.D., 1970 referred to in the said paragraph 16. Save as aforesaid the Defendant denies every allegation in the said paragraphs. The Defendant will contend that any consent by the mortgagee under the said mortgage pursuant to the said letter or otherwise was to a disposition of the equity of redemption only under clause 4(a) (iv) of the said mortgage and did not release the said premises or any part thereof from the said mortgage nor authorise the granting of a lease thereof binding on the mortgagee.

15. The Defendant denies that the Plaintiff is entitled to any lien on the said premises as alleged in paragraph 17 of the Amended Statement of Claim or at all.

16. Save as is hereinbefore expressly admitted the Defendant denies each and every allegation of fact contained in Paragraphs 1 to 17 of the Amended Statement of Claim as if the same were set forth herein and specifically traversed.

AND BY WAY OF COUNTERCLAIM

17. The Defendant repeats Paragraphs 1 to 16 of its Defence and says that the Defendant, John Ennis both as Director of Alliance Services Industrial & Commercial Corporation Limited and in his personal capacity represented to the Defendant that the Defendant, Alliance Services Industrial & Commercial Corporation Limited neither approved of nor consented to the purported lease or in any way acknowledged its validity.

18. That the said representation by the said Alliance Services Industrial & Commercial Corporation Limited, and the said John Ennis, was made orally and in writing in particular in Clause 8 of an Agreement dated the 28th day of October, A.D., 1974 and made between the said Alliance Services Industrial & Commercial Corporation Limited of the one part and Gleneagles Investment Company Limited of the other part, the benefit of which was assigned to the Defendant by

the said Gleneagles Investment Company Limited on the 4th day of November, A.D., 1974. The Defendant will refer to the said Agreement at the trial of this Action for its full terms and effect.

19. That in reliance upon the Defendant's said representation the Plaintiff purchased the said Silver Sands Hotel for the sum of Six hundred and Thirty thousand ($630,000.00) dollars and invested additional sums in the refurbishing thereof and payment of customs duty thereon.

20. That if, which is not admitted, the allegations of the Plaintiff are correct and the said Alliance Services Industrial & Commercial Corporation Limited is found to have consented to the purported lease, which is also not admitted, then the said representations was made fraudulently, in that the Defendants, the said Alliance Services Industrial & Commercial Corporation Limited and the said John Ennis, knew it to be false, or made it recklessly, not caring whether it was true or false.

21. By reason of the Defendants' said fraudulent misrepresentation the Plaintiff has suffered loss and damage.

PARTICULARS

(i) Loss of the sum of Six hundred and Thirty thousand ($630,000.00) dollars paid to the said Alliance Services Industrial & Commercial Corporation Limited and John Ennis together with interest thereon;

(ii) Loss of sum of Ninety thousand ($90,000.00) dollars paid for Customs Duty together with interest thereon;

(iii) Loss of sum of Fifty thousand ($50,000.00) dollars paid for refurbishing as aforesaid together with interest thereon.

22. That if the allegations made by the Plaintiff are correct, which is not admitted, that the Defendant be indemnified by the said Alliance Services Industrial & Commercial Corporation Limited and the said John Ennis herein.

AND the Defendant counterclaims:-

1. Against the Plaintiff:-

(i) A Declaration that the Defendant is seised of the premises comprising Apartments:-

B101, B102, B103, B104, B105, B106, B107, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403, situate in Buildings A & B of Kismet Apartments, Freeport, Grand Bahama, now known as Silver Sands Hotel.

(ii) An Injunction to restrain the Plaintiff whether by himself or his agents or servants or otherwise from doing the following acts or any of them, that is to say trespassing on the said premises

(iii) Costs.

(iv) Such further or other relief as to the Court seems just.

Alternatively, against the said Alliance Services Industrial & Commercial Corporation Limited and the said John Ennis :-

(i) Damages;

(ii) Indemnity against the Plaintiff's claim herein.

(iii) Costs.

(iv) Such further or other relief as to the Court seems just.

DATED the 20th day of June, A.D., 1977.

TO: The Plaintiff or
Messrs. Callenders, Orr, Pyfrom & Roberts
Chambers,
Queen Street,
Nassau, N.P., Bahamas.

TO: The Defendant (by Counterclaim)
Alliance Services Industrial &
Commercial Corporation Limited, or
Messrs. Dupuch & Turnquest, its Attorneys
Shirley Street,
Nassau, N.P., Bahamas.

TO: The Defendant (By Counterclaim)
John Ennis; or
Messrs. Dupuch & Turnquest, his Attorneys
Shirley Street,
Nassau, N.P., Bahamas.

No. 9

Proceedings - 7th January 1980

COMMONWEALTH OF THE BAHAMAS 1975

IN THE SUPREME COURT No. 145

Equity Side

B E T W E E N :

J. WILLIAM MADDEN

VS.

INVERUGIE INVESTMENTS LIMITED

A N D B E T W E E N :

RICHARD HACKETT

VS.

INVERUGIE INVESTMENTS LIMITED

DATE: 7th January, 1980

Application in Chambers

For Plaintiff Madden (Suit 88/1975) Mr. Liddell
For Defendant " Mr. Whitfield
For Third Party (Alliance Services) Dupuch & Turnquest not represented.
Action against them stayed.

Suit 145/1975

For Plaintiff - Mr. J. Pyfrom
For Defendant - Mr. Whitfield
For Third Defendant (Alliance Services) Dupuch & Turnquest not represented.
Actions stayed.
Third Defendant - John Ennis

Mr. Pyfrom - I apply for an adjournment. Hackett is seriously ill - Hospitalised on 24th December, 1979. Released only Friday 5th January, 1980 - Has to return for further treatment this week. Further, Callender Q.C. who is to lead me is not available. His wife is seriously ill. Hacket may be available in 4 - 6 weeks time. Would suggest an adjournment for two months.

Mr. Liddell - I support the application. The cases

are intertwined. My case receives support from Hackett's case and I would be prejudiced if the case were to proceed without him.

Mr. Whitfield - I oppose. Writ issued in March 1975 - No point has been made that Hackett's presence is essential to the case. Entire matter turns on documents. My clients are being delayed - have been delayed for five years.

Mr. Pyfrom - Hackett is a necessary witness. He will have to give oral evidence explanatory of background and some of the correspondence. Allegations have been made such as absence of consent by mortgagor to the lease which Hackett has to deal with - There are other matters of fact which emerge which he will have to deal with. Then he has to give evidence as to damages. Ordered that matter be adjourned for hearing on Tuesday the 18th of March, 1980. Costs occasioned by the adjournment to abide the event.

20th March 1980

1st Day - Thursday 20th March, 1980

For Plaintiff Madden - James Liddell

For Plaintiff Hackett - E. Callender Q.C. & Jerome Pyfrom & Miss Muskow

For Defendant - Wallace Whitfield & Harvey Tynes.

E. Callender Q.C. opens

Case arises out of purchase by Hackett in 1970 of a lease of 30 apartments in Silver Sands Hotel for 98 years. Hotel owned then by Myra Investments. In 1969 Myra was in financial difficulties in constructing Hotel and obtaining a mortgage from Alliance of $630,000. Mortgagor, Myra remained in possession.

In May 1970 negotiations began between Myra and Plaintiff Hackett for the funds to be applied for completion of the building. Negotiations took place between Myra, Alliance and Hackett. As a result Hackett agreed to invest $300,000 in the project in consideration of his receiving a lease of the 30 apartments for 95 years.

Hackett will say that under no circumstance would he have lent the money to Myra - He did not wish to be a second mortgagor. It was only after it was agreed that he should have leases that he put up the $300,000. These discussions culminated in letter of 2nd April, 1970. Tower of Alliance to Myra - As a result, transaction went

through. Hackett paid the $300,000 in instalments None of the money was paid in reduction of the mortgage. Hackett was not represented by Counsel in the negotiations.

Shortly after, Hackett went into possession. Apartments were put in the hands of a Chartered Accountant to rent out on a short term basis. Some were rented and provided income for Hackett.

This state of affairs went on for four years. Other apartments were leased by Myra in a similar manner to the knowledge of Alliance - In 1974 Myra defaulted on its mortgage to Alliance - Alliance exercised its powers of sale as mortgagee. Alliance sold to Gleneagles. Contract contained a representation that no leases had been consented to in writing - At that time there were a number of such leases recorded. Hackett's leases were not. Gleneagles assigned contract of sale to Inverugie - When Inverugie purchased, it had notice of all the recorded leases. Plaintiff's case is that although his lease may not, in law, have been effective against Alliance, Alliance was in equity bound by Hackett's lease. If Hackett had a lease in equity of which Inverugie had notice, Inverugie was bound by the equity. Alternatively, notice or no notice, Inverugie cannot be in any better position than Alliance and would be bounded by the equity. The fact that Hackett's lease was not recorded would not affect the matter.

Inverugie accepted the conveyance from Alliance on 5th November, 1974 - Shortly thereafter, someone on behalf of Inverugie visited the building and changed the locks on the 30 apartments without Hackett's knowledge. When Hackett learnt of this, he consulted his lawyers and started this action -

Later an injunction was granted restraining Inverugie from occupying the apartments. Injunction was operative until December 1975 - In 1976 Inverugie condominumised the apartments and the apartments were put up for sale. Hackett sought and obtained a further injunction restraining the sale unless $14,000 was paid into Court in respect of the sale of any apartment. This situation has obtained until the present time. There has been no sale of any of the apartments as far as we know.

ISSUES:

(1) Is Alliance bound under Hackett's lease by way of estoppel?

(2) If lease bound Alliance, is Inverugie bound?

(3) Does Registration of Records Act effect the issue in that Hackett's claim is rooted in equity?

(4) If Plaintiff entitled to succed, what damages is he entitled to?

I will be referring to High Trees - 1956 1 A.E.R. 256. Denning J. at pp. 256-258. P 258 E.F.G.H.I.

Hopgood vs. Brown - 1955 1 A.E.R. 550, 559, 561 & 564.

Invards & Others vs. Baker - 1965 2 Q.B. page 29.

Plinner vs. Wellington- 1884 9 A.C. 699

Eves Investments vs. Hugh- 1967 2 Q.B. 379

Corbett vs. Plowder - 1866 25 Ch. 678 p.681

Ramsden vs. Dyson - 1866 L.R. 1 H of L. p.129

A.G. to H.R.H. Prince of Wales vs. Collom 1916 1 K.B. 193.

Court refers Counsel to the following:-

Alan & C. vs. Nasar 1972 2 Q.B. 189;
Evenden vs. Guildford Football Club 1975 1 Q.B.917;
Moongate vs. Twitchings 1976 1 Q.B. 225;
Crab vs. Arun 1976 1 Ch. 179;
Kammins Ballrooms vs. Zenith Investments - 1970 2 A.E.R. 871.

Mr. Liddell:

I do not have a great deal to add. My client's case, (Madden) is almost parallel to the case of Hackett. My client bought a lease in an apartment, paid for it and furnished it and took possession. He used the apartment for himself and his family and gave various short term leases to third parties. The events subsequent to sale to Inverugie led to a disturbance of Madden's possession. Madden was refused entry to his apartment - Later on Madden obtained an injunction restraining Inverugie from selling his apartment - Madden's lease was recorded unlike the position with Hackett.

Court asks whether paragraph 3 of Madden's Statement of Claim "entry into possession in January 1970" is correct-

Liddell

I do not think this is correct. It should have read "January, 1971", but I will look into it. My client will arrive tomorrow.

Adjournment for Mid-morning break at 11:30 a.m.

Resumption 12:00 noon.

I am satisfied that "January 1970" in paragraph 3 of Statement of Claim should read 1971. Will apply to amend after confirmation by my client who will arrive tomorrow -

No. 10

Richard Hackett - 20th March 1980

Richard Hackett Examination in Chief Sworn:

I live 1277 Via Paraiso Palm Springs, California U.S.A. I am retired. Was a Consultant Naval Architect. In February 1976 I decided to settle in the Bahamas - arrived in Freeport. Resided there until 1971. First I bought a house - Later around June, 1976 I entered into a partnership to develop a Condominium Apartment Complex named now Silverpoint Limited. This is adjacent to Silver Sands Hotel. Silver Sands Hotel was not then in existence. Entered into partnership with an Englishman named Moody and a Polish gentleman, Radomski. Apart from Silverpoint entered into the other business until Radomski approached me towards the end of 1969 or early 1970.

Radomski approached me to assist him in funding the completion of Kismet Apartments which later became Silver Sands. At that time Kismet was not completed. One building was 80% completed. The other 90%. A third building under construction was about 80% completed. Up to that stage I did not know the original source from which the Kismet project was being financed - i.e. - up to January - May of 1970. Kismet apartments was owned by a Company which I later learnt was Myra Investments Limited - When Radomski approached me, he approached me more in his personal capacity than on behalf of the Company. From what I could gather he had approached many sources for a loan for the continuation of the project, but without success. I did not know at that time whether any other source had put up money for the project. At that point, I turned down Radomski's request for a loan. He had offered me no security for the loan. I turned down his request because he offered no security and I did not like Myra Investments.

In May or June 1970 I learnt that Alliance were involved in a loan to Myra, and that new Directors to the Board of Myra had been appointed who were acceptable to me. I did not know how Alliance's loan was secured. I learnt that Alliance had a mortgage on the loan about the first week in June, 1970 - When I learnt that Myra required Alliance's permission for any further investment in Myra's property I said I would be interested in purchasing 30 apartments each worth $10,000. I agreed to take the 30 apartments on condition that Alliance give their consent to

approval to the sale of the apartments. I was to get a lease of the apartments at the price of $300,000. Ray Tower was President of Alliance and I came in contact with him during the negotiations - Tower was a lawyer and he practised in the offices of Dupuch & Turnquest. I never wanted the $300,000 which I was to pay, to be turned over to Alliance in reduction of the mortgage loan to Myra. I wanted to see the building completed - My money was not a loan to Myra. I wanted to get the apartments in return for my money -

NOTE: Witness not feeling well -- (Went into a short faint)
Adjournment taken at this stage until 2:30 pm.

Resumption at 2:30 p.m.

Mr. Callender:

Plaintiff has seen a doctor. Whilst doctor does not say he is unfit to go on, I think it would be unwise for him to continue. Subject to what Defence says, I would ask for an adjournment at least until tomorrow when position will be reviewed plaintiff was hospitalised and under intensive care in January, 1980 -

Mr. Whitfield:

I do not object to course proposed - I would agree to an adjournment to Monday if necessary.

Mr. Callender:

Plaintiff wishes to go on. Would not wish to adjourn until as late as Monday. I adhere to application for adjournment to Friday subject to review. I now understand my client has to undergo further medical tests tomorrow. So on reflection, I will apply for an adjournment until Monday -

Adjournment until Monday the 24th of March at 10:00 a.m.

2nd Day - 24th March, 1980

24th March 1980

Resumption at 10:00 a.m.

Richard Hackett Examination in Chief Cont'd:

The letter 2nd June, 1970 from Alliance to Myra was drawn to my attention about the 3rd or 4th of July, 1970. Letter in evidence - p.11 Section B. of Hackett Bundle - I see this letter.

I saw it before. This letter was shown to me by Mr. Capps in the Office of Dawson Roberts, Freeport, Grand Bahama. Capps was Secretary and Legal Adviser to Myra. Radomski of Myra was present when Capps showed me this letter.

When I read the letter I did not agree with everything set out in it. I agreed to condition 2 of this letter - I did not agree to condition 3 - I did not agree because Tower would not have had the time to insure that the disbursements were properly made -

I was interested in seeing that the buildings were completed so as to insure that I would have a return on my money. I had an investment at Silver Point Limited which was adjacent to the Myra project then known as Kismet - I owned 8 apartments at Silver Point. Silver Point was a completed project by October, 1968. My 8 apartments there provided a source of income for me.

I proposed as alternative to condition 3 of the letter of 2nd June, 1970 that I personally supervise the disbursement of the $300,000 to contractors, tradesmen and sub-contractors - I felt that this would have insured that the building was completed.

I arranged with Myra to pay cheques to each contractor - The arrangement was that Myra would pay the contractors, and when I was satisfied that the Myra cheques were paid in respect of bona fide past debts, or for work actually completed, I would re-imburse Myra. My suggestion was adopted as far as I know. I disbursed my $300,000 in accordance with this arrangement between June and November, 1970. The building was completed in November, 1970.

I signed the lease dated 5th June, 1970 at pp 13-34 Section D. of Bundle.

I put the Apartments in the hands of Myra for letting for my account. The apartments were furnished. I furnished them. I spent $60,000 on furnishing the apartments, over and above the $300,000 I paid for the leases. I know the apartments were rented after that - I do not recall how many - I never received any rent for the apartments - Myra used the rent for maintenance expenses, salaries etc. I derived no benefit from the apartments at that time - i.e. initially I have never made any money off the

apartments. They have been a losing proposition ever since I took the leases. The apartments have been rented on and off, but the rentals have barely managed to pay the mortgage and other expenses -

In November 1974 the apartments were taken over first by Gleneagles, then by Inverugie. The keys for my apartments were given to Myra - I have at times occupied one or more of my apartments. I have seen the keys - After November 1974 my representative was refused access to the apartments. I was not living in Freeport from mid 1971 onwards. My representative was refused access by Mrs. Wright - The manageress of Inverugie. From 1971 until 1974 my possession was never questioned by Alliance nor anyone on behalf of Alliance.

My lease was not recorded until December, 1974.

I inspected the 30 apartments before I took the lease - These apartments are located in two buildings. When the apartments were rented, things were slow and rentals were $7.50 per day per apartment - Rentals were increased to $17.50 per day for the winter season 74/75. Suntours of Canada and Sunglite of Canada were the Tower Companies that rented the apartments. I also had to pay Customs duties at the rate of $1,000 on each apartment. So my total investment cost me $390,000.

I never received any consent in writing from Alliance in connection with the lease - I had no dealings with Alliance.

Dawson Roberts were the lawyers for Silver Point Limited in 1967. I discussed the letter of 2nd June 1970 and the views I held as to condition 3 with Dawson Roberts - I never paid any money directly to Alliance in the matter -

To Court:

There are now two buildings with apartments at Silver Sands Limited - 144 apartments. There is another 2 storey building with reception, sauna baths, and store-rooms, restaurant, bar, and kitchen - After I purchased my lease, the 2 storey building was completed -

I never met anyone from Alliance during the discussions with Myra about the leases - I never

In the Supreme Court

Plaintiff's Evidence
No. 10
Richard Hackett - 24th March 1980 Examination (cont'd)

Cross-Examination

met Tower in connection with the negotiations for the lease - I do not know whether anyone from Alliance visited the premises after I took my lease - I never knew what were the terms of the mortgage between Myra and Alliance at the time I took my lease - I never knew that under that mortgage Myra could not lease without Alliance's previous consent in writing.

NO CROSS-EXAMINATION BY MR. LIDDELL

CROSS EXAMINATION BY MR. WHITFIELD:

The first cheque I paid was for $4,500 - for the power company. That was an outstanding debt - I paid my cheque to Myra and they paid the power company - There was $150,000 expended to get the building rolling again. This was the debts incurred for the period June to August 1970 - I had no agreement with Myra thatI would pay the $300,000 in instalments -

I saw my affidavit, pages 5-10 - Section B. of Bundle - I see paragraph 2 of this affidavit. The statement that I paid $150,000 on 7th June, 1970 in this affidavit is not true.

I see paragraph 4 of the affidavit - This refers to the commencement of the negotiations. I agreed to provide the $300,000 on the 3rd June, 1970. I went in to Myra on one or other of those dates, and the letter of the 2nd of June 1970 was produced. I had not agreed between the 5th of June 1970 to provide the $300,000. We have had talks before, but I finally agreed to provide the $300,000 and purchase the apartments on 5th June, 1970.

Mid-morning Break taken at 11:30 a.m.

Resumption at 11:50 a.m.

Richard Hackett Cross-Examination Cont'd.:

It was when I saw this letter of 2nd June, 1970 that I first knew of a mortgage by Myra to Alliance - That was on the 3rd or 4th of June 1970 - On 5th June, 1970 I never paid $300,000 to Myra - Myra never received $300,000 from me on 5th June, 1970 - I see the lease. P. 18 of Section D - The statement in paragraph 1 that the $300,000 was paid is untrue. I gave Myra no promissory notes -

I see paragraph 5 of my affidavit Section B. p6. Paragraph 5 - I realised the position as

stated in paragraph 5 of this affidavit on 3rd or 4th of June, 1970. I agree that Alliance was agreeing on strict conditions to extend time for repayment of the mortgage. I realised this from language in paragraph 2 of their letter of 2nd June, 1970. It appears they made their forebearance subject to compliance with all three of the conditions stated in the letter - I was fully aware of all these conditions. I read and understood the letter - On 3rd and 4th of June I understood that Myra had discussed the content of the letter of the 2nd of June 1970 with Alliance. Myra and Capps - the Secretary of Myra gave me so to understand. I never saw any document to show that Alliance was agreeing to anything other than what they stated in their letter of 2nd June, 1970.

I see Section B. of Bundle p. 17 - Corporate Bank and Trust Company were my representatives in relation to my apartments. I never told Corporate Bank of my arrangements with Myra - Wynne was not aware of them at the time of the letter of 31st January, 1975 - I later told Wynne of the terms of the arrangement I had with Myra - I never told him before the letter of 31st January, 1975 - I told him fully afterwards.

I turn to p. 30 Section E. Letter Corporate Bank to Nottage 5th November, 1974. I never knew Wynne had written this letter - I have no idea where Wynne got this information in this letter from -

I knew that Alliance had given notice to Myra of its intention to exercise the powers of sale. I was going to superintend the disbursement of the $300,000. My interest was in a sense wider than just getting a lease of 30 apartments. My whole idea in putting up the $300,000 was to see all the buildings for the project completed. On the 5th of June, 1970 no apartments anywhere on the project were completed - All my apartments were then under construction - All apartments were completed by the end of 1970 - My 30 apartments were furnished by the end of 1970 - I paid the money for the furnishing to Radomski - I also paid him the Customs duties - He was supposed to have put the furnishings in my apartments -

RE-EXAMINATION: Re-Examination

I know Raymond Tower. I met him socially. At no time did I discuss my possible involvement in 30 apartments with Tower on any social occasion - Paragraph 2 of my affidavit pages 5-10

was not intended to mislead - I did write cheques amounting to approximately $150,000 on the 7th of June, 1970 - My affidavit is wrong only in so far as it says that the payment was made in cash - Subsequently between 7th June, 1970 and August, 1970 I paid out a further $150,000 - This affidavit was in support of an application for an injunction-

As to receipt of the $300,000 noted in the lease which had not then been paid, Radomski had no reason to doubt my word that it would have been paid as arranged.

I would never have gone in to the project unless the money I was loaning or financing on whatever else you call it was used in the completion of all the buildings. If the buildings had not been completed I would have been affected. I could not have taken possession of the apartments if they had not been completed - I would also have been affected if the restaurant, the bar and the sauna had not been completed - My 30 apartments would be a better investment when the restaurant etc. was completed than otherwise -

Luncheon Adjournment taken at 12:45 p.m.

Resumption at 2:30 p.m.

By Agreement between Counsel

Record of Leases and Conveyances made between Myra and other parties between 8th November, 1968 and 1st October, 1974 tendered in Evidence - Exhibit 1 -.

No. 11

Joseph William Madden - 24th and 25th March, 1970

Joseph William Madden Sworn:

I live Demerest Avenue, Oradell, New Jersey, U.S.A. I am a Salesman. I bought a lease of an apartment B306 in the Silver Sands Hotel in January, 1971. I obtained this lease shown at Section D. p.10 of the Madden Bundle. Lease was recorded on 23rd February, 1973 - I paid $17,995 for the lease inclusive of duty of $1000 - I also paid some $400 for closing costs - I believe I purchased a 99 year lease.

I took no local legal advice when I bought this lease. I paid for the lease cash, over a period of one year in four separate payments - deposits of $6,000 - $10,995 was paid in four separate payments. The apartment was turned over to me on 1st January, 1971- At that time there was a balance outstanding which I paid over a year afterwards, and then I had my lease recorded - I took possession on 1st January, 1971.

I lived in the apartment myself - I lived in it with my family for about 4 weeks a year, and then rented it to friends for periods varying between 15-18 weeks each year. I paid $88 per month for land, rent and maintenance. I made this arrangement with Radomski. Myself and my tenants were totally undisturbed in the use of the apartment for approximately 3 years and 10 months - In November, 1974 I got certain information that caused me to come down to Freeport.

On arrival I spoke to the manageress Mrs. Wright and asked her to be let in to my apartment. She said new owners had taken over and I would not be permitted in to my apartment - She said the lock had been changed and any further questions I had to ask were to be referred to Mr. Bereaux an attorney in Freeport. Bereaux was a lawyer with Kendal Nottage and Co., Freeport -

I then went to Bereaux's office. I saw Bereaux - He told me new owners had taken over and that I would not be permitted to use the apartment - I told him my lease had been recorded - He said many people had not paid duty on the apartments. He checked a list and varified that I had paid my customs duties - He said that

In the Supreme Court

Plaintiff's Evidence No. 11 Joseph William Madden - 24th March 1980 Examination (cont'd)

in the circumstances I would be treated differently. I was told to go right down the hall, find myself a lawyer, and come back and he would negotiate with me. My lawyer from New Jersey arrived at about 1:00 p.m. He was Mr. Curran - So I did not use a local attorney. Curran spoke to Bereaux in my presence - Bereaux said he would speak to his principles - We went back to New Jersey. Curran called Bereaux. I was listening on the extension. It was a three way conversation. I knew Bereaux as Inverugie's representative. Bereaux suggested that I forego my claim to the lease for $6,000 - Mr Curran did not agree - The dispute was then put in the hands of local Counsel.

I never knew of the existence of any mortgage over the freehold out of which my lease was carved.

I let the apartment on short term lease - I kept records of my lettings. I would make a record of lettings on old calendars - In 1975 I prepared this record from the old calendars which are not now available - Record tendered Exhibit 2 (NO OBJECTION BY MR. WHITFIELD) Section "From here on after take over" refers to monies I received for rentals which I had to refund because I was prevented from using my apartment -

I never knew until November, 1974 that there were any problems at all concerning my lease.

Cross-Examination

CROSS-EXAMINED BY MR. CALLENDER:

I would not have taken my lease if I knew that there was a mortgage on property which required the previous consent in writing of the mortgage to the lease - I did not know Alliance in the matter at all. I signed an agreement for the lease before entering into the Formal Lease. Bereaux was the attorney in Kendal Nottage & Co., who acted for the Defendant Inverugie.

Cross-Examination

CROSS-EXAMINED BY MR. WHITFIELD:

I see this document. I believe this is the assignment of contract which I took from one Mr. Adams in relation to my apartment - When I signed this in June, 1970 I was aware of a leasehold mortgage. The amount mentioned in this document is what I owed Myra for the apartment. I never mortgaged my apartment to Myra. I do not know of any mortgage in relation to this matter apart from mortgage Alliance to Myra.

Document "Assignment Adams to William Madden - about to be tendered -

In the Supreme Court

Plaintiff's Evidence No. 11 Joseph William Madden - 24th March 1980 Cross-Examination (cont'd)

WITNESS:

I now question my signature on this document. I am saying it does not look like my signature - I agree, however, that this paper contains what I agreed to - When I said earlier that I had signed the document, I had not looked at my signature properly -

By Consent (Document tendered as evidence of the terms of an assignment Adams to Madden - Exhibit 3). The assignment I entered into was on the 15th June, 1970 - So I bought before January, 1971.

I now know of mortgage Alliance to Myra made in 1969, and recorded in January, 1970 - I went to Dawson Roberts in 1973 to get my lease recorded. I see from page 10 Section D. Hackett Bundle that the mortgage was lodged for record on 15th January, 1970 - When I saw Bereaux, he placed emphasis on the fact that my lease was recorded - I wanted it recorded because I understood that that was the correct way to prove ownership in the Bahamas - Had I searched the Registry of Records in June 1970, I would have discussed the terms of the Alliance/Myra Mortgage - I never searched the records of the Bahamas when I took my lease - I had already consulted my lawyers when I prepared Exhibit 2. I did not prepare Exhibit 2 for the purposes of this case.

Re-Examination

RE-EXAMINATION:

I know nothing of the Myra/Alliance mortgage until after November, 1974. Radomski suggested I consult Dawson Roberts to have my lease recorded. Liddel now applies to amend paragraph 3 of his Amended Statement of Claim by deleting 1970 in 2nd. line and substituting "1971".

Whitfield - No objection.

Ordered that Plaintiff Madden be at liberty to amend as prayed - Formal amendment to be filed by Counsel.

Adjournment taken at 3:45 p.m.

25th March, 1980

25th March 1980

Resumption 10:05 a.m.

Liddell asks for permission to re-call Plaintiff Madden - Permission granted.

Joseph William Madden - Re-called - Sworn:

In the Supreme Court

Plaintiff's Evidence
No. 11
Joseph William Madden -25th March 1980
Re-Examination (cont'd)

To Liddell by Permission

Since giving evidence yesterday, I have found this Purchase Contract between myself and Myra dated 15th June, 1970. It is signed by Z.W. Radmoski and myself - Purchase Contract tendered Exhibit 4. I purchased my lease in terms of this document - I made the payments specified in clause 6 on the dates set out, and in due course I was given an executed lease by Myra -

NO CROSS-EXAMINATION BY MR. CALLENDER

NO CROSS-EXAMINATION BY MR. WHITFIELD

TO COURT:

I know Mr. John Adams of the address referred to in Exhibit 3. Adams had entered into a contract initially with Myra.

Adams had paid Myra $6,000. Adams then decided not to go through with the transaction. Adams then came to me and asked me to take over his contract upon terms that I would pay him the $6,000 deposit he had paid - Myra would credit me with the $6,000 he had paid them, and I would be responsible for the balance - It was in those circumstances that Exhibit 4 came into being after a discussion between myself, Adams and Radomski -

I see Exhibit 3 - I do not know Adams' signature - The signature on Exhibit 3 appears to be Radomski's - I still insist that the signature on Exhibit 3 is not mine - I cannot explain what Exhibit 3 means or how it came about. I know it was produced by my Counsel Mr. Liddell. I do not believe I gave it to him. He may have got it from my attorney in New Jersey. My attorney may have got it from my papers. How Exhibit 3 came to be in my papers, I do not know -

TO MR. WHITFIELD BY PERMISSION:

The closing costs are not mentioned in Exhibit 4. I believe they were paid to Radomski's attorney. I paid the closing costs I was asked to pay to Radmoski's lawyers - The amount was $400. It was for lawyers' fees - I think I paid the $400 to E. Dawson Roberts. It is not correct that I engaged Dawson Roberts to look after my interests, and paid him a fee myself for that -

TO MR. LIDDELL:

My New Jersey attorney acted for quite a few other persons interested in the apartments about the same time he was acting for me -

No. 12

Derek Leslie Higgs - 25th March 1980

Derek Leslie Higgs Sworn:

EXAMINATION IN CHIEF:

I live at 38 Carrington Drive, Freeport, Grand Bahama. I am a member of the Bahamas Bar, and a member of the law firm Dawson Roberts, Higgs & Co. I have been attached to this office from April, 1967 to the present time. I joined the firm as an associate and became a partner in late 1973. The firm was originally E. Dawson Roberts & Co. Gerald L. Capps was an associate of the firm from 1967 until late 1972. Capps left the firm sometime in 1972. Capps was attached to the firm before I joined - He was there from about 1965.

We were the registered office for Myra Investments - We represented the Company Myra and as well its principal shareholders and officers - viz, Hackett, Z.W. Radomski and Jack Spanton.

After Capps' departure in 1972, I was solely responsible for the work of Myra and its principal shareholders which Capps used to be responsible for -

Myra's principal business between 1972 and 1974 was a building in Freeport. They were the developers - The project was then called Kismet Apartments. I dealt with correspondence relating to this Project - Prior to 1973 I was not involved in Myra's problems to any substantial degree - I became heavily involved after Capps' departure.

I knew that there was a mortgage. Myra to Alliance. I saw this copy of a letter dated 13th November, 1974 which I wrote to Bereaux. Bereaux was an associate in the then firm of Kendal Nottage & Co., who in 1974 represented Inverugie. Bereaux and I had a conversation re the proposed purchase by Inverugie from Alliance of the Kismet Apartments. Bereaux asked me to let him have some evidence that Alliance was aware of the sale of certain of the units in the mortgagee's property (s/c) - The leasehold sales were sales of terms for 99 years. That is why I wrote this letter of 13th November, 1974 to Bereaux.

Letter dated 13th November, 1974 Higgs to Bereaux with enclosures tendered together by Consent Exhibit 5.

In the Supreme Court

Plaintiff's Evidence No. 12 Derek Leslie Higgs - 25th March 1980 Examination (cont'd)

I see this copy of a letter written to me dated 20th May, 1971 from John Millican of Dupuch & Turnquest. Millican was then acting for Alliance. At the time I received this letter Capps was away from the office. Alliance was at that time seeking an amendment to the original mortgage, and as well an amendment to the assignment form that was then being used. Prior to this letter, Myra was leasing apartments on the property to persons on a long term basis - My understanding was that there were leases by Myra - Sometimes there were contracts made by Myra to grant long term leases. To the best of my recollection there was an assignment which Alliance wanted amended. I have no recollection of the contract of any assignments that were in use prior to the date of this letter, nor have I seen the form of amended assignment this letter appears to suggest.

Letter dated 20th May, 1971 Dupuch & Turnquest to Higgs - Tendered by Consent Exhibit 6.

Mid-Morning Break taken at 11:25 a.m.

Resumption at 11:45 a.m.

Derek Leslie Higgs:

Cross-Examination

CROSS-EXAMINATION BY MR. LIDDELL:

I do not personally know if Myra's rights under any contracts for leases with third parties were ever assigned to Alliance. It appeared to me from reading this letter, Exhibit 6, that there was an intention to amend an assignment and this suggested that there were such assignments in existence before the date of Exhibit 6.

Cross-Examination

CROSS-EXAMINATION BY MR. WHITFIELD:

I see Exhibit 4PL, P.O. Box 427 shown on this was the P.O. Box of E. Dawson Roberts & Co. Myra was not operating its business from this address. I think Directors had a sales office on the Project side and Legal fees would have been paid to E. Dawson Roberts & Co. in respect of transaction evidenced by Exhibit 4 - If Madden paid $400 closing costs, the money would be legal fees to E. Dawson Roberts.

I see page 35 Section D. of the Hackett Bundle - This is an amendment of the mortgage Myra to Alliance. D.42 is a notice to Myra dated 29th June, 1972, requiring payment of the principal sum under the mortgage. Looking at this I would say notice was served pursuant to the 1969 mortgage as amended on 1st July, 1970 -

I now look at Exhibit 6. I would agree that no other amendment of the mortgage came into effect between 1st July, 1970 and 29th June, 1972 - It does not appear to me that any further amendment to the Myra/Alliance mortgage resulted from this letter Exhibit 6.

I see my signature on Document at page 16 Section D. I took responsibility for the preparation of this Document even though Capps who was not a member of the Bahamian Bar prepared it. I cannot say when "B115" in first Schedule was changed to "A115" on backing sheet at page 34 of Section D. I look at Exhibit 1 - It appears from a comparison of Exhibit 1 with the Schedule to the Hackett Leases at page 29 of Section D that apartment 409B, 411A, and 413A were leased both to Hackett and Grand Bahama Plumbing Co., if Exhibit 1 is correct. The principal shareholder in Grand Bahama Plumbing Company in 1974 was Mr. Jack Spanton. Other major shareholder was Radomski - Spanton and Radomski were shareholders in Myra also. I see letter at page 30 of Section E. of the Hackett Bundle. I have no personal knowledge of the contents of this letter.

NO RE-EXAMINATION

No. 13

Examination
Gerald Nelson Capps - 25th March, 1980

Gerald Nelson Capps:

I live Miami Florida 1800 N.E. 114th. Street - I am a member of the Florida Bar and in practice in Florida. I was associated with E. Dawson Roberts & Co., from 1959 until the end of 1972 - I was first in Nassau with that firm, and went to Freeport in 1965, whilst still with them.

When I first went to Freeport, I was only a lawyer in the office - I was later joined by Derek Higgs. This I think was in 1967. Before 1967 I had contact with Myra. Our firm represented Myra. I may have at some stage been an officer in Myra.

I recall a Company called Silverpoint Ltd. Our firm represented Silverpoint Ltd. also. The principal shareholders in Silverpoint were Radomski and I believe Hackett, and maybe Jack Spanton also - I may also have been an officer in Silverpoint Ltd. Silverpoint Ltd. built a comdominium known as Silverpoint.

Myra undertook a development initially known as Kismet - Later as Silver Sands - The project was a Co-operative Apartment Project - It was supposed to sell 99 year leases instead of the fee simple in a condominium. That is why the project was styled "Co-operative Apartments".

I am aware that Hackett became involved in a transaction with Silver Sands - Hackett purchased 30 apartments at Silver Sands from Myra - As far as I know, Hackett was never a shareholder nor officer of Myra. Radomski was the principal shareholder and controller of Myra during my time.

Radomski gave me my instructions in connection with leases at Silver Sands. I had the contracts for leases printed. This Exhibit 4 was the standard form of contract used for leases at Silver Sands - I would say there was something of the order of 120 - 124 apartments to be leased, but I cannot be positive. It might have been 144 -

Myra commenced the Kismet Silver Sands Project in 1969 - 1970 - Initially there was no mortgage of the land on which the buildings were to be erected. Subsequently a mortgage was negotiated with Alliance. Alliance was a company

belonging to John Ennis. The mortgage was dated 15th November, 1969. The building was financed from prior sales of long term leases - There had been pre-sales prior to the mortgage - That is how the building was being financed. at that time of the mortgage, some building had already commenced. I would say pre-sale contracts of the form in Exhibit 4 had been signed by Myra with third parties prior to the mortgage.

I had a hand in the negotiations leading up to the mortgage Myra to Alliance. Silverpoint and Silver Sands were adjacent properties. Silverpoint was on the back, and Silver Sands was north of Silverpoint.

I see Hackett Bundle Section E. page 24 - I mark on diagram on this plant, the positions of Silver Point and Silver Sands.

Adjournment taken at 1:00 p.m.

Resumption at 2:40 p.m.

Gerald Nelson Capps

EXAMINATION IN CHIEF : CONT'D:

I now refer to mortgage at page 1 of Section D of Hackett Bundle. I saw this document which is a copy of a letter I wrote on 7th November, 1969 to Ray Tower who was either President or Vice President of Alliance. I recall this letter. In addition to the land, there was other security for the mortgage. That security was an assignment of all contracts made up to them by Myra with third parties for leases - Letter tendered - Exhibit 7 with enclosure.

To the best of my knowledge, the assignment to Alliance of contracts existing at the date of the mortgage was finalised. I now produce the formal assignment of the contracts which came into existence as a result of the letter Exhibit 7 and the draft assignment enclosed therein. I know the signatures of Radomski and Tower - They signed for Myra and Alliance respectively and I witnessed Radomski's signature - Formal assignment tendered Exhibit 8 Document at Section D page 35 amended the terms of the prior mortgage. Exhibit 8 was the only assignment of contracts prior to the 1st of July, 1970. As to Exhibit 8, Alliance required the assignment because of an arrangement Radomski had made with Ennis. I do not know why Alliance wanted the purchase contracts with Myra assigned to them -

The arrangement was that the funds payable by the third parties under the specified contracts with Myra, were to be paid to an accounting firm called Bainbridge & Caldwell in Freeport, by Myra - Bainbridge & Caldwell would then pay them over to Alliance. I cannot say whether it was Myra or Alliance who made the arrangements with Bainbridge & Caldwell. What I do know is that the arrangements were put in to effect.

I know of the agreement of 1st July, 1970. It was made because Myra was about to be put in default under the mortgage - Why the paragraphs shown on page 30 etc. Section D were struck out I do not know. I assume it was because the parties agreed so to do.

I see letter Section B page 11 of Hackett Bundle - Letter 2nd June, 1970 Tower of Alliance to Myra. I remember receiving this letter from Tower. Before this was written there was a meeting in Tower's office in Freeport at which Tower, Radomski and I were present. This letter was a confirmation of what had been discussed with Tower.

When the letter came, Radomski did not accept that the letter set out what had been discussed and agreed at the meeting. Radomski said he did not want to pay $200,000 on the 1st of September, 1970. He was unhappy at the proposal in condition (3) for the disbursement of the $300,000. He wanted to make certain that the labourers and material suppliers for the Project were all paid.

There were then further discussions between Tower, and Radomski at which I was present. I do not know what happened or was said in relation to Radomski's objection to paying the $200,000. I know, however, that Tower and Radomski agreed that if Radomski could produce to him (Tower) receipts of payment signed by the various contractors, Tower would accept the same as evidence of payment and treat the sums paid as coming out of the $300,000. It was urgent that these arrangements were finalised, because the mortgage fell due for re payment by the 30th of June, 1970.

Plaintiff Hackett was, I believe in my office along with Radomski prior to the first meeting Radomski and I had with Tower. Hackett was made aware of the contents of the letter dated 2nd June, 1970. I remember him telling me after 2nd June, 1970 that he was going to go ahead with his purchase, but he wished to be assured that the various contractors were going to be paid.

TO COURT:

I remember Hackett being in my office along with Radomski after the date of the letter of 2nd June, 1970. Hackett was present in my office at the time Radomski and I were discussing the conditions set out in Alliance's letter of 2nd June, 1970. He heard what was said re the $200,000

EXAMINATION CONT'D:

I believe Hackett made some arrangement with Myra through Radomski to issue that the bills were paid out of the $300,000 he was paying for his 30 apartments.

At the meeting with Tower prior to letter of 2nd June, 1970, Radomski mentioned a possible purchase by Hackett of 30 apartments for $300,000. Hackett got his leases. I acted for Myra in the transaction. -

TO COURT:

The Hackett leases were for 99 years. All the other leases were for 99 years - Alliance never objected to the first set of leases assigned in November, 1969 on ground that they had not given their consent in writing. Tower never raised the question of consent in writing when the Hackett leases were mentioned at the meeting prior to 2nd June, 1970. Alliance never at any stage insisted upon exercising their rights to give a consent in writing to a lease as a precondition of the leases validity.

EXAMINATION CONT'D:

Up to the time I left Freeport late in 1972, I would say that more than 50% of the apartments in Silver Sands were sold. I dealt with other lawyers in Freeport in relation to the sale of apartments in Silver Sands.

Refreshing my memory from this document, I would say that Dupuch & Turnquest acted on occasion for purchasers of leases from Myra. Dupuch & Turnquest were also lawyers for Alliance. Tower, who was President of Alliance, was an associate of Dupuch & Turnquest and represented that firm in Freeport.

I was familiar with Kendal Nottage & Co. between the years 1970-1972. I knew Bereaux who

In the Supreme Court

Plaintiff's Evidence No. 13 Gerald Nelson Capps - 25th & 26th March 1980 Examination (cont'd)

was attached to Nottage & Co. He was a lawyer. I do not know if Nottage & Co. acted as attorneys for purchasers of leases at Silver Sands.

Adjournment taken at 4:35 p.m.

26th March, 1980

Resumption at 10:15 a.m.

Gerald Nelson Capps

NO CROSS-EXAMINATION BY MR. LIDDELL

Gerald Nelson Capps

Cross-Examination

CROSS-EXAMINATION BY MR. WHITFIELD:

I was the person in charge of the Chambers of Dawson Roberts from 1965 to latter part of 1972. Derek Higgs worked under me. The Hackett & Madden leases at Section D. 13-34 of Brown Bundle and Section D. 10-31 of the Blue Bundle respectively were prepared either by Higgs or me. I cannot say which. A part of the Hackett leases were prepared by me - I can only say that that part of the lease which is in my handwriting was prepared by me. The remainder was done either by Higgs or me. I cannot remember which of us did it.

As to the Madden lease, either Higgs or I prepared it. I cannot remember which of us did. The probability is that our offices would be closed on New Years Day. The Madden lease is dated the 1st of January, 1971; which was New Years day -

I see Exhibit 1. There are eleven leases in this Exhibit dated 1st January, 1971 on the first page. The second, third and fourth leases on page 2 of the Exhibit are also dated the 1st January, 1971. I believe that when the leases were printed, since they were all supposed to be for 99 years a commencing date - viz the 1st of January, was arbitrarily inserted in all of them. I am not, however sure of this.

I now look at the Hackett lease Section D. page 16. I now agree that the printed form here did not provide at this point in time for the commencement of the lease on an arbitrary date, and expiring on a date reckoned by reference to an arbitrary commencing date. The Madden lease shows that the commencing date was inserted in hand, and not arbitrarily printed in. I walked

into Court when Higgs was giving evidence. I stayed in Court for about one minute whilst he was giving evidence, and walked out.

I was probably President, Treasurer and Director of Myra when it was formed. It is possible I held the last two offices until 1969. I was a beneficial shareholder in Myra from the inception. When I left the Bahamas in 1972 I don't remember whether I retained the shares or assigned them over to Radomski - I have no idea whether I am still a shareholder at the present time.

A co-operative agreement for the apartments that were to be built was never drawn up by Myra. A set of drawings were lodged with the Grand Bahama Port Authority. They were never lodged with the Registry of Records under any co-operative scheme.

The Sales Office of Myra would have had at some stage plans by reference to which prospective purchasers could identify apartments they might be interested in acquiring - Grand Bahama Plumbing has a lease according to Exhibit 1 for Apartments 409B, 411A and 413A. These three apartments are included in the Hackett lease. I cannot say how this conflict is to be resolved.

I do not know whether Building A was always known as Building B, and vice versa.

TO COURT:

When Hackett bought his leases, I cannot say that the doors of his apartments were numbered - I know there were numbers on the doors of some of the apartments at that time.

CROSS EXAMINATION CONT'd:

The plan was lodged with Grand Bahama Port Authority. These plans were submitted for Ministry of Works and Town Planning authority only. They would not have shown apartment numbers.

I look at the Brown Bundle Section D. pages 1-10. This is a mortgage Myra to Alliance dated 15th November, 1969. I look at Exhibit 8 (Assignment of Contracts Myra to Alliance). This Exhibit 8 is also dated 15th November, 1969. I would agree that anything that is not attached to Exhibit 8 is not made part of the assignment.

I see Section D. page 16 - Lease from Myra to Hackett. It is dated the 5th of June, 1970. This Assignment could not have been included at Exhibit 4. I agree that the Madden contract dated 15th June, 1970 could not have been the subject of the Assignment made on 15th November, 1969. Neither could the Madden lease dated 1st January, 1971.

The only leases which were ever assigned to Alliance were those leases which also had mortgages on them in favour of Myra. Some leases were sold for cash - Leases that were sold for cash were never to the best of my knowledge assigned to Alliance.

I do not believe that the first lease ever executed after November, 1969 was the one to Hackett. If Exhibit 1 is correct, the Hackett lease was the first lease executed by Myra. Of all the leases recorded, if Exhibit 1 is correct, the Hackett lease was the first.

I see mortgage to Myra. Document Section D 1-10. I look at Cl 2 of the mortgage pages 3 and 4 - I agree Myra retained the equity of redemption - I am not aware that Myra thereafter was leasing the equity of redemption I will accept that. I agree that Myra required the consent of Alliance to make dispositions of the equity of redemption such as are contained in the Hackett and Madden leases (See Cl IV page 6 Section D - Brown Bundle).

I now look at page 11 Section B of the Brown Bundle. Letter Alliance to Myra dated 2nd June, 1970.

Q: Was this letter not written as a result of Myra seeking or trying to obtain an extension of time for repayment and the consent in writing to dispositions of the equity of redemptions ?

A: I agree that letter was written as a result of Myra seeking and trying to obtain an extension of the time for repayment.

Q: In order for Myra to deal with its equity of redemption without being in breach of the agreement, it was required to obtain the consent of Alliance to deal with the equity of redemption?

A: Yes.

Q: No consent in writing was sought or obtained by Myra from Alliance in respect of Cl 4 (e) of the mortgage. (Page 7 of Brown Bundle)?

A: That is correct.

Q: Was the sum of $200,000 paid on or before 1st September, 1970?

A: Not to my knowledge.

Q: Were all monies received paid to Alliance as required by letter of 2nd June, 1970?

A: They were - So I believe.

Hackett was not directed by Myra to pay his $300,000 to Dupuch & Turnquest. So the strict conditions laid down by Alliance were not observed.

Radomski did agree to the terms set out in the letter of 2nd June, 1970. I see letter dated 20th February, 1975 Section B page 13. I agree that this letter indicates that Radomski did agree to the terms set out in letter of 2nd June, 1970.

Q: Since Radomski agreed to the terms of this letter, on 2nd June, 1970 and Hackett was present when it was being discussed, Hackett was aware of Myra's agreement to the strict terms and conditions laid down by Alliance in the letter of 2nd June, 1970?

A: I cannot agree with that.

Hackett was present at the time Myra received the letter of 2nd June, 1970, and Radomski and I discussed it. I cannot tell you whether Hackett knew that Myra had agreed to Alliance's terms as set out - I now agree that Hackett knew from 2nd June 1970 that Myra had accepted Alliance's terms as set out in letter of 2nd June, 1970, and that Alliance required strict compliance therewith.

Mid-Morning Break taken at 12::00 noon

Resumption at 12:20 p.m.

MR. CAPPS CROSS-EXAMINATION BY MR. WHITFIELD CONT'D:

I cannot recollect Madden being in my office in relation to Exhibits 3 and 4. He could have been - It is possible he paid my firm $400 in

closing costs - I do not remember. The vendor usually pays stamp duty, and the purchaser, the recording fee.

If Madden paid $400 to us, I have no idea what services my firm would have performed for him to warrant such a payment. I now agree, however, that if he paid $400 to us, it would be in respect of legal fees. I do not know that he in fact paid $400, and if he did do so, I do not have a clue as to what legal services the firm performed for him to justify such a payment - I agree that if he did pay $400, then it was because the firm was giving him legal advice or some sort or another -

I look at the Madden Bundle Section D page 131. I am certain that I drew the form of the lease in order to have printed copies made - I decided on the form of recitals in the document. If circumstances subsequently required a change to the form of the lease, I would see to it that such changes as were necessary were made - None of the Recitals to the Madden lease, refers to the mortgage Myra to Alliance. The mortgage was in existence at the time of the Hackett and Madden leases - Neither lease recites the mortgage. The explanation is that Radomski and Ennis who were fond friends did not require the Mortgage to be recited. They were fond friends and did not anticipate any problems. The Recitals were formulated on the instructions of Myra.

I do not remember whether it was the practice for purchasers of leases to pay closing costs - It was not the standard practice that such persons would pay our firm a fee for closing costs.

TO COURT:

My firm never held itself out as acting for both Myra and prospective purchasers of leases.

CROSS-EXAMINATION CONT'D:

Q: If Alliance were not threatening to exercise its rights under the mortgage, why did the meeting prior to 2nd June, 1970 occur?

A: Alliance was threatening to foreclose for default in payment of instalments of principal and interest. No question of consent in writing for leases previously made ever arose. Consent to leases to be made was not mentioned. Myra never raised the question of consent to leases with Alliance. Neither did Alliance.

Jack Spanton was a shareholder in, and Director of Myra - I cannot say if Spanton was a Director when Hackett took his leases.

I see page 30 Section E - Brown Bundle. I also see page 26 of Section E - I look at paragraph 6 of that document. I still say that Hackett purchased the leases - That was my impression - I never thought he lent Myra money on the security of the leases.

Q: Were Hackett's leases taken as security for a loan to Myra?

A: That was never my understanding - I have no recollection as to how much money Myra obtained from the sale of leases. The average price of a 99 year lease on one apartment would be between $12 - 15,000. I see the Madden lease D14 of the Blue Bundle. The Madden lease was sold for $17,995. If Myra received $12,000 for each of 70 apartments by 1972, that would have been sufficient to satisfy the mortgage principal and interest. Sometimes purchasers defaulted on their contracts to take leases.

I see B 6 - Hackett's affidavit. I agree with paragraph 5 on pages 6 - 7 of that document. All the correspondence I am aware of on the point dealt with in this paragraph, is at pages 11 - 13 of Section B.

TO MR. LIDDELL BY PERMISSION OF COURT:

I look at Blue Bundle page D 19, paragraph 9 requires the tenant to pay the landlords legal costs etc. etc. This was common to all the leases.

TO MR. WHITFIELD ARISING OUT OF LIDDEL'S QUESTION BY PERMISSION:

Stamp Duty and recording fees on the Madden lease were $161.40. I cannot say what Myra's legal costs for drawing the document would be. There was a flat fee for our costs. I doubt it would have been as high as $238.40. Any flat fee would have been paid to our firm by Madden for legal fees in respect of services rendered to him.

RE-EXAMINATION BY MR. PYFROM:

Re-Examination

Cl 9 of the leases was intended to deal only with the legal costs of the landlord. The Hackett lease was for 99 years. It was always contemplated that leases should be for a term of

99 years - (See paragraph 5 of Exhibit 4). There was an arbitrary date set for the expiration of some of the leases so as to insure that the reversion would fall in on a date certain and common to all leases. This would have resulted in some leases being for 99 years and others of shorter duration. I know this problem was discussed, but I am unable now to say what the arbitrary fell in date was.

As to identification of apartments, there were sales brochures showing the buildings in which various apartments were located identified by number, and floor. Buildings A and B comprised several floors of apartments. I think both buildings were identical. Assuming the system was properly worked a buyer should have had no problem in identifying the apartment he bought.

I refer to letter of 2nd June, 1970 Section D of Brown Bundle page 11. The mortgage was not called in on 30th June, 1970. The mortgage was in fact extended for one year from 1st July, 1970. The $200,000 was never paid as far as I am aware. Alliance did not call in the mortgage for breach of this condition of the letter. They never called in the mortgage until 1972 or 1973. I do not remember if I made it clear to Hackett he would run a risk of losing his $300,000 if the $200,000 was not paid by 1st September, 1970 - I cannot remember Hackett making any comment on that part of the letter which required payment of the $200,000.

The letter of 2nd June, 1970 did not indicate that Myra should tell Hackett that unless all the terms and conditions if contained were met, Alliance would refuse to consent to his lease of the 30 apartments.

TO COURT:

After the letter of 2nd June, 1970, Myra leased apartments. Myra paid the monies over to Alliance through Bainbridge & Caldwell. Alliance never raised the question that such leases should not have been granted without their consent. The system was that Myra would notify Bainbridge & Caldwell of the apartment number sold and would send a cheque for the amount received. This is my recollection of what happened. I maybe wrong.

TO MR. WHITFIELD BY PERMISSION:

I cannot produce any documentary evidence to show that any receipts from sale of leases entered into subsequent to 2nd June, 1970 were forwarded to Bainbridge & Caldwell at any time or at all.

NO QUESTIONS BY MR. LIDDELL

NO FURTHER RE-EXAMINATION BY MR. PYFROM

Adjournment taken at 2:30 p.m.

27th March, 1980

Resumption at 11:08 a.m.

Mr. Whitfield applies for Plaintiff Hackett to be recalled for further Cross-Examination.

No objection by Mr. Callender:

Permission granted.

In the Supreme Court

Plaintiff's Evidence

No. 14

Richard Hackett (recalled) 27th March 1980 - Cross Examination

No. 14

Richard Hackett (Recalled) - 27th March, 1980

Richard Hackett - Re-Called Sworn:

CROSS-EXAMINED BY MR. WHITFIELD:

I first came to the Bahamas in 1967 as a tourist. I bought land in the Bahamas in 1967. No firm of lawyers represented me in the purchase.

On 31st March, 1967 I purchased a lot of land. Lot 548 - Inagua Avenue, Lucaya Ridge Subdivision - Section B from the Grand Bahama Port Authority Limited.

I never had any dealings with Raymond Tower then. I did not know he was a lawyer working with Grand Bahama Port Authority at that time. I knew that Derek Higgs was attached to Chambers of Dawson Roberts, Freeport in 1967. Dawson Roberts represented me on the legal side on the legal closing of the lot of land referred to.

I purchased another lot - 549 Jamaica Avenue, Lucaya Ridge Subdivision Section 2 from Mr. & Mrs. Radomski. Dawson Roberts performed the legal services for me in that transaction. I paid some $64,000 for both of theselots.

I have bought land elsewhere in the Bahamas. Dawson Roberts acted for me in relation to all my land transactions in Freeport - i.e. they were my lawyers to see to the legal completion of the transactions. They were also my lawyers in respect of the investment in Silver Sands. By that I mean I was expecting full protection from them on the legal side.

TO COURT:

I never paid them a fee in relation to the Silver Sands transaction. I paid them a fee for the Silverpoint investment. The fee was paid on my behalf through Silver Point Limited which was a Company in which I had an interest.

CROSS-EXAMINATION CONT'D:

I did not ask Dawson Roberts especially for protection in the Silver Sands transaction. I expected it. I expected it because I thought I

was doing Myra a service by getting them out of a financial mess. For that reason I expected Dawson Roberts as Myra's lawyers and also mine on previous occasions to protect me.

The financial mess I was getting Myra out of was that they could not complete the building. I was approached by Radomski of Myra. He told me they had no funds to complete the building. I initially rejected Radomski's request for help because Ronald Schauffer, and Ronny Molko and another German gentleman were involved in Myra as Directors, and I did not care for them. I suggested to Radomski that these gentlemen be removed as a condition of my investment. This was done. I also told Radomski that another condition was that in order to insure completion of the building, I wanted an assurance that the monies invested would go to contractors, and materials, suppliers, so as to finish the building.

I knew Myra owed money to contractors etc, but I did not know that there was a mortgage on the land on which the buildings were being constructed. I did ask Radomski for a list of Myra's creditors. I never learnt that Alliance was a creditor of Myra by way of mortgage or otherwise.

I subsequently learnt that Alliance was a creditor by way of mortgage after the letter of the 2nd June, 1970. Tower to Myra was written. This was about the 3rd or 4th of June, 1970. That was the first time I became aware of the existence of the mortgage Myra to Alliance. I became aware because I visited the office of Dawson Roberts. I had gone there because I had told Radomski I was prepared to purchase 30 apartments. I had already tentatively decided to purchase when I went to Dawson Roberts' office on the 3rd or 4th June. When I got there I saw the letter of the 2nd June, 1970, Alliance to Myra. That letter did not cause me to change my mind about the investment because I was informed by Radomski and Capps that they could get Alliance to change the paragraph in the letter dealing with the disbursement of the $300,000.

About 2 - 3 hours after the meeting with Radomski and Capps on 3rd or 4th June, Radomski and Capps came back and told me that they had met Tower and he had agreed on the change I had proposed in relation to disbursement. I never asked for confirmation of that change in writing. I had confidence in Capps and Radomski and believed

everything was above board. Lawyers at that time were very, very busy. One would have had practically to queue up to get a lawyer. I agree, however, that I had easy access to Higgs and Capps of Dawson Roberts. I believe I was still in Dawson Roberts and Capps' office when Radomski and Capps came back.

TO COURT:

I was apprehensive when I discovered on 3rd or 4th June that there was a mortgage. I was surprised and annoyed. I had had my Bank Manager run a check on Myra. My accountants also ran a check on Myra. I was advised there were financial difficulties, but Radomski could be relied upon. I see letter B 13. Radomski at no time told me that he had agreed to the terms and conditions of this letter of 2nd June, 1970. I never knew of any such agreement at any time.

CROSS-EXAMINATION CONT'D:

I now say that I had my Bank Manager and accountants check out Myra before I discovered that there was a mortgage. When I discovered that there was a mortgage although I was annoyed and surprised, I decided to go on with the investment because I had confidence that Radomski would finish the buildings. I found out on 3rd or 4th June, 1970 that the amount secured on the mortgage was of the order of $695,000 Canadian. I saw from the letter that Alliance was about to foreclose. I was told by Radomski he would take care of the $200,000, at the same time he was discussing the disbursement of the $300,000 I was to put up for purchase of my apartments. I never asked Dawson Roberts legal advice about the wisdom of my investment. I am a qualified naval architect. I can read blue prints and plans. I was confident that if my $300,000 was used in the correct manner in paying off debts to contractors etc., the building would be finished. The fact is that the building was finished. I feel that if the building was finished Myra would then be able to collect on sales and liquidate some of their debt to Alliance, if not all.

I was not concerned with the mortgage or its terms. I took a calculated risk.

I first saw my lease when I signed it. After I signed it, I left it in the custody of Dawson Roberts. They did not give me a copy. I got the lease back from Dawson Roberts in November,

1974. I see this lease - Brown Bundle. D 16 at page 29. I cannot explain who changed "B 115" to A 115". I looked at this schedule and examined it when I signed the lease. The "A" had not to the best of my knowledge been written over the "B" at that time.

The first time I visited the premises was when the building was completed and furnished. It was then a hotel. A list of all apartment numbers and their owners was given to the manager of the complex by Myra. When I visited I was taken to some of the apartments - I do not know if any of the apartments that I was taken to are in fact contained in the Schedule to the Lease. There were numbers on the doors of each apartment. I can remember being taken to apartment B 100 - 102 etc. There is an "A" Building and a "B" Building. Ground floor apartments are numbered beginning with the number 100. Also B 302, 304, and B 403, B 409 - Also A 403, 405, and 407. I believe this was in 1972, or 1973. This was the first time I saw the apartments in their completed state.

Break taken at 12:35 p.m.

Resumption at 12:50 p.m.

HACKETT CROSS-EXAMINATION CONT'D:

RE: APARTMENTS

B 409, A 411 and A 413 - I see Exhibit 1 page 3. Spanton was the principal shareholder in Grand Bahama Plumbing Company. I am very surprised that these apartments which were leased to me should have been leased to Grand Bahama Plumbing Limited. The fact that my lease was recorded subsequent to that of Grand Bahama Plumbing Limited causes me great concern.

Re: Letter of 2nd June, 1970 - Page B11

Acknowledgement - Page B13

Both of these documents suggest that Myra agreed unconditionally to the terms of Alliance as stated in the letter of 2nd June, 1970. At a meeting on 3rd or 4th June, 1970, Capps and Radomski were present. The letter was put before me and I read it for myself. I chose despite the threat to foreclose to honour my promise re purchase of the 30 apartments. I was not concerned with Alliance's statement that they

were prepared to extend the time for repayment at the rate of interest they were talking about, or with some of the other terms.

The strict conditions set out concerned me and meant a great deal to me. It really did not matter to me whether the $200,000 was paid by the 1st September, 1970 as required by condition 1 because I had not then been committed to the purchase.

TO COURT:

I would not have bought the apartments if I knew the mortgage was going to be foreclose.

CROSS-EXAMINATION CONT'D:

If Myra could not have made arrangements to pay the $200,000 by 1st September, 1970, I would not have gone in to the investment. Myra told me that they had had talks with Tower about this. I believed what Radomski and Capps told me. I recognised that if the $200,000 was not paid, the mortgage would be foreclosed, and if I were to invest, I would lose my money. I understood this at the time. Radomski said he would take care of the $200,000 as I need not worry to condition 2 letter of 2nd June, 1970.

This was important to me also. I have no idea as to whether Myra complied with this as to payment of sums in respect of leases taken before 2nd June, 1970. I accepted Myra's assurance that they would. I realised at that time that Myra had received monies for leases. Myra told me that the monies received on past sales had already been spent on the building. I understood from Radomski and Capps that paragraph 2 of the letter was not referring to amounts collected in the past on sales of suites, but only the balances that were outstanding or past transactions. On 3rd or 4th of June, 1970 I asked a question about the meaning of condition 2 - Radomski and Capps advised me they could not pay over money already collected until the building was finished. I understood them to say that even if the sums on past transactions were to be paid after the 2nd of June, Myra would be unable to pay the sums over to Alliance until the Building was completed.

I understood, however, that all monies collected on sales after the 2nd of June, should go to Alliance save and except in my case. - That was what they said condition 2 meant.

Adjournment taken at 1:50 p.m.

Resumption at 3:30 p.m.

HACKETT CROSS-EXAMINATION CONT'D:

In the case of monies received after 2nd June, 1970 save mine, these were to be paid to Alliance.

On 3rd or 4th June, 1970, Radomski told me that there was a mortgage Myra to Alliance dated November, 1969. Radomski said that prior to November, 1969 some 70 apartments had been sold, on which certain sums of money had been paid, and on which certain balances remained yet to be paid to Myra. In the cases where monies had been paid, the monies had been used in the construction of the Buildings. As a result they said Myra found itself in a bind in November, 1969, and borrowed money from Alliance, and gave the land and buildings as security. On 3rd or 4th of June, 1970 I concluded that Myra had made a bad estimate of the funds required to complete the project and had again run out of money. I gathered from Radomski that between November 1969 - the date of the mortgage, and 2nd June, 1970 there had been no sales of any of the apartments. I was therefore satisfied that Alliance could not have been asking Myra to hand over monies collected prior to the date of the mortgage.

My apartments were the first sales to be made after 2nd June, 1970. I signed a sales contract on 5th June, 1970 which was the same day I signed the lease. I accepted Radomski's word that the monies collected after 2nd June, 1970 on sales would have been paid over to Alliance. I had faith in Radomski - I trusted him.

I see condition 3 - letter of 2nd June, 1970. There was no consent in writing to the variation of condition 3 of letter of 2nd June, 1970. Radomski said that Capps and he had just come from a meeting with Tower and Tower said Alliance would agree to my proposal as to disbursements of the $300,000.

I knew the whole of the project was subject to a mortgage and that if Myra defaulted, I might have lost my apartments.

RE-EXAMINED BY MR. CALLENDER:

Re-examination

I signed a purchase contract on 5th June, 1970. It was on a printed form of the type shown

In the Supreme Court

Plaintiff's Evidence
No. 14
Richard Hackett (recalled)
27th March 1980
Re-Examination (cont'd)

on Exhibit 4. I had signed similar forms before. There were some in the sales office.

I left the lease with Dawson Roberts in their capacity as attorneys for Myra. I could not take possession under the lease until I had paid off the $300,000. I could not take possession of the apartments until they were completed. I took possession of my apartments some time after October, 1970.

As to the 70 apartments sold prior to 1969, only deposits had been paid. By virtue of Cl 9 of the Sales Contracts, no leases could be executed until the buildings were completed.

I had my Bankers and Accountants investigate Myra between November/December, 1969, and January/February, 1970.

I was induced to invest because Freeport was going through a difficult time. I had an interest in Silverpoint which was adjacent. I feel a moral obligation to see Silver Sands completed. Besides, if Silver Sands were completed as I felt it would be, the value of my investment in Silverpoint would have been enhanced.

Adjournment taken at 4:40 p.m.

28th March 1980

28th March, 1980

Resumption at 10:00 a.m.

RICHARD HACKETT RE-EXAMINATION BY MR. CALLENDER CONT'D:

I relied on the information Capps and Radomski gave me in relation to what they said Tower had agreed concerning the terms of the letter of 2nd June, 1970. Accordingly, I acted upon the variations which I understood Alliance had agreed to. Between that date and November, 1974, no representative of Alliance told me they were not in agreement with what had been done. When I signed the contract and lease on 5th June, 1970 I was aware of the existence of some 70 prior contracts. I knew of the existence of these from February/March, 1970.

The calculated risk I took was not that the mortgage would be called in and I would lose the apartments I had leased, but that the building would be completed. Although Radomski's figures suggested that it would require $400,000 or so to complete, I felt that $300,000 would have sufficed, and if it did not, Radomski would have had no

difficulty in raising the difference.

I paid the $90,000 for the furniture, and the $30,000 for customs duty towards the end of 1970 when the building was completed. When I occupied the apartments I paid the going rate for the apartments. They were all in a pool.

When I visited in 1972 or 1973 for the first time after the apartments were completed, I knew some of the other apartments had been furnished. Some of these were being occupied at the time. Some of the apartments were occupied by the owners of the apartments to my knowledge.

My lease was not recorded until 5th December, 1974. Dawson Roberts sent the lease to my Accountants. The Accountants filed them and forgot all about recording it.

I realised the importance of recording my lease in the Registry. I realised that by recording I was running a certain amount of risk. I had instructed Dawson Roberts to have the lease recorded - Unknown to me they passed the burden on to my accountants. My view was that I was at risk by not recording the lease and if it transpired that Alliance foreclosed the mortage. I thought that if Alliance foreclosed I would lose my leases. I believed I would have been more protected if my lease had been recorded.

I do not know how the mortgage Myra to Alliance was to be paid off. If the $200,000 mentioned in the letter of 2nd June, 1970 had not been paid on arrangements made with Alliance about its payment, I would not have gone along with the investment.

TO COURT:

Every apartment owner who occupied his own apartment agreed to be treated as a tourist during the period of his persual (sic) occupancy, and all the monies collected would then go in to a pool, the proceeds of which would in turn be divided amongst apartment owners.

In the Supreme Court

Plaintiff's Evidence
No. 15
William B. Caldwell
28th March 1980
Examination

No. 15

William B. Caldwell - 28th March 1980

William B. Caldwell Sworn:

EXAMINATION IN CHIEF:

I live Owen Street, Nassau. I am a qualified Chartered Accountant. In 1969 - 1974 I was attached to a firm - Bainbridge, Caldwell, Ingraham & Co. I was a partner in the firm. The firm had offices in Freeport and conducted business there.

My firm had dealings with the persons responsible for the buildings at Kismet Apartments - later Silver Sands. We were engaged by Mr. Radomski of Myra to receive and bank monies received by Myra from purchasers paying on time, and paying over a period for apartments sold. The banking began in February 1971 and the last banking was made by us in April, 1974. In addition the firm kept financial records of transactions through the Bank Account - All monies received went into the Bank Account. Afterwards, some monies were paid out.

As I remember it, the Bank had instructions to pay money to Jonenco Ltd.

(Short adjournment granted to Mr. Pyfrom to enable him to consult his clients and speak to witness from whom he has no statement to ascertain if witness can give evidence to support his instructions. Mr. Whitfield not objecting).

Resumption at 11.15 a.m.

MR. CALDWELL EXAMINATION IN CHIEF CONT'D:

MR. PYFROM:

I will not put any further questions to this witness.

Cross-Examination

CROSS-EXAMINED BY MR. LIDDELL:

I came to know something of the beneficial ownership of John Ennis. I was told about this - Mr. Whitfield objects.

NO CROSS-EXAMINATION BY MR. WHITFIELD:

MR. CALLENDER - CASE FOR PLAINTIFF HACKETT

MR. LIDDELL:

I have no witnesses to call in support of Madden's case. I have already called Madden.

CASE FOR THE PLAINTIFF MADDEN

No. 16

Proceedings - 28th March 1980

MR. WHITFIELD:

Before I address, it is necessary to decide now what documents in the Brown and Blue Bundle are to be treated as being in evidence. Perhaps this can be done by agreement. I ask for a short adjournment for the purpose.

Adjournment taken at 11:25 a.m.

Resumption at 11:55 a.m.

MR. CALLENDER:

It is agreed that the following documents are to be treated as being in evidence and for all purposes treated at evidence. Brown Bundle

(a) Paragraph 5 of document at B 6 & 7 -
(b) Document at Pages 11 - 13
(c) All of the Documents in Section D
(d) All of the Documents in Section E with the exception of document at pages 26 - 27.

MR. LIDDELL:

As to the Blue Bundle it is agreed that -

(1) All of the Documents in Sections D and E are to be treated as being in evidence.

(2) Letter dated 2nd June, 1970 - Alliance to Myra are to be treated as being in evidence.

MR. WHITFIELD:

I agree that all of the above has been agreed. It is agreed also that all of the Exhibits tendered by consent are admissible for such purposes as are permitted by the laws of Evidence.

Adjournment taken at 12:10 p.m. until Monday the 31st March at 10:00 a.m. for addresses.

Monday 31st March, 1980

31st March 1980

Resumption at 10:07 a.m.

No. 17

Address on behalf of the Plaintiff - 31st March, 1980

MR. CALLENDER FOR PLAINTIFF HACKETT:

Promissory estoppel is no part of Plaintiff's case. Plaintiff relies on proprietory estoppel. Principles Shell's Equity 27th.Edition - pages 565 - 568. (27th Edition is similar to 26th. - pages 629 - 633).

Spencer Brown - Estoppel by Representation 3rd. Edition, 1977 page 52, paragraph 59.

> "A duty ..... third person to knowledge of..... amounts to a trait adoption. 14 C.B. N.S. page 824 - 839. Martyn vs. Gray.

Also page 283 paragraph 290 Encouragement or acquiescence Also page 286 paragraph 291 - 292 Dubusche vs. Alt 1878 8th Chapter 286 - 314. Wilmot vs. Barber 1880 15th. Chapter D96.

Submit that:

(1) Plaintiff must have made a mistake as to his legal right. Mistake was to assume that he would get a valid lease notwithstanding that there was a mortage - Hackett was aware that some sort of concurrence or arrangement with Alliance had to be made for him to proceed in view of the mortgage. He said in evidence that any further investment with Myra had to be made with consent of Alliance - - Agreed upon terms that Alliance consented (See Hackett pages 213 - 214) Whatever consent Alliance had to give, Hackett's state of mind included the fact that consent of Alliance was required in some manner. Letter of 2nd June, 1970 satisfied Hackett and demonstrate to him Alliance's acquiscence and concurrence in his purchase of the 30 apartments -

As To Money Expended - It is admitted that Hackett spent the $300,000. (See paragraph 14 of the Defence).

As to Alliance's Knowledge of its own right inconsistent with Hackett's right

Alliance must have known of the right to object under the mortgage. They must have known that they could have refused to consent - If they

were asserting this right, Hackett could not have got the lease. Alliance knew that Hackett intended to purchase 30 apartments. They must have known he was not gambling his $300,000 - $400,000.

Alliance appointed Myra as their agent to deal with Hackett in relation to the leases. - Submit that Alliance constituted Capps and Radomski as their agents to communicate with Hackett concerning his leases. Alliance had a duty to put Hackett on notice as the time of the letter of 2nd. June, 1970 that they were intending to reserve their rights to refuse to consent. The failure to mention this was encouragement to Hackett to spend his money. They made no mention at any time that the picture had changed after 2nd June, 1970. Alliance knew that it was likely Hackett would have spent $300,000. They encouraged him to proceed by suggesting a process whereby his money would be handed over, and as to how the $300,000 was to be utilised. Alliance put no qualifications whatever on the conditions upon which Hackett was to purchase. They directed Hackett that the money was to be paid to their attorneys.

There is no evidence that Alliance has ever objected to the leases. All they did was to make certain representations to Inverugie.

CASES:

Ramsden vs. Dyson - 1866 L.R. 1 H.L. 129
page 140 - 141
Alliance's conduct was passive acquiescence.

Also Lord Kingsdown page 170.

Mid-Morning Break taken at 11:35 a.m.

(Mr. Callender asks that it be made half an hour)

Resumption at 12:05 p.m.

MR. CALLENDER CONTINUING:

Kammins Ballrooms vs. Zenith 1970 2 A.E.R. 871

Lord Diplock at page 895

Crabb vs. Arun- 175 - 3 A.E.R. 865, 871 Lord Denning
L.T. Scarman 876 - G. - H.

In their letter of 2nd June, 1970, Alliance abstained from asserting their legal right.

Moongate vs. Twitchings 1975 1 Q.B. 275
Denning page 241 - 243
Brown L.J. page 245 E

Corbett vs. Blowden 25 Chapter D 678 -68
Selborne L.C. page 681

Invards vs. Baker 1965 - 2 Q.B. 29

Plimmer vs. Wellington 1884 9 A.C. 699 710 - 714.

Court must look at cives to decide in what way the equity can be satisfied.

Hopford vs. Brown 1955 1 A.E.R. 550 page 559 D.

Adjournment taken at 1:05 p.m.

Resumption at 2:35 p.m.

MR. CALLENDER CONTINUING:

Ives Investment vs. High 1966 2 Q.B. 379
Lord Denning page 391
Danckwerts page 399

Alliance stood by knowing that Hackett was spending his money and allowed him to continue to do so. I am submitting that:-

(1) Hackett's lease bound Alliance by way of proprietory estoppel

(2) Alliance allowed Hackett to spend money under an expectation which they encouraged - that he would be allowed to remain there for the duration of the lease.

(3) Alliance allowed Hackett to purchase the 30 apartments. Alliance must have known Hackett was acquiring a long or perpetual interest from the mortgagor. Yet they stood by and instructed the $300,000 to be spent on improving the property to the enhancement of their security.

(4) The only way to give effect to the equity so raised is to declare the lease as effective.

Refers to letter at B 11. Tower is a lawyer.

Paragraph 2 shows Alliance knew on 2nd June, 1970 that apartments had already been sold. With that knowledge, could they have intended to repudiate those leases? Paragraph 3 shows Alliance knew Hackett was planning to acquire 30 apartments.

Alliance must have known that this information was to be passed on to Hackett - Alliance intended him to invest $300,000 to enhance their security.

There is no mention in the contracts about Alliance's consent being obtained. Hackett relied on this letter as his authority to go ahead and make his investment.

In Notice of Default D 42 to mention of default by Alliance in leasing without consent.

When Alliance conveyed in 1974 the property was worth (144 apartments at $15,000 furniture $2,000 per apartment) about two million dollars. Was $630,000 a fair market value? Section 20 of Chapter 115 Sections 20(3) and (13). Letter of 2nd June, 1970.

Mr. Liddell will deal with this aspect of the matter - i.e. Section 20.

Closes 3:45 p.m.

In the Supreme Court

No. 18

Address on behalf of John W. Madden
31st March 1980

No. 18
Address on behalf of John W. Madden
31st March 1980

MR. LIDDELL:

I submit that the letter of 2nd June, 1970 is a consent to a lease - unless this is so, it is a nonsense. The apartments could not be sold without creating leases. Both Alliance and Myra were aware of this. Alliance was saying to Myra - you can sell. Implicit in this was a consent to a lease.

The Court is asked to infer that the leases were for 99 years. I rely on Wilmit vs. Barber in relation to other aspect of the case. Madden knew nothing about any mortgage. He paid his money and got a lease. He paid his money under the mistaken belief that he would get a lease that was unassailable.

I do not suggest that Alliance knew of the existence of Madden, but they knew that there were purchasers of suites. Myra were Alliance's agents to find purchasers for the suites on the basis of the authority contained in the letter of 2nd June, 1970. No cash purchasers would be known to Alliance, but only to Myra. By the letter of 2nd June, 1970 Alliance appointed Myra as their agent to go out to all the world and canvas leases.

Because Myra were bad payers under the mortgage, Alliance was encouraging them to sell suites knowing quite well that this encouragement would be an encouragement to all third parties who dealt with Myra.

My case is exactly the same as the case of Hackett.

Refers to his Statement of Claim, and the prayed.

Adjournment taken at 4:40 p.m.

1st April 1980

1st April, 1980

Resumption at 11:00 a.m.

MR. LIDDELL:

Dawson Roberts acted for Madden. They were led to believe that Alliance was not interested in

exercising its right to consent by virtue of letter of 2nd June, 1970. By so doing they presumably encouraged Madden to pay his money in the mistaken belief that he would get a lease.

THE PERIOD OF THE LEASE - Evidence here is scanty. Higgs spoke of a conversation with Bereaux in which 99 year leases were mentioned. (Court: Bereaux was a representative of Alliance). Capps said Exhibit 4 was the normal form of contract used. So if Alliance had assignment of contracts, they would know that the leases were for 99 years - Refers also to Capps' evidence to the Court at page 244.

No. 19

Further Address on behalf of the Plaintiff
1st April 1980

MR. PYFROM WITH PERMISSION:

Re Duration of Lease - Capps' evidence - I have 12 points to make:-

(a) Myra's only business was sales of apartments.

(b) Proceeds were to be used to complete the building.

(c) Standard form contract Exhibit 4 was used in those sales.

(d) Sales did not proceed as well as expected.

(e) By reason of (a) - (d) Alliance was called on to provide additional building funds - Loan was a loan for the purpose of building. See Recital to the mortgage.

(f) Part of security was the assignment of balances to be paid under contracts for leases. This requested by Alliance.

(g) A draft of the proposed assignment was put forward for Alliance's approval Exhibit 7 - Assignment formalised. Form of contracts was not attached.

(h) Standard form of contract does in fact refer to 99 year leases.

(i) Caldwell's evidence and Capps' evidence indicates that monies collected pursual to these contracts were paid over to B & C for account of Alliance.

(j) There was a proposal re financing of the mortgage and a request from Alliance for an up dated assignment - See Exhibit 6. There is no evidence that these proposal in this letter was acted upon.

(k) All of the above is sufficient to ground the inference that on a balance of probabilities, Alliance knew that Myra was entering into 99 year leases, and that Alliance reserved the proceeds directly in cases, save the case of Hackett.

By this action Myra had a licence from Alliance to proceed with the sales arrangements in circumstances in which Alliance's consent to leases was to be treated as dispensed with - Alliance must be taken as having adopted the leases by calling on Myra to pay the monies received therefrom over to them. Mere knowledge of the lease does not bind the mortgage.

Letter of 2nd June, 1970 may be construed as a release of parts of the mortgage security.

Mid-Morning Break taken at 11:45 a.m.

Resumption at 11:50 a.m.

MR. LIDDELL:

I would like to amend paragraph 16 of my Amended Statement of Claim as follows - By adding to paragraph 16 the following words at the end of the paragraph. "The Plaintiff says that the said letter constitutes a consent by Alliance to the completing by Myra of all sales mentioned thereunder including thereunder that of Plaintiff's lease".

Court asks why this allegation is not included in paragraph 4 since paragraphs 13 - 16 deal with equitable estoppel.

MR. LIDDELL:

I will consider this.

No. 20

Address on behalf of the Defendant
1st April 1980

MR. WHITFIELD ADDRESSES:

Myra owned equity of redemption in property described in mortgage of November, 1969. By that mortgage, Myra granted and conveyed the property to Alliance. Subject to Myra's equity of redemption Cl 4CCl fixed a redemption date in June, 1970. This was later treated as "30th June, 1970". 10

By Cl 1 - Myra made certain covenants - (a) payment of $200,000 by 25th March, 1970 - (b) $495,000 on 31st June, 1970.

Cl 4 provides events in which principal and interest became due and payable and in which power of sale may be exercised. Cl (IV) disposition of equity without consent of Alliance and also circumstances in which powers of leasing could be exercised.

On 2nd June, 1970 Alliance wrote to Myra - 20
Stated they were agreeable to extending time for payment subject to 3 strict conditions.

(i) The $200,000 due 25th March, 1970 and unpaid was to be paid September, 1970.

(ii) Monies received on sales to be paid to Alliance in reduction of loan.

(iii) Hackett to pay $300,000 over to D & J by 15th July, 1970 to be disbursed.

On same day Myra agreed to terms of this letter - 30
See endorsement of Radomski at foot of letter.
B 12 of Hackett Bundle.

On 5th June, 1970 Myra granted a lease of 30 apartments of the mortgaged property to Hackett at a premium of $300,000 at a rate of $40 per month for a term of 99 years.

On 1st January, 1971 Myra granted a lease of one apartment to Madden. Premium $17,995 rent $40 per month - term 99 years.

On 1st July, 1970, mortgage of November, 1969 was amended by adding new terms. This is final 40
agreement of parties to the mortgage after negotiation - See D 35.

Common ground that Myra defaulted Alliance served notice dated 29th June, 1972 requiring payment of principal and interest in default of which statutory powers of sale would be exercised. Myra defaulted. Alliance sold to Gleneagles - 24th October, 1974 for $720,000 plus an additional $25,000, and a further $90,000 for customs duties. C/8 of agreement for sale contains a representation by Alliance that there has been no consent in writing by Alliance to the leases.

On 4th November, 1974 Gleneagles assigned contract to Inverugie. On 5th November, 1974 Alliance exercised the power of sale under Section 23 of Chapter 115. Alliance then conveyed to Inverugie by Deed - free from incumbrances, rights of redemption and claims under the mortgage. It is submitted that this was in terms of Section 23 - Conveyance was made in exercise of powers of sale conveyed by the Act.

Priorities preserved by Section 10 of Chapter 193. Mortgage was accepted for record on 15th January, 1970. Lease to Madden was accepted for record on 23rd February, 1973. The hub of my submission is that Inverugie took free of all equities.

Lease to Hackett accepted for record 27th December, 1974 Section 10 of Chapter 193 is clear. Deeds have priority in order of date save in cases of actual fraud.

Mortgage had priority over the leases from Myra to Hackett and Madden. All other leases were subsequent to the mortgage and its recording.

Conveyance to Inverugie was recorded on 7th November, 1974.

One of priorities would only be as between parties who took conveyances from Myra.

Plaintiffs are now saying that the priority which the mortgage had over their leases should be lost because of unconscionable conduct on the part of Alliance, and so Alliance's successors were being estopped from asserting their priorities.

Adjournment taken at 1:10 p.m.

Resumption at 2:35 p.m.

MR. WHITFIELD CONTINUING HIS ADDRESS:

Where a lease of mortgaged property is created by a mortgagor in possession, and the mortgagor subsequently leases with the mortgagee's consent, or in accord with the provisions of Section 20, the estate on interest which the mortgagee can later convey in the event to exercise his powers of sale is an estate on interest subject to the lease. The subject of the mortgage is then the freehold cut down by a lease in which the mortgagor and mortgagee concur or jointly grant.

The Plaintiffs here are seeking to restrict the subject of the mortgage tacking on to it an estate on interest to wit leases which were not within the ambit of the mortgage.

Wilmot vs. Barber is consistent in our submission with Section 10 of Chapter 193 (1880 15 Chapter D97)

Inverugie has a legal right - there being no consent in writing to the lease - evidence to deprive them of that right must be strong and cogherent.

Fraud must be specifically, and strictly pleaded. The matters set out in the respective statements of claim are the only matters upon which the Plaintiffs can rely to establish the propietory estoppel.

Refers to Davy vs. Garrett - 1877 7 Chapter 473 at page 489
Thessigar L.J. at page 489 - Fraud must be pleaded or proved.

THE PLEADINGS

Brown Bundle - Pages A 23 and 24

Blue Bundle - Pages A 32 - 37

As to Hackett's Statement of Claim - Paragraphs 12 - 16

There is nothing in the Pleadings to suggest that **the** Plaintiff was mistaken as to his legal rights - nor is it alleged that the Plaintiff spent money or did any act on the faith of any mistaken belief. Nor is it alleged that Alliance knew of the existence of any right of its own which was inconsistent with any right claimed by Hackett. Neither is it alleged that Alliance knew of any mistaken belief as to Hackett's rights. The same observations apply to the Madden Statement of Claim.

COURT:

But you have not objected or insisted on any Amendment to the Statement of Claim?

The more serious the allegation, the higher the degree of proof necessary to establish the fact alleged. A high degree of proof is required.

THE EVIDENCE:

Court must look at the totality of Hackett's evidence.

Allegation is that Hackett was induced by Myra and encouraged by Alliance

What is the evidence - Hackett said Radomski was asking him to invest. He never said Alliance encouraged him to do anything - Hackett's evidence properly examined, established that his mind was not affected nor purported to have been affected by anything done by Alliance - On his own admission, his investment was for the purpose of protecting the value of his investment in Silver Point Limited. Further, that he had made up his mind to expend the $300,000 before he saw the letter dated 2nd June, 1970. (See Hackett page 271) - Also page 263. Hackett's evidence does not indicate that anything that Alliance did, or did not do affected his decision to invest - Page 264. Discrepancy between Capps and Hackett re arrangements over the $200,000 - How, if the terms of the letter were discussed on 3rd or 4th June 1970, do we find Radomski acknowledging and agreeing to the terms on 2nd June, 1970.

Why did Hackett not make Alliance - a Defendant Alliance is a Bahamian Company. Perhaps it was because knowing they would not have been able to prove anything against Alliance, they thought it would be easier by making rebellious allegations which Inverugie could not answer to make Inverugie the sacrificial lamb.

Letter of 2nd June, 1970

Alliance was laying down in this letter the terms upon which the time for repayment would be extended.

Hackett's affidavit paragraph 5 B6

The $300,000 investment had nothing to do with the leasehold value of the 30 apartments. It had to do with Hackett's and Radomski's estimate

of how much would be required to complete the building - Capps said the value would be $12 - 15,000 per apartment. Nowhere in the letter of 2nd June, 1970 is the word "lease" used. The word used is sales. There is nothing in the letter which suggests a release from the terms of the mortgage.

Adjournment taken at 5:15 p.m.

2nd April, 1980

Resumption at 10:05 a.m.

MR. WHITFIELD CONTINUING HIS ADDRESS:

There is no evidence that Capps even communicated to Hackett, the discussions of which he says took place between Radomski and Tower relating to the variation of condition 3 of the letter of 2nd June, 1970.

Letter of 2nd June, 1970 has Radomski's acceptance. Capps said it was confirmatory of the prior discussions. The details of what those discussions are, are not spelt out. Important to bear in mind that Alliance held a mortgage which was about to mature. Alliance was seeking nothing. It was Myra Myra wanted an extension of time within which to pay. It is submitted that it was Myra who approached Alliance for an extension. Myra must have made proposals. Alliance said they would forebear upon the terms set out in the letter of 2nd June, 1970. Inference is that the letter was delivered on 2nd June, 197o to Myra and accepted and agreed to on same day. The oral evidence is that one approach only was made to Tower re a variation. According to Capps this resulted in one oral variation.

The documentary evidence particularly the acceptance of 2nd June, 1970 is against any oral variation. The change of date "15th June" for 15th July 1970 is the only variation to the agreement.

If Tower was approached after 2nd June, 1970, the probability is that the only variation which was made was to change "15th June" for "15th July".

Letter 20th February, 1975 B13 - Higgs to Pyfrom. There is no note at all by Dawson Roberts that any oral variation of terms of letter dated 2nd June, 1970 ever occurred - The letter says that all that occurred was that the terms of 2nd June, 1970 were accepted - In cross-examination Capps said that Hackett was aware that Alliance required strict compliance with its terms and Myra was agreeing.

Plaintiff is asking Court to find unconscionable conduct or part of Alliance based upon a letter initialled by Myra to obtain forebearance re the mortgage. Alliance always records what it agrees to. Further, the amendment to the mortgage of 1st July, 1970 is recorded - D 35 Brown Bundle. This amendment makes no mention of Hackett's leases. One would have expected that if Alliance had any knowledge of Hackett, it would have been envoided in this document. If Alliance had agreed to forebear and extend the time by reason of the Hackett proposal for leases, this would have been embodied at least in a recital.

CROWN COUNSEL'S NOTE: It seems like a great deal happened between 2nd June, 1970 and 1st July, 1970 that Court has not heard about). It is clear that the letter of 2nd June, 1970 contained mere proposals which never fructified -

Clause 2 of paragraph 2 suggests that Alliance had knowledge of the fact that suites had been purchased by third parties.

There is no evidence that Alliance was aware that Hackett did go through with the proposal to purchase 30 apartments. Hackett's $300,000 was never paid to Dupuch & Turnquest. Alliance would never have known that Hackett paid. Hackett gave no evidence that any time he notified Alliance of his disbursements and to whom made.

Mid-Morning Break at 11:30 a.m.

Resumption at 11:50 a.m.

MR. WHITFIELD CONTINUES TO ADDRESS:

Hackett was not encouraged to make his investment by anything done by Alliance - When one examines all his evidence, he was concerned to get a lease from Myra on 5th June, 1970, but he was not concerned to get anything in writing from Alliance. He was not induced by anything Alliance did to take the leases.

Hackett was paid money to Myra. Myra paid out the money in respect of its project. Myra used this money in the building. It was Myra who was improving the security with funds which it received from Hackett without the knowledge of Alliance. Neither Hackett nor Myra made Hackett's lease known to Alliance.

If there were 70 prior contracts, how come the Hackett lease is the first lease created by Myra?

There is absolutely no evidence to support any of those submissions. Neither Radomski nor Capps made any such claim. Neither did Hackett. Capps' evidence is that he acted only for Myra in the Hackett transaction.

Hackett says he did not appoint Capps as his attorney. So Capps was not Hackett's agent according to Hackett's testimony.

There is no evidence in the documents that Alliance ever appointed Capps to act for them in any capacity. It would be wrong to attempt to cull from the evidence any such inference of agency.

There is no evidence that Alliance ever knew that Hackett took a lease. Paragraph 14 of the Defence is not an admission that Alliance knew that Hackett had paid $300,000 towards the completion of the building. It is a mere admission that it was so spent.

Did Hackett lend the money to Myra or Alliance?

Section 23(3) -Chapter 115 - If he did he has a right to recover as against Alliance.

Hackett was not sure whether he was lending $300,000 or buying leases (Page 224). Hackett does not say that he took a lease mistakenly thinking that there was no need for Alliance to consent to it. He was in no way concerned with the terms of the mortgage. His only concern was that Radomski should complete the building. (See page 272). The $300,000 was not related to the value of a lease of apartments, but to the estimate of what was required to complete the building.

Letter E. 28 - 29 Loan
Letter E. 30 - 31

Hackett is here claiming re-imbursement for money lent.

The description of the parties in the leases does not convey anything. What has been conveyed is not certain. No proprietory estoppel has on the evidence been established because:

(A) There is no evidence that Alliance passively or actively encouraged Hackett to expend money

in the expectation that he would get any leases. He invested his money for totally different reasons wholly unmatched with the terms of the mortgage to Alliance.

(B) Alternatively, even if on a view of the evidence most favourable to Hackett, he did expect to get a lease, there is no evidence whatever that Alliance knew that he mistakenly thought he had a right to obtain such a lease without their previous consent in writing.

MADDEN'S CASE:

The Madden case is worse - none of the elements of estoppel by acquiescence have been made out. Not one of the elements set out in Wilmot vs. Barber has been proved by Madden.

Cases 1937 - Chapter 313) on my list are
1960 - Chapter 368) perhaps of more relevance than the others included in the list.

MR. CALLENDER BY PERMISSION:

I would like to remind the Court that on the question of knowledge of Alliance that leases were being sold - enclosure to Exhibit 5 is relevant.

MR. WHITFIELD:

Mr. Liddell has given me a copy of his proposed amendment to paragraph 4 of the Statement of Claim in the Madden Suite. I do not object to it, if he makes the application.

MR. CALLENDER:

I apply on Mr. Liddell's behalf for the amendment. Leave granted to amend in terms of document marked "X" - Counsel for Plaintiff Madden undertaking to file same.

No. 21

Judgment - 29th May 1981

COMMONWEALTH OF THE BAHAMAS 1975

IN THE SUPREME COURT No. 145

Equity Side

B E T W E E N :

RICHARD HACKETT Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED Third Party

AND

JOHN ENNIS Third Party

A N D B E T W E E N : 1975 No. 88

J. WILLIAM MADDEN Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED Third Party

AND

JOHN ENNIS Third Party

FOR THE PLAINTIFF HACKETT:- Ernest Callender Q.C. and Jerome Pyfrom

FOR THE PLAINTIFF MADDEN:- James Liddell

FOR THE DEFENDANT:- Cecil Wallace Whitfield and Harvey Tynes

J U D G M E N T

V. O. Blake, J.:

These actions which arise from claims by the Plaintiffs to be entitled to leases for terms of ninety-eight and ninety-nine years respectively in certain apartments in the Silver Sands Hotel

situated in Freeport, Grand Bahama, and inter alia for possession and damages, were consolidated by order of the Court dated the 9th of September, 1977. The order, which was made by the former Chief Justice, Sir Leonard Knowles stayed the proceedings against the Third Parties until after the trial of the actions.

With the greatest respect to the former Chief Justice this was an unfortunate order to make. The pleadings disclosed that the first named Third Party was the Defendant's predecessor in title, and that the Plaintiffs were claiming an equity to a lease based upon their conduct whilst they were mortgagees. This equity they said was enforceable against the land in the hands of the Defendant. The Defendant denied the Plaintiffs' claims but pleaded in the alternative that if they were good, the Defendant was entitled to an indemnity by reason of a clause in the contract of sale between the first Third Party and the Defendant whereby they warranted that there were no leases of the land.

The effect of this Order has been to oblige the Court to adjudicate the issue as to whether the Plaintiffs' equity exists without hearing from the first Third Party, whose conduct the Plaintiffs have impunged. In addition, it has opened the door to a situation in which in the event the Plaintiffs were to succeed, the Defendant's claim to the indemnity might be defeated in the adjourned Third Party proceedings if the first Third Party were to succeed in establishing that the Plaintiffs were not in fact entitled to the equity they claimed. I need hardly say that the effect of this Order has been to add to my burdens in deciding the issues presently before the Court.

THE PLAINTIFF HACKETT:

I will deal first with the claim of the Plaintiff Richard Hackett, hereinafter referred to as "Hackett". The story begins on the 8th of November, 1968, when a company known as Polcan Limited conveyed a parcel of land some 3.4 acres in extent in the Freeport/Lucaya area of Grand Bahama to Myra Industries Limited, hereinafter called "Myra". One Z.W. Radomski subsequently became President of Myra. He continued to hold that office until at least some time in the year 1972 and possibly thereafter. He was the principal shareholder. Myra's attorneys were at all material times E. Dawson Roberts & Company, Freeport, Grand Bahama. Gerald Nelson Capps, an associate of

Dawson Roberts & Company, was the lawyer principally concerned with the handling of Myra's affairs until he left the Bahamas in 1972. He was at one time Secretary of Myra and also held office in that company as Treasurer and Director. He was a shareholder in Myra until 1972. Derek Higgs was also an associate of the firm.

The land purchased by Myra from Polcan Limited was immediately to the north of a tract of land which belonged to another company named Silver Point Limited. Hackett and Radomski were good friends and substantial shareholders in Silverpoint. At the time of Myra's purchase, Silverpoint had either already erected an apartment complex on its land, or the complex was very near completion.

Early in 1969 Myra undertook a development which was originally called Kismet Apartments on the land it had acquired from Polcan. This development later became known as Silver Sands. The project involved the erection of two main buildings which were in turn to accommodate some one hundred and forty-four (144) apartments. The plan was that the building costs were to be financed largely, if not entirely, from the monies that Myra hoped to realise as a result of advance sales of all the apartments. To that end, a number of persons were induced to enter into contracts with Myra.

These contracts required the purchasers to make deposits on account of the purchase price, and pay the outstanding balances in stated instalments from time to time. In return Myra undertook to grant leases for a term of ninety-nine (99) years when the payments were completed and to give possession within sixty (60) days of the grant of a certificate of occupancy by the Building Department of the Grand Bahama Port Authority. The contracts fixed a date by which Myra was to begin, construction, but strangely enough were ominously silent as to the time when it was to be completed. Although it is not very clear on the evidence, it appears that a number of persons who contracted to take ninety-nine year leases on apartments paid the entirety of the agreed purchase price in advance in cash. Contracts for leases and leases were commonly referred to as the sale and purchase of suites or apartments. A contract for a lease under which a balance remained to be paid by a purchaser was sometimes loosely described as a "leasehold mortgage".

By the end of October 1969, Myra had run into

financial difficulties. Either they had underestimated the building costs, or they had failed to find purchasers for a sufficient number of apartments to cover them or both. They were hard put to find the cash to complete.

In early November, 1969, Myra turned to Alliance Services Industrial and Commercial Corporation Limited, ("Alliance"), for help. The principal shareholder in Alliance was a gentleman called John Ennis, and its President at the time Raymond S. Tower of the legal firm of Dupuch & Turnquest. Alliance duly came to the rescue and agreed to lend Myra the sum of $695,000. (Canadian) on the security of a mortgage which was entered into on the 15th of November, 1969. Myra conveyed its land and the unfinished buildings thereon to Alliance, and the mortgage instrument provided inter alia that Myra was:-

(a) To repay $200,000. of the sum lent on the 25th of March, 1970, and the balance of $495,000. on the 30th of June, 1970.

(b) To pay interest at 10% per annum from the 15th November, 1969 on $600,000. on the date of maturity, the 30th of June, 1970 and thereafter by equal monthly payments in arrears on so much of the principal sum as remained unpaid.

(c) Not to exercise the powers of leasing conferred on mortgagors in possession by section 20(3) of the Conveyancing and Law of Property Act Chapter 115 of the 1965 Statute Laws of the Bahamas, without the consent in writing of Alliance.

The deed contained the usual proviso for redemption and stipulated that the mortgagee's powers to sell, foreclose, take possession, and appoint a receiver were to become exercisable on the occurrence of a number of events including:-

(i) Failure by Myra to pay any instalment of principal or interest within a specified time after notice.

(ii) Any disposition or attempt by Myra to deal with the equity of redemption or any part thereof without Alliance's written consent.

It was also agreed between the parties that Myra should assign to Alliance all its rights under contracts which it had entered into up to the 15th

of November, 1969 with Third Parties for the sale and purchase of leases of apartments, as collateral security. Such an assignment was duly executed on the 15th of November, 1969. The contracts assigned were merely attached to the instrument, instead of being listed in a schedule and attached, as is the usual practice. A copy only of the assignment was put in evidence, and needless to say, I was not favoured with a sight of these contracts, neither was it ever made clear how many such were assigned, nor what was the sum due and owing to Myra thereunder at the date of the assignment.

The loan which Alliance made proved to be no panacea for Myra's financial ills. By the early months of 1970, one of the two buildings that was being erected was some 80% complete, and the other some 90%. Radomski approached several persons for financial assistance to continue building operations without success, and finally turned to Hackett. Hackett initially turned him down for reasons the details of which it is not necessary here to recount. Meanwhile Myra had failed to pay Alliance the $200,000. which was due under the mortgage on the 25th of March, 1970, and the 30th of June, the day fixed for repayment of Alliance's $695,000. together with interest - was fast approaching, and Myra was obviously in desperate financial straits. They were on the horns of a dilemma. If money could not be found to complete the construction, there was very little prospect of further sales of leases of apartments the proceeds of which could be utilised to pay off Alliance. If Alliance was not paid by the 30th of June, or could not be persuaded to extend the time for repayment under the mortgage, there was a grave risk that Alliance would sell or foreclose, and Myra would stand to lose on its investment in the venture.

It appears that sometime in May of 1970, Hackett was persuaded by Radomski to relent on his initial unwillingness to become involved in the solution of Myra's problems and signified his willingness to invest some $300,000. This was the sum that Hackett estimated would be required to complete construction, despite the fact that Radomski's estimate put the figure closer to $400,000. The proposal was that in return for his investment of $300,000. he would be granted leases for ninety-nine (99) years on thirty apartments at Silver Sands. With the proposed Hackett investment to bait the hook, Radomski and Capps went off to see Tower of Alliance with a view to bargaining for an extension of the time fixed by

the mortgage for the repayment of Alliance's $695,000 plus interest. As a result of a meeting which probably took place towards the end of May, Tower wrote to Myra on the 2nd of June, 1970 as follows:-

" 2nd June, 1970

Myra Investments Limited,
P.O. Box F-427,
Freeport, Grand Bahama.

"Dear Sirs,

Re: Alliance Services Industrial & Commercial Corporation Limited - First Mortgage Loan to Myra Investments Limited

The above First Mortgage loan matures on 30th June, 1970.

We are agreeable to extending the time for repayment of this First Mortgage by one (1) year from 1st July, 1970 at an increased interest rate of 12% per annum payable monthly commencing 1st August, 1970, provided however, that this extension is subject to the following strict conditions:

(1) That the sum of Two hundred thousand dollars $200,000 be paid to us on or by 1st September, 1970.

(2) That any and all monies received by you on the sale of suites, whether before or after the date of this letter (save and except the 30 apartments being sold to Richard Hackett) is to be repaid directly to us in reduction of the First Mortgage.

(3) That on the purchase of the 30 Apartments by the said Richard Hackett for the sum of Three hundred thousand dollars ($300,000.), that you direct him to make payment of the said sum of Three hundred thousand dollars ($300,000.) on or by 15th June, 1970 to the order of Messrs. Dupuch & Turnquest, our attorneys to bona fide sub-contractors, tradesmen, labourers, on proper written authorization of Z.W. Radomski.

We would again stress that the said sum of Three hundred thousand dollars ($300,000) is in no way being used to reduce our First Mortgage but is

being allocated towards the completion of the Co-operative Apartment building.

Yours very truly,

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED

Raymond S. Tower
President"

Hackett's claim is founded largely on the content of this letter, particularly paragraph 2(3), the terms of which he says Radomski and Capps gave him to understand Tower agreed to vary so as to allow Hackett personally to disburse the $300,000 to the sub-contractors, tradesmen and labourers. Much more will be said later as to the events which antedated and succeeded this letter. Hackett says that on the faith of this alleged variation, he proceeded on the 5th of June, 1970 to enter into a lease with Myra of thirty apartments at Silver Sands for a term of approximately ninety-nine (99) years. On the 7th of June he paid out $150,000 of the sum he had agreed to pay for the leases to contractors and workmen. The remaining $150,000 was disbursed by the end of August 1970.

It seems, however, that at the very time when Hackett was taking his leases and paying out his $300,000, Radomski and Alliance were still negotiating the terms for the extension of the time for the repayment by Myra of the $695,000 which had been borrowed in November, 1969. Although the evidence suggests that Myra was initially prepared to accept all three of the conditions for extension set out in the June letter, there can be very little doubt that the parties resiled from this position some time afterwards. In fact the terms for the extension were not finalised until much later. Those terms are contained in an indenture for the amendment of the mortgage of November, 1969 dated the 1st of July, 1970 signed on behalf of Myra and Alliance by Radomski and John W. Millican respectively. The latter gentleman seems by then to have succeeded Tower as President of Alliance. The time for repayment was extended to the 30th June, 1971, but the terms of the amendment stand in striking contrast with the conditions which were spelt out in Alliance's letter of the 2nd of June, 1970. In the first place the rate of interest fixed by the amendment was 15% instead of the 12% proposed by the June letter. Secondly, the amendment made no mention whatever of either the

purchase by Hackett of thirty (30) apartments as a condition precedent to the extension of time, nor of any payment to be made by Myra to Alliance of monies received from the sale of apartments before or after the 2nd of June, 1970. What is more the amending deed confirmed that the sum due and owing by Alliance was $695,000 as at the 1st of July, 1970 and this was to be liquidated by monthly payments of $15,000 on account of principal and interest from the 15th of January, 1971 to the 15th of June, 1971, the balance to be fully paid by the 30th of June. There was no requirement as to the payment of the $200,000 which the June letter had proposed should be made on or before the 1st of September, 1970. The irresistible inference from all this is that Myra was either unable or unwilling to meet conditions (1) and (2) of Alliance's letter of the 2nd of June, with the result that the parties bargained afresh and agreed terms for an extension of time which were entirely different from those that had been mooted originally. Radomski must have been heavily involved in these negotiations, but he was not called as a witness. Capps testified as a witness for Hackett and said that he knew of the amendment of the 1st of July, 1970, but for all he was asked, the Court was left in the dark concerning the circumstances leading up to the amendment, and more particularly as to whether he appreciated that Myra and Alliance had so retreated from the suggestions for extension put forward on the 2nd of June, 1970 as to oblige him to warn Hackett of the dangers of proceeding to lay out money on the faith of anything contained in the letter of that date or a variation of only one of its terms. Hackett seems to have been quite oblivious of the negotiations that were taking place between Myra and Alliance after the 5th of June, 1970. Certainly his friend Radomski took no steps to acquaint him of what was going on. It would seem that as far as Radomski was concerned, having got Hackett to provide the money which he hoped would suffice to complete the buildings, he proceeded on the Biblical basis of "Let not thy left hand know what thy right hand doeth".

The negotiations between Myra and Alliance which culminated in the amendment, occurred subsequent to the 2nd of June, 1970. In the event, Myra did not agree to the three conditions that Alliance had laid down for an extension of time in their letter of the 2nd of June, 1970. Instead, what was agreed was radically different from what that letter had proposed. These circumstances pose two critical questions:-

(a) Can anything which Alliance said in their letter of the 2nd of June be regarded as an unconditional consent to Hackett's leases as has been suggested?

(b) If the consent was conditional only, did Alliance know that that notwithstanding, Hackett was committing himself to a lease, and did they with that knowledge encourage him to spend his $300,000 in the manner in which he did.

These questions will be discussed when the evidence comes to be examined in greater detail. It may, however, be convenient to mention at this stage certain features of the mortgage amendment which have been left totally unexplored and very much up in the air. Although the Deed is dated the 1st of July, 1970, correspondence passing between Millican of Alliance and Derek Higgs of Dawson Roberts & Company, and Millican and Capps, as evidenced by letters dated the 20th May, 21st, June, (Exhibits 5 and 6), and 25th June, 1971, (Section B page 15 - 16 of the Hackett Bundle) indicates that the amendment was not submitted by Alliance to Myra for approval until the 20th of May, 1971. The document that had been submitted was returned by Capps to Millican "duly executed on behalf of Myra" on the 25th June, 1971, Capps at the same time requested Millican to return to him one copy duly executed by Alliance for his files. It would seem then that either the parties had fully agreed on the terms of the amendment from as far back as the 1st of July, 1970, but for some reason or another it was not formalised until nearly a year later, alternatively the negotiations for the amendment were long drawn out, and the amendment when finalised, was back dated to bear date the 1st of July, 1970. If the latter, Alliance would have had a longer time during which they might have discovered that Hackett had taken a lease and was spending money pursuant thereto. It will be recalled that Hackett paid out $150,000 on the 7th of June, 1970, and the remaining $150,000 by the end of August, 1970.

To add to the confusion, the photostatic copy of the mortgage amendment which has been put in evidence, (Page 35, section D of the Hackett Bundle), shows that clause 3 of the amendment as originally drawn, contained five sub-clauses. Clause 3(i) required Myra, as further security for the due payment of the principal sum and interest, to provide Alliance or their Canadian solicitors with certificates representing all the issued and

outstanding shares in the company duly endorsed in blank for transfer. This was to be done by the 10th of December, 1970. Clause 3(ii) stipulated that on or before the aforesaid date, Myra was to furnish certain financial statements concerning the affairs of its shareholders Radomski, Capps, and one Jack Spanton. The intention seems to have been that these gentlemen were to be guarantors for repayment of Alliance's money. Clause 3(iii) provided that Myra was to satisfy Alliance on or before a date left blank in the instrument, that it had purchased certain items of goods and equipment and utilised them in furnishing eighteen (18) of the apartments. These three sub-clauses have been struck from the copy document, tendered. The alterations are initialled presumably by Radomski, and one Dena Lippy who was then Myra's Assistant Secretary. These alterations are not however initialled by Millican or any one else on behalf of Alliance. How they came to be made, when they were made, why they were made, and whether Alliance accepted them, I have not been told. Capps was asked about them by Hackett's counsel. The only light he could throw on the matter was to say:-

> "Why the paragraphs shown were struck out I do not know. I assume it was because the parties agreed to do so".

The only thing that is clear is that when Millican submitted the document to Dawson Roberts on the 20th of May, 1971 for Myra's approval and execution, sub-clause 3(i), and (ii) were part of it, because he asked Myra to do what was necessary to comply with their provisions. And when Capps wrote to Millican on the 25th of June, 1971 and said that he was returning the amendment duly executed, he said nothing to suggest that Myra wished to have those sub-clauses deleted. I mention these matters because it is very much part of Hackett's case that Alliance knew of his lease, and that such knowledge is partly to be deduced from the fact that on the 20th of May, 1971 Millican forwarded the agreement for the amendment of the mortgage for Myra's approval and execution, and asked as well for an amended assignment to cover all purchase and sale agreements of apartments that were then in existence. It was said that this goes to show that Alliance knew that leases had been entered into subsequent to the 15th of November, 1969, and more particularly after the 2nd of June, 1970. There is however, no clear evidence that the assignment of the 15th of November, 1969 (Exhibit 8) was ever amended to include leases entered into by Myra with third

parties subsequent to that date, or that the question of such an assignment was further pursued, after June, 1971. It may well be that the matter was dropped because the final agreement for the amendment of the mortgage which was in fact signed by Myra and Alliance contained sub-clauses (i) and (ii) of clause 3, and the further security for the loan thereby contemplated was eventually considered sufficient by Alliance. On the other hand if these sub-clauses were deleted, as the document in evidence suggests, Alliance may very well have proceeded at some stage to take an amended assignment. The state of the evidence however, has made it impossible for me to come to any definite conclusion as to what clause 3 of the amendment as finally agreed contained.

But to continue with the narrative - By the end of 1970, Myra completed their building operations. Thereafter Hackett took possession of the thirty (30) apartments. He spent an additional $90,000 to furnish them and in satisfaction of certain customs duties which they attracted. He put them out for rental. Quite frequently he occupied some of them himself when he was on holiday in the Bahamas. Myra's financial position had not, however, improved. They seemed not to have benefitted from the extension of time for repayment of Alliance's loan. They defaulted in the discharge of their obligations and on the 29th of June, 1972 Alliance served them a notice requiring payment of the principal sum outstanding and interest and stated that in default of such payment, Alliance would exercise their powers of sale. Myra was unable to comply, and on the 28th of October, 1974, Alliance agreed to sell the premises to Gleneagles Investment Company. The contract recited the November, 1969 mortgage. Clause 8 was in the following terms:-

> "It is understood that certain parties may be claiming leases on portions of the said hereditaments. The Vendor hereby represents that these leases have never received the Vendor's previous written consent and are therefore in breach of the said mortgage between the Vendor and the said Myra Investments Limited".

Gleneagles assigned its rights under this contract to the Defendant Company on the 4th of November, 1974, and on the following day, Alliance conveyed to them.

Thereafter the Defendant changed the apartment

locks and took over the apartments, denied Hackett access to them, and have continued to do so ever since. By his Amended Statement of claim dated the 11th of May, 1977 Hackett claims:-

(1) Possession of the apartments

(2) A declaration that he is entitled to a lease to the apartments in terms of the lease of the 5th of June, 1970 which he entered into with Myra.

(3) An injunction to restrain the Defendant from trespassing on the apartments.

(4) Mesne profits.

(5) Damages for trespass.

There is also an alternative claim for an order that he is entitled to an equitable lien over the premises to secure the sum of $390,000 together with interest at 6% computed from the 5th of June, 1970.

THE ISSUES:

The issues expressly raised by the pleadings and the evidence are three in number:-

(a) Did clause 8 of the agreement for sale of the 28th October, 1974 between Alliance and Gleneagles put the Defendant on notice that Hackett was entitled in equity to a lease, and did the Defendant purchase with such knowledge?

(b) Did Alliance in fact consent in writing to Hackett's lease?

(c) In the events which transpired subsequent to Alliance's letter to Myra of the 2nd of June, 1970, did Hackett acquire an equity to a lease enforceable against Alliance by virtue of proprietary estoppel or as it is otherwise called estoppel by encouragement or acquiescence, and does that equity bind the land in the hands of the Defendant, who are Alliance's successor in title?

I deal with these issues in turn.

To plead that clause eight (8) of the contract of sale between Alliance and Gleneagles of the 28th of October, 1974 put the Defendant on notice that Hackett had an equitable right to a lease of part of

Silver Sands is to beg the question by presupposing that he in fact and in law had such a right. But even if he did, clause eight (8) on its proper construction was not notice that he had any such entitlement. To the contrary, far from asserting that he had such a right, the effect of the clause was to negative its existence. It stated in the most positive terms that although certain persons might have been claiming leases, those leases were invalid because they had been made in breach of the express terms of the mortgage between Alliance and Myra. The allegation that clause eight (8) operated as notice of Hackett's right to a lease is in my view without merit.

Can Alliance's letter of the 2nd of June, 1970, (the terms of which have been fully set out at pages 5 - 6 of this judgment), then be construed as a consent in writing to Hackett's lease of the 5th of June, 1970? The Defendant has pleaded in paragraph fourteen (14) of the Defence and it has been submitted on their behalf that such consent as can be deduced from the language of the letter was a consent only to a disposition by Myra of part of its equity of redemption pursuant to clause 4(a) (iv) of the mortgage, and not to a lease. It is true that after Myra conveyed the fee simple in the premises to Alliance as security for the mortgage all that remained in Myra was the mortgagor's equity of redemption, coupled with the equitable right to redeem. In Casborne vs. Scarfe 1738 1 Atk. 603, the Lord Chancellor, Lord Hardwicke, considered the nature of an equity of redemption and said at page 605:-

> "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."

The learned authors of Megarry and Wade's Law of Real Property the 4th Edition cite this case at page 891 as authority for the proposition that the mortgagors equity of redemption:-

> "Is an interest in the land which the mortgagor can convey, devise, settle, lease or mortgage, just like any other interests in land."

A lease by Myra of thirty (30) apartments without Alliance's previous consent in writing would therefore be a disposition of part of the equity of redemption which would entitle Alliance to exercise the mortgagee's powers of sale, foreclosure, etc. under clause 4(a) (iv). But when Alliance wrote to Myra on the 2nd of June, 1970, the parties had not been discussing the waiver by Alliance of its rights to sell under that clause. No lease to Hackett was then in existence, neither had Myra at that time made any attempt to lease the apartments to him. What was being considered were terms for the extension of the time for repayment and the continuation of the mortgage. Such a lease was one of the terms upon which Alliance was prepared to extend the time. In the circumstances, no question of Alliance waiving its rights under clause 4(a)(iv) then arose. Accordingly, what arises for determination is whether Alliance's preparedness to sanction such a lease was unqualified or conditional only. This to my mind depends upon a proper interpretation of the letter of the 2nd of June, 1970.

It seems to me that the only fair reading of that letter is that Alliance was saying that it would consent to a lease to Hackett of thirty (30) apartments as part and parcel of an agreement for an extension of time, provided Myra was willing to:-

(a) Pay interest in the future at the rate of 12% instead of 10%.

(b) Pay $200,000 on or before the 1st of September, 1970.

(c) Have Hackett pay the $300,000 for the leases to Tower for the purposes stated.

(d) Pay over all monies received pursuant to contracts for the sale of leases made before or after the 2nd of June to Alliance in reduction of the First Mortgage.

As such, the consent to Hackett's lease was conditional only, and not unqualified. In the event, conditions (a), (b) and (d) were not satisfied. There is nothing whatever to show that Alliance was signifying or ever did signify its willingness to extend the time upon condition only that the money for Hackett's lease be paid over to Tower, or disbursed by Hackett himself to Myra's contractors and workmen. The terms that were eventually agreed between Myra and Alliance

for the amendment of the mortgage of November, 1969 indicate that none of the conditions which had been proposed in June, 1970 informed the agreement to extend the time for repayment. In my judgment therefore, no consent by Alliance to Hackett's lease of the 5th of June, 1970 can in the events which occurred be implied from anything which Alliance said in the letter of the 2nd of June, 1970. Had all of the conditions therein stated been accepted by Myra, the situation would have been otherwise. If that had occurred it would have been impossible for Alliance to contend that they had not consented to Hackett leasing thirty (30) apartments for $300,000. And notwithstanding the provisions of clause 4(e) of the instrument, and the fact that the Conveyancing and Law of Property Act sanctions occupation leases by a mortgagor in possession for twenty-one years only, they would have been hard put to assert that in the face of Myra's previous dealings in leases of which they had prior knowledge, they were not consenting to a lease for ninety-nine years. It seems therefore, that Hackett can only succeed in this action on the basis of estoppel by encouragement or acquiescence, or what is now called "proprietary estoppel".

THE LAW AS TO ESTOPPEL BY ENCOURAGEMENT OR ACQUIESCENCE:

In Ramsden vs. Dyson 1866, L.R. 1 H.L. 129, Joseph Thornton and Lee Dyson sued the grandson of Sir John Ramsden claiming leases of certain of Sir John's properties or a lien on them. The allegation was that Sir John by his servants and agents encouraged his tenants at will, of whom Thornton was one, to erect buildings on the land and stood by whilst expenditure was incurred on the erection of such buildings with knowledge that the tenants were laying out their money in the belief that they had a right to call for leases. Dyson claimed as an incumbrancer under Thornton. Lord Cranworth, the Lord Chancellor, stated the principles of equity applicable to such a situation in the following terms at pages 140 - 141:-

> "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It

considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

Lord Wensleydale put the matter this way at page 168:-

"If a stranger build on my land, supposing it to be his own, and I knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier had imprudently added to it. If a tenant of mine does the same thing he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build."

Lord Kingsdown said at page 170:-

"The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays

out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

In Wilmott vs. Barber, 1880 15 Ch. D96 a lessee of three acres of land let one acre to the Plaintiff and agreed also to sell to him his interest in the whole three acres at any time within five (5) years from the date of the agreement. The lease contained a covenant by the lessee not to assign or part with the possession of the land or any part of it without the lessor's written consent. The Plaintiff was not aware of this covenant. He went into possession of the one acre, and laid out money on it. The lessor was aware of this expenditure. The Plaintiff subsequently gave the lessee notice of his desire to purchase his leasehold interest in the three acres. The lessor refused his consent, and the lessee declined to perform his agreement. The Plaintiff thereupon sued the lessee and lessor claiming specific performance of the agreement by the lessee and to compel the lessor to give consent. It was alleged that the lessor had acquiesced in the Plaintiff's expenditure knowing that he was acting in the mistaken belief that the lessee was able to assign the property to him.

In dealing with the claim by the Plaintiff, against the lessor, Fry J. said at pages 105-106:-

> "It must, however, be borne in mind that a person who stipulates for a written license to assign a lease wisely stipulates for evidence in writing of his consent to an assignment, in order that the contest which often arises when there is only parol evidence may be avoided; the writing is to be an end of all strife between the parties. It requires very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document. It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of

that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his right which is inconsistent with the right claimed by the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

The aforementioned five classic probanda of Sir Edward Fry as to the essential ingredients of estoppel by acquiescence or encouragement have stood the test of time. They were approved and applied by Lord Diplock in the House of Lords in Kammins Ballrooms vs. Zenith Investments (Torquay) Ltd., 1970 2 A.E.R. 871 at page 895. As recently as 1975, in Crabb vs. Arun District Council 1975 3 A.E.R. 865, Scarman L.J. as he then was, referred to them as providing:-

> "A valuable guide as to the matters of fact which have to be established in order that a plaintiff may establish this particular equity."

It is well settled that the equity acquired as a consequence of this branch of the law of estoppel may be enforced against the land in the hands of the successor in title of the person whose conduct gave rise to its creation. See for example Inwards and Others vs. Baker 1965 1 A.E.R. 446, and E.R. Ives Investment Ltd. vs. High 1967 1 A.E.R. 504.

The point has been taken in paragraph 4 of the Defence that the mortgage between Alliance and Myra of the 15th of November, 1969, was recorded in the Registry of Records on or about the 15th of January, 1970, and consequently on the 5th of June, 1970 Hackett had notice of the fact that Myra could not grant a lease without Alliance's consent in writing. It has been submitted that as a result, it is not open to Hackett to say that he was mistaken as to his legal rights because he had constructive notice of the fact that his lease was not valid. Fry J. dealt with a similar submission in Wilmott vs. Barber supra. In the course of the argument, he observed at page 101:-

> "The equitable doctrine of acquiescence is founded on there having been a mistake of fact; can it be repelled by showing that there was constructive notice of the real facts? In every case in which a man acts under the mistaken belief that he is entitled to land, he might, if he had inquired, have found out that he had no title. And yet the Courts appear always to have inquired simply whether a mistake has been made, not whether the plaintiff ought to have made it."

The learned judge repeated this in the course of his judgment at page 106, where he said that when a plaintiff is seeking relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge. For my part, I respectfully adopt the reasoning of Fry J., and hold that Hackett's claim cannot be defeated on the ground of constructive notice of the content of Myra's mortgage with Alliance.

THE EVIDENCE:

Before considering the evidence that has been offered in proof of the matters requisite to the establishment of the estoppel relied upon, it is necessary to say a word or two about the Amended Statement of Claim. Paragraphs 12 - 15 allege that Hackett was induced and encouraged by Alliance to assist in the completion of the buildings at Silver Sands by accepting the lease for the thirty (30) apartments and paying therefor the sum of $300,000 which was to be utilisted towards the costs of construction; further that he took the lease and laid out the $300,000 for the aforementioned purposes and Alliance acquiesced in the expenditure presumably knowing that he expected to obtain a lease. The pleading is however silent as to what was the nature of the mistake he

laboured under when he executed the lease with Myra and proceeded to lay out his money. It is not pleaded that he did not know that there was a covenant in the mortgage which required Alliance's written consent to leases. There is no allegation that his actions were informed by the mistaken belief that he could obtain a valid lease without Alliance's consent in writing, or by any other mistaken belief. So far, therefore, as the first two ingredients of estoppel by acquiescence as propounded in Wilmott vs. Barber are concerned, the Statement of Claim has left the Court completely in the dark. Indeed it appears on close examination that these paragraphs of the Statement of Claim were designed more to raise the issue of promissory estoppel as matter of defence in an action against Alliance based upon words and conduct, rather than assert a cause of action for an equity to a lease rooted in proprietary estoppel. Promissory estoppel was, however, jettisoned by Hackett's Counsel at the hearing and the case proceeded on the footing of proprietary estoppel. Counsel for the defendant, whilst criticising the defects in the pleading, raised no objection to such a course being adopted, nor did he insist on an amendment to the Statement of Claim to allege the precise nature of the mistaken belief relied upon.

I come then to the evidence, as it relates to proof of what a plaintiff must establish when he relies on estoppel by acquiescence or encouragement. The testimony that is principally relevant is that of Hackett himself, Gerald Nelson Capps, and to a minor extent, Derek Higgs and William Blackett Caldwell.

Hackett is a retired naval architect, but he was not very clear on a number of matters of importance. Some of the answers he made to questions put to him by his own counsel and in cross-examination were ill considered. On occasion he made statements inconsistent with previous answers. At other times he recanted. Nonetheless, he struck me as an honest witness who was doing his best within his limitations to speak the truth. I formed the distinct impression that part of his problem was that he did not appreciate the basis upon which his claim to a lease was founded. What is more he was recovering from a serious illness when the hearing began, and I am certain that his state of health affected his performance in the early stages of his evidence.

Hackett said that in May or June, 1970, he learnt that Alliance had lent Myra money but he did not then know how the loan was secured. His testimony is not very clear on the point, but it appears that at about the same time that he discovered this, he also learnt that Alliance's permission was required before anyone could invest with Myra. He did not say how he came to discover this, or who was his informant. He continued:-

> "When I learnt that Myra required Alliance's permission for any further investment in Myra's property I said I would be interested in purchasing thirty (30) apartments each worth $10,000. I agreed to take the thirty apartments on condition that Alliance give their consent and approval to the sale of the thirty (30) apartments."

He was here speaking in the context of discussions he was having in May, 1970 with Radomski who had been pressing him to invest, and it appears that it was to Radomski that he signified his agreement to take thirty (30) apartments on condition that Alliance consented. As I understand his evidence, he also told Radomski that a further condition of his investment was that the money which was to be paid for the apartments should be utilised in paying contractors and workmen so as to insure completion of the buildings that were then under construction. All this occurred shortly before the 2nd of June. As a result, Radomski and Capps had a meeting with Tower of Alliance, and discussed terms for an extension of the time for the repayment of Myra of the principal and interest owing to Alliance under the mortgage, and which fell due on the 30th of June.

Thereafter, on either the 3rd or 4th of June, 1970, Hackett met Radomski and Capps at Myra's registered office which was located in the same building in which Dawson Roberts & Company had their law offices. Radomski and Capps showed Hackett Alliance's letter of the 2nd of June, 1970. He read the letter and discovered for the first time that Alliance had a mortgage on Myra's property. By then he had already tentatively committed himself to a lease of the apartments. He said that he fully appreciated that Alliance was willing to extend the time for repayment and that their agreement was subject to Myra complying with all three of the strict conditions which the letter stated. A discussion then ensued between Hackett, Radomski and Capps. Hackett said that he voiced his objection to condition 3, and proposed that it should be varied to enable him and not Tower to

disburse the $300,000 to the contractors and tradesmen.

In cross-examination he at first said that he was not concerned with the other conditions Alliance had laid down as a condition of their forebearance, but he soon resiled from this position. He said he was very much concerned with them, and raised them in the course of the discussion. Radomski told him that he had talks with Tower about the requirement for the payment of $200,000 by the 1st September, 1970, and assured him that he need not worry about it, and that he, Radomski, would take care of that matter at the same time that he discussed the variation of the term as to the disbursement of the $300,000 with Tower. So far as the term relating to the payment of sums received or to be received on the sale of leases was concerned, Radomski and Capps gave their assurance that that term related only to agreements for leases on which balances were due and owing to Myra by third parties, and Myra would assign such agreements and ensure that the respective sums were paid over to Alliance. Hackett said more than once that he had faith in Radomski and trusted him. It seems that he was completely convinced by Radomski and Capps that Myra could or would accept and honour conditions 1 and 2 of Alliance's letter, and the only live question was whether Tower would agree to the variation of condition 3. To the Court he said he did not know that Myra had covenanted with Alliance not to lease without Alliance's consent.

Capps supported Hackett's account as to the suggestion for a variation of condition 3, but added that Radomski made it plain that he was not anxious to comply with condition 2 which required Myra to pay $200,000 by the 1st of September 1970. According to him, following the discussions between Hackett, Radomski and himself in Myra's office, there was a further meeting on the same day with Tower, presumably at Tower's office. Hackett was not present. Capps said that at that meeting Tower and Radomski agreed that if Radomski could produce receipts signed from time to time by the various building contractors and workmen engaged on the construction, Tower would accept them as evidence of payment and treat the sums so disbursed as having been made out of the $300,000 that Hackett would be paying for his apartments. Capps blandly stated that he did not know what, if anything, was discussed at that meeting between Tower and Radomski concerning Alliance's demand that Myra agree to pay $200,000 by the 1st of September

1970, as part of the price for Alliance's willingness to forbear. I find this difficult to believe. It is perfectly clear that Radomski did not wish to pay this sum by that date. It is also clear that Myra was not then in any financial position to make any such committment. Equally clear is the fact that the payment of that sum by the 1st September, 1970, or at any other time, was never part of the agreement that was eventually arrived at between Myra and Alliance for the amendment of the mortgage. It is highly improbable that with the date for the maturity of the mortgage rapidly approaching, there would not have been a full discussion of all the terms that Alliance had then proposed for an extension of the time for repayment, and Myra's ability or inability to meet them. I believe that much more was discussed at the meeting which Radomski and Capps had with Tower besides the variation of one only of the three conditions which Alliance had stipulated for in return for the agreement to an extension. I incline to the view that the payment of the $200,000 must have been mentioned, as well as the payment by Myra of the sums mentioned in condition 2 of the June letter. I am satisfied that Capps was not frank with the Court when he said he did not know what was discussed about the payment of this $200,000 and that he has suppressed a great deal of what he knows did transpire by a pretence of ignorance. In fact on the evidence before me the probability is that Radomski and Capps started from that very day to re-negotiate with Tower for an amendment of the mortgage which would not reflect the conditions which Tower had laid down in the letter of the 2nd of June and that those re-negotiations were principally inspired by the fact that Myra was in no position then to commit itself to a payment of $200,000 by the 1st of September, 1970. If Tower mentioned anything at all about his willingness to vary condition 3 along the lines mentioned by Hackett, this must have been said in the context of an inconclusive discussion of terms for the amendment of the morgage, the negotiations for which were not concluded on the 3rd or 4th of June.

What then did Radomski and Capps do after they had seen Tower? According to Hackett they returned to Myra's office some two to three hours later. He had been awaiting their return. They told him that Tower had agreed on the variation he had proposed in relation to the disbursement of the $300,000. There is no evidence that they told him anything else. Lulled as he had been into a sense of false security by Radomski's previous assurances about the other terms of Alliance's letter, Hackett asked no questions, but seemed to have assumed that

all was well. By the 5th of June he had signed his lease with Myra for the thirty (30) apartments, and by the 7th of June he had paid out $150,000 in settlement of Myra's construction bills. There is no evidence that either Radomski or Capps told him that the terms for the mortgage amendment had not been finalised. It would seem that they did not.

It is against this background that one must ask what was the mistake that Hackett made? It seems to me he made two mistakes. The first was to rely on what Capps and Radomski had told him without taking any steps to have Alliance confirm that they had settled with Myra for an extension of the time for repayment upon terms which included a lease to him of the thirty (30) apartments for $300,000. The second, and the one vital for the purposes of this case, was that he believed from what he was told that Alliance had orally consented to the lease. And not knowing that that consent was required to be in writing, Hackett thought that he had a legal right to take such a lease.

The next question is: Did Hackett spend his $300,000 in satisfaction of Myra's bills on the faith that he had a valid lease on the thirty apartments? One would have thought that he would have had no difficulty in making it clear by his evidence that this was so. But he obscured the point by emphasising a number of other objectives which he hoped to achieve by the expenditure of his money. Thus when he was being pressed in cross-examination as to the reasons why he invested he said:-

> "When I discovered that there was a mortgage, although I was annoyed and surprised, I decided to go on with the investment because I had confidence that Radomski would finish the buildings."

Later he added:-

> "I was confident that if my $300,000 was used in the correct manner in paying off debts to contractors, etc. the building would be finished. The fact is that the building was finished. Myra would then be able to collect on sales, and liquidate some of their debt to Alliance if not all. I was not concerned with the mortgage or its terms. I took a calculated risk."

In re-examination he explained that what he meant by this last answer was that the calculated risk he took was that despite Radomski's estimate that $400,000 would have been required to complete construction, he was of the view that $300,000 would have sufficed. But when his counsel tried to put him back on the rails by asking why he spent his money, obviously hoping that this question would have elicited the answer, "I did so believing that I was entitled to a lease", Hackett replied:-

> "I was induced to invest because Freeport was going through a difficult time. I had an interest in Silverpoint which was adjacent. I felt a moral obligation to see Silver Sands complete. Besides, if Silver Sands werecompleted as I felt it would be, the value of my investment in Silverpoint would have been enhanced."

These answers taken in isolation would tend to suggest that Hackett spent his money solely out of altruism or to indulge a gambler's instinct and not on the faith of a mistaken belief that he had a good lease of thirty (30) apartments. In my judgment, however, they must be taken in conjunction with the remainder of his evidence. He had earlier made it plain that:-

> "My money was not a loan to Myra. I wanted to get the apartments in return for my money."

He further testified:-

> "I was interested in seeing that the buildings were completed so as to insure that I would have a return on my money."

Finally, he also said:-

> "My interest was in a sense wider than just getting a lease of thirty (30) apartments. My whole idea in putting up the $300,000 was to see all the buildings for the project completed."

Unless the buildings, which included a restaurant, a bar and sauna baths, were completed, the thirty (30) apartments would have had very little value in Hackett's hands. He planned to rent them out when completed so as to supplement his income. Unless he had a lease which entitled him to do so, there would have been no return on his money. Viewing

his evidence as a whole, I am satisfied that Hackett laid out his money on the faith of the mistaken belief that the lease which he executed on the 5th of June was valid, and that it would have borne fruit when the project was completed. The other considerations which induced him to incur the expenditure, such as the side benefits which would have accrued to Freeport and to his Silverpoint investment, were considerations of secondary and, at most, of equal importance.

I turn then to the third question: Did Alliance know that their consent in writing to a lease by Myra was necessary? No witness from Alliance has been called, and in the absence of evidence to the contrary, I am obliged to assume that they did. They certainly did know of their rights under clause 4(e) of the mortgage when they agreed to sell to Gleneagles on the 28th of October, 1974, and there is no reason to suppose that they were ignorant of them between June and August of 1970.

The final inquiry is whether Alliance knew that subsequent to the interview which Radomski and Capps had with Tower on the 3rd or 4th of June, 1970 concerning the terms of the letter of the 2nd of June, Hackett mistakenly believed that he could take a lease of thirty (30) apartments without their consent in writing; further, whether with that knowledge, they actively or passively encouraged him to lay out his $300,000 between June and August, 1970 in the manner and for the purposes he described on the faith that he had a valid lease. Proof that Alliance discovered what Hackett had done long afterwards will not suffice. It must be established that between the 3rd of June and the end of August, 1970 Alliance knew what Hackett was about, and during that time encouraged him to continue, either actively, or passively by abstaining from asserting their own inconsistent right. In this connection I refer to the passages from the judgments of Lords Cranworth and Wensleydale in Ramsden and Dyson which have earlier been quoted. To these I would only add the words of Thesiger L.J. concerning acquiescence in the celebrated case of De Busche vs. Alt 1878 8 Ch. D.286 at page 314:-

> "If a person having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its

being committed, he cannot afterwards be heard to complain of the act."

On this aspect of the case, it was argued that Alliance's letter of the 2nd of June was a representation to Hackett that he could take a lease of thirty apartments if Myra agreed to accept the conditions therein stated for an amendment to the mortgage. It was said that Tower agreed to a variation of one of those terms and if the situation changed and Alliance was no longer prepared to consider the lease, a duty was cast upon them so to inform Hackett. Their failure to do so was an encouragement to Hackett to enter into the lease of the 5th of June, 1970. There is of course a line of authority for the proposition that where a representation is made with the object of inducing a particular person to act upon it, and an event supervenes whereby the representation is no longer operative, the representor's silence is an implied representation of the continued existence of the original state of affairs. If without knowing of the change, the representee acts upon the original representation, the representor may be estopped from averring that any change has occurred. This principle, is, however, more apposite to cases where promissory estoppel is raised as matter of defence than it is to situations in which estoppel by acquiescence or encouragement is relied on as the genesis of a cause of action. But even if I am wrong about this, this is not the form of estoppel that has been pleaded. Besides the evidence does not show that Hackett took his lease on the basis that Myra had in fact agreed to all the conditions expressed in Alliance's letter of the 2nd of June, 1970. The fact is that he himself proposed a variation to one of those conditions without which he states he would never have entered into the transaction in question. Thereafter, he was told by Radomski and Capps that Alliance had accepted the variation he had suggested. He assumed, or was led to believe by Radomski, that the remaining conditions had been or would be accepted by Myra, and proceeded to commit himself to the lease. It may here be noted that whilst Hackett says that when the terms of the June letter were being discussed in Myra's office, Radomski said he would take care of the payment of the $200,000 as Alliance had stipulated, Capps swore that Radomski had made it plain that he did not wish to pay that sum, and this was said in the presence and hearing of Hackett. Accordingly, Hackett knew enough then to realise that there was more than a possibility that Alliance's terms for the grant of a lease to him might not have materialised.

It was also suggested that the oral evidence and the letters dated the 20th of May and 21st of June, 1971 which Millican of Alliance wrote to Derek Higgs and Capps of Myra (Exhibits 6 and 5) established that Alliance took assignments of the benefits accruing to Myra under all the contracts which Myra had entered into with third parties after November, 1969 for leases of apartments. It was contended that this indicated that Alliance had knowledge that Myra did in fact enter into contracts to grant leases around the time that Hackett was spending his money, and from this an inference could be drawn that they must therefore have had knowledge of Hackett's lease and his expenditure.

Millican's letter of the 20th of May (Exhibit 6) stated that he was of the view that in order to complete the documentation for the new arrangement for the amendment of the mortgage, an amended assignment to cover all purchase and sale agreements that were then in existence or entered into in the future would be required. His letter of the 21st of June (Exhibit 5) said inter alia:-

> "My clients would also like details of the Fire Insurance on the property and an up to date list of the purchasers of the apartments of which there is, I believe, ninety."

As to this last letter, Hackett said that Radomski told him that prior to the November 1969 mortgage, Myra had entered into contracts with third parties for the lease of some seventy (70) apartments and that sums remained to be paid by those third parties to Myra under the terms of those agreements. He also alleged that Radomski had further informed him that between that time and the 2nd of June, 1970, Myra had not sold any additional apartments. These utterances of Radomski are not admissible to prove the truth of the facts therein stated. They are admissible under section 42(2) of the Evidence Act Chapter 42 merely to show Hackett's state of mind after he read Alliance's letter of the 2nd of June and after he received information as to the implications of condition two (2) of the letter. I am therefore quite unable to "marry" the statements attributed by Hackett to Radomski to the contents of Millican's letter of the 21st of June, 1971 (Exhibit 5) and conclude that Myra entered into contracts for leases on twenty additional apartments between the 2nd of June, 1970 and the date of Millican's letter of the 21st June 1971, and that Alliance had knowledge of these

long before the date of Millican's letter. Still less am I able to infer that these leases must have been entered into between the 2nd of June, 1970 and the end of August of that year to the knowledge of Alliance.

There is no evidence as to how many contracts were assigned to Alliance on the 15th of November, 1969 pursuant to the assignment of that date (Exhibit 8). As I have already pointed out the assignment merely refers to the "Purchase Agreements hereto attached". Capps said that when he left Grand Bahama late in 1972, more than 50% of the apartments in Silver Sands had been sold. He was of the impression that the buildings comprised some 144 apartments. According to the evidence, the only contracts for leases that were assignable were those in respect of which sums of money remained to be paid to Myra. When a third party bought outright for cash, there was nothing to assign. Capps gave no evidence whatsoever as to how many of the apartments which he said had been sold up to the end of 1972 were sold for cash and how many upon terms, or when such contracts had been made . Here again I am unable to draw any inference from the letter of the 21st.June, 1971 that Alliance knew in 1970 of the existence of such assignable contracts as Myra might have entered into after the 15th November, 1969.

The question of whether any contracts were in fact assigned as a result of Millican's letter of the 20th of May 1971 to Derek Higgs (Exhibit 6), has been left completely unresolved by the evidence. When Derek Higgs was cross-examined by Mr. Liddell he said:-

> "I do not personally know if Myra's rights under any contracts for leases with third parties were ever assigned to Alliance. It appeared to me from reading this letter Exhibit 6 that there was an intention to amend an assignment, and this suggested that there were such assignments in existence before the date of Exhibit 6."

The mortgage amendment of the 1st of July, 1970 did not specify that contracts entered into subsequent to the 15th of November 1969 were to be assigned to Alliance as further consideration or additional security for the loan. Notice of default under the mortgage as amended was given by Alliance to Myra on the 29th of June, 1972. Higgs said in cross-examination by Mr. Whitfield:-

> "I would agree that no other amendment of the mortgage came into effect between the 1st of July, 1970 and the 29th of June, 1972. It does not appear to me that any further amendment to the Myra/Alliance mortgage resulted from this letter Exhibit 6."

Capps explained in examination in chief that in order to put the Assignment of the 15th of November, 1969 into effect, arrangements were made that the sums which fell due to Myra under the assigned contracts should be paid over to a firm by the name of Bainbridge and Caldwell, Freeport, Grand Bahama for the account of Alliance. He was positive that those arrangements were in fact implemented so far as the November 1969 assignment was concerned. He was asked no questions in chief as to what happened to monies collected by Myra subsequent to the 2nd of June, 1970 pursuant to contracts which might have been entered into with third parties after that date. Counsel for Madden put no such questions to him either. He was later cross-examined by Mr. Whitfield who quite understandably left the matter severely alone. He was then re-examined by Junior counsel for Hackett, Mr. Pyfrom. At the end of all this examination in chief, cross-examination and re-examination, this area of the case remained virgin soil. It fell to the Court at the end of the re-examination to canvass the matter with Capps. He stated:-

> "After the letter of the 2nd of June 1970, Myra leased apartments. Myra paid the monies over to Alliance through Bainbridge and Caldwell. The system was that Myra would notify Bainbridge and Caldwell of the apartment number sold and then send a cheque for the amount received. This is my recollection of what happened. I may be wrong."

Arising from this answer he told Mr. Whitfield:-

> "I cannot produce any documentary evidence to show that any receipts from sales of leases entered into subsequent to the 2nd of June 1970 were forwarded to Bainbridge and Caldwell at any time or at all."

No assignment covering contracts made after the 2nd of June, 1970 was produced or otherwise proved.

In the aforementioned state of affairs counsel for Hackett made a last attempt to establish that

monies received by Myra in respect of post 2nd. June contracts had been paid over to Bainbridge and Caldwell as Capps seems to have believed. They called Mr. William Blackett Caldwell of Bainbridge & Caldwell for the purpose. But the best this gengleman could do was to say that Radomski of Myra had engaged his firm to receive and bank monies collected by Myra from persons who contracted to lease apartments. The monies he said were banked by his firm to the credit of a company called Jonenco Ltd. He added:-

> "The banking began in February, 1971 and the last banking was made by us in April, 1974."

There was no evidence as to what Joneco was or its relationship to Alliance. In the circumstances I cannot assume that Jonenco was Alliance's collecting agent, or that Jonenco's knowledge was Alliance's knowledge.

Mr. Caldwell did not say whether the sums received and banked were attributable to the contracts assigned in November, 1969 as per Exhibit 8, or to contracts entered into by Myra thereafter, and more particularly to contracts entered into subsequent to the 2nd of June, 1970. The burden is on Hackett to prove on a balance of probabilities that Jonenco was Alliance's agent and further that the sums received related to contracts of the latter group if he wishes to rely on this fact as bringing home knowledge to Alliance of Myra's dealings in contracts for leases after the 2nd of June, 1970, and inferentially of his lease and expenditure. In the state of the evidence, I am unable to come to a firm conclusion one way or the other. The evidence is more consistent with no further assignment of contracts for leases having been made subsequent to the assignment of the 15th of November, 1969 than it is with such an assignment having been executed. If there was such an assignment it is difficult to understand why a copy of it has not been produced in the same way as Hackett has been able to produce the assignment of the 15th of November, 1969. As to the question of whether independent of any fresh assignment, Alliance was receiving sums due under contracts for leases entered into by Myra after the 2nd of June, 1970, the evidence of Capps and Caldwell is inconclusive. At best it is as consistent with the sums banked being referable to the contracts which were assigned in November, 1969, as it is with them being referable to contracts entered into subsequently.

It seems to me, therefore, that the critical inquiry is whether quite apart from post 2nd June, 1970 contracts and assignments and the dealings with Bainbridge and Caldwell, there is other evidence which establishes that Alliance knew that though the terms for the mortgage had not been finalised on the 3rd or 4th of June, 1970, Hackett was nonetheless pressing on to commit himself to a lease of thirty (30) apartments and incur expenditure.

There is not a shred of evidence to show that during the period June to August, 1970 Myra took any steps to acquaint Tower or any other agent of Alliance that Hackett had entered into the lease of the 5th of June. Hackett had no direct dealings with Alliance before the 2nd of June. He never advised Alliance after the 5th of June that he had taken a lease. He never even asked Alliance for written confirmation of the variation of condition 3 of the June letter to which Radomski and Capps told him Tower had agreed. Had he done so, Alliance would have had some knowledge of what he was about. The variation to which Tower is alleged to have agreed was that if Radomski produced receipts signed by contractors and workmen, Alliance would treat the receipted sums as coming out of the $300,000 Hackett was to pay for the lease of his thirty (30) apartments. But no evidence has been led to prove that any such receipts were at any time submitted to Tower or any other officer or agent of Alliance by Radomski or Capps or Hackett. There is no evidence that the fact that such payments were being made by Hackett was otherwise reported to Alliance orally or in writing from time to time during the relevant period. There is no evidence that anyone from Alliance visited the site whilst the payments were being made, and as a consequence discovered that Hackett was spending money on the buildings.

Mr. Callender submitted that a letter dated the 27th of June, 1974 which Davies, Ward and Beck (Alliance's Canadian lawyers), wrote to McPherson and Brown and which appears at page 28 - 29 of Section E of the Hackett Bundle proves that Alliance knew that Hackett spent money on the acquisition of his lease. I was not told who McPherson and Brown were. The letter from Davies, Ward and Beck of the 27th of June is in reply to a communication from McPherson and Brown dated the 12th of June, 1974, addressed to Alliance's President, John Ennis. That letter has not been tendered in evidence. Paragraphs 4 and 5 of

Davies, Ward and Beck's reply state as follows:-

> "Your comments set out in the last Paragraph of the first page of your letter will be satisfactory. Forty apartments have been sold with terms for payment. Forty suites have been conveyed to Hackett as security for a loan in the amount of $300,000. These conveyances have not been consented to by the mortgagee. The receivables on the sales are payable to the mortgagor's auditors, Caldwell and Bainbridge. We have no knowledge of the lease arrangements with the restaurant.
>
> The mortgagee has at no time consented to any leases of the property offered as security since the mortgage was first registered and the security given for the loan is as set out by you at the bottom of page 2 of the letter."

Without seeing the McPherson and Brown letter I have no means of knowing when it is that the forty apartments described as sold are supposed to have been sold. I am also unable to conclude that anything said by Davies, Ward and Beck in those paragraphs is an admission that between June and August, 1970 Alliance knew that Hackett had taken a lease and was spending money on the faith of such a lease. It would be dangerous and tantamount to taking a leap in the dark to come to any such conclusion. Such statements as are contained in the letter might very well have been based on knowledge of Hackett's involvement which Alliance acquired long after the event. A similar submission was made by Mr. Callender based on paragraph 14 of the Defence. I am unable to agree. Paragraph 14 of the Defence admits that Hackett spent $300,000. It is by no means an admission that Alliance knew at the material time that it was being spent. In fact when that paragraph is read in conjunction with paragraphs 12 - 16 of the Statement of Claim to which it is replying, it will be seen that the Defendant is denying that Alliance induced or encouraged Hackett actively or passively to take the lease and spend his money. The clear implication is that the Defendant is asserting that Alliance had no knowledge at the material time that the money was being spent.

In the absence of all this evidence, the case for Hackett collapses. He has failed to establish the 4th and 5th essentials of the estoppel by acquiescence or encouragement laid down in Wilmot vs. Barber supra. In the result

it has not been established that Alliance knew that he mistakenly believed that he had a right to a lease of thirty (30) apartments, and with that knowledge encouraged him either actively to spend his money, or passively by standing by and abstaining from asserting their own rights under clause 4(e) of the mortgage of the 15th of November, 1969. It is true that Alliance got the benefit of his expenditure which went to improving their security and that they and the Defendant have in a sense reaped where they have not sown. But, unfortunate though it may be for Hackett, hard cases make bad law and I am obliged to observe and honour the law as I understand it.

In my judgment therefore, the Hackett action fails. It may well be that the facts proved established a cause of action by Hackett against Myra for breach of the covenant of quiet enjoyment contained in his lease of the 5th of June, 1970, but for reasons best known to himself and his counsel, he has not elected to sue Myra, or claim against them in this action in the alternative.

THE PLAINTIFF MADDEN:

Madden's case falls much wider of the mark than that of Hackett. Exhibit 3 which was put in evidence, suggests that Madden took an assignment on the 15th day of June, 1970 from one John Adams of the latter's rights under a contract with Myra dated the 27th of February, 1969 to purchase a ninety-nine (99) year lease of apartment 306B at Silver Sands. Myra appears to have consented to the assignment. The assignment provided that in case Myra entered into a new contract with Madden, the new contract should supercede the original agreement between Myra and Adams. I do not know whether Myra's rights under the Adams contract were ever assigned to Alliance. As has already been pointed out, the assignment of the 15th November, 1969, Exhibit 8, merely refers to an assignment of rights under agreements "hereto attached". There has been no proof of what contracts were attached.

Be that as it may, Madden disowned the signature on Exhibit 3 which seemed to be his. He affirmed that what transpired was that he had orally agreed with Radomski and Adams that he should pay Adams the $6,000 which Adams had paid to Myra as a deposit under the agreement of 27th February, 1969. Myra would then credit him Madden with that sum, and he would sign a fresh agreement for the purchase of the apartment with

Myra. This he did on the 15th of June, 1970, as per Exhibit 4.

Madden said that he paid most of the instalments of purchase price stipulated for in the agreement, and was let into possession on the 1st of January, 1971. At that time a small balance remained due and owing to Myra. He signed a lease on the 1st of January, 1971 and paid the balance a short time afterwards. After taking possession, he personally used the apartment for four (4) weeks each year, and rented it to friends for periods varying between 15 - 18 weeks per year. In November of 1974, he discovered that the Defendant had taken possession and changed the locks to the apartment. He was denied access thereto by the Defendant's Manageress. An abortive attempt was made to settle the dispute which existed between himself and the Defendant as to who had the legal right to the apartment, and he consulted his lawyers. He testified further that when he signed his contract Exhibit 4 with Myra, paid his money, and took his lease, he did not know of the mortgage Myra to Alliance of 15th November, 1969, as amended. He said he was not otherwise aware that Alliance had to consent to leases and that he had no dealings whatever at any time with Alliance. It does not appear that he even saw or heard of the letter of the 2nd of June, 1970 from Alliance to Myra, (to which extensive reference has previously been made), when he was dealing with Myra. Nonetheless, as will hereafter appear, his counsel fastened on to that letter and sought to make its contents a large part of the foundation of Madden's claim.

The case for Madden as presented by Mr. Liddell was as follows:-

(1) "The effect of Alliance's letter of the 2nd of June, 1970 was to appoint Myra as Alliance's agent to go out to all the world and sell leases of apartments at Silver Sands. This was based upon condition 2 of the letter in which Alliance told Myra that they would agree to an extension of time for repayment of the sum borrowed provided inter alia that any and all monies received by Myra on the sale of suites after the 2nd of June be paid to Alliance in reduction of the mortgage. It was therefore contended that any contract for a lease or any lease which Myra entered into with any third party after the 2nd of June, 1970 was a lease or a contract for a lease which was authorised by Alliance.

(2) Alternatively, if Myra was not Alliance's agent to contract for leases, or to enter into leases, the words of condition 2 of the letter was a consent in writing to all leases of apartments which Myra entered into with third parties after the 2nd of June, 1970.

(3) In the further alternative, the language used in the June letter was an encouragement to Madden to contract to take a lease and pay money for it, in the mistaken belief that by so doing he would obtain a valid lease. If it was not encouragement to Madden, directly, it certainly was such an encouragement to E. Dawson Roberts & Company who acted for Madden in the transaction of lease with Myra.

(4) In any event, the evidence tendered on behalf of Hackett, established that Madden also had an equity to a lease rooted on the principles enunciated in Wilmot vs. Barber supra."

Contentions (1) and (2) may shortly be disposed of. Alliance's letter of the 2nd of June, 1970 cannot fairly or rationally bear the meaning which it has been sought to attribute to it. It cannot be torn from its true context and isolated from the events which subsequently occurred so as to transform one small part of it into a general authority to Myra to contract for leases as Alliance's agent. I cannot possibly construe it as a waiver by Alliance of its rights under clause 4(e) of the mortgage, or as dispensing for the indefinite future with the need for Alliance's written consent to leases, regardless of the circumstances. I have already fully dealt with the suggestion that the letter was a consent in writing to Hackett's lease, and stated my reasons for concluding that it was a conditional consent only. The same reasoning applies to Mr. Liddell's contention 2, and it is unnecessary to repeat it.

Contention (3) is without merit for a variety of reasons. In the first phase, Madden's evidence is that he had no dealings at any time with Alliance or any of Alliance's servants or agents when he entered into his contract of the 15th of June, 1970, paid his money and took his lease of the 1st of January, 1971. If Alliance did not know of him, they could not have known that he was proposing to take, or had taken a lease. By the same token they could not have known that he

mistakenly believed that he would have been able to obtain a valid lease after he had paid Myra what was due under the contract of the 15th of June, 1970, Exhibit 4. In the circumstances, Alliance was under no obligation to assert their inconsistent rights under clause 4(e) of the mortgage of the 15th of November, 1969.

Secondly, Madden did not know of the letter of the 2nd of June, 1970. A fortiori he could not have been actively encouraged by anything it contained to do what he did. Finally, the argument that the letter was an encouragement to Madden's lawyers, E. Dawson Roberts & Company, to believe that Madden could obtain a lease without Alliance's consent, may be dismissed with the simple observation that Madden's own evidence is that he never consulted Dawson Roberts until 1973, and then only for the purpose of recording his lease of the 1st of January, 1971. By that time, he had fully paid for the ninety-nine (99) year lease on his apartment. No question of Dawson Roberts & Company being encouraged to think that Alliance was dispensing with the requirement of consent whilst Madden was incurring his expenditure and taking his lease, can therefore arise. What is more even if Dawson Roberts & Company were Madden's attorneys from the 15th of June, 1970 there is no evidence that any person in Dawson Roberts & Company believed that the letter of the 2nd of June was a licence from Alliance dispensing with the need for consent to all leases after the 2nd of June regardless of the circumstances.

Contention (4) fails for the very reason that Hackett's claim fails. In a nutshell there is not a tittle of evidence that Alliance:-

(a) Knew of the contract of 15/6/70 between Madden and Myra for a lease of Apartment 306B.

(b) Knew that Madden was paying sums of money to Myra pursuant to that contract, in the expectation that he would obtain a valid lease.

(c) Received any of the monies paid by Madden under the contract either with knowledge that Madden had contracted for a lease, or at all.

In the absence of such evidence it follows that Madden cannot successfully assert an equity to a lease based upon estoppel by encouragement and/or

acquiescence. Neither the 4th nor 5th ingredient of such an estoppel as laid down in Wilmott and Barber has been proved.

In the result there will be Judgment:-

(A) For the Defendant against the Plaintiff Hackett on Hackett's claim, and for the Defendant against Hackett for the relief claimed in (1) and (2) of the Defendant's Counterclaim.

(B) For the Defendant against the Plaintiff Madden on Madden's claim, and for the Defendant against Madden for the relief claimed in (1) and (2) of the Defendant's Counterclaim.

The Defendant is to have its costs of the actions payable as to 66 2/3% by the Plaintiff Hackett, and as to 33 1/3% by the Plaintiff Madden, the same to be agreed, or failing agreement to be taxed.

DATED this 29th day of May, 1981.

V. O. Blake, J.

On the application of Mr. Cecil Wallace Whitfield for the Defendant, it is certified that the case was a proper one for the engagement by the Defendant of two Counsel.

DATED this 29th day of May, 1981.

V. O. Blake, J.

No. 22

Order - 29th May 1981

COMMONWEALTH OF THE BAHAMAS 1975

IN THE SUPREME COURT No. 145

Equity Side

B E T W E E N

RICHARD HACKETT Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED Third Party

AND

JOHN ENNIS Third Party

AND 1975
No. 88

B E T W E E N

J. WILLIAM MADDEN Plaintiff

AND

INVERUGIE INVESTMENTS LIMITED Defendant

AND

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED Third Party

AND

JOHN ENNIS Third Party

Actions consolidated by Order dated the 9th September, 1977.

O R D E R

Before The Honourable Mr. Justice V.O.S. Blake, O.J.
Friday the 29th day of May, A.D. 1981

THIS CONSOLIDATED ACTION AND COUNTERCLAIM coming on on the 20th, 25th, 26th, 27th, 28th and 31st March, the 1st and 2nd April, 1980 and this day for trial before this Court in the presence of Counsel for the respective Plaintiffs and the Defendant.

AND UPON READING the pleadings and the Order dated the 9th September, 1977

AND UPON HEARING the evidence and what was alleged by Counsel for the respective Plaintiffs and the Defendant

THIS COURT DOTH ORDER that these actions do stand dismissed out of this Court with costs to be taxed unless agreed and two thirds thereof paid by the Plaintiff Richard Hackett to the Defendant and one third thereof paid by the Plaintiff J. William Madden to the Defendant.

AND on the Counterclaim IT IS:-

(i) DECLARED that the Defendant is seised of the premises comprising Apartments Nos. B101, B102, B103, B104, B105, B106, B107, B108, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 situate in Buildings A and B of Kismet Apartments, Freeport, Grand Bahama now known as Silver Sands Hotel; and

(ii) ORDERED that the Plaintiff, Richard Hackett whether by himself or his agents or servants or otherwise be restricted from doing the following acts or any of them, that is to say trespassing on the said premises or in any manner restricting the Defendant's use thereof; and

(iii) DECLARED that the Defendant is seised of the premises known as Apartment No. 306B Silver Sands Hotel, Freeport, Grand Bahama; and

(iv) ORDERED that the Plaintiff J. William Madden whether by himself or his agents or servants or otherwise from doing the following acts or any of them, that is to say trespassing on the said premises or in any manner restricting the Defendant's use thereof; and

(v) ORDERED that the Plaintiffs do pay to the Defendant his costs of these Counterclaims two thirds thereof to be paid by the Plaintiff Richard Hackett and one third thereof by the Plaintiff J. William Madden.

BY ORDER OF THE COURT

REGISTRAR

No. 23

Notice of Appeal - 11th August 1981

COMMONWEALTH OF THE BAHAMAS 1981

IN THE COURT OF APPEAL No. 17

Civil Side

B E T W E E N :

RICHARD HACKETT — Appellant (Plaintiff)

AND

INVERUGIE INVESTMENTS LIMITED — Respondent (Defendant)

NOTICE OF APPEAL

TAKE NOTICE THAT the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant (Plaintiff) on appeal from the Judgment herein of the Honourable Mr. Justice Vivian Oscar Blake made at the trial of this Action given on the 29th day of May, A.D., 1981 WHEREBY IT WAS ADJUDGED THAT --

THIS COURT DOTH ORDER THAT this Action do stand dismissed out of this Court with costs to be taxed unless agreed and two thirds thereof paid by the Plaintiff Richard Hackett to the Defendant (....)

AND ON the (Defendant's) Counterclaim IT IS--

(i) DECLARED that the Defendant is seised of the premises comprising Apartment Nos. B101, B102, B103, B104, B105, B106, B107, B108, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415, A405, A407, A411, A413, A403 situate in Buildings A and B of Kismet Apartments, Freeport, Grand Bahama now known as Silver Sands Hotel; and

(ii) ORDERED that the Plaintiff, Richard Hackett, whether by himself or his agents or servants or otherwise be restricted from doing the following acts or any of them, that is to say, trespassing on the said premises or in any manner restricting the Defendant's use thereof; and (.....)

(iii) ORDERED that the Plaintiff(s) do pay to the

Defendant his costs of this Counterclaim two thirds thereof to be paid by the Plaintiff Richard Hackett (and one third thereof by the Plaintiff J. William Madden).

FOR AN ORDER THAT the Judgment of the learned Judge be set aside and that this Honourable Court doth order that the Appellant (Plaintiff) is entitled to --

1. Possession of the premises comprising apartments numbered B101, B102, B103, B104, B105, B106, B107, B108, B109, B110, B111, B112, B113, B114, B115, B116, B117, B200, B204, B302, B304, B403, B408, B409, B411, B415,A405, A407, A411, A413, and A403 of Silver Sands Hotel (formerly known as Kismet Apartments) in the City of Freeport.

2. A Declaration that the Plaintiff is entitled to a Lease to be granted to him in all respects similar to the said Lease of the 5th of June, 1970; or alternatively

3. An Order that Alliance Services Industrial & Commercial Corporation Limited is deemed to have consented to the grant of the said Lease to the Plaintiff; or

4. An Injunction to restrain the Defendant whether by itself or by its agents or servants or otherwise from doing the following acts or any of them, that is to say, trespassing on the said premises;

5. Mesne profits;

6. Damages for trespass and exemplary damages.

OR ALTERNATIVELY

7. An Order that the Plaintiff is entitled to and holds an Equitable Lien over the premises conveyed to the Defendant on the 5th day of November, 1974 to secure the repayment to him of:-

(a) the sum of B.$390,000.00; and

(b) interest thereon from the 5th day of June, 1970 to date at 6% per annum or at such rate as this Honourable Court may determine just and expedient.

AND

8. Costs;

9. Further or other relief.

AND FURTHER TAKE NOTICE THAT the grounds for Appeal are as follows:-

1. In a crucial finding about the Lease of the 30 Apartments (the subject of the Action) by Myra Investments Limited ("Myra") to the Appellant and the Plaintiff below ("Hackett") the learned Judge misconstrued the letter dated 2nd June, 1970 which he quoted ("the 2nd June letter") and also misdirected himself in law and erred in fact. This crucial finding was that Alliance Service Industrial and Commercial Corporation Limited one of the Third Parties below ("Alliance") acquiesced in the Lease only conditionally upon conditions never fulfilled. In truth no such conditions were imposed by the 2nd June letter or otherwise and Alliance had acquiesced unconditionally before that letter was written. In more detail:-

(a) From before the Mortgage of the Buildings containing the 30 apartments by Myra to Alliance dated 15th November, 1969 Alliance knew that Myra was selling leases of Apartments in the Building for terms of 99 years. As the learned Judge correctly inferred, Alliance knew that this was not authorized under its Mortgage when the same was drawn and executed. Alliance knew that Myra nonetheless intended to continue such sales. It was obvious (and Alliance therefore also knew) that the buyers would expect to get Leases valid against all the world including any such Mortgagee as Alliance.

(b) With knowledge of all those matters Alliance stood by and allowed sales of Apartments for 99 year leases to continue generally.

(c) Specifically, Alliance knew by 2nd June, 1970 that the 30 Apartments were being sold (2nd June letter at paragraph (2)) to Hackett for $300,000.00 for a 99 year Lease. It was obvious that (as the Judge rightly found) Hackett expected this Lease would be valid as against Alliance, but Alliance knew that as a matter of law it would not be.

(d) Alliance nonetheless stood by and allowed Hackett to take his Lease from Myra and pay the $300,000.00 on the sole stipulation (as amended at the meeting on 3rd or 4th June, 1970

between Tower, Radomski and Capps) that it should be disbursed by Hackett to the contractors and tradesmen for completing the mortgaged buildings. That stipulation was fulfilled.

(e) It was in the interest of both Myra and Alliance that Hackett should buy the Lease as contemplated so long only as the $300,000.00 paid for it was applied towards completing the Buildings. On the evidence, the 2nd June letter was not intended to impose any other condition on the grant of the Lease.

(f) The 2nd June letter grammatically does not impose any other condition on the grant of the Lease but only on the extension of time for repayment under Alliance's Mortgage.

(g) Crabb v Arun D. C. (1976) Ch. 179 and the earlier authorities show that in standing by with knowledge that buyers of Apartments thought they were getting (or were about to get) leases valid against Alliance which Alliance knew they were not. Alliance thereby waived objection to the Leases and was estopped from challenging them and so was bound by them. Further, this applied specifically to Hackett in his specific circumstances mentioned above.

2. The learned Judge misdirected himself in law and erred in fact by holding that no waiver or estoppel bound the Respondent and Defendant below ("Inverugie") because Inverugie was not on notice of Hackett's Lease and others. Clause 8 of the Agreement for Sale of the Buildings by Alliance (of which Inverugie took an Assignment) put Inverugie on notice of the claims of Lessees including Hackett that their Leases were binding on Alliance. Inverugie is therefore bound by the estoppel and so by the Leases and specifically by Hackett's Lease.

3. The learned Judge erred in failing to take proper notice of that part of Appellant's claim relating to US$90,000 worth of furniture and furnishings which the Appellant had purchased and installed in his 30 apartments. The Appellant's rights and interest therein were wholly separate and apart and independent of the issue of whether or not his Lease was valid and binding as against the Respondent. The learned Judge in disposing of the Appellant's claim to the Lease also (whether intentionally or otherwise) dismissed the Appellants claim in relation to his other goods

without giving such claim any of any due consideration and without reference to the evidence in relation thereto and without assigning any reason therefore.

Dated this 11th day of August, A.D., 1981.

PYFROM & ROBERTS
Chambers
Charlotte House
Charlotte Street
Nassau, N.P., Bahamas. 10

Attorneys for the Appellant.

TO: The Respondent (Defendant) and their Attorney

Wallace-Whitfield & Co.,
Chambers, Mosmar Building
Queen Street,
Nassau, Bahamas.

No. 24

Respondent/Defendant's Amended Notice (re William Madden) - 5th November 1981

COMMONWEALTH OF THE BAHAMAS 1981

IN THE COURT OF APPEAL No.

Civil Side

B E T W E E N

WILLIAM MADDEN Plaintiff/ Appellant

AND

INVERUGIE INVESTMENTS LIMITED Defendant/ Respondent

AMENDED RESPONDENT'S NOTICE
Under Rule 13 of the Court of Appeal Rules

TAKE NOTICE that the Respondent while seeking to uphold the Judgment entered for the Respondent against the Plaintiffs upon the trial of these consolidated actions on the grounds on which such Judgment was in fact entered, desires to content on the appeal that the said Judgment should be affirmed on the following other grounds, namely:-

1. That the letter dated the 2nd June, 1970 addressed to Myra Investments Limited from Alliance Services Industrial and Commercial Corporation Limited (a) does not refer in terms to any lease; (b) does not suggest that the sale of any of the apartments was to be free of the mortgage;

2. That even if Alliance as mortgagees could be taken to have consented to the exercise by Myra, the Mortgagors, of the statutory power of leasing, the lease granted to the Appellant was not a proper exercise of that power in at least two respects

(i) It was not a building lease; the term was ~~exercise;~~ excessive and

(ii) a premium or fine of ~~$300,000.00~~ $17,995.00 was taken

3. That the Appellant failed to prove that Alliance had any actual or implied knowledge of the terms of a lease to the Appellant.

4. That the Appellant failed to prove that the Respondent had any knowledge of any fraud as contemplated in the decision of Wilmott v. Barber (1880) #5 15 Ch. D 96.

5. That if the true view is that when Myra granted the lease to the Appellant Myra was not exercising the statutory power Myra was only doing that which it could do apart from the statute - namely, grant a lease which was not binding on Alliance the mortgagees.

6. That the mortgage had priority over the Appellant's lease by virtue of Section 10 of the Registration of Records Act, Chapter 193.

7. That the Respondent was a bona fide purchaser for value without notice of any equity and took the property freed from all estates and rights to which the mortgage had priority, but subject to all estates interests and rights which had priority to the mortgage.

8. That the Respondent was not a party nor privy to any alleged representation made to the Appellant by Myra or Alliance. It was not alleged that the Respondent made any representations, was privy to any representations or had notice of any representations sufficient to raise any estoppel or at all.

9. That neither Alliance nor the Respondent was shown to know of the existence of its own right which was inconsistent with the right claimed by the Appellant.

10. That the elements or requisites necessary to constitute proprietary estoppel were not pleaded.

AND FURTHER TAKE NOTICE that the Respondent will apply to the Court of Appeal for an Order that the Appellant pay to the Respondent the costs occasioned by this notice.

~~Dated the 18th day of September, A.D. 1981.~~

Dated the 5th November, A.D. 1981

Wallace Whitfield & Co.,
Attorneys for the Respondent
Chambers, The Mosmar Building
Queen Street, Nassau, Bahamas.

TO: The above-named Appellant and/or his Attorneys Messrs. Pyfrom & Roberts, Chambers, Charlotte House, Shirley Street, Nassau, Bahamas.

AND Mr. James Liddell, Messrs. McKinney, Bancroft & Hughes, Chambers, Shirley Street, Nassau, Bahamas.

No. 24A

Respondent/Defendant's Amended Notice (re Richard Hackett) - 6th November 1981

IN THE COURT OF APPEAL No.

Civil Side

B E T W E E N

RICHARD HACKETT Plaintiff/ Appellant

AND

INVERUGIE INVESTMENTS LIMITED Defendant/ Respondent

AMENDED RESPONDENT'S NOTICE
Under Rule 13 of the Court of Appeal Rules

TAKE NOTICE that the Respondent while seeking to uphold the Judgment entered for the Respondent against the Plaintiffs upon the trial of these consolidated actions on the grounds on which such Judgment was in fact entered, desires to contend on the appeal that the said Judgment should be affirmed on the following other grounds, namely:-

1. That the letter dated the 2nd June, 1970 addressed to Myra Investments Limited from Alliance Services Industrial and Commercial Corporation Limited (a) does not refer in terms to any lease; (b) does not suggest that the sale of any of the apartments was to be free of the mortgage.

2. That it was in consideration of a forbearance and not a release that the Appellant made his investment of $300,000.00 in the purchase of apartments.

3. That the Appellant loaned Myra $300,000.00 and as such is a second mortgagee.

4. That even if Alliance as mortgagees could be taken to have consented to the exercise by Myra, the mortgagors, of the statutory power of leasing, the lease granted to the Appellant was not a proper exercise of that power in at least two respects

(i) it was not a building lease; the term was excessive; and

(ii) a premium orfine of $300,000.00 was taken.

5. That the Appellant failed to prove that Alliance had any actual or implied knowledge of the terms of a lease to the Appellant.

6. That the Appellant failed to prove that the Respondent had any knowledge of any fraud as contemplated in the decision of Wilmott v. Barker (1880) 15 Ch. D 96.

7. That if the true view is that when Myra granted the lease to the Appellant Myra was not exercising the statutory power, Myra was only doing that which it could do apart from the statute - namely, grant a lease which was not binding on Alliance, the mortgagees.

8. That the mortgage had priority over the Appellant's lease by virtue of Section 10 of the Registration of Records Act, Chapter 193.

9. That the Respondent was a bona fide purchaser for value without notice of any equity and took the property freed from all estates and rights to which the mortgage had priority, but subject to all estates interests and rights which had priority to the mortgage.

10. That the Respondent was not a party nor privy to any alleged representation made to the Appellant by Myra or Alliance. It was not alleged that the Respondent made any representations, was privy to any representations or had notice of any representations sufficient to raise any estoppel or at all.

11. That neither Alliance nor the Respondent was shown to know of the existence of its own right which was inconsistent with the right claimed by the Appellant.

12. That the elements or requisites necessary to constitute proprietary estoppel were not pleaded.

FURTHER TAKE NOTICE that the Respondent will apply to the Court of Appeal for an Order that the Appellant pay to the Respondent costs occasioned by this notice.

~~Dated the 18th day of September, A.D. 1981~~

Dated this 6th day of November, A.D. 1981

Wallace Whitfield & Co.,
Attorneys for the Respondent
Chambers, The Mosmar Building
Queen Street, Nassau, Bahamas.

TO: The above-named Appellant and/or his Attorneys Messrs. Pyfrom & Roberts, Chambers, Charlotte House, Shirley Street, Nassau, Bahamas.

AND Mr. James Liddell, Messrs. McKinney, Bancroft & Hughes, Chambers, Shirley Street,, Nassau, Bahamas.

No. 25

Judgment of Joseph A. Luckhoo, P. - 8th July 1982

COMMONWEALTH OF THE BAHAMAS 1981

IN THE COURT OF APPEAL No. 17

CIVIL SIDE

B E T W E E N

RICHARD HACKETT — Appellant (Plaintiff)

AND

INVERUGIE INVESTMENTS LIMITED — Respondent (Defendant)

J U D G M E N T

This is an appeal by the plaintiff Richard Hackett from the judgment of the learned Chief Justice dismissing his claim to be entitled to a lease for 99 years in certain apartments in the Silver Sands Hotel situated in Freeport, Grand Bahamas and inter alia to possession and damages and granting the counterclaim of the defendant Inverugie Investments Limited (Inverugie) for an order that Inverugie is seized of the premises comprising those apartments.

The apartments, the subject matter of the plaintiff's claim, form part of a development undertaken by Myra Industries Limited (Myra) early in the year 1969 on lands purchased by that company in November 1968. Originally the development was called Kismet Apartments but later became known as Silver Sands. Two main buildings comprising 144 apartments were erected. In its inception it was envisaged that the building costs would be financed from moneys Myra could realize from advance sales of the apartments. A number of persons entered into contracts with Myra under which they were required to make deposits on account of the purchase price and to pay the balance remaining by way of instalments in return for Myra granting leases for a term of 99 years when the payments were completed. Some of those persons made the required deposits and instalment payments while others paid the whole of the agreed purchase price in advance. By the end of October, 1969, Myra found that the moneys paid under these contracts were insufficient to complete the development it had undertaken and, in November, 1969,

to that end it sought financial assistance from Alliance Services Industrial and Commercial Corporation Limited (Alliance). Alliance agreed to lend Myra the sum of $695,000 (Canadian) on the security of a mortgage which was executed on the 15th November, 1969. Myra conveyed its land and the unfinished buildings thereon to Alliance. Apart from the terms of repayment of the loan, the mortgage deed provided inter alia: (1) that Myra would not exercise the powers of leasing conferred on mortgagors in possession by section 20 (3) of the Conveyancing and Law of Property Act (Cap. 115) without the consent in writing of Alliance; (2) that the mortgagee's power to sell, foreclosure, take possession, and to appoint a receiver were to become exercisable (a) on failure by Myra to pay any instalment of principal or interest within a specified time after notice; (b) on any disposition or attempt by Myra to deal with the equity of redemption or any part thereof without Alliance's written consent. Myra was required to assign to Alliance as collateral security all its rights under contracts into which it had entered upon to the 15th November, 1969, (the date of the mortgage) with third parties for the sale and purchase of leases of apartments. This was done on the same day by way of attaching the contracts to the instrument.

The development of the lands proceeded. Early in the year 1970, one building was 80 percent complete and the other some 90 percent. Further financial assistance was now required to fully complete the buildings. Radomski the President of Myra approached several persons but was unsuccessful. He then approached Hackett who at first turned him down. Myra failed to pay Alliance the amount of $200,000 which was due under mortgage on the 25th March, 1970. The day fixed for the repayment of the Alliance's loan of $695,000 together with interest was the 30th June, 1970. Myra estimated that it would take some $400,000 more to complete the buildings. If the buildings could be completed the apartments could be sold and the proceeds used to pay off Alliance or at least Alliance could be persuaded to extend the time for payment to be made under the mortgage. Eventually Radomski was able to strike a deal with Hackett whereby Hackett would invest the sum of $300,000, the amount Hackett thought would be sufficient to complete the construction, and in return Hackett would be granted leases for 99 years on 30 apartments in the development. As the trial judge observed Radomski and Capps (the lawyer principally concerned with Myra's affairs), "with the proposed Hackett investment to bait the hook", went to see Tower, the

President of Alliance and a member of the legal firm of Dupuch and Turnquest, with a view to bargaining for an extension of the time fixed by the mortgage for the repayment of the amount of Alliance's loan and interest thereon. The outcome was that Alliance agreed to an extension of time on certain conditions which were set out in a letter that Tower wrote to Myra on the 2nd June, 1970 as follows:

"2nd June, 1970

Myra Investments Limited,
P.O. Box F-427,
Freeport, Grand Bahama.

"Dear Sirs,

Re: Alliance Services Industrial & Commercial Corporation Limited - First Mortgage Loan to Myra Investments Limited

The above First Mortgage loan matures on 30th June, 1970. We are agreeable to extending the time for repayment of this First Mortgage by one (1) year from 1st July, 1970 at an increased interest rate of 12% per annum payable monthly commencing 1st August, 1970, provided however, that this extension is subject to the following strict conditions:

(1) That the sum of Two hundred thousand dollars $200,000 be paid to us on or by 1st September, 1970.

(2) That any and all monies received by you on the sale of suites, whether before or after the date of this letter (save and except the 30 apartments being sold to Richard Hackett) is to be repaid directly to us in reduction of the First Mortgage.

(3) That on the purchase of the 30 apartments by the said Richard Hackett for the sum of Three hundred thousand dollars ($300,000), that you direct him to make payment of said sum of Three hundred thousand dollars ($300,000) on or by 15th June, 1970 to the order of Messrs. Dupuch & Turnquest, our attorneys to bona fide sub-contractors, tradesmen, labourers, on proper written authorization of Z.W. Radomski.

We would again stress that the said sum of Three hundred thousand dollars ($300,000) is in no way being used to reduce our First Mortgage but is being

allocated towards the completion of the Co-operative Apartment building.

Yours very truly,

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED

Raymond S. Tower
President"

Initially Myra, through Radomski, signified its acceptance of the conditions imposed by Alliance for the extension of the time of repayment of the mortgage by one year from the 1st July, 1970. On the 3rd or 4th June, 1970 Hackett attended at Myra's office where Radomski informed him of Alliance's requirement contained in the third condition set out in the letter of the 2nd June, 1970, that on his purchase of the 30 apartments, Myra must direct him to make payment to the order of Messrs Dupuch & Turnquest, Alliance's attorneys, to bona fide sub-contractors, tradesmen, labourers, on proper written authorization of Radomski. Hackett objected to the mode of payment so stipulated by Alliance and suggested to Radomski that it be varied to enable him (Hackett) to disburse the $300,000 purchase price to the builders. Radomski had second thoughts about Myra's ability to meet Alliance's condition for payment of $200,000 on or by the 1st September, 1970. Radomski and Capp went to see Tower on the same day leaving Hackett in Myra's office. On their return to Myra's office Radomski told Hackett that Tower had agreed that Hackett himself should disburse the $300,000 purchase price. On the strength of this oral representation by Radomski (there was no written confirmation by Alliance) on the 5th July, 1970, Hackett proceeded to enter into a lease with Myra for the 30 apartments for a term of 99 years. On the 7th June, 1970, Hackett paid out the sum of $150,000 to contractors and workmen. By the end of August 1970, he had disbursed the entire amount of $300,000. The evidence indicates that while Hackett was making these payments, Myra was seeking to have the terms and conditions specified in Alliance's letter of the 2nd June, 1970, renegotiated. Eventually new terms for the extension of the time fixed by the mortgage for the repayment of the amount of Alliance's loan and interest thereon were finalized. Those terms are embodied in an indenture for the amendment of the mortgage of the 15th November, 1969, dated the 1st July, 1970, signed by Radomski on behalf of Myra and Millican (who had succeeded Tower as President) for Alliance. The time for repayment was extended to the

30th June, 1971. The rate of interest was now to be 15 per cent instead of 12 per cent as specified in the 2nd June, 1970 letter. No mention was made in the new terms of the Hackett purchase or of payment by Myra to Alliance of moneys received from the sale of apartments before or after the 2nd June, 1970. There was no requirement as to the payment of $200,000 as contained in the letter of 2nd June, 1970. The amending deed confirmed that the sum due and owing by Myra was $695,000 as of the 1st July, 1970 and required that this sum be liquidated by monthly payments of $15,000 from the 15th January, 1971, to the 15th June, 1971, with the balance to be paid by the 30th June, 1971.

I am in agreement with the learned trial judge that the irresistible inference from these facts is that Myra was either unable or unwilling to meet conditions (1) and (2) set out in Alliance's letter of the 2nd June, 1970, with the result that the parties bargained afresh and agreed terms for an extension of time which were entirely different from those which had been originally discussed. The circumstances leading up to the amendment were not disclosed at the trial of the action. Neither Radomski nor Tower testified at the trial. Capps, who testified on Hackett's behalf, did not throw any light on this aspect of the matter. It does appear that Hackett was, as the trial judge thought, quite oblivious of the negotiations that were taking place between Myra and Alliance. The evidence does not assist in determining the date at which Alliance and Myra agreed the (illegible) reflected in the amendment. The correspondence between those parties indicate that the document containing the amendment was not submitted by Alliance to Myra until the 20th May, 1971. When the amendment was finalized, it was back dated to the 1st July, 1970.

Myra completed their building operations by the end of 1970. Thereafter, Hackett took possession of the 30 apartments and spent some $90,000 in furnishing them and in payment of certain customs duties which they attracted. He put the apartments out for rental with Myra as his renting agent.

Myra defaulted in its payments under the mortgage and on the 29th June, 1972, Alliance served Myra with notice requiring payment of the outstanding principal sum and interest failing which Alliance would exercise its powers of sale under the mortgage. Myra failed to comply and, on

the 28th October, 1974, Alliance agreed to sell the premises to Gleneagles Investment Company (Gleneagles). The contract between Alliance and Gleneagles contained the following as clause 8:-

> "It is understood that certain parties may be claiming leases on portions of the said hereditaments. The Vendor hereby represents that these leases have never received the Vendor's previous written consent and are therefore in breach of the said mortgage between the Vendor and the said Myra Investments Limited."

Gleneagles assigned its rights under the contract to Inverugie on the 4th November, 1974, and on the following day Alliance conveyed the property to Inverugie. Hackett's lease was not registered until after that conveyance was made. Inverugie changed the locks and took over the apartments. Inverugie thereafter denied Hackett access to the apartments.

Hackett claimed:

(1) Possession of the 30 apartments;

(2) A declaration that he is entitled to a lease in terms of the lease of the 5th June, 1970, he entered with Myra;

(3) An injunction to restrain Inverugie from trespassing on the apartments;

(4) Mesne Profits;

(5) Damages for trespass;

alternatively, an order that he is entitled to an equitable lien over the premises to secure the sum of $390,000 together with interest at 6 per cent per annum computed from the 5th June, 1970.

Before proceeding to identify the issues which were canvassed at the hearing of this appeal, it should be mentioned that, by order of a judge of the Supreme Court prior to the trial of the action, proceedings against the third parties Alliance and John Ennis (the principal shareholder in Alliance) were stayed until after the trial of the actions. The learned trial judge had this to say in respect of that order -

> "With the greatest respect to the former Chief Justice this was an unfortunate order

to make. The pleadings disclosed that the first named Third Party was the Defendant's predecessor in title, and that the Plaintiffs were claiming an equity to a lease based upon their conduct whilst they were mortgagees. This equity they said was enforceable against the land in the hands of the Defendant. The Defendant denied the Plaintiffs' claims but pleaded in the alternative that if they were good, the Defendant was entitled to an indemnity by reason of a clause in the contract of sale between the first Third Party and the Defendant whereby they warranted that there were no leases of the land.

The effect of this Order has been to oblige the Court to adjudicate the issue as to whether the Plaintiffs' equity exists without hearing from the first Third Party, whose conduct the Plaintiffs have impugned. In addition, it has opened the door to a situation in which in the event the Plaintiffs were to succeed, the Defendant's claim to the indemnity might be defeated in the adjourned Third Party proceedings if the first Third Party were to succeed in establishing that the Plaintiffs were not in fact entitled to the equity they claimed. I need hardly say that the effect of this Order has been to add to my burdens in deciding the issues presently before the Court."

I think there is much force in the learned trial judge's observations.

The Issues

The mortgage to Alliance did not allow Myra to grant leases for over 21 years or to grant a lease at a premium. The mortgage even forbade the mortgagor to grant leases of 21 years or a lesser period at a rack rent without Alliance's written permission. It is common ground that when Myra granted a 99-year lease of the still unfinished 30 apartments to Hackett no written consent thereto was obtained from Alliance. It is also common ground that the lease contravened the other above-mentioned provisions of the mortgage. However, it was submitted on behalf of Hackett that the lease bound Alliance because Alliance stood by and allowed Hackett to spend $300,000 on the property in the face of a belief that Hackett was getting a lease good against the world including Alliance.

The lease also bound Inverugie, it was submitted, because it bound Alliance which conveyed to Inverugie and Inverugie was on notice of Hackett's rights against Alliance under the lease. The central issue in the case is thus whether Alliance was bound by the terms of the lease executed on the 5th June, 1970, by and between Myra and Hackett.

Hackett's case is based on the principles of acquiescence and proprietary estoppel. In a nutshell the Plaintiff puts his case on the silence of the mortgagee Alliance. The argument is that Alliance knew that Myra was selling apartments on 99-year leases and taking premiums and that Alliance intended to continue to do so. Obviously, the buyers of leases expected to get leases that were good against the world, including Alliance, and Alliance must have appreciated this because it was so obvious. Nevertheless, Alliance stood by and allowed the sales to continue. More particularly, Alliance knew that Myra was selling 30 apartments to Hackett and that Hackett was paying a $300,000 premium but Alliance stood by and allowed that transaction to be effected.

Estoppel by Acquiescence

The essential elements of estoppel by acquiescence are set out in Spencer-Bower and Turner, Estoppel by Representation, 3rd edition (1977), in the following extract from the judgment of Thesiger, J.L. in De Bussche v. Alt (1878) Ch. D. at p. 314,

> "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottonham said in the case already cited, is the proper sense of the term "acquiescence", and in that sense it may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct".

In the English case of Willmott v. Barber (1880) 15 Ch. D. at pp. 105;106, Fry, J. stated the five requisites of a case of estoppel by acquiesence - the so-called five probanda:

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know it he is in the same position as the plaintiff and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exists, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do."

In the text Estoppel by Representation it is pointed out that the first, second and fifth of Fry, J.'s probanda apply to all estoppels by representation but, for estoppel by acquiescence to apply, the third and fourth rules have special application -

> "When the third and fourth of Sir Edward Fry's probanda are considered acquiescence is fairly seen to exhibit special characteristics of estoppel which arise from silence or inaction, as distinct from those based on positive words or equivalent conduct."

It might also be observed that "fraud" and "fraudulent" as used in Wilmott v. Barber are not

used in the sense of wilful and deliberate dishonesty but rather in the more restricted sense usually defined as "equitable or constructive fraud" as accepted by the rules of equity.

Mr. Mowbray for the appellant Hackett submitted that Hackett had succeeded in establishing all five probanda even though it might be that, upon a consideration of judgment of Oliver, J. in Taylor Fashions v. Liverpool Victoria Trustees Co., (1981) 1 All E.R. in relation to the general principles of estoppel to be deduced from more recent cases, it might be that Hackett did not need to establish more than that it would be unconscionable for Alliance to insist on its legal position. Reference will be made to the Taylor Fashions case later in this judgment but it might here be observed that that case was not cited to the learned trial judge and we are consequently without the benefit on his views on the observations made by Oliver, J.

The learned trial judge found that the first three of Fry, J.'s probanda had been satisfied but that the remaining two were not. As to the first probanda the learned trial judge said, and I agree with him, that Hackett made two mistakes. The first was to rely on what Capps and Radomski told him without taking any steps to have Alliance confirm that they had settled with Alliance for an extension of the time for repayment upon terms which included a lease to him of the 30 apartments for $300,000. The second, which the trial judge said was vital for the purposes of this case, was that Hackett believed from what he was told that Alliance had orally consented to the lease and not knowing that that consent was required to be in writing, Hackett thought that he had a legal right to take such a lease. The second probandum was also satisfied in that it was shown that Hackett spent his $300,000 in furtherance of the development of the lands on the faith that he had a valid lease of the 30 apartments. The third probandum was satisfied as the trial judge found as Alliance knew that its consent in writing to a lease by Myra was necessary. In respect of the fourth and fifth probanda, the learned trial judge had this to say:-

> "The final inquiry is whether Alliance knew that subsequent to the interview which Radomski and Capps had with Tower on the 3rd or 4th of June, 1970 concerning the terms of the letter of the 2nd of June, Hackett mistakenly believed that he could take a lease of thirty (30) apartments without

their consent in writing; further, whether with that knowledge, they actively or passively encouraged him to lay out his $300,000 between June and August, 1970 in the manner and for the purpose he described on the faith that he had a valid lease. Proof that Alliance discovered what Hackett had done long afterwards will not suffice. It must be established that between the 3rd of June and the end of August, 1970 Alliance knew what Hackett was about, and during that time encouraged him to continue, either actively, or passively by abstaining from asserting their own inconsistent right."

The trial judge, after referring in this connection to the passages from the judgments of Lords Cranworth and Wensleydale in Ramsden v. Dyson, which he had earlier quoted also referred to what Thesiger, L.J. had said at p. 314 in De Busche v. Alt, (1878) 8 Ch. D. and continued:

"On this aspect of the case, it was argued that Alliance's letter of the 2nd of June was representation to Hackett that he could take a lease of thirty apartments if Myra agreed to accept the conditions therein stated for an amendment to the mortgage. It was said that Tower agreed to a variation of one of those terms and if the situation changed and Alliance was no longer prepared to consider the lease, a duty was cast upon them so to inform Hackett. Their failure to do so was an encouragement to Hackett to enter into the lease of the 5th of June, 1970. There is of course a line of authority for the proposition that where a representation is made with the object of inducing a particular person to act upon it, and an event supervenes whereby the representation is no longer operative, the representor's silence is an implied representation of the continued existence of the original state of affairs. If without knowing of the change, the representee acts upon the original representation, the representor may be estopped from averring that any change has occurred. This principle is, however, more apposite to cases where promissory estoppel is raised as matter of defence than it is to situations in which estoppel by acquiescence or encouragement is relied on as the genesis of a cause of action. But even if I am wrong about this, this is not the form of estoppel that has been pleaded. Besides the evidence

does not show that Hackett took his lease on the basis that Myra had in fact agreed to all the conditions expressed in Alliance's letter of the 2nd of June, 1970. The fact is that he himself proposed a variation to one of those conditions without which he states he would never have entered into the transaction in question. Thereafter, he was told by Radomski and Capps that Alliance had accepted the variation he had suggested. He assumed, or was led to believe by Radomski, that the remaining conditions had been or would be accepted by Myra, and proceeded to commit himself to the lease. It may here be noted that whilst Hackett says that when the terms of the June letter were being discussed in Myra's office, Radomski said he would take care of the payment of the $200,000 as Alliance had stipulated, Capps swore that Radomski had made it plain that he did not wish to pay that sum, and this was said in the presence and hearing of Hackett. Accordingly, Hackett knew enough then to realise that there was more than a possibility that Alliance's terms for the grant of a lease to him might not have materialised.

It was also suggested that the oral evidence and the letters dated the 20th of May and 21st of June, 1971 which Millican of Alliance wrote to Derek Higgs and Capps of Myra (Exhibits 6 and 5) established that Alliance took assignments of the benefits accruing to Myra under all the contracts which Myra had entered into with third parties after November, 1969 for lease of apartments. It was contended that this indicated that Alliance had knowledge that Myra did in fact enter into contracts to grant leases around the time that Hackett was spending his money, and from this an inference could be drawn that they must therefore have had knowledge of Hackett's lease and his expenditure."

The learned trial judge then went on to examine the evidence in this regard and rejected that contention. On this aspect the learned trial judge further observed:

"There is not a shred of evidence to show that during the period June to August, 1970 Myra took any steps to acquaint Tower or any other agent of Alliance that Hackett had entered into the lease of the 5th of June. Hackett had no direct dealings with Alliance

after the 5th of June that he had taken a lease. He never even asked Alliance for written confirmation of the variation of condition 3 of the June letter to which Radomski and Capps told him Tower had agreed. Had he done so, Alliance would have had some knowledge of what he was about. The variation to which Tower is alleged to have agreed was that if Radomski produced receipts signed by contractors and workmen, Alliance would treat the receipted sums as coming out of the $300,000 Hackett was to pay for the lease of his thirty (30) apartments. But no evidence has been led to prove that any such receipts were at any time submitted to Tower or any other officer or agent of Alliance by Radomski or Capps or Hackett. There is no evidence that the fact that such payments were being made by Hackett was otherwise reported to Alliance orally or in writing from time to time during the relevant period. There is no evidence that anyone from Alliance visited the site whilst the payments were being made, and as a consequence discovered that Hackett was spending money on the building."

The learned trial judge, after dealing with other submissions relating to the question of Alliance's knowledge of the expenditure made by Hackett, said that he was unable to conclude that there was any admission that between June and August, 1970, Alliance knew that Hackett had taken a lease and was spending money on the faith of such a lease. Finally, the learned trial judge concluded -

"In the absence of all this evidence, the case for Hackett collapses. He has failed to establish the 4th and 5th essentials of the estoppel by acquiescence or encouragement laid down in Wilmot vs. Barber supra. In the result it has not been established that Alliance knew that he mistakenly believed that he had a right to a lease of Thirty (30) apartments, and with that knowledge encouraged him either actively to spend his money or passively by standing by and abstaining from asserting their own rights under clause 4(e) of the mortgage of the 15th of November, 1969. It is true that Alliance got the benefit of his expenditure which went to improving their security and that they and the Defendant have in a sense reaped where they have not sown. But, unfortunate though it may be for Hackett, hard cases make bad law and I am obliged to observe and honour the law as I understand it.

> In my judgment therefore, the Hackett action fails. It may well be that the facts proved established a cause of action by Hackett against Myra for breach of the covenant of quiet enjoyment contained in his lease of the 5th of June, 1970, but for reasons best known to himself and his counsel, he has not elected to sue Myra, or claim against them in this action in the alternative."

Mr. Mowbray submitted that the learned trial judge was in error in his interpretation of Alliance's letter of the 2nd June, 1970, in that it was the extension of time that was subject to the conditions specified and the letter was not to be interpreted as a conditional consent to the sale to Hackett. The form of the third condition specified in the letter, Mr. Mowbray urged, assumed that the sale to Hackett was going forward with the terms of sale being imposed in relation to the disbursement of the purchase money. If such an interpretation is given to the letter, then it followed that Alliance knew that Hackett was under a mistaken belief that he could obtain a valid lease without Alliance's written consent to the lease being granted by Myra and Alliance was therefore under a duty to disabuse Hackett as to this mistaken belief. When Alliance kept silent it indirectly encouraged Hackett to expend the money.

It is true that when Capps and Radomski first went to Tower to seek an extension of time for payment of the amounts due under the mortgage they had already obtained Hackett's agreement to take a lease for a term of 99 years in 30 apartments for $300,000. Hackett had even secured the removal of certain directors of Myra who were unacceptable to him and their replacement by persons who were acceptable to him. When he was shown Alliance's letter of the 2nd June, 1970, Hackett objected to the condition contained in that letter that the amount of $300,000 was to be disbursed through Dupuch & Turnquest. His decision to pursue his original intention to take on lease the 30 apartments was now made subject to Alliance's agreement to change that condition so that he (Hackett) might disburse the purchase price himself. At that point of time the position was that Alliance would grant Myra the extension if, and only if, the three specified strict conditions were performed. Hackett would take on lease the 30 apartments only if the third condition requiring disbursement through Dupuch & Turnquest - was varied so that he (Hackett) could disburse himself. Hackett admitted that when he was shown Alliance's

letter by Radomski on the 3rd or 4th June, 1970, he was made aware of the "strict" conditions Alliance had imposed for granting the extension of time sought by Myra. As Capps testified Radomski's concern about the ability of Myra to comply with the condition for payment of $200,000 by 1st September, 1970 was stated in Hackett's presence and hearing. The evidence clearly indicates that Hackett's ultimate decision to take the lease resulted from Radomski's representation to him that Towers had accepted the required variation. Implicit in Alliance's agreement (as contained in its letter of 2nd June, 1970) to grant Myra an extension of time was the condition that Hackett's lease when taken must be on the basis of payment being made; (1) through Dupuch & Turnquest; (2) to sub-contractors; (3) on or before the 15th June, 1970.

There is no admissible evidence that Tower did in fact signify his agreement to the change Hackett wished to obtain in condition 3. It is not inconceivable that Radomski's representation to Hackett that Tower had agreed to the requested variation might have proceeded solely from Radomski's perhaps understandable desire to avoid the exercise of Alliance's power of sale in the desperate situation in which Myra found itself and not by reason of any agreement by Tower to vary condition 3. As Capps stated in the course of his testimony Radomski found that the condition relating to the payment of $200,000 by the 1st September, 1970 in reduction of the arrears due under the mortgage was unduly onerous and indeed negotiations with Tower to alter the terms under which the extension was granted must have commenced soon after the letter of the 2nd June, 1970 was received by Myra. Further, there is nothing contained in the letter of the 2nd June, 1970, from which it might be reasonably be inferred that Alliance was waiving the condition contained in the mortgage deed requiring written consent by Alliance for any lease to be given by Myra in the premises. I find myself in agreement with the learned trial judge's reasons for coming to the conclusion that he did that it has not been shown (and the onus in this regard is on Hackett) that Hackett was induced by the conduct of Alliance or by any representation made by Alliance to enter into the lease on the 5th June, 1970, and that there was nothing to suggest to Alliance that Hackett was indeed expending money on the mortgaged property.

It would follow that in the absence of Alliance being bound by any equity in favour of Hackett on the

basis of Fry L.J.'s five probanda the case against Inverugie - the question of trespass to Hackett's furniture apart - would fail.

Would the result be different if the matter be approached on the basis of the views expressed by Oliver, J. in the Taylor Fashions case? The facts of that case need not be recited. It is, I think, sufficient to refer to the what was held by Oliver J. This is accurately summarised at page 898 of (1981) 1 All E.R. as follows;-

> "Held - (1) The doctrine of estoppel by acquiscence was not restricted to cases where the representor was aware both of what his strict rights were and that the representee was acting in the belief that those rights would not be enforced against him. Instead, the court was required to ascertain whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment."

The operative words in that passage are "allowed or encouraged". In my view it has not been shown in the instant case that Alliance "allowed or encouraged" Hackett to assume that he could proceed to take a valid lease on a basis other than that specified in the letter of the 2nd June, 1970 or to make the expenditure he incurred. The views of the judges of the English Court of Appeal in Crabb v. Arun District Council, (1975) 3 All E.R. 865 is an example of what Oliver, J. says is the approach taken in the modern authorities. One last observation on this aspect of the case. Mr. Mowbray referred to the fact that Hackett paid $300,000 for the 30 apartments whereas Inverugie paid $630,000 for 144 apartments, that is $10,000 per apartment as compared with $4,500 per apartment. Mr. Mowbray argued that Inverugie had reaped the benefit of Hackett's $300,000 so there would be no injustice to Inverugie if it was not allowed to reap the benefit of the 30 apartments. This argument overlooks an important factor in the change in real estate values between 1970 and 1974 and the uncertainty prevailing in the real estate market in the Bahamas for some time after the attainment of Independence in 1973.

The Furniture

It was submitted on behalf of Appellant Hackett that the learned trial judge erred in failing to

take proper notice of that part of the appellant's claim relating to US$90,000 worth of furniture and furnishings which the appellant had purchased and installed in the 30 apartments. In considering this submission it is pertinent to observe that no argument appears to have been addressed to the learned trial judge on this aspect of the case. It is also pertinent to refer to the amended statement of claim of the appellant where it was pleaded at paragraph 14 -

> "14. The Plaintiff was as a result of his taking of the said Lease required by law to pay to the Customs' duty applicable to the leasehold premises covered by the said Lease which amounted to $30,000.00 which the Plaintiff did pay. Further, the Plaintiff paid an additional sum of $60,000.00 towards the costs of furniture, fixtures and equipment which were installed in or placed in the apartments comprising the leasehold premises."

The Appellant's prayer in the amended statement of claim does not contain any request for the return of the furniture or its value. There is a claim for damages at paragraph 6 of the prayer but this appears to relate to the alleged trespass on the premises in respect of which an injunction was sought at paragraph 4 of the Prayer. The alternative claim, however includes the cost of the furniture $60,000 and customs dues paid by Hackett $30,000 in the amount of the equitable lien $390,000 claimed over the premises.

I have been unable to find any evidence which indicates the value of the fixtures as opposed to that of moveable furniture or furnishings. The fixtures form part of the realty. To award a sum in relation to the moveable furniture and furnishings would be pure guesswork. The appellant Hackett has not discharged the burden of proof in this regard.

I would dismiss his appeal and affirm the judgment in the court below with costs to be taxed or agreed.

Joseph A. Luckhoo P.

Dated the 8th day of July 1982

No. 26

Judgment of Sir James Smith, J.A. - 8th July 1982

COMMONWEALTHOF THE BAHAMAS 1981

IN THE COURT OF APPEAL No. 17

CIVIL SIDE

B E T W E E N

RICHARD HACKETT — Appellant (Plaintiff)

AND

INVERUGIE INVESTMENTS LIMITED — Respondent (Defendant).

J U D G M E N T

The main question in this appeal turns on whether or not a lease dated 5th June 1970 granted by Myra Industries Ltd. (Myra) to the appellant Richard Hackett for a term of 99 years in respect of 30 apartments in a property called Silver Sands Hotel (originally known as Kismet Apartments) in consideration of the sum of $300,000 is valid and existing as against the respondent Inverugie Investments Ltd. (Inverugie).

Silver Sands Hotel is situated in Freeport, Grand Bahama, and consists of two main buildings containing altogether 144 apartments erected by Myra and financed out of funds received by advanced sales of apartments at a premium before the buildings had been completed which took the form of printed contracts to grant leases for 99 years upon the completion of the buildings or where the consideration was paid by instalments, upon payment of all money due.

By November 1969 Myra were in financial difficulties. They mortgaged the land and the partly completed buildings to Alliance Services Industrial and Commercial Corporation Ltd. (Alliance) to secure the sum of $695,000 (Canadian). The mortgage deed dated 15th November, 1969 in clause 4(e) prohibited Myra from leasing apartments without the consent in writing of Alliance.

By May 1970 Myra were again in dire need of funds to complete the two main buildings which at that time were 80% and 90% complete respectively.

At that time the president of Myra was Z.W. Radomski with Capps of Dawson Roberts and Co. as their lawyer, and R.S. Tower, a lawyer with Dupuch and Turnquest was the president of Alliance.

Radomski approached Hackett for a loan. Hackett at first refused but later agreed to advance $300,000 to complete the erection of the main buildings provided the money was applied to paying the contractors, tradesman and workmen. For this consideration Myra agreed to lease to Hackett 30 apartments for a term of 99 years.

By a letter dated 2nd June 1970 from Alliance to Myra signed by Tower as president of Alliance it was agreed between them to vary the terms of the mortgage as to repayment of principal and interest. It was also stated that the variation was

> "subject to the following conditions:-
>
> 1. That the sum of $200,000 be paid to us (Alliance) on or by 1st September 1970
>
> 2. That all moneys received by you (Myra) on the sale of suites, whether before or after the date of this letter (save and except the 30 apartments being sold to Richard Hackett) is to be repaid directly to us in reduction of the first mortgage.
>
> 3. That on the purchase of the 30 apartments by the said Richard Hackett for the sum of $300,000 that you direct him to make payment on or by 15th June 1970 to the order of Messrs. Dupuch and Turnquest our attorneys to bona fide sub contractors, tradesmen labourers on proper written authorisation of Z.W. Radomski."

and the letter continued:

> "We would stress that the said sum of $300,000 is in no way being used to reduce our first mortgage but is being allocated towards completion of the co-operative apartment building."

On 3rd or 4th June 1970 Hackett was shown this letter in Myra's office by Radomski and Capps but Hackett was unwilling that his $300,000 should be distributed through Dupuch and Turnquest and in the event after Radomski and Capps had gone to see

Tower Hackett himself distributed the $300,000 through Myra to the contractors, tradesmen and workmen concerned in the construction of the buildings in two portions one of $150,000 in June and another $150,000 in August. The main buildings were completed in November 1970.

The 30 apartments were furnished by Myra from $60,000 provided by Hackett and there was a further sum of $30,000 for customs dues in respect thereof.

Myra acted as Hackett's letting agent and had possession of the keys of the apartments and Hackett himself occupied some of the apartments from time to time. He went into possession of the 30 apartments in 1971 and continued in possession until November 1974 when Inverugie entered the apartments and changed the locks on the doors.

As to the variation of the mortgage of 15th November 1969 set out in the letter of 2nd June 1970, the terms thereof were subsequently negotiated afresh as between the mortgagor Myra and the mortgagee Alliance and eventually agreed sometime in 1971, the variations being contained in an indenture which was executed by 25th June 1971 but back-dated to 1st July 1970. The variations in this indenture were made unbeknown to Hackett.

After the variations, Myra again defaulted on the mortgage and on 29th June 1972 Alliance served Myra with notice to pay principal and interest, otherwise Alliance would exercise its powers of sale. Myra failed to comply and in October 1974 Alliance agreed to sell the property to Gleneagles Investment Co. Ltd. (Gleneagles), clause 8 of the contract for sale dated 28th October 1974 stated:-

> "It is understood certain parties may be claiming leases on portions of the said hereditaments. The vendor (Alliance) hereby represents that these leases never received the vendor's written consent and are therefore in breach of the said mortgage (between Alliance and Myra)."

On 4th November 1974 Gleneagles assigned its rights thereunder to Inverugie and the conveyance from Alliance to Inverugie was executed on 5th November 1974.

It is now common ground that Alliance did not consent in writing to the lease by Myra to Hackett of 5th June 1970. The learned judge so found and commented that "Hackett can only succeed

in this action on the basis of estoppel by encouragement or acquiescence or what is now called "proprietary estoppel". Having set out the principles stated by Lords Cranworth, Wensleydale and Kingsdown in Ramsden v. Dyson (1886) L.R., 1. H.L. 129 at pp. 140 - 141; 168 and 170, the learned judge went on to consider and apply the five probanda of Fry J. in Wilmott V. Barber 1880, 15 Ch. D. 96 at pp. 105, 196. The learned judge then considered the evidence, and on his findings of fact held that the first three probanda of Fry J. had been established, namely:-

> 1. Hackett thought he was getting a valid lease not knowing at the material time that the consent of Alliance was required thereto in writing.
>
> 2. Hackett laid out his money on the faith of the mistaken belief that the lease which was executed on 5th June 1970 was valid and that it would have borne fruit when the project was completed.
>
> 3. Alliance knew that their consent in writing to the lease by Myra was necessary.

The fourth and fifth probanda of Fry J. in Willmott v. Barber were:-

> "Fourthly, the defendant, the possessor of the legal right, must know of the plaintiffs mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own rights.
>
> Lastly (i.e. fifthly) the defendant the possessor of the legal right must have encouraged the plaintiff in the expenditure of money or in other acts he has done, either directly or by abstaining from his legal rights."

As to proof of the fourth and fifth probanda the learned trial judge was of the view, I quote:

> "It must be established that between 3rd June and the end of August 1970 Alliance knew what Hackett was about, and during that time encouraged him to continue, either actively or passively by abstaining from asserting their own incumbent right."

And after discussing the evidence in relation to

the dicta of Lords Cranworth and Wensleydale in Ramsden v. Dyson and those of Thesiger L.J. in De Busche v. Alt 1878 8 Ch. D. 286 at p.314 which read:

> "If a person having a right and seeing another person about to commit an act infringing upon that rights stands by in such manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act."

the learned judge found:

> "There is not a shred of evidence to show that during the period June to August 1970 Myra took any steps to acquaint Tower or any other agent of Alliance that Hackett had entered into the lease of 5th June. Hackett had no direct dealings with Alliance before 2nd June. He never advised Alliance after 5th June that he had taken a lease .....
>
> But no evidence has been led to prove that any such receipts (of payments by Hackett to contractors) were at any time submitted to Tower or any other officer or agent of Alliance by Radomski or Capps or Hackett ..... There is no evidence that anyone from Alliance visited the site whilst the payments were being made and as a consequence discovered that Hackett was spending money on the buildings".

The learned judge concluded that in the absence of this evidence, "the case for Hackett collapses. He has failed to establish the fourth and fifth essentials of the estoppel by acquiescence or encouragement laid down in Willmott v. Barber" and added that it was true Alliance got the benefit of Hackett's expenditure which improved their security and that Inverugie had "in a sense reaped where they have not sown". Finally the learned judge said: "unfortunate though it may be for Hackett, hard cases make bad law and I am obliged to observe and honour the law as I understand it."

While the instant case has been argued primarily on the basis of the five probanda of Fry. J. in Willmott v. Barber, doubts have been expressed by judges from time to time whether all five probanda are essential to the proof of estoppel by acquiescence or encouragement. Oliver J. reviewed the authorities in Taylor Fashions Ltd. v. Liverpool Victoria Trustees

Co. Ltd. (1981) 1 All E.R., 897. the most recent of which at the time of his judgment (27th February 1979) was Shaw v. Applegate (1978) 1 All E.R. 123 where Buckley L.J. referred to the doubts expressed by Evershed M.R. in Electrolux Ltd. v. Electrix Ltd. (1954) 71 R.P.C. 23 and Buckley L.J. himself said:

> "So I do not, as at present advised, think it is clear that it is essential to find all the five tests set out by Fry J. literally applicable and satisfied in any particular case. The real test, I think must be whether on the facts of a particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it."

and Goff L.J., in the same case, expressed a similar view.

In the Taylor Fashions case (supra) Oliver J. (as he then was) said:

> "Furthermore, the more recent cases indicate, in my judgment, that the application of the Ramsden V. Dyson principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly, he has allowed to encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

In Habib Bank Ltd. v. Habib Bank A.G. Zurich, (1981) 2 All E.R., as Oliver L.J., he reaffirmed the above passage from the Taylor Fashions case and both Watkins and Stephenson L.J.J. agreed; the latter specifically mentioned the above statement from Taylor Fashions.

More recently Robert Goff J. in Amalgamated Investment and Property Ltd. (in liquidation) v. Texas Commerce International Bank Ltd. (1981) 1 All E.R. 923. held that the doctrine of equitable estoppel was not confined to certain defined

categories and applied the broad principle of the Taylor Fashions case. His decision was upheld on appeal, reported in (1981) 3 All E.R. 578 where Lord Denning said in the paragraph headed "Conclusion" at p.584:-

> "The doctrine of estoppel is one of the most flexible in the armoury of the law..... It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims; estoppel is only a rule of evidence: estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth.. 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 of law, and 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."

Brandon L.J., in the same appeal was of the view that the kind of estoppel which was relevant in that case was not the usual kind of estoppel based on a representation made by A to B and acted on by B to his detriment but rather the kind of estoppel described by Spencer Bower and Turner in Estoppel by Representation (Third Ed 1977) as estoppel by convention: "When the parties have acted in their transaction upon an agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed".

In Berg Homes Ltd. v. Grey (19th July 1979 reported in Estate Gazette L.R. Vol. 253, pp.473 to 479) which was drawn to our attention by Mr. Wallace-Whitfield, a case based on proprietary estoppel, Brandon, L.J., applied the five probanda of Fry J. in Willmott v. Barber and found on the facts that the first and fifth probanda had not been established. Ormrod L.J. in the same appeal said:-

> "It is vital that the courts recognise and apply the limits of this equitable jurisdiction set out in the first place by Lord Kingsdown in Ramsden v Dyson at p. 170 and later by Fry, J. in the passages which were cited by Scarman L.J. (in Crabb v Arun District Council).

My learned brother, da Costa, J.A., in his judgment has referred to Crabb v. Arun District Council and the comment of Oliver L.J., on the judgment of Scarman L.J., in that case. I do not think I need add anything to what has been said.

In the result the cases cited illustrate the divergence of judicial opinion as to what is needed to prove proprietory estoppel.

Mr. Mowbray for the appellant submitted that all five of the probanda of Fry J. in Willmott v. Barber (supra) had been established and as to the letter of 2nd June 1970 he contended it had been misinterpreted by the learned judge and this had led him to find that the fourth probandum had not been proved.

Mr. Mowbray contended that it was no more than a letter from Alliance, as mortgagee, to Myra as mortgagor setting out conditions for the extension of time for the repayment of the mortgage of 15th November 1969; that it was not a consent in writing of a lease to Hackett but nevertheless the letter did show that Alliance had knowledge of a proposed lease by Myra to Hackett and in condition (2) of the letter Alliance was "standing by" for further leases by Myra the proceeds of premiums for which were to be paid directly by Myra to Alliance to reduce the mortgage debt but excluded the lease to Hackett of 30 apartments for $300,000 which sum was to be used to pay contractors and others to complete the construction of the apartments; and that the letter assumed the lease to Hackett was going forward irrespective of whatever happened about the extension of the mortgage.

Mr. Wallace-Whitfield for Inverugie pointed out that the letter was not addressed to Hackett and thereby made no representation to him; it showed that no purchase of a lease by Hackett had then taken place; condition (2) indicated there had been some talk between Alliance and Myra as to the "sale of suites" and from condition (3) there must have been some prior representation by Myra to Alliance of Hackett making a purchase and on

that happening the purchase money was to be turned over to Dupuch and Turnquest as attorneys for Alliance and applied in paying contractors and others to complete the construction of the buildings. Had that been done, he submitted, Alliance would have been aware that some such purchase had come about but as Hackett disbursed the $300,000 through Myra, Alliance had no knowledge of the grant of the lease.

The letter of 2nd June 1970 spoke of "sales of suites" or apartments but it was apparent from other evidence and known to Alliance that there existed contracts for leases from Myra to third parties on printed forms in every instance for a term of 99 years the rights under which had been assigned to Alliance the contracts being attached to the instrument of assignment dated 15th November 1969 to Alliance as an additional security to the mortgage of the same date.

It seems to me that the letter of 2nd June 1970 is to be construed as referring to two separate matters which were happening contemporaneously. Myra due to their dire financial straits had defaulted on the mortgage in March 1970 and were anxious to have the time for the repayment of the mortgage extended. Myra also needed money to complete the construction of the apartment buildings. Both sets of negotiation were going on at the same time, between Myra and Alliance on the one hand for the extension of the mortgage and by Myra and Hackett on the other, whereby Hackett agreed to provide $300,000 to pay the contractors tradesmen and workmen to complete the buildings in return for a lease to him by Myra of 30 apartments for 99 years. As Mr. Wallace-Whitfield indicated there must have been some representation by Myra to Alliance before 2nd June of what Hackett was willing to do. This is reflected in the letter, from the terms of which, it appears to me there was an underlying assumption that Hackett would provide $300,000 to complete the buildings in return for the lease. It is clear from the last paragraph of the letter that Alliance wanted this money to be applied to complete the buildings. But Alliance wished to ensure that the money was applied for this purpose and therefore required Myra to have the $300,000 paid through Dupuch and Turnquest to the contractors and others to complete the buildings. Hackett wished to disburse the money himself through Myra. In the event this is what happened and the buildings were completed. It may be that the proposal by Hackett to put up $300,000 in return for the lease of the apartments was the factor which persuaded Alliance

to extend the time for repayment on the mortgage as the injection of $300,000 by Hackett and the completion of the buildings increased the value of the security.

As to the fourth probandum, namely that Alliance knew that Hackett believed he had a valid lease, Mr. Mowbray submitted that Alliance knew not only that their consent in writing was necessary to make the lease valid but also that they had not given their consent in writing. Counsel also urged that Alliance knew by their letter of 2nd June 1970 that Hackett was buying apartments and without their consent he would be no more than a tenant at the will of Alliance which did not justify an outlay of $300,000 and it was thus obvious to Alliance that Hackett was acting under a mistaken belief he had a valid lease.

It was the contention of Mr. Wallace-Whitfield that there was no evidence to show that a lease was in fact granted by Myra to Hackett to the knowledge of Alliance. Mr. Mowbray's reply to that was, it sufficed that by the letter of 2nd June 1970 Alliance knew that a lease from Myra to Hackett was going to be granted and the expectation that it would be validly granted was acquiesced in.

I would add that it appears from the letter of 2nd June 1970 that Alliance anticipated the $300,000 would be forthcoming by 15th June 1970. It would follow that Alliance expected the lease from Myra to Hackett to be executed by that date and Alliance should have warned Hackett before that date that their written consent was necessary. The lease was in fact executed on 5th June 1970. On that evidence and the submissions by counsel I find that the fourth probandum was established.

As to the fifth probandum, Mr. Mowbray submitted once Alliance was aware that Hackett was mistaken in believing he was getting a valid lease for 99 years, Alliance was under a duty to speak to prevent Hackett from spending $300,000 on a worthless lease and by saying nothing Alliance was indirectly encouraging Hackett to spend his money.

Here the situation was similar to that which gave rise to the following comment by Lord Cranworth in Ramsden v. Dyson:

> "When I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest of me to remain wilfully passive

> on such an occasion, in order afterwards to profit by the mistake which I ought to have prevented"

In the circumstances I find that the fifth probandum was also established by the acquiescence of Alliance and their failure to tell Hackett that without their prior written consent the lease to him from Myra was worthless. By their silence Hackett in the belief he had a valid lease had been encouraged to alter his position irrevocably in the faith of a belief which was known to Alliance to be mistaken. This was unconscionable behaviour and accordingly Alliance was estopped from denying the validity of the lease and is deemed to have consented thereto in writing.

As in the court below, I have considered the merits of this appeal on the basis of the five probanda of Fry J. in Willmott v. Barber but this appeal could equally well have been decided on the broad principle of unconscionable or dishonest conduct as expounded in the recent cases to which I have referred. The five probanda were a useful guide in considering the doctrine of proprietory estoppel but it appears from the recent cases that it is unnecessary to establish all five probanda in order to decide if the conduct of the individual was dishonest or unconscionable so as to give rise to estoppel.

Then there was the question of whether the estoppel which was binding on Alliance also bound Inverugie to whom the property was conveyed on 5th November 1974. Counsel for the appellant drew attention to E.R. Ives v. High 1967 2 Q.B. p.379 to show that estoppel in title binds successors in title. Lord Denning at p.394 of the report said:

> "The right arises out of the expense incurred by Mr. High in building his garage, as it is now, with access only over the yard and the Wrights standing by acquiescing in it, knowing that he believed he had a right of way over the yard. By so doing the Wrights created in Mr. High's mind a reasonable expectation that his access over the yard would not be disturbed. That gives rise to an "equity arising out of acquiescence". It is available not only against the Wrights but also their successors in title. The court will not allow that expectation to be defeated when it would be inequitable to do so. It is for the court to decide in what way the equity can be satisfied: see Inwards v. Baker (1965) 2 Q.B. 29 and Ward v. Kirkland (1966) 1 All E.R. 609."

As indicated later in this judgment Inverugie had actual notice of the existence of leases to which Alliance said in Clause 8 of the contract for sale from Alliance to Gleneagles, no previous consent in writing had been given by Alliance.

Section 57(1) of our Conveyancing and Law of Property Act (Ch. 115) provides that a purchaser shall not be prejudicially affected by notice of any instrument fact or thing unless (a) it is within his knowledge or would have come to his knowledge if such inquiries and inspections had been made or ought reasonably to have been made by him, or similarly, (b) in the same transaction had come to the knowledge of his counsel or other agent as such or would have come to his knowledge as such upon inquiry and inspection; and subsection (3) provided that a person shall not by reason of anything in the section be affected by notice in any case where he would not have been so affected if this section had not been enacted. These provisions are similar to section 199 of the English Law of Property Act 1925 and as pointed out in Snells' Equity 27th Edition at p.50: a purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered (i) where he had actual notice he would also be held to have constructive notice of all he would have discovered if he had investigated; and (ii) where the purchaser either deliberately or carelessly abstained from making those inquiries that a prudent purchaser would have made.

As to notice Mr. Mowbray drew attention to clause 8 of the agreement for sale of 28th October 1974 from Alliance to Gleneagles and the assignment of their interest thereunder by Gleneagles to Inverugie of 4th November 1974, followed by the conveyance the next day from Alliance to Inverugie on 5th November 1974. By those documents Inverugie had actual notice of the ~~evidence~~ existence of leases which by clause 8 were said by Alliance to be in breach of the mortgage of 15th November 1969 from Myra to Alliance, the said mortgage being recited in both the said agreement for sale and the conveyance of 5th November 1974 and the agreement for sale itself being also recited in the assignment of 4th November 1974. Counsel submitted that Inverugie should have investigated those leases as a lease necessarily affects title in that it creates a legal term of years in the land. He further submitted, in my view correctly, that actual notice of the existence of these leases placed Inverugie

with constructive notice of their contents.

Further a purchaser has constructive notice of the rights of anyone in occupation. As Mr. Mowbray pointed out Hackett was in occupation of the 30 apartments by his furniture and his agent, Myra, who held the keys to the apartments and Inverugie thus bought the property with notice of Hackett's rights.

In the event Inverugie entered those apartments and changed the locks on the doors, thereby committing trespass.

In conclusion I would say that Inverugie at the time of the conveyance to them from Alliance on 5th November 1974 were bound by the same estoppel as that which bound Alliance and consequently Inverugie took the property subject to Hackett's rights in the 30 apartments. I would therefore allow the appeal with costs here and below.

As to the terms of the order to be made in consequence of allowing this appeal I have discussed the matter with my learned brother, da Costa, J.A. and I am in agreement with the form of order set out in his judgment.

DATED the 8th day of July 1982.

Sir James Smith,
J.A.

No. 27

Judgment of H.L. da Costa - 8th July 1982

COMMONWEALTH OF THE BAHAMAS 1981

IN THE COURT OF APPEAL No. 17

Civil Side

B E T W E E N

RICHARD HACKETT — Appellant (Plaintiff)

AND

INVERUGIE INVESTMENTS LIMITED — Respondent (Defendant)

Mr. Mowbray Q.C. and Mr. Pyfrom for the Appellant

Mr. Cecil Wallace-Whitfield and Mr. V. Wallace-Whitfield for the Respondent

J U D G M E N T

This is an appeal by Richard Hackett from the judgment of the learned Chief Justice dismissing his claim to be entitled to a lease for 99 years in certain apartments in the Silver Sands Hotel situated in Freeport, Grand Bahama and inter alia to possession and damages and granting the counter-claim of the defendant Inverugie Investments Limited (Inverugie) for an order that Inverugie is seized of the premises comprising those apartments.

On November 8, 1968 Myra Investments Limited (Myra) acquired from Polcan Limited some 3.4 acres of land in the Freeport/Lucaya area of Grand Bahama with the intention of constructing two apartment buildings. Construction of these buildings commenced in early 1967; thirty of these apartments is the subject-matter of the plaintiff's claim. The development was originally known as Kismet Apartments, but later became known as Silver Sands. The development was to comprise two main buildings with a total of 144 apartments. The initial plan was that the captial required for construction of the buildings was to be provided largely, if not entirely, from advance sales of the apartments. A number of persons were induced to enter into contracts with Myra under which they

were required to make deposits on account of the purchase price and to pay the balance outstanding by instalments; in return Myra undertook to grant leases of a term of 99 years when the payments were complete. It appears that a number of persons who entered into such contracts paid the entirety of the purchase price in advance. As the learned Chief Justice pointed out - Contracts for leases were commonly referred to as the sale and purchase of suites or apartments.

It was obviously a precarious method of financing building construction and by the end of October 1969 Myra found itself in financial difficulties; accordingly in November 1969 it sought financial assistance from Alliance Services Industrial & Commercial Corporation Limited (Alliance). The President of Alliance at that time was Raymond S. Tower, a member of the legal firm of Dupuch & Turnquest, and its principal shareholder was John Ennis, a friend of Radomski, the President of Myra.

Alliance agreed to lend Myra the sum of $695,000 (Canadian) on the security of a mortgage which was executed on November 15, 1969. Myra conveyed its land with the unfinished buildings thereon to Alliance. The mortgage instrument provided inter alia that Myra was:

(a) to repay $200,000 of the sum lent on the 25th March 1970 and the balance of $495,000 on the 30th June 1970.

(b) to pay interest at 10% per annum from the 15th November 1969 on $600,000 on the date of maturity, the 30th June 1970 and thereafter by equal monthly instalments in arrears on so much of the principal sum as remain unpaid.

It was further provided that:

(i) Myra would not exercise its powers of leasing conferred on mortgagors in possession by section 20(3) of the Conveyancing and Law of Property Act (ch. 115) without the consent in writing of Alliance;

(ii) the mortgagee's power to sell, foreclose, take possession, and to appoint a receiver were to become exercisable on the occurrence of a number of events including:

(a) failure by Myra to pay any instalment of principal or interest within a specified time after notice;

(b) any disposition or attempt by Myra to deal with the equity of redemption or any part thereof without Alliance's written consent.

Myra was also required to assign to Alliance all its rights under contracts which it had entered into up to November 15, 1969 with third parties for the sale and purchase of leases of apartments as collateral security. The assignment was duly executed on November 15, 1969 (the same day as the mortgage); the contracts were merely attached and not listed in a schedule with the result that it is not clear how many contracts were attached or what were the sums due and owing to Myra thereunder on November 15, 1969.

The loan from Alliance, however, proved inadequate to ensure the completion of the buildings. By early 1970, one building was 80% complete and the other some 90% complete. It was clear therefore that further financial assistance was necessary to ensure completion of the building. Radomski sought assistance from several sources without success. Eventually he turned to Hackett, a good friend and like Radomski a substantial shareholder in Silver Point Limited, another development scheme adjoining Silver Sands. Hackett at first refused his assistance. Myra was under pressure. Myra failed to pay Alliance the sum of $200,000 which was due under the mortgage on March 25, 1970; further the day fixed for the repayment of Alliance's loan of $695,000 together with interest of 10% was June 30, 1970. Myra estimated that the cost of completing the buildings would be in the region of $400,000. If the buildings were completed then at least there was a possibility of selling the apartments and discharging their mortgage obligation; or at the worst, persuading Alliance to extend time for the mortgage payments.

Eventually, it appears that Radomski's powers of persuasion prevailed and Hackett signified his willingness to invest some $300,000, the sum that Hackett estimated would be necessary to complete the buildings; in return for his investment of $300,000 Hackettwould be granted a lease for ninety-nine years on thirty apartments at Silver Sands.

Fortified by the proposed Hackett investments Radomski and Capps (Myra's lawyer and a shareholder in Myra) went to see Tower of Alliance with a view to bargaining for an extension of time to meet Myra's mortgage obligations. This meeting between

these three gentlemen took place near the end of May. As a result of the meeting, on June 2, 1970 Tower wrote to Myra as follows:

"2nd June, 1970

Myra Investments Limited
P.O. Box F-427
Freeport, Grand Bahama

Dear Sirs,

Re: Alliance Services Industrial & Commercial Corporation Limited - First Mortgage Loan to Myra Investments Limited

The above First Mortgage loan matures on 30th June, 1970.

We are agreeable to extending time for repayment of this First Mortage by one (1) year from 1st July, 1970, at an increased rate of 12% per annum payable monthly commencing 1st August, 1970, provided however that this extension is subject to the following strict conditions:

(1) That the sum of Two hundred thousand dollars ($200,000) be paid to us on or by 1st September, 1970.

(2) That any and all monies received by you on the sale of suites, whether before or after the date of this letter (save and except the thirty apartments being sold to Richard Hackett) is to be repaid directly to us in reduction of the First Mortgage.

(3) That on the purchase of the 30 apartments by the said Richard Hackett for the sum of Three hundred thousand dollars ($300,000), that you direct him to make payment of the said sum of Three hundred thousand dollars ($300,000) on or by 15th June, 1970, to the order of Messrs. Dupuch & Turnquest, our attorneys to bona-fide sub-contractors, tradesmen, labourers, on proper written authorization of Z.W. Radomski.

We would again stress that the said sum of Three hundred thousand dollars ($300,000) is in no way being used to reduce our First Mortgage but is being allocated towards the completion of the Co-operative Apartment building.

Yours very truly,
ALLIANCE SERVICES INDUSTRIAL &
COMMERCIAL CORPORATION LIMITED

Raymond S. Tower
President"

Tower's letter is endorsed at the foot as follows:

"Receipt of the above letter acknowledged and agreement to the terms and conditions therein contained.

2 June, 1970

MYRA INVESTMENTS LIMITED

by Z.W. Radomski
President"

So that on the face of it at a particular point in time there was agreement between Alliance and Myra as to the terms and conditions for the extension of time for repayment of the mortgage loan.

On the 3rd or 4th June, 1970 Hackett and Radomski met at Myra's office. Radomski informed Hackett of Alliance's requirement as to disbursement of the $300,000 (the purchase price of the 30 apartments) as set out in condition 3 of Tower's letter of 2 June, 1970. This did not meet with Hackett's approval and he therefore suggested to Radomski that it be varied to enable him (Hackett) to disburse the $300,000 to builders and workmen.

Apparently Radomski was having second thoughts as to whether Myra would be able to meet Alliance's condition for payment of $200,000 on or by 1st September 1970. And so on that very day Radomski and Capps went to see Tower leaving Hackett in Myra's office. On their return to Myra's office Radomski informed Hackett that Tower had agreed to Hackett himself disbursing the $300,000, the purchase price of the flats. With this assurance, Hackett decided to commit himself and so on the 5th June 1970 he proceeded to enter into a lease with Myra for the 30 apartments for a term of 99 years. On June 7, 1970 Hackett paid out a total of $150,000 to contractors and workmen, and by the end of August he had disbursed the total sum of $300,000.

It would appear, however, that at the very time when Hackett was taking his lease and disbursing his $300,000 Radomski and Alliance had commenced to re-negotiate the terms which they had previously agreed for the extension of time for repayment by Myra of the sum it had borrowed and on the strength of which terms Hackett had agreed to participate. After what must have been protracted negotiations between Myra and Alliance final terms eventually emerged in an indenture for the amendment of the mortgage of November 1969, dated July 1, 1970. It was signed by Radomski on behalf of Myra and by John W. Millican (who had succeeded Tower as President) for Alliance.

The time for repayment was extended to June 30, 1971. The rate of interest was now to be 15% instead of the 12% stated in the letter of 2nd June 1970. The amendment made no mention of the purchase by Hackett of 30 apartments. It may very well be, however, that this was regarded by the parties as a fait accompli. There was also no mention of any payments by Myra to Alliance of monies received from the sale of apartments before or after June 2, 1970. There was no requirement as to the payment of $200,000, one of the conditions stipulated in the June 2nd letter. Finally, the amending deed confirmed that the sum due and owing by Myra was $695,000 as at the 1st July 1970 and required that this sum be liquidated by monthly payments of $15,000 from the 15th January 1971, to the 15th June 1971 with the balance to be paid by the 30th June 1971.

The circumstances leading up to the amendment are rather shrouded in mystery. Radomski, the Prince of Denmark of the drama, did not appear as a witness at the trial; neither did Tower. Capps, who testified on Hackett's behalf, was hardly illuminating on this aspect of the matter. And it does not appear that Hackett knew anything about the negotiations that were taking place between Myra and Alliance behind the scenes as it were. It is quite impossible on the evidence to determine the date at which Myra and Alliance agreed the terms eventually embodied in the amendment. The correspondence between the parties reveal that the document containing the amendment was not submitted by Alliance to Myra until May 20, 1971; and the document that was submitted was returned by Capps to Millican "duly executed on behalf of Myra" on June 25, 1971. The amending deed, however, is dated July 1, 1970. The learned Chief Justice thought that there were two possibilities. The parties agreed the terms from 1st July 1970 but for some reason or other did not put it into formal shape until almost a year later. Alternatively, the negotiations for the amendment when finalized was back dated to the date July 1, 1970. In my opinion the second alternative seems undoubtedly the correct one and is more consistent with the tenor of the correspondence: see for example the letter of May 20, 1971 from Millican to Higgs enclosing the agreement for approval of his clients Myra and referring to "other documentation that will be necessary". If this be the correct view, as I venture to think it is, then it means that almost nine months after Hackett had paid out $300,000 which enabled the apartments to be completed by the end of 1970, the parties were still negotiating over the terms of the amendment.

To return to the mainstream of the story - By the end of 1970 Myra had completed their building operations. Thereafter Hackett took possession of his thirty apartments and spent an additional $90,000 in furnishing them and in satisfaction of certain custom duties which they attracted. He put the apartments out for rental with Myra acting as his renting and collecting agent; and on occasions Hackett occupied one of the apartments when he was on holiday in the Bahamas.

Myra's financial position apparently continued to deteriorate. They defaulted in their mortgage payments and on June 29, 1972 Alliance served Myra with notice requiring payment of the principal sum outstanding and interest failing which Alliance would exercise its powers of sale. Myra was unable to comply and on October 28, 1974 Alliance agreed to sell the premises to Gleneagles Investment Company (Gleneagles). The contract between Alliance and Gleneagles contains a significant provision: Clause 8 was in the following terms:

> "It is understood that certain parties may be claiming leases on portions of the said hereditaments. The Vendor hereby represents that these leases have never received the Vendor's previous written consent and are therefore in breach of the said mortgage between the Vendor and the said Myra Investments Limited".

On November 4, 1974 Gleneagles assigned its rights under this contract to Inverugie and on the following day Alliance conveyed to them. Hackett's lease was not registered until after the conveyance was made.

Inverugie took over the apartments and changed the locks; they denied and continue to deny access to Hackett. By his Amended Statement of Claim Hackett claimed:

(1) Possession of the apartments;

(2) A declaration that he is entitled to a lease to the apartments in terms of the lease of the 5th of June 1970 which he entered into with Myra;

(3) An injunction to restrain the Defendant from trespassing on the apartments;

(4) Mesne profits;

(5) Damages for trespass.

Alternatively, there is a claim for an order that he is entitled to an equitable lien over the premises to secure the sum of $390,000 together with interest at 6% computed from the 5th June, 1970.

The mortgage to Alliance did not permit Myra to grant leases for over 21 years or to grant a lease at a premium. Clause 4(e) of the mortgage to Myra even forbad the latter to grant leases of 21 years or a lesser period without the consent in writing of Alliance. It is not disputed that when Myra granted a 99 year lease of 30 apartments to Hackett there was no consent in writing from Alliance. It is equally not in dispute that the lease contravened the other provisions of the mortgage referred to above.

The law on "leases not under the statutory power" is summed up tersely by Megarry & Wade as follows:

> "If the power is excluded and the mortgagor nevertheless grants an unauthorized lease, the lease is void as against the mortgagee and his successors in title (unless they are estopped from asserting this), but valid as between the parties to it: the statutory powers of leasing do not deprive the parties of their common law rights to create leases not binding upon each other. For example, if a mortgage contains a covenant by the mortgagor not to exercise the statutory power of leasing without the mortgagee's written consent, the mortgagor may nevertheless grant a valid yearly tenancy which binds the mortgagor under the principle of estoppel but which does not bind the mortgagee." (Megarry & Wade, The Law of Real Property, 4th edn pp 935-936; see also Iron Trades Employers Insurance Association Limited v. Union Land & House Investors Limited (1937) Ch. 313)

However, Counsel for Hackett submitted that Alliance was bound by the lease, because Alliance stood by and allowed Hackett to spend $300,000 on the property in the faith of a belief that he was getting a lease good against the world including Hackett. It was further submitted that the lease also bound Inverugie, because it bound Alliance who conveyed to Inverugie and the latter had notice of Hackett's rights against Alliance under the lease: it is settled law that an equitable estoppel so arising may be enforced against the land in the hands of the successors in title with notice of the equity. (Inwards v. Baker (1965) 1 All E.R.446; E.R. Ives Investment Limited v. High (1967) 1 All ER 504).

There are thus two vital questions for determination in this appeal. The first is whether in the events which transpired subsequent to Alliance's letter of June 2, 1970 to Myra, Hackett acquired an equity to a lease enforceable against Alliance by virtue of proprietary estoppel, otherwise known as estoppel by encouragement or acquiescence. The second is whether that equity binds the land in the hands of the respondent Inverugie, who are Alliance's successor in title.

The case for the appellant is squarely based on proprietary estoppel or estoppel by acquiescence. In summary, the appellant puts his case on the silence of Alliance in circumstances when there was a duty to speak. The argument is that Alliance was well aware of the fact that Myra was selling apartments on 99 year leases and taking premiums and that indeed Alliance intended to continue to pursue such a course of action. Quite clearly the purchasers of leases expected to obtain leases that were good against the world, including Alliance, and Alliance must have appreciated this because it was so obvious. Nevertheless, Alliance stood by and permitted the sales to continue. And indeed in Hackett's case, Alliance knew that Myra was selling 30 apartments to Hackett, and that Hackett was paying a premium of $300,000; yet Alliance stood by and allowed that transaction to be consummated.

Although it has recently been said by high authority that "of all doctrines, equitable estoppel is surely one of the most flexible" the limits of its flexibility still has to be determined. As Robert Goff J. said in Amalgamated Property Co. v. Texas Bank (1981) 2WLR 554 at 569-570:

> "The cases concerned appear to derive from two distinct principles; the principle stated by Lord Cranworth L.C. in Ramsden v. Dyson, L.R. 1HL 129, and the principle stated by Lord Kingsdown in the same case - the former being concerned with an estoppel precluding a person, who stands by and allows another to incur expenditure or otherwise act on the basis of a mistaken belief as to his rights, from thereafter asserting rights inconsistent with that mistaken belief (commonly called the doctrine of acquiescence); and the other being concerned with an estoppel precluding a person who has encouraged another to improve his, the encourager's property in the expectation that he will receive an interest

in it, from denying that he is entitled to that interest. It is to be observed that the first of these principles appears to be directed towards preventing person from fraudulently taking advantage of another's error, whereas the latter appears to derive rather from encouragement or representation."

Ramsden v. Dyson (sup.) was decided in 1866. Then in 1880 came the decision in Willmott v. Barber 15 Ch.D. 96 in which Fry J. enunciated his five probanda constituting the essential matters of fact which must be established before this particular equity may be invoked.

Fry J. at pp 105-106 stated the five requisites of estoppel by acquiescence as follows:

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know it he is in the same position as the plaintiff and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do."

In two related actions Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. and Old & Campbell Ltd. v. Liverpool Victoria Trustees Co. Ltd. (1981) 1 All E.R. 897 Oliver J. (as he then was) examined the doctrine of proprietary estoppel. A landlord company had encouraged its tenants to spend money on improvements and installing a lift on the supposition that an option to renew the lease was valid. Later, when the tenants sought to exercise the option, the landlords woke up to the fact that the option was void for want of registration. It was argued on behalf of the landlords that they could not be estopped unless at the time of the representation, or of the expenditure, they were aware of their true rights. In the judge's view this might be appropriate when all they had done was to stand passively by while the expenditure had been incurred thus giving rise to a simple case of acquiescence such as Willmott v. Barber (1880) 15 Ch.D.96. Yet possibly even that case, let alone cases where the intervention is more active, should be subsumed under a broader principle. The more recent authorities, in the view of Oliver J:

> "Support a much wider equitable jurisdiction to interfere in cases when the assertion of strict legal rights is found by the court to be unconscionable. It may well be (although I think that this must now be considered open to doubt) that the strict Willmott v. Barber probanda are applicable as necessary requirements in those cases where all that happened is that the party alleged to be estopped has stood by without protest while his rights have been infringed." ((1981) 1 All E.R. at p 910)

And again later in his judgment Oliver J. observed:

> "Furthermore, the more recent cases indicate in my judgment, that the application of the Ramsden v. Dyson principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to enquiring whether the circumstances can be fitted within the confines

of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

So regarded knowledge of the true position by the party alleged to be estopped becomes merely one of the relevant factors (it may even be the determining factor in certain cases) in the enquiry." (ibid. at p.915)

The approach of Oliver J. is all the more significant because in the two cases referred to above the learned judge embarked upon an extensive review of the cases. Oliver J. at pp 912 et seq. reviewed the old authorities to demonstrate that in many of those cases the five probanda were not all present. Then the learned judge proceeded to analyse the modern authorities to show that the approach taken was consistent with the view he expressed (pp. 916 et seq.). In Inwards v. Baker (1965) 1 All E.R. 446 there was no mistaken belief on either side: "Each knew the state of the title, but the defendant had been led to expect that he would get an interest in the land on which he had built." Danckwerts L.J. said (1965) 1 All E.R. 446 at 449-450:

"It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

E.R. Ives Investment Ltd. v. High (1967) 1 All E.R. 504 is an even more striking example as Oliver J. remarked at p 916:

"Here, again, there does not appear to have been any question of the persons who had acquiesced in the defendant's expenditure having known that his belief that he had an enforceable right of way was mistaken. Indeed, at the stage when the expenditure took place, both sides seem to have shared the belief that the agreement between them created effective rights. Nevertheless, the successor in title to the acquiescing party was held to be estopped." (And see Lord Denning MR at (1967) 1 All E.R. 504 at 507-508)

In Crabb v. Arun District Council (1975) 3 All E.R. 865 the plaintiff had altered his legal position in the expectation, encouraged by the defendants,

that he would have a certain access to a road". But there was clearly no mistake. "Each party knew that the road was vested in the defendants and each knew that no formal grant had been made" (p.917). It should be noted that despite Scarman L.J. stating in Crabb's case that he was applying the five probanda, he could not, as Oliver J. points out, have found the fourth probandum in the ordinary sense. "Scarman L.J. must have construed this probandum in the sense which counsel for the plaintiff urge on me, namely that the defendant must know merely of the plaintiff's belief which, in the event, turns out to be mistaken." (p.917)

In Shaw v. Applegate (1978) 1 All E.R. 123, another case in which a plea of estoppel by acquiescence was raised, two members of the court "expressed serious doubt whether it was necessary in every case of acquiescence to satisfy the five probanda". Buckley L.J. said at pp 130-131:

> "So I do not, as at present advised, think it is clear that it is essential to find all the five tests set out by Fry J. literally applicable. The real test, I think, must be whether in the facts of the particular case the situation has become such that it would be dishonest and unconscionable for the plaintiff or the person having the right sought to be enforced, to continue to enforce it."

Goff L.J. also, after referring to the judgment in Willmott v. Barber, went on to say (1978) 1 All E.R. 123 at 132:

> "But for my part, I share the doubts entertained by Evershed MR in the Electrolux case whether it is necessary in all cases to establish the five tests which are laid down by Fry J, and I agree the test is whether, in the circumstances, it has become unconscionable for the plaintiff to rely on his legal right."

The comment of Oliver J on this case at p.918 is significant:

> "So here, once again, is the Court of Appeal asserting the broad test of whether in the circumstances the conduct complained of is unconsionable, without the necessity of forcing those incumbrances into a Proscrustean bed constructed from some unalterable criteria." (And see Lord Denning MR in Moorgate Mercantile Co. Ltd. v. Twitchings (1975) 3 All E.R. 314 at 323)

And so in the Taylor case Oliver J. approached his enquiry on the basis as to whether in all the circumstances of the case it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared.

In Amalgamated Property Co. v. Texas Bank (1981) 2 W.L.R. 554 at p.570 Robert Goff J. said:

> "The authorities on the subject have recently been reviewed by Oliver J. in his judgment in two related actions (Taylor & Old cases); and on the basis of his analysis of the cases, which I gratefully adopt, he rejected an argument founded upon rigid categorisation. The argument was that a clear distinction must be drawn between cases of proprietary estoppel and estoppel by acquiescence on the one hand, and promissory estoppel or estoppel by representation (whether express or by conduct) on the other; and that in the former class of the cases it was essential that the party alleged to be estopped himself knew the true position (that is, that he knew that the other party was acting under a mistake as to his rights) the fourth of the five criteria laid down by Fry J. in Willmott v. Barber, 15 Ch. D.96, as necessary to establish estoppel by acquiescence. Oliver J., however, while recognizing that the strict Willmott v. Barber criteria may be necessary requirements in cases where all that has happened is that the party alleged to be estopped has stood by without protest while his rights have been infringed, concluded that the recent authorities supported a much wider jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable."

Here again Robert Goff J. approached the enquiry in the same manner as Oliver J. did in the Taylor case. The judgment of Robert Goff J. has now been approved by the Court of Appeal: (1982) 3 All E.R. 577.

In Habib Bank Ltd. v. Habib Bank A.G. Zurich (1981) 2 All E.R. 650 Oliver L.J. delivered the leading judgment of the Court of Appeal. One of the issues raised in the case was whether the plaintiff's claim was barred on the grounds of acquiescence, laches and estoppel. Oliver L.J. at p.666 quoted from his judgment in Taylor's case (1981) 1 All E.R. 897 at pp 915-916 (see quotation at p.12 above).

After reading the quotation he said:

> "Whilst having heard the judgment read by counsel I could wish that it had been more succinct, that statement at least is one to which I adhere."

Watkins L.J. agreed - "There is nothing I could possibly add to that judgment". Stephenson L.J. also concurred expressly approving the statement which Oliver L.J. read from his judgment in the Taylor case.

No authority emanating from this court was cited in argument. I assume the diligence of counsel has not discovered any Bahamian authority. In my judgment, however, there is ample recent authority from the Courts in England for asserting that the proper test is whether in all the circumstances it is unconscionable for the defendant having the right sought to be enforced, to continue to seek to enforce it, without resort to some sacrosanct formula. It is not often that new wine can be safely poured into old bottles.

It may be, however, that the relevant law is still correctly stated by Spencer-Bower & Turner, when dealing with Sir Edward Fry's five probanda:

> "The first, second and fifth of Sir Edward Fry's probanda are obviously applicable to all estoppels by representation. Taking them in order, we find the first of them to be identical with, or a corollary of, the general rule that no representee can claim to have been misled who knows the real facts, or to have acted on the faith of a representation which he could not have believed; and that the second results from the general rules as to inducement and alteration of the representee's position for the worse. The fifth and last of the probanda is found to be no other than the burden which at the outset rests on every representee of establishing the fact that the representor made the alleged representation either in language or conduct or (where he was under a duty to the representee to speak or act) by silence or inaction. But when the third and fourth of Sir Edward Fry's probanda are considered acquiescence is fairly seen to exhibit the special characteristics of estoppel which arise from silence or inaction, as distinct from those based on positive words or equivalent conduct. As we have earlier seen, there can be no estoppel arising from silence unless the

representor is under a legal duty to speak; and in the absence of some fiduciary relationship or of a contract uberrimae fidei between the parties (either of which will give rise to a different remedy) such a duty can arise only where there is actual knowledge by the representor (a) of his own right and (b) of the fact that another is acting upon the mistaken assumption that he has no such rights." (Spencer Bower & Turner, Estoppel by Representation, 3rd edn pp 287-288). In parenthesis, however, I would observe that the third edition of Spencer Bower & Turner was published in 1977.

The learned trial judge after a careful and lucid analysis of the evidence arrived at certain conclusions on the five probanda. He found that the first three had been satisfied but that the fourth and fifth were not. The first probandum was satisfied because Hackett believed from what he was told that Alliance had orally consented to the lease and not knowing that consent was required to be in writing, Hackett thought that he had a legal right to take such a lease. The next question was: Did Hackett spend his $300,000 in satisfaction of Myra's bills on the faith that he had a valid lease of the thirty apartments? On this issue the learned judge said:

> "Viewing his evidence as a whole, I am satisfied that Hackett laid out his money on the faith of the mistaken belief that the lease which he executed on the 5th of June was valid, and that it would have borne fruit when the project was completed. The other considerations which induced him to incur the expenditure, such as the side benefits which would have accrued to Freeport and to his Silver Point investment, were considerations of second and, at most, of equal importance."

The third probandum was also satisfied for the trial judge had no difficulty in finding that Alliance knew that under clause 4(e) of the mortgage its consent in writing to a lease by Myra was necessary. Then on the critical issue the trial judge observed:

> "The final enquiry is whether Alliance knew that subsequent to the interview which Radomski and Capps had with Tower on the 3rd or 4th of June, 1970 concerning the terms of the letter of the 2nd of June, Hackett mistakenly believed that he could take a lease

of thirty (30) apartments without their consent in writing; further, whether with that knowledge, they actively or passively encouraged him to lay out his $300,000 between June and August, 1970 in the manner and for the purposes he described on the faith that he had a valid lease."

After a painstaking analysis of the evidence on these two issues the trial judge came to the conclusion that Hackett had:

"failed to establish the 4th and 5th essentials of the estoppel by acquiescence or encouragement laid down in Wilmott v. Barber supra. In the result it has not been established that Alliance knew that he mistakenly believed that he had a right to a lease of thirty (30) apartments, and with that knowledge encouraged him either actively to spend his money, or passively by standing by and abstaining from asserting their own rights under clause 4(e) of the mortgage of the 15th of November, 1969. It is true that Alliance got the benefit of his expenditure which went to improving their security and that they and the defendant have in a sense reaped where they have not sown. But, unfortunate though it may be for Hackett, hard cases make bad law and I am obliged to observe and honour the law as I understand it."

It will be observed that Oliver J. in discussing the approach to equitable estoppel in the more recent cases observed that "knowledge of the true position by the party alleged to be estopped becomes merely one of the relevant factors (it may even be the determining factor in certain cases) in the enquiry". What then was the state of knowledge of Alliance? From before the mortgage of November 15, 1969 of the two buildings containing the thirty apartments Alliance knew that Myra was selling leases of apartments in the building for terms of 99 years. As the learned judge correctly inferred Alliance was aware that this was not authorized under its mortgage when the same was drawn and executed. Alliance knew that Myra nevertheless intended to continue such sales. In my view paragraph (2) of Alliance's letter of June 2, 1970 clearly underlines this fact. As late as June 21, 1971 we find Millican writing to Capps and saying: "My clients would also like... an up-to-date list of the purchasers of the apartments of which there is I believe ninety". It was obvious and Alliance must have known - that the

purchasers of apartments would expect to get leases valid against all the world, including mortgagee as Alliance. Despite the knowledge of all those matters Alliance stood by and allowed sales of apartments for 99 year leases to continue.

In particular, Alliance knew by June 2, 1970 that the 30 apartments were beind sold to Hackett on 99 year lease for $300,000. Paragraph (2) of the letter of June 2, 1970 refers to "the 30 apartments being sold to Richard Hackett". The purchase by Hackett of 30 apartments was of utmost importance to both Alliance and Myra. Indeed, as Tower emphasized in the final paragraph of his letter of June 2, 1970: "We would again stress that the said sum of Three hundred thousand dollars ($300,000) is in no way being used to reduce our First Mortgage but is being allocated towards the completion of the Co-operative apartment building". It was obvious that without the participation of Hackett there was little prospect of the apartments being completed. Further, I think it is fair to say that both Myra and Alliance assumed that the sale of 30 apartments to Hackett was going through whatever happened.

The letter of June 2, 1970 from Alliance to Myra was the subject of much argument in this Court and the Court below. The learned trial judge found that Alliance's agreement to Hackett's lease was conditional and the conditions were never fulfilled. The appellants have argued that the only condition imposed on the grant of a lease to Hackettwas that the sum of $300,000 should be used for the completion of the apartment buildings and that grammatically the letter of June 2, does not impose any other condition on the grant of the lease but only on the extension of time for repayment under Alliance's mortgage.

Mr. Wallace-Whitfield for the respondent rightly emphasized that the letter of June 2, 1970 was addressed to Myra not Hackett. That letter laid down the conditions which Myra were to perform not Hackett. They were the conditions that Myra had to perform or procure to be performed, in order to secure an extension of time. One was to ensure that Hackett invested as proposed in the letter. It is true that in the final analysis the failure to ensure the performance of all three conditions meant they would not secure an extension of time to make the mortgage payments; but in my opinion it could not nullify the fact that Hackett had invested in 30 leases in pursuance of the proposal contained in the letter of June 2, 1970.

The matter can be tested in this way. Let it be assumed that conditions (1) and (3) in the letter had been complied with. Condition (2) however is an on-going one i.e. moneys received by Myra on sale of suites were to be "repaid directly" to Alliance in reduction of the first mortgage.

Now let it be further assumed that after a few months Myra refused to comply with this condition and refused to pay over to Alliance moneys received on sale of suites. Clearly in those circumstances Alliance could treat the agreement for an extension of time as at an end. But could it possibly be said that purchases of suites previously completed would be invalidated by Myra's breach? Or could it invalidate a lease that had been granted in pursuance of condition (3)? If the answers to the two questions posed are in the negative then it must follow that it is the extension of time and not the sale of the 30 apartments that is subject to the strict conditions.

The learned trial judge came to the conclusion that the fourth and fifth probanda were not satisfied, and at p.45 of the Record he lists the negative aspects of Hackett's conduct and its repercussion, so far as Alliance is concerned. But, with respect, surely one can draw certain inferences from known facts. Alliance had a sizeable sum tied up in its mortgage to Myra in a falling property market. Myra had been in continual default under its mortgage. Myra was unable to complete the buildings by selling leases to finance its building programme or to obtain funds for that purpose. Unless the apartment buildings were completed, Alliance was at risk. Eventually Hackett, like the deus ex machina comes on the scene. No other source of finance was ever mooted or discussed; the prospect of any other financier coming to the rescue was most unlikely in the then state of the property market. Indeed, it was vitally important to both Myra and Alliance that the project should be completed. It was agains this background that the learned trial judge observed at p.45: "There is no evidence that anyone from Alliance visited the site whilst the payments were being made, and as a consequence discovered that Hackett was spending money on the buildings". But with respect one asks, what are the probabilities? Wouldn't it be the most natural and reasonable thing for a mortgagee with that money at stake to keep an eye on the project to see what progress, if any, was being made.

Let it be borne in mind too that this is not a project being carried out in a large metropolitan city, but in a relatively small island community. Is it really probable that Alliance, given its interest and previous knowledge, did not know that completion was taking place at the critical time. And, if so, wasn't is the natural assumption that it was Hackett who was paying the piper. We are dealing with lawyers and business men here. Isn't it reasonable to assume that they would behave in a business-like manner? I find it a little hard to suppose that Tower could have been in such blissful ignorance of what was going on under his very nose.

The appellant, Hackett, in the learned judge's view failed to surmount the fourth and fifth hurdle. Fry J.'s fourth probandum requires that the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. On this issue Mr. Mowbray submitted that Alliance knew their written consent was necessary to make the lease valid; they knew that a lease was being granted to Hackett; they knew they had not given their written consent; it must therefore have been obvious to them that Hackett was under a mistaken belief that he could obtain a valid lease without Alliance's written consent to the grant of the lease by Myra; because it was only on the supposition that he was getting a valid lease that such a large expenditure could have been justified. Alliance could not possibly have thought that Hackett would be laying out that sum on an invalid lease. In the language of Lord Eldon L.C. in Dann v. Spurrier (1802) 32 E.R. 94 at 95-96 Hackett "conceived, he had that larger interest; and was putting himself to considerable expense, unreasonable, compared with the smaller interest; and which the other party observed, and must have supposed incurred under the idea, that he intended to give that larger interest...".

The fifth probandum requires that the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right. Here Mr. Mowbray submitted that given Alliance's realization that Hackett must have been under a misapprehension, Alliance was under a duty to disabuse Hackett and prevent him from spending money on a worthless interest. (see Ramsden v. Dyson (1866) L.R. 1 HL 129 at 140-141 per Lord Cranworth)

Alliance, as the learned trial judge observed, got the benefit of Hackett's expenditure"which went to improving their security and that they and the defendant have in a sense reaped where they have not sown". But if Alliance is "right in law and there is no equity which assists the plaintiff, it is no part of a judge's function to seek to impose on a party to litigation his own idiosyncratic code of commercial morality", as Oliver observed in Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (1981) 1 All ER 897 at 900-901. In my judgment, however, there is an equity which assists the plaintiff. If one applies the test adumbrated in a number of recent authorities i.e. in the circumstances has it become unconscionable for the possessor of the legal right to rely on his legal right - I think there can be but one answer in this case and that is, that Alliance is estopped from alleging that it was not bound by the lease granted by Myra to Hackett.

But even if I am wrong in what I conceive to be the proper test to be applied as laid down in the recent English authorities and the correct view is that the five probanda laid down by Fry J. still apply in all their pristine rigour, then in my opinion the appellant has succeeded in establishing them. The trial judge found the first three probanda were established. As to the fourth and fifth probanda, apart from the letter of June 2, 1970 Tower knew how the construction of the buildings was being financed and therefore that if sales were stopped construction would come to a halt. Tower also knew that Alliance could not refuse its consent, otherwise the buildings would never be completed. In the circumstances it would be pointless selling leases that would be destroyed by Alliance. Alliance knew that their written consent to the lease was necessary; they knew a lease was being granted to Hackett and they knew they had not given their written consent. Alliance must have realized that no one would lay out the sum of $300,000 unless he thought he was getting a valid lease. It must therefore have been obvious to them that Hackett was under a mistaken belief that he could obtain a valid lease without Alliance's written consent.

Alliance stood by and allowed the existing method of financing the construction of the buildings to continue. At no time did Alliance tell Myra not to grant any more leases. And what is more Alliance assumed that that method of financing construction would continue (see letter of 20 May1971 from Millican to Higgs). So far as

Hackett was concerned, once Alliance realized his mistake, Alliance was under a duty to disabuse Hackett and prevent him expending his money on an invalid lease. For Alliance to stand by, to allow Hackett to lay out his money, and then take the benefit of that expenditure would in my opinion amount to fraud in a court of equity.

The next question that arises is whether Inverugie is bound by Hackett's equity against Alliance. Inverugie will only be bound if it had notice of the facts that raised the estoppel. By reason of the provisions of Section 57(1) of the Conveyancing & Law of Property Act (ch.115) it is clear that a purchaser may be affected by notice of an equity in three cases:

(i) He may have actual notice: where the equity is within his own knowledge;

(ii) He may have constructive notice: where the equity would have to come to his own knowledge if proper inquiries and inspections had been made as ought reasonably to have been made by him; and

(iii) He may have imputed notice: where his agent as such in the course of the transaction has actual or constructive notice of the equity.

As regards constructive notice "the general principle is that a purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered". Snell's Principles of Equity, 27th edn p.50. Constructive notice may arise from failure to investigate the known as well as from abstaining, whether carelessly or deliberately, from making those enquiries which a prudent purchaser would have made. Thus a purchaser with notice of a mortgage will have constructive notice of any other circumstances referred to in the mortgage deed. And, "generally speaking a purchaser or mortgagee is bound to enquire into the title of his vendor or mortgagor, and will be affected by notice of what appears upon the title if he does not enquire" Wilson v. Hart (1866) 1 ch. App. 463 at 467, per Turner L.J.

Further, apart from investigating the deeds, a prudent purchaser will inspect the land itself. "If any of the land is occupied by any person other than the vendor, this occupation is constructive notice of the estate or interest of the occupier, the terms of his lease, tenancy or other right of occupation, and of any other rights of his, except, it seems a mere equity, e.g. to have his

tenancy agreement rectified for mistake." Snell's Principles of Equity, 27th edn p.53.

Clause 8 of the Agreement for sale dated 28 October, 1974 between Alliance and Gleneagles is in the following terms:

> "It is understood that certain parties may be claiming Leases on portions of the said hereditaments. The Vendor hereby represents that these Leases have never received the Vendor's previous written consent and are therefore in breach of the said Mortgage between the Vendor and the said Myra Investments Limited."

Gleneagles rights under the above agreement were assigned to Inverugie by an indenture dated November 4, 1974 which specifically recites the agreement between Alliance and Gleneagles.

Clause 8 constitutes clear notice that certain parties may be claiming leases on portions of the property being sold. Subsisting leases could create rights adverse to the freehold title depending on the time of their creation. Clause 8 gave Inverugie actual notice that leases of parts of the property it was buying did or might exist. The notice to Inverugie was not countered by the representation that the leases were invalid as against Alliance. The actual notice of the leases gave Inverugie constructive notice of their contents. Patman v. Harland (1881) 17 Ch.D 353. In their own interests, as a prudent purchaser, Inverugie should have called for the leases and examined them if only to see when they were created, because leases granted before the mortgage could not be over-ridden.

As Inverugie had constructive notice of the contents of the leases this naturally involves knowledge of the fact that premiums were paid under the leases. Inverugie knew that Alliance's written consent to the leases was necessary and Inverugie further knew that Alliance was well aware that its written consent to some seventy leases was necessary. Inverugie thus put on enquiry ought then to have addressed a number of pertinent questions to Alliance concerning its knowledge, its general conduct and attitude to the grant of these leases. Inverugie's failure to act as a prudent purchaser entails the consequence that it is affected by Hackett's actual rights under the doctrine of proprietary estoppel.

The mention of leases in Clause 8 should have

led to a further enquiry - were the lessees in possession? Hackett had taken possession in 1971 and had spent some $60,000 in furnishing his apartments. His possession was undisturbed until 1974. Myra held the keys of his apartments as his letting agent. Inspection by Inverugie would have disclosed he was in occupation by the presence of his furniture. This occupation was constructive notice of his lease or interest. (see Snell, Principles of Equity, p.53): It is to be noted the defendants called no one to prove they had no notice of Hackett's rights although they so pleaded.

In my opinion, Inverugie is therefore bound by Hackett's equity against Alliance for the reasons stated above.

I now turn to consider the claim in respect of the furniture. The appellant's complaint is summed up in paragraph 3 of the grounds of appeal as follows:

> "The learned Judge erred in failing to take proper notice of that part of the Appellant's claim relating to U.S.$90,000 worth of furniture and furnishings which the Appellant had purchased and installed in his 30 apartments. The Appellant's rights and interest therein were wholly separate and apart and independent of the issue of whether or not his lease was valid and binding as against the Respondent. The learned Judge in disposing of the Appellant's claim to the lease also (whether intentionally or otherwise) dismissed the Appellant's claim in relation to his other goods without giving such claim any or any due consideration and without reference to the evidence in relation thereto and without assigning any reason therefor."

While it is true that the trial judge failed to deal with the furniture as a separate issue in his judgment, this is understandable,as it would appear that Counsel in concentrating on the esoteric niceties of proprietary estoppel omitted to address any argument to the trial judge on this aspect of the case.

When one examines the pleadings it appears that the amended statement of claim contains the following paragraph:

> "14. The Plaintiff was as the result of the taking of the said lease required by law

> to pay the Customs' duty applicable to the leasehold premises covered by the said Lease which amounted to $30,000 which the Plaintiff did pay. Further, the Plaintiff paid an additional sum of £60,000 towards the cost of the furniture, fixtures and equipment which were installed or placed in the apartments comprising the leasehold premises."

Now, although the pleadings refer to "furniture, fixtures and equipment", there is nothing in the evidence to suggest that Hackett spent any money on "fixtures", as such.

As far as I can discover the evidence on this issue is contained in two short passages in Hackett's evidence.

He first said:

> "The apartments were furnished. I furnished them. I spent $60,000 on furnishing the apartments, over and above the $300,000 I paid for the leases."

And again:

> "My apartments were furnished by the end of 1970. I paid the money for the furnishing to Radomski - I also paid the Custom duties - He was supposed to have put the furnishings in my apartments."

For some reason that is certainly not apparent, the plaintiff's prayer in the amended statement of claim does not contain any request for the return of the furniture or its value. The claim for damages in paragraph 6 of the prayer seems more strictly to relate to the alleged trespass to the premises in respect of which an injunction was sought in paragraph 4 of the prayer. The alternative claim, however, does include the cost of the furniture in the sum of $60,000 and the $30,000 customs duty paid by Hackett in the amount of the equitable lien of $390,000 claimed over the premises. Mr. Mowbray submitted that the order for damages should include damages for trespass to the furniture. This would seem to be the only way of doing justice in the inelegant state of the pleadings.

Accordingly, I would allow the appeal and grant the following relief:

(1) Declaration that Alliance be deemed to have consented to the lease of 5th June 1970 and that Inverugie is bound by the said lease, but without prejudice to such rights, if any, as may be subsisting in respect of the leases of Apartment 407A in favour of Grand Bahama Development Co. Ltd. and of Apartments 408B and 409B in favour of Grand Bahama Plumbing Ltd. and registered at Vol. 2314 pgs 1-22; 45-66 and 89-110 respectively.

(2) Declaration that Hackett is entitled to possession of the premises comprising the apartments listed in paragraph 1 of the prayer in the Amended statement of claim, but subject as aforesaid.

(3) Order for possession of the apartments comprised in the said lease, but subject as aforesaid.

(4) And Counsel for Hackett abandoning any claim for exemplary damages, an enquiry as to mesne profits and damages, including damages for trespass to Hackett's furniture.

(5) Costs of the appeal and costs in the court below.

Finally, before concluding this judgment, I must pay tribute to the learned trial judge for his painstaking and penetrating analysis of the evidence and for performing a task that was rendered acutely difficult by the procedural blunder of isolating Alliance from the enquiry. The researches of Counsel and my own have, however, revealed some authorities which were not cited to the trial judge. I am therefore without the advantage of his views on these authorities. In the end, however, I have, with respect, felt compelled to differ from the conclusion he reached, for the reasons I have ventured to advance.

H.L. da COSTA

Dated this 8th day of July 1982

No. 28

Order granting Final Leave to Appeal to H.M. in Council - 18th January, 1983

COMMONWEALTH OF THE BAHAMAS 1981

IN THE COURT OF APPEAL No. 17

Civil Side

B E T W E E N

RICHARD HACKETT Appellant (Plaintiff)

AND

INVERUGIE INVESTMENTS LIMITED Respondent (Defendant)

O R D E R

Before the Honourable Vivian O.S. Blake, Chief Justice of the Supreme Court of The Commonwealth of The Bahamas.

UPON THE APPLICATION of the Respondent/ Defendant by Notice of Motion dated the 15th day of November, A.D., 1982

AND UPON HEARING Cecil Vincent Wallace Whitfield of Counsel for the Respondent/Defendant and Jerome E. Pyfrom of Counsel for the Appellant/Plaintiff

AND UPON READING the Affidavit of Cecil Vincent Wallace Whitfield filed herein on the 15th day of November, A.D., 1982

IT IS ORDERED:-

(1) That the time limited for the Respondent/ Defendant to procure the preparation of the record and the despatch thereof to England be extended to the 10th November, 1982.

(2) That Inverugie Investments Limited be and is hereby granted final leave to appeal to Her Majesty in Council.

In the Court of Appeal

No. 28
Order granting Final leave to Appeal to H.M. in Council 18th January 1983 (cont'd)

(3) That the costs of this application abide the result of the appeal to Her Majesty in Council.

Dated the 18th day of January, A.D. 1983

BY ORDER OF THE COURT

R E G I S T R A R

PART II

EXHIBITS

Hackett Bundle, Section D. Mortgage Myra Investments Ltd., to Alliance Services Industrial & Commercial Corporation Ltd.

Exhibits

Hackett Bundle Section D Mortgage, Myra Investments Ltd. to Alliance Services Industrial & Commercial Corporation Ltd. 15th November 1969

COMMONWEALTH OF THE BAHAMA ISLANDS

GRAND BAHAMA

Freeport

THIS INDENTURE is made the Fifteenth day of November in the Year of Our Lord One Thousand Nine Hundred and Sixty-nine BETWEEN MYRA INVESTMENTS LIMITED a company incorporated under the laws of the Bahama Islands and carrying on business in the Commonwealth (hereinafter called "the Borrower" which expression shall where the context so admits include its assigns) of the one part AND ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED a company also incorporated under the laws of the said Bahama Islands and carrying on business in the Commonwealth (hereinafter called "the Lender" which expression shall where the context so admits include its assigns) of the other part

W H E R E A S the Borrower is seised for an estate in fee simple in possession subject as hereinafter mentioned but otherwise free from incumbrances of the hereditaments (hereinafter referred to as "the said hereditaments" (hereinafter described in the Schedule hereto AND WHEREAS the said hereditaments are subject to certain restrictive covenants and conditions as to building and otherwise (hereinafter referred to as "the said restrictions") contained in an Indenture dated the Eighth day of November, A.D.1968 and made between Polcan Limited of the one part and the Borrower of the other part and now of record in the Registry of Records in the City of Nassau in the Island of New Providence one of the said Bahama Islands in Book 1369 at pages 587 to 599 AND WHEREAS the Lender has agreed to lend to the Borrower the sum of Six Hundred and Ninety-five Thousand Dollars ($695,000) in the Currency of the Dominion of Canada or the Bahamian Dollar equivalent thereof with interest

Exhibits

Hackett Bundle Section D Mortgage, Myra Investments Ltd. to Alliance Services Industrial & Commercial Corporation Ltd. 15th November 1969 (cont'd)

being secured in the manner hereinafter appearing AND WHEREAS this mortgage is a building mortgage and it is the intention of the Borrower and the Lender that the full amount of the moneys hereby secured is to be advanced from time to time in the discretion of the Lender in accordance with the progress of the building or buildings being erected or to be erected on the said hereditaments

NOW THIS INDENTURE WITNESSETH as follows:-

1. In pursuance of the said agreement and in consideration of the said sum of Six Hundred and Ninety-five Thousand Dollars ($695,000) in the said Currency now paid by the Lender to the Borrower (the receipt whereof the Borrower hereby acknowledges) the Borrower hereby covenants with the Lender to pay to the Lender (a) the sum of Two Hundred Thousand Dollars ($200,000) in the said Currency on the Twenty-fifth day of March, A.D. 1970 (b) the balance of Four Hundred and Ninety-five Thousand Dollars ($495,000) in the said currency at the date of maturity; and (c) interest at the rate of Ten per centum (10%) per annum on the sum of Six Hundred Thousand Dollars ($600,000) in the said Currency to be computed from the date of these presents payable at the expiration of the term hereby created AND ALSO so long after the day of June, A.D.1970 as any principal money remains due under these presents to pay to the Lender interest thereon (or on so much thereof as shall from time to time remain unpaid) after such rate as aforesaid by equal monthly payments in arrears in each and every month

2. For the consideration aforesaid the Borrower as BENEFICIAL OWNER hereby grants and conveys unto the Lender ALL the said hereditaments more particularly described in the Schedule hereto TOGETHER with the appurtenances thereunto belonging TO HOLD the same unto and to the use of the Lender and its assigns in fee simple SUBJECT to the proviso for redemption hereinafter contained

3. The Borrower hereby covenants with the Lender as follows:-

(a) That during the continuance of this security the Borrower will keep all buildings (if any) for the time being subject thereto insured against loss or damage by fire however caused and against loss or damage by hurricane storm or tempest to the full insurable value thereof in some insurance

office or offices approved of by the Lender and will pay all premiums payable in respect of such insurances at least Seven (7) days before the same shall become due and will assign to the Lender the policy or policies and will on demand produce and deliver to the Lender such policy or policies and the receipt for every premium payable in respect thereof AND THAT if the Borrower shall make default in any of the above matters the Lender may in its discretion insure and keep insured all or any of the said buildings to the full insurable value thereof and that the expense of so doing shall be repaid to the Lender by the Borrower on demand and until so repaid shall be added to the principal moneys hereby secured and bear interest accordingly AND FURTHER the Borrower hereby irrevocably appoints the Lender to be its attorney to ask demand sue for recover and receive and give effectual discharges for all moneys that shall become due or owing or payable to the Borrower under or in respect of any insurances now or hereafter to be effected on the buildings for the time being subject to these presents;

(b) That the Borrower will during the continuance of this security regularly and punctually pay all taxes rates assessments outgoings and impositions whatsoever now or during the continuance of this security to become payable in respect of the said hereditaments and will on demand produce and deliver to the Lender all receipts and vouchers in proof of such payment AND that if the Borrower shall make default in any of the above matters the Lender may at its discretion pay all or any of such taxes rates assessments outgoings and impositions whatsoever and that its expenses of so doing shall be repaid by the Borrower on demand and until so repaid shall be added to the principal monies hereby secured and bear interest accordingly

4. PROVIDED ALWAYS AND IT IS HEREBY EXPRESSLY DECLARED as follows:-

(a) The full amount of the principal outstanding and all interest and arrears of interest hereunder shall forthwith become due and payable and all a Mortgagee's power of sale foreclosure action possession and of appointing a receiver (and any other powers and remedies of a Mortgagee) shall forthwith be available to the Lender in enforcing its security hereunder in the event of any of the

Exhibits

Hackett Bundle Section D Mortgage, Myra Investments Ltd. to Alliance Services Industrial & Commercial Corporation Ltd. 15th November 1969 (cont'd)

following contingencies coming to pass:-

(i) If any instalment of principal and interest or any part thereof shall remain unpaid for fourteen (14) clear days after the same shall have become due (whether formally demanded or not) and the Lender shall have delivered fourteen (14) clear days subsequent notice in writing to the Borrower as to which periods time shall be of the essence of the contract to pay the same and the same shall not have been paid to the Lender at the expiration of the said notice

(ii) If the Borrower shall have a receiving order made against it or shall go into liquidation whether voluntary (save for the purpose of amalgamation or reconstruction only) or compulsory or be struck off the Register of Companies or shall make any assignment for the benefit of its creditors or make any arrangements with its creditors for liquidation of its debts by composition or otherwise

(iii) If there has been a breach of some covenant contained in this Deed or some provision of the Conveyancing and Law of Property Act (or any statutory amendment or re-enactment thereof) and on the part of the Borrower to be observed or performed other than and besides the covenant for repayment of Principal and Interest contained in Clause 4(i) hereof;

(iv) If the Borrower shall make any disposition or otherwise attempt to deal with the equity of redemption in the Mortgaged Property or any part thereof without the written consent of the Lender;

(v) If foreclosure proceedings under any second mortgage or charge in respect of the Mortgaged Property or any sale in connection therewith should be instituted

(b) Any demand for payment or any other demand or notice under this Deed may be made by any

Manager or Officer of the Lender or by the Lender or by the Lender's Attorneys, by letter delivered to the Mortgaged Property, or sent by post addressed to the Borrower at its Registered Office in the Bahamas, and every demand so made shall be deemed both to be made on the day the letter was delivered or two days after the same was posted and also to have been properly delivered or served;

(c) That if the whole sum required to repay the loan hereby secured together with interest thereon as herein provided shall be paid to the Lender on the day of June in the Year of Our Lord One thousand Nine hundred and Seventy according to the foregoing covenant in that behalf the said hereditaments shall at the request and cost of the Borrower be reconveyed to the Borrower or as the Borrower may direct;

(d) Section 19 of The Conveyancing and Law of Property Act shall not apply to these presents;

(e) The powers of leasing conferred on mortgagors by Section 20 of The Conveyancing and Law of Property Act shall not be exercisable by the Borrower without the consent in writing of the Lender;

(f) The Lender shall not be answerable for any involuntary loss happening in or about the exercise or execution of any power conferred on the Lender by these presents or by statute or of any trust connected therewith

5. The Borrower hereby warrants that it has obtained all formal permissions and have complied with all regulations and requirements whether arising under any statute or regulation or order of any governmental or local authority or public body required to be obtained or complied with in respect of the said hereditaments and the erecting and completion of the construction works on part thereof and in particular but without limitation to the generality thereto warrant that it has obtained all necessary approvals from The Grand Bahama Port Authority, Limited and undertakes to comply with any other regulations or requirements whether existing or future which may now or at any later time relate to the foregoing and further agrees to keep the Borrower indemnified in respect of any financial or other obligation arising in respect of any breach of the foregoing warranty and undertaking

Exhibits

THE SCHEDULE HEREINBEFORE REFERRED TO

Hackett Bundle Section D Mortgage, Myra Investments Ltd. to Alliance Services Industrial & Commercial Corporation Ltd. 15th November 1969 (cont'd)

ALL THAT piece parcel or part of a tract of land situate in Lucaya in the City of Freeport in the Island of Grand Bahama one of the said Bahama Islands and containing Three and Three hundred and Four thousandths (3.304) acres which said piece parcel or part of a tract of land is bounded NORTHWARDLY by a road called and known as Royal Palm Way and running thereon Three Hundred (300) feet EASTWARDLY partly by land the property of the Grand Bahama Port Authority, Limited and partly by a Road called and known as Acacia Road and running thereon jointly Four hundred and Seventy-two and Thirty-five hundredths (472.35) feet SOUTHWARDLY by a Road Reservation and running thereon Two hundred and Eighty-seven and Fifty hundredths (287.50) feet and thence again EASTWARDLY partly by the said Road Reservation and running thereon Twelve and Five tenths (12.5) feet and partly also by land the property of Silver Point Limited and running thereon Four hundred and Sixty-four and Eighty-seven hundredths (464.87) feet thence again SOUTHWARDLY by the Sea and running thereon Twelve and Fifty hundredths (12.50) feet and WESTWARDLY by land the property of Bahama Reef Development Company Limited (formerly Bahama Reef Banking & Development Company Limited) and running thereon Nine hundred and Forty-nine and Seventy-two hundredths (949.72) feet which said piece parcel or part of a tract of land has such position shape marks boundaries and dimensions as are shown on the diagram or plan attached to the said Conveyance and is delineated on that part which is coloured Yellow of the said diagram or plan AND TOGETHER WITH the rights of way (in common with all other persons now or hereafter claiming the like right) with and without vehicles for all purposes connected with the lawful use and enjoyment of the said hereditaments over and along the main arterial roads delineated and coloured Pink on the diagrams or plans recorded in the said Registry of Records in Volume 585 at pages 488, 489 and 498 and over and along the road reservation known as the Westerly Extension of Royal Palm Way and delineated and coloured on the said diagram or plan attached to the said Conveyance

IN WITNESS WHEREOF the Borrower has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed Radomski
PRESIDENT

The Common Seal of MYRA INVESTMENTS LIMITED was affixed hereto by Z.W. Radomski the President of the said Company and the said Z.W. Radomski affixed his signature hereto in the presence of:-

Signed Capps
SECRETARY

Exhibits

Hackett Bundle Section D Mortgage, Myra Investments Ltd. to Alliance Services Industrial & Commercial Corporation Ltd. 15th November 1969 (cont'd)

Exhibits

Hackett Bundle Section D Lease, Myra Investments Ltd. to Richard Hackett 5th June 1970

BAHAMA ISLANDS

Grand Bahama

THIS INDENTURE is made the Fifth day of June in the Year of Our Lord One thousand Nine hundred and Seventy BETWEEN Myra Investments Limited a company incorporated under the laws of the Bahama Islands and carrying on business within the Commonwealth (hereinafter called "the Landlord" which expression shall where the context so admits include the person for the time being entitled to the reversion immediately expectant on the determination of the term hereby created) of the first part SILVER SANDS HOTEL LIMITED another company also incorporated under the laws of the Bahama Islands and carrying on business as aforesaid (hereinafter called "the Management Company") of the second part AND RICHARD HACKETT of c/o P.O. Box F.1245 Freeport Grand Bahama Island (hereinafter called "the Tenant" which expression shall where the context so admits include the person for the time being entitled to the term hereby granted) of the third part

WHEREAS:-

A. By an Indenture of Conveyance dated the Eighth day of November in the year of Our Lord One thousand Nine hundred and Sixty-eight (hereinafter called "the Conveyance") made between Polcan Limited of the one part and the Landlord of the other part and recorded in the Registry of Records in the City of Nassau on the Island of New Providence another of the said Bahama Islands in Volume 1369 at pages 587 to 599 the said Polcan Limited granted and conveyed all the hereditaments and premises hereinafter described in the First Schedule hereto (hereinafter called "the said hereditaments") to the Landlord for an estate in fee simple subject to the restrictive covenants more particularly set forth in the Conveyance;

B. The Landlord has completed or is in the process of completing the erection of the said hereditaments of One hundred and Forty-four (144) efficiency type apartments (hereinafter called "the Building");

Exhibits

Hackett Bundle Section D Lease, Myra Investments Ltd. to Richard Hackett 5th June 1970 (cont'd)

C. The Landlord intends to grant or has previously granted leases of apartments and the Landlord has in every lease imposed and intends in every future lease to impose the restrictions set forth in the Second Schedule hereto to the intent that any tenant for the time being of any apartment may be able to enforce the observance and performance of the said restrictions by the tenants or occupiers for the time being of the other apartments;

D. The Landlord has agreed with the Tenant for the granting to the Tenant of a lease of the apartment hereinafter described for the consideration of the sum of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) in the currency of the United States of America or the Bahamian dollar equivalent (hereinafter called "the said currency") and of the rents and on the terms and conditions hereinafter appearing;

E. The Landlord has entered into an agreement with the Management Company in respect to maintenance of the hereditaments and whenever all the apartments have been leased by the Landlord the Maintenance Company has agreed to accept the assignment from the Landlord of the benefits and burdens of the Landlord in respect to maintenance of the hereditaments by covenants to:-

1. Observe and perform the covenants conditions and stipulations contained herein and on the part of the Landlord to observe and perform in respect to maintenance of the hereditaments.

NOW THIS AGREEMENT WITNESSETH as follows:-

1. In pursuance of the said Agreement and in consideration of the said sum of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) in the said currency paid or satisfied to the Landlord by the Tenant (the receipt whereof the Landlord hereby acknowledges) and of the rents covenants and stipulations hereinafter contained and on the part of the Tenant to be paid and observed and performed the Landlord hereby demises unto the Tenant ALL THAT the apartment (hereinafter called "the Apartment")numbered (SEE FIRST SCHEDULE) and being on the floor of the said building (and the internal and external boundary walls of the Apartment and one-half (½) part in depth of the floors and ceilings of the Apartment) (the

Exhibits

Hackett Bundle Section D Lease, Myra Investments Ltd. to Richard Hackett 5th June 1970 (cont'd)

Apartment being sometimes hereinafter called "the demised premises") TOGETHER WITH the easements rights and privileges mentioned in the Third Schedule hereto EXCEPTING AND RESERVING as mentioned in the Schedule hereto TO HOLD the same unto the Tenant from the date of these presents until the 4th day of June in the year of Our Lord Two thousand and Sixty-nine (hereinafter called "the said term")

YIELDING AND PAYING THEREFORE:-

(a) FIRSTLY the rent for Forty dollars ($40.00) in the said currency on the First day of each and every month during the said term clear of all deductions whatsoever; and

(b) SECONDLY by way of a further or additional rent in respect to each maintenance period (as hereinafter defined) during the said term clear of all deductions whatsoever a sum of money equal to One hundred and Forty-fourths (1/144) part of the maintenance expenses (as hereinafter defined) and it is hereby declared that:-

a. For the purposes of this sub-clause the term "maintenance period" shall mean each month during the term hereby created commencing on the First day of each and every month and ending on the Last day of each and every month during the said term;

b. For the purposes of this sub-clause the term "maintenance expenses" shall mean the amount expended by the Landlord during each maintenance period in respect of:-

(i) The cost of effecting and maintaining the insurance on the said building and all other structures from time to time on the said hereditaments against loss or damage by fire hurricane storm tempest sea wave riots and malicious damage and all such other risks as the Landlord can from time to time determine to be in the best interests of the Landlord and the tenants of the said building;

(ii) The costs expenses and outgoings incurred by the Landlord in respect to the matters hereinafter mentioned in the Fourth Schedule hereto.

c. The said One hundred and Forty-fourth (1/144) part of the maintenance expenses shall be

payable by the Tenant to the Landlord or the Management Company whichever the case may be on the written request of the Landlord or the Management Company whichever the case may be (hereinafter called "the rental request") made after the end of each maintenance period;

d. At any time or times during each maintenance period (and provided that similar notices are sent out simultaneously by the Landlord or the Management Company whichever the case may be to all other tenants of the said building) the Landlord or the Management Company whichever the case may be may serve written notice on the Tenant (hereinafter referred to as "an Assessment Notice") notifying the Tenant of the amount which the Landlord or the Management Company whichever the case may be bona fide estimates to be the maintenance expenses in respect of such part of that maintenance period as is specified in that Assessment Notice and thereupon the Tenant shall pay forthwith to the Landlord or the Management Company whichever the case may be a sum of money equal to One hundred and Forty-fourth (1/144) part of the amount mentioned in such Assessment Notice.

2. The Tenant so that this covenant shall be for the benefit and protection of the said building and the other tenants thereof and every part thereof hereby covenants with every tenant for the time being of any other part of the said building that the Tenant and all persons deriving title through or under the Tenant will at all times hereafter observe and perform the restrictions set forth in the Second Schedule hereto.

3. The Tenant to the intent that the obligations may continue throughout the said term hereby covenants with the Landlord as follows:-

(1) To pay the rents hereby reserved during the said term at the times and in the manner aforesaid without any deductions.

(2) To bear pay and discharge all rates taxes duties assessments charges impositions and outgoings which may at any time during the said term be assessed charged or imposed upon the demised premises or the owner or occupier in respect thereof except Real Property Taxes imposed in addition thereto or in substitution

therefor in respect of the said building and not merely in respect of the demised premises or any part thereof (which Real Property Taxes or any taxes imposed in addition thereto or in substitution therefore are hereinafter referred to in sub-clause Three (3) of clause Five (5) hereof).

(3) Not to make any structural alterations or structural additions to the demised premises or remove any of the Landlord's fixtures without the previous consent in writing of the Landlord and not to cut maim or injure or suffer to be cut maimed or injured any walls or timbers therein.

(4) To pay all costs charges and expenses (including attorneys' costs and surveyors' fees) incurred by the Landlord for the purpose of or incidental to the preparation and service of a notice under Section 16 of The Conveyancing and Law of Property Act requiring the Tenant to remedy a breach of any covenants or conditions on the part of the Tenant herein contained notwithstanding forfeiture for such breach shall be avoided otherwise than by relief granted by the Court.

(5) Forthwith after service upon the Tenant of any notice affecting the demised premises or the said building or any part thereof respectively served by any person body or authority (other than the Landlord) to deliver a true copy thereof to the Landlord and if so required by the Landlord to join with the Landlord in making such representation to any such person body or authority concerning any proposals affecting the demised premises and the said building or any part thereof respectively as the Landlord may consider advisable and to join with the Landlord in any appeal against any order or direction affecting the demised premises and the said building or any part thereof respectively as the Landlord may consider desirable.

(6) At all reasonable times during the said term on notice to permit the Landlord and the tenants of adjoining or contiguous premises with workmen and others to enter into and upon the demised premises or any part thereof for the purpose of maintaining repairing testing or rebuilding any adjoining or contiguous premises in the said building or any part thereof or any utility service thereto or any convenience or thing belonging to serving or used for the same

the Landlord or the said tenants (as the case may be) making good all damage occasioned thereby to the demised premises.

(7) To permit the Landlord and its servants or agents with or without workmen at all reasonable times subject to prior notification by the Landlord to the Tenant to enter into and upon the demised premises to examine the state and condition of the same and to take inventories of the Landlord's fixtures therein and otherwise to exercise any right or power reserved to the Landlord.

(8) At the expiration or sooner determination of the said term peaceably to surrender and yield up to the Landlord all and singular the demised premises together with all additions thereto and all Landlord's fixtures and fittings (if any) in good and tenantable repair and condition (fair wear and tear excepted).

(9) To pay to the Landlord all legal costs in respect to the execution of these presents including attorneys' fees stamp duties recording fees and all mortgage expenses (if any).

(10) The Tenant being the hold of THIRTY (30) ordinary shares of the Management Company hereby covenants with the Landlord that except upon or immediately before and in contemplation of an assignment of this lease the Tenant will not sell mortgage charge assign transfer dispose of or part with the said share or shares or any of them during the continuance of the term hereby created.

4. The Tenant hereby covenants with the Landlord and with the tenants for the time being of other parts of the said building that the Tenant and all persons deriving title through or under the Tenant will at all times hereafter:-

(1) Keep the demised premises including party walls and appurtenances thereto belonging in good and tenantable repair and condition and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the parts of the said building other than the demised premises.

(2) Not to do or permit to be done any act or thing which may render void or voidable any policy or policies of insurance on or relating to the said building or any part thereof or cause

Exhibits

Hackett Bundle
Section D
Lease, Myra Investments Ltd. to Richard Hackett 5th June 1970 (cont'd)

the premiums payable in respect thereof to be increased.

5. The Landlord or the Management Company whichever the case may be to the intent that the obligations may continue throughout the said term hereby covenants with the Tenant as follows:-

(1) That the Tenant paying the rents hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on the Tenant's part to be performed and observed shall and may peaceably and quietly hold and enjoy the demised premises during the said term without any lawful interruption or disturbance from or by the Landlord or any person rightfully claiming under or in trust for it.

(2) That the Landlord will at all times during the said term (unless such insurance shall be vitiated by any act or default of the Tenant or occupiers of the tenants or occupiers of any other part of the said building) insure and keep insured the said building and all other structures from time to time on the said hereditaments against loss or damage by fire hurricane storm tempest sea wave riots and malicious damage and such other risks as the Landlord shall from time to time determine to be in the best interests of the Landlord and the tenants of the said building in some insurance office of repute (which term shall include the underwriters of Lloyds of London) to the full insurable value thereof and will whenever required produce to the Tenant the policy or policies of such insurances and the receipt for the last premium for the same and will apply all monies received by virtue of such insurance in making good the loss or damage in respect of which the same shall have been received.

(3) To bear pay and discharge all rates taxes duties assessments charges impositions and outgoings which may at any time during the said term be assessed charged or imposed upon the said building as a whole or upon the said hereditaments and not merely in respect of the demised premises or any part thereof (other than rates taxes duties assessments charges impositions and outgoings assessed charged or imposed upon the Tenant or occupier of any apartment in the said building) including Real Property Taxes or any taxes imposed in addition thereto or in substitution therefore.

(4) That the Landlord will require every person to whom it shall hereafter grant a

lease of any part of the said building to covenant to observe the restrictions set forth in the Second Schedule hereto.

(5) That (subject to the payment of the rents firstly and secondly hereinbefore reserved and of all amounts payable under sub-paragraph (b) of clause One (1) of these presents at the times and in the manner hereinbefore provided and to the observance and performance of the covenants and stipulations herein contained and on the part of the Tenant to be observed and performed the Landlord will carry out and perform or arrange for the carrying out and performance of the several matters and things hereinafter mentioned and set out in the Fourth Schedule hereto and will defray the costs and expenses thereof.

(6) That (if so required by the Tenant) the Landlord will enforce the covenants similar to those contained in clause Four (4) hereof entered into or to be entered into by the tenants of other parts of the said building on the Tenant indemnifying the Landlord against all costs and expenses in respect of such enforcement and providing such security in respect of costs and expenses as the Landlord may reasonably require.

(7) That all leases of any part of the said building for a term in excess of Two (2) years granted or to be granted by the Landlord shall contain substantially the same covenants stipulations and conditions as are herein set forth except as to the dates of such leases the amounts of money payable in respect of maintenance expenses the amount of the consideration payable under clause One (1) hereof the commencing dates of such leases.

(8) That upon the execution of these presents to cause the Management Company to transfer THIRTY (30) share or shares to the Tenant for the sum of THIRTY DOLLARS ($30.00) Bahamian currency.

6. IT IS HEREBY MUTUALLY AGREED AND DECLARED as follows:-

(1) That during the term hereof if the rents hereby reserved or any part thereof shall at any time be in arrear and unpaid (whether formally demanded or not) for Thirty (30) days after the same shall become due and payable or if any amount payable under an Assessment Notice

Exhibits

Hackett Bundle Section D Lease, Myra Investments Ltd. to Richard Hackett 5th June 1970 (cont'd)

served on the Tenant pursuant to paragraph One (1) of sub-clause (d) of clause One (1) of these presents of such Assessment Notice the Landlord or the Management Company may give the Tenant notice in writing to that effect and if on the expiration of Twenty-five (25) days after service of the said notice in writing on the Tenant the said rents or any part thereof respectively or the said amount payable under an Assessment Notice as aforesaid or any part thereof are or is still unpaid then and in any such case it shall be lawful for the Landlord or the Management Company whichever the case may be at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely cease and determine but without prejudice to any right of action of the Landlord or the Management Company whichever the case may be in respect of any antecedent breach of the Tenant's covenants or the provisions and stipulations herein contained.

(2) That during the term hereof if any covenant or stipulation on the part of the Tenant herein contained (other than for the payment of rent and the amount payable under any Assessment Notice) shall not be performed or observed then the Landlord or the Management Company whichever the case may be give the Tenant notice in writing to that effect (hereinafter in this sub-clause called "the First Notice") and if the Tenant shall fail to remedy the said breach for Twenty-five (25) days after service of the First Notice on the Tenant the Landlord or the Management Company whichever the case may be may give the Tenant notice in writing to this effect (hereinafter in this sub-clause called "the Second Notice") and if on the expiration of Twenty-five (25) days after service of the Second Notice on the Tenant the Tenant shall still have failed to remedy the said breach or shall not have taken steps to commence to remedy the said breach or default complained of and is not proceeding with reasonable diligence in curing the said breach or default then and in any such case it shall be lawful for the Landlord or the Management Company whichever the case may be at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely cease and determine but without prejudice to any right of action of the Landlord or the Management Company whichever the case may be in respect of any antecedent breach of the Tenant's covenants or the provisions

and stipulations herein contained.

(3) That during the term hereof if the Tenant not being a corporation shall become subject to the bankruptcy laws or make any arrangement with the Tenant's creditors for the liquidation of the Tenant's debts by composition or otherwise or if the Tenant being a corporation shall be wound up either voluntarily (save for the purpose of reconstruction) or compulsorily then and in any such case it shall be lawful for the Landlord at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely cease and determine but without prejudice to any right of action of the Landlord in respect of any antecedent breach of the Tenant's covenants or the provisions and stipulations hereinafter contained.

(4) Any notice to be served hereunder on the Tenant shall be served by delivering the same to the Tenant personally (or the Tenant being a corporation by delivering the same at the Registered Office of the Tenant in the Colony) or by sending the same to the Tenant by prepaid registered mail to the last known address of the Tenant in the Colony (or the Tenant being a corporation to its Registered Office as aforesaid) with a copy thereof sent by prepaid registered mail to RICHARD HACKETT at the before mentioned address with a further copy thereof sent by prepaid registered mail to BAINBRIDGE CALDWELL INGRAHAM & CO. P.O. BOX 2515 FREEPORT or to such other address or addresses (not exceeding Two (2) in number) as may be from time to time notified by the Tenant to the Landlord in writing and in the case of the Landlord shall be sufficiently served on the Landlord by delivering the same at the Registered Offices of the Landlord in the Colony or by sending the same by prepaid registered mail to the Registered Office of the Landlord in the Colony or to such other address or addresses as may be from time to time notified by the Landlord to the Tenant in writing. Any notice posted in the Colony to an address outside of the Colony or any notice posted outside of the Colony to an address in the Colony shall be sent by airmail. Any notice sent by post shall be deemed to be given and served at the time when in due course of post it would be delivered at the address to which it is sent.

Exhibits

Hackett Bundle
Section D
Lease, Myra
Investments
Ltd. to Richard
Hackett 5th
June 1970
(cont'd)

7. Notwithstanding anything herein contained the Tenant hereby admits and acknowledges that the Landlord which expression shall include its directors and officers has not made any representations or warranties of any kind whatsoever as to the rent or maintenance expenses hereby reserved notwithstanding any statements made or any figures or information contained in any brochure publication or advertising material whatsoever published or issued or circulated by or on behalf of the Landlord and if (notwithstanding such admission and acknowledgement) there may have been any such representations or warranties the Tenant hereby releases and discharges the Landlord from all claims demands causes of action and suits whatsoever which the Tenant now has or at any time hereafter may have by virtue of such representation or warranties or any of them or for or in respect of any matter or thing in anywise relating thereto.

8. In the interpretation of these presents words importing persons shall include corporations and vice versa the masculine gender shall include the feminine gender and vice versa and words importing the singular number only shall include the plural number and vice versa.

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO

ALL that Apartment numbers B 101, B 102, B 103, B 104, B 105, B 106, B 107, B 109, B 110, B 111, B 112, B 113, B 114, B 115, B 116, B 117, B 200, B 204, B 302, B 304, B 403, B 408, B 409, B 411, A 115, A 405, A 407, A 411, A 413, A 403, situated in buildings numbered A & B Kismet Apartments, Freeport, Grand Bahamas.

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

1. Not to use the demised premises nor permit the same to be used for any purpose whatsoever other than as a private dwelling-house in the occupation of one family their guests and servants nor to use or permit the same to be used or any illegal objectionable or immoral purpose and not to do or permit any act or thing in or about the demised premises or in or about the said building or the said hereditaments which may be or become a nuisance or annoyance to the tenants or occupiers of any part of the said building.

2. Not to throw dirt rubbish rags or other refuse or permit the same to be thrown into the

sinks baths lavatories cisterns or waste or soil pipes of the demised premises or on or into any part of the said building or the said hereditaments.

3. No name writing drawing signboard plate placard or advertising device of any kind shall be put on or in any window on the exterior of the demised premises or so as to be visible from the outside of the demised premises and only the name of the occupant of the demised premises shall be displayed at the entrance to the demised premises.

4. The exterior of the demised premises shall not be decorated otherwise in a manner agreed to in writing by the Landlord.

THE THIRD SCHEDULE HEREINBEFORE REFERRED TO

1. Full right and liberty for the Tenant and all persons authorised by the Tenant (in common with the Landlord and all other persons authorised by it) at all times by day and by night and for all lawful purposes:-

(a) With or without motor cars and other vehicles to go pass and repass along over and upon the driveways leading to and from the said building;

(b) On foot only to go pass and repass along over upon and through the forecourt main entrance passages landings and staircases in the said building and along over and upon the foot-paths in the gardens and grounds of the said building.

2. The right to subjacent and lateral support and to shelter and protection from the other parts of the said building wherein the demised premises are situate and from the site and roof thereof.

3. The free and uninterrupted passage and running of water electricity gas and other utilities and soil and waste from and to the demised premises through the sewers drains water-courses cables pipes wires and apparatus which now are or may at any time hereafter be in under or passing through the said building or the said hereditaments or any part thereof.

Exhibits

Hackett Bundle Section D Lease, Myra Investments Ltd. to Richard Hackett 5th June 1970 (cont'd)

4. The right for the Tenant with servants workmen and others at all reasonable times on notice (except in the case of emergency) to enter into and upon other parts of the said building for the purpose of repairing maintaining renewing altering or rebuilding the demised premises.

5. The benefit of the restrictions contained in the leases of other parts of the said building granted or to be granted.

THE FOURTH SCHEDULE HEREINBEFORE REFERRED TO

1. The maintenance repair redecoration and renewal of the following that is to say:-

(a) The exterior of the said building and all other structures from time to time on the said hereditaments including the respective roofs gutters and rain water pipes thereof;

(b) The utility services to and in the said building (including all wires pipes apparatus and means of transmitting or conveying the same to and in the said building) and all other structures from time to time on the said hereditaments;

(c) The elevators entrances passages landings staircases and service rooms (including manager's accommodation and servant's quarters and changing rooms and washrooms) of the said building and the swimming pool (and all machinery pumps apparatus and things used in connection therewith) and patios porches and forecourts of the said building;

(d) The gardens and grounds of the said building the driveway and footpaths therein and the boundary walls and fences thereof; and

(e) All other parts of the said building and the said hereditaments not specifically demised to any tenant therein.

2. The lighting cleansing operating and supplying of utility services to or for the grounds gardens elevators entrances passages landings staircases and service rooms (including manager's accommodation and servants' quarters and changing rooms and the washrooms) of the said building and the apparatus and things used in connection therewith.

3. All other matters and things which may be necessary for the maintenance and operation of

the said building and the said hereditaments as a first-class residential co-operative apartment operation (including a manager's salary and the payment of any rates taxes duties assessments charges impositions and outgoings payable by the Landlord).

4. The employment of all personnel necessary for the maintenance and operation of the said building and the said hereditaments as a first-class residential co-operative apartment operation.

IN WITNESS WHEREOF the Landlord has caused its Common Seal to be hereunto affixed

Signed Radomski

The Common seal of Myra Investments Limited was affixed hereto by Z.W. Radomski the President of the said Company and the said Z.W. Radomski affixed his signature hereto in the presence of:-

Signed Dena Lippy

(If Tenant Individual) IN WITNESS WHEREOF the Tenant has hereunto set his/her hand and seal

Signed R Hackett

Signed Sealed and Delivered by the said

in the presence of:-

Signed Illegible

(If Tenant Company) IN WITNESS WHEREOF the Tenant has caused its Common Seal to be hereunto affixed

The Common Seal of
was affixed hereto by
the President of the said Company and the said
affixed his signature
hereto in the presence of:-

IN WITNESS WHEREOF the Management Company has caused its Common Seal to be hereunto affixed

Signed Radomski

Exhibits

Hackett Bundle Section D Lease, Myra Investments Ltd. to Richard Hackett 5th June 1970 (cont'd)

The Common Seal of SILVER SANDS HOTEL LIMITED was affixed hereto by Z.W. Radomski the President of the said Company and the said Z.W. Radomski affixed his signature hereto in the presence of:-

Signed Dena Lippy

BAHAMA ISLANDS

Grand Bahama

I, DENA LIPPY ASSISTANT SECRETARY of SILVER SANDS HOTEL LIMITED (hereinafter called "the Company") make oath and say that I was present and saw the Common Seal of the Company affixed to the annexed Indenture of Lease dated the 5th day of June in the year of Our Lord One thousand Nine hundred and Seventy by Z.W. RADOMSKI PRESIDENT of the Company and that I saw the said Z.W. RADOMSKI sign execute and deliver the said Indenture of Lease as and for the Act and Deed of the Company and for the purposes therein mentioned; and that I subscribed my name as the witness to the due execution thereof. And Further that the Seal affixed and impressed at the foot or end of the said Indenture of Lease is the Common Seal of the Company and was affixed and impressed thereto by the said Z.W. RADOMSKI by order and with the authority of the Board of Directors of the Company and in conformity with the Articles of Association of the Company.

Sworn to this 5th day) of June A.D., 1970) Signed Dena Lippy

Before me,

Signed Illegible

NOTARY PUBLIC

BAHAMA

Grand Bahama

I, DENA LIPPY ASSISTANT SECRETARY of Myra Investments Limited (hereinafter called "the Company") make oath and say that I was present and saw the Common Seal of the Company affixed to the annexed Indenture of Lease dated the 5th day of June in the year of Our Lord One thousand Nine hundred and Seventy by Z.W. Radomski the President

of the Company and that I saw the said Z.W. Radomski sign execute and deliver the said Indenture of Lease as and for the Act and Deed of the Company and for the purposes therein mentioned; and that I subscribed my name as the witness to the due execution thereof. And Further that the Seal affixed and impressed at the foot or end of the said Indenture of Lease is the Common Seal of the Company and was affixed and impressed thereto by the said Z.W. Radomski by order and with the authority of the Board of Directors of the Company and in conformity with the Articles of Association of the Company.

Sworn to this 5th day of June A.D., 1970) Signed Dena Lippy

Before me, Signed Illegible

NOTARY PUBLIC

BAHAMA ISLANDS

Grand Bahama

I, Isabelle Russell of the City of Freeport of the Island of Grand Bahama make oath and say that I was present and saw Richard Hackett of the City of Freeport aforesaid sign seal and as and for his Act and Deed execute and deliver the annexed Indenture of Lease dated the 5th day of June in the year of Our Lord One thousand Nine hundred and Seventy for the purposes therein mentioned; and that I subscribed my name as the witness to the due execution thereof.

Sworn to this 5th day of June A.D., 1970) Signed Isabelle Russell

Before me, Signed Illegible

NOTARY PUBLIC

Exhibits

Hackett Bundle Section D Mortage amendment, Myra Investments Ltd. to Alliance Services Industrial and Commercial Corporation Ltd. 1st July 1970

Hackett Bundle, Section D. Mortgage amendment, Myra Investments Ltd. to Alliance Services Industrial and Commercial Corporation Ltd.

THIS INDENTURE made as of the 1st day of July, 1970

B E T W E E N :

MYRA INVESTMENTS LIMITED, a company incorporated under the laws of the Bahama Islands, (hereinafter called the "Borrower") OF THE FIRST PART,

and

ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED, a company incorporated under the laws of the Bahama Islands, (hereinafter called the "Lender") OF THE SECOND PART,

WHEREAS by Indenture dated the 15th day of November, 1969 and registered in accordance with the provisions of the Registration Records Act (Bahamas) in the Registry of Records in the City of Nassau, Island of New Providence, one of the Bahama Islands in book 1543 at pages 185 to 194, the Borrower did grant, convey and mortgage ALL AND SINGULAR that certain parcel or part of a tract of land situate in Lucaya, in the City of Freeport, in the Island of Grand Bahama, one of the Bahama Islands containing 3.304 acres as more particularly described in Schedule A annexed hereto to the Lender to secure the principal sum of Six Hundred and Ninety-five Thousand Dollars ($695,000) Canadian;

AND WHEREAS the time for payment of the said principal moneys elapsed on the 30th day of June 1970 and no payments on account of principal or interest have been made;

AND WHEREAS the Borrower has applied for an amendment of the said indenture and an extension of the time for payment of the principal and interest owing under the said indenture;

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the premises and the sum of One ($1.00) Dollar now paid by each of the parties hereto to the other (the receipt of which is hereby

acknowledged) the parties hereto hereby covenant and agree as follows:

Exhibits

Hackett Bundle Section D Mortgage amendment, Myra Investments Ltd. to Alliance Services Industrial and Commercial Corporation Ltd. 1st July 1970 (cont'd)

1. The Borrower acknowledges receipt of the full principal amount of $695,000 (Canadian) advanced or to be advanced pursuant to the said indenture.

2. The said indenture is hereby amended as follows:

(a) the Borrower shall pay interest on the said principal sum of $695,000 (Canadian) (or on so much thereof as shall from time to time remain unpaid) at the rate of 15% per annum from and after the 1st day of July, 1970 calculated half yearly not in advance,so long as any principal money remains due under the said indenture;

(b) the Borrower shall pay the sum of $15,000 on account of principal and interest on the 15th day of each and every month from and including the 15th day of January, 1971 to and including the 15th day of June, 1971;

(c) the balance of the said principal sum together with interest thereon as provided in the said indenture as amended hereby shall be due and payable on June 30, 1971 and the date of maturity of the said indenture is hereby extended to June 30, 1971.

3. As further security for the due payment of the said principal sum of $695,000 (Canadian) and interest as aforesaid the Borrower shall provide the Lender or its solicitors, Messrs. Davies, Ward & Beck, Toronto, Ontario, Canada, with the following:

(i) on or before December 10, 1970 certificates representing all the issued and outstanding shares in the capital of the Borrower duly endorsed in blank for transfer and in marketable form, to be held as general and continuing collateral security and as a pledge to secure all moneys advanced to the Borrower under the said mortgage together with a duly executed pledge agreement in a form satisfactory to counsel for the Lender;

Exhibits

Hackett Bundle Section D Mortgage amendment, Myra Investments Ltd. to Alliance Services Industrial and Commercial Corporation Ltd. 1st July 1970 (cont'd)

(ii) on or before December 10, 1970 financial statements for an annual period ending not earlier than August 31, 1970 of the Borrower and Jack Spanton, Z.W. Radomski, and Gerald Nelson Capps, who are the sole owners of the Borrowers; and

(iii) upon or before good and sufficient evidence that the Borrower has purchased and accepted delivery of suitable furnishings, equipment, goods, chattels and fixtures in an amount of not less than $27,000 as more particularly described in Schedule B attached hereto, and has used such equipment, goods, chattels, furnishings and fixtures to furnish eighteen (18) suites in the building presently erected on the said lands;

[The document as signed by the parties contains these clauses, but crossed out and deletions initialled by Radomski and Dena Lippy - (this is referred to in judgement of V.O. Blake J @ p 97 supra of the record)

(iv) upon or before 15th JAN., 1971 good and sufficient evidence that the Borrower has leased the necessary hotel equipment to equip the building presently erected on the said lands as a commercial hotel;

(v) upon or before 15th JAN., 1971 good and sufficient evidence that the Borrower has paid $90,000 to the customs authorities of the Bahama Islands on account of customs duty due and owing by the Purchasers of suites in the building presently erected on the said lands with regard to the importation of the furniture for such suites.

If the provisions of this paragraph 3 have not been completed and complied with by the dates hereinbefore specified, sub-paragraphs (b) and (c) of paragraph 2 hereof shall be null and void and of no further effect and the full amount of the said principal sum together with interest as provided in the said indenture and in sub-paragraph (a) of paragraph 2 hereof shall forthwith become due and payable.

4. Save and except as herein amended, all the terms and conditions of the said indenture shall

remain the same and nothing in this agreement shall affect or prejudice the rights of the Lender as against the Borrower or as against any surety or guarantor for the payment of any moneys under the said indenture or any part thereof or as against any collateral security which the Lender may now or hereafter hold in respect of the said indenture.

5. The Borrower shall execute such deeds, documents or assurances as counsel for the Lender may advise in order to more effectually carry out the terms of this agreement.

6. The provisions of this agreement shall extend to and be binding upon and ensure to the benefit of the respective successors and assigns of each of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereto affixed their respective corporate seals under the hands of their respective proper officers duly authorized in that behalf.

IN WITNESS WHEREOF the Borrower has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed Radomski
PRESIDENT

The Common seal of MYRA INVESTMENTS LIMITED was affixed hereto by Z.W. Radomski, the President of the said Company and the said Z.W. Radomski affixed his signature hereto in the presence of:-

Signed Dena Lippy
ASST. SECRETARY

IN WITNESS WHEREOF the Lender has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed Illegible
President

The Common Seal of ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED was affixed hereto by John W. Millican, the President of the said Company and the said John W. Millican affixed his signature hereto in the presence of:-

Signed Illegible
Secretary

Exhibits

Hackett Bundle Section D Mortgage amendment, Myra Investments Ltd.to Alliance Services Industrial and Commercial Corporation Ltd. 1st July 1970 (cont'd)

SCHEDULE A

ALL THAT piece, parcel or part of a tract of land situate in Lucaya in the City of Freeport in the Island of Grand Bahama, one of the said Bahama Islands and containing Three and Three Hundred and Four Thousandths (3.304) acres which said piece, parcel or part of a tract of land is bounded NORTHWARDLY by a road called and known as Royal Palm Way and running thereon Three Hundred (300) feet EASTWARDLY partly by land the property of The Grand Bahama Port Authority, Limited and partly by a road called and known as Acacia Road and running thereon jointly Four Hundred and Seventy-two and Thirty-five Hundredths (472.35) feet SOUTHWARDLY by a Road Reservation and running thereon Two Hundred and Eighty-seven and Fifty Hundredths (287.50) feet thence again EASTWARDLY partly by the said Road Reservation and running thereon Twleve and Five tenths (12.5) feet and partly also by land the property of Silver Point Limited and running thereon Four Hundred and Sixty-four and Eighty-seven Hundredths (464.87) feet thence again SOUTHWARDLY by the Sea and running thereon Twelve and Fifty Hundredths (12.50) feet and WESTWARDLY by land the property of Bahama Reef Development Company Limited (formerly Bahama Reef Banking & Development Company Limited) and running thereon Nine Hundred and Forty-nine and Seventy-two Hundredths (949.72) feet which said piece, parcel or part of a tract of land has such position, shape, marks, boundaries and dimensions as are shown on the diagram or plan attached to the said Conveyance and is delineated on that part which is coloured Yellow of the said diagram or plan AND TOGETHER WITH the rights of way (in common with all other persons now or hereafter claiming the like right) with and without vehicles for all purposes connected with the lawful use and enjoyment of the said hereditaments over and long the main arterial roads delineated and coloured Pink on the diagrams or plans recorded in the said Registry of Records in Volume 585 at pages 488, 489 and 498 and over and along the Road Reservation known as the Westerly Extension of Royal Palm Way and delineated and coloured on the said diagram or plan attached to the said Conveyance.

COMMONWEALTH OF THE BAHAMA ISLANDS

GRAND BAHAMA

Freeport

I, GERALD NELSON CAPPS of the City of Freeport in the Island of Grand Bahama one of the Bahama Islands, Secretary of MYRA INVESTMENTS LIMITED (hereinafter called "the Company") make Oath and say that I was present and saw the Common Seal of the Company affixed to the annexed Indenture of Mortgage dated the 15th day of November, A.D. 1969 by Z.W. Radomski the President of the Company and that I saw the said Z.W. Radomski sign, execute and deliver the said Indenture of Mortgage as and for the Act and Deed of the Company and for the purposes mentioned therein and that I subscribed my name as the witness to the due execution thereof. And Further that the seal affixed and impressed at the foot or end of the Conveyance is the Common Seal of the Company and was affixed and impressed thereto by the said Z.W. Radomski by the order and with the authority of the Board of Directors of the Company and in conformity with the Articles of Association of the Company.

SWORN TO this 25th day of November, A.D. 1969) Signed G.N. CAPPS

Before me, Signed Illegible
NOTARY PUBLIC

Exhibits

Hackett Bundle, Section D. Notice to Myra Investments Ltd.

Hackett Bundle Section D Notice to Myra Investments Ltd. 29th June 1972

COMMONWEALTH OF THE BAHAMA ISLANDS

GRAND BAHAMA

Freeport

TO: MYRA INVESTMENTS LIMITED
and their attorneys
E. DAWSON ROBERTS & CO.,
CHAMBERS,
FREEPORT, GRAND BAHAMA.

AS ATTORNEYS for Alliance Services Industrial & Commercial Corporation Limited a company incorporated under the laws of the Bahama Islands and carrying on business within the Commonwealth WE HEREBY GIVE YOU NOTICE that you are in default under the terms and conditions of an Indenture of Mortgage made the 15th day of November 1969 between yourselves of the one part and Alliance Services Industrial & Commercial Corporation Limited of the other part as amended by an Indenture between the same parties made the 1st July 1970 in that principal payments as of the date hereof are four and one-half months in arrears and WE HEREBY REQUIRE YOU TO PAY to Alliance Services Industrial & Commercial Corporation Limited forthwith the principal sum outstanding as at the 15th day of June 1972 together with all interest accrued thereon at the rate referred to in the Indenture of Mortgage as amended by the said Indenture of the 1st July 1970.

AND WE FURTHER GIVE YOU NOTICE that if you make default in doing so for fourteen (14) days after the service of this Notice in accordance with Clause 4 (a) (i) of the said Indenture of Mortgage of the 15th November 1969 the said Alliance Services Industrial & Commercial Corporation Limited will exercise their powers statutory and otherwise as mentioned in the said Indenture of Mortgage as they shall think fit.

dated this Twenty-ninth day of June, A.D.1972

DUPUCH & TURNQUEST
Attorneys for and on behalf of
Alliance Services Industrial
& Commercial Corporation Limited

Hackett Bundle, Section E. Letter Kendal Nottage & Co., to Dupuch & Turnquest

Exhibits

Hackett Bundle Section E Letter, Kendal Nottage & Co., to Dupuch & Turnquest 4th March 1974

Dupuch & Turnquest
Counsel & Attorneys-at-Law
P.O. Box F. 2578
Freeport,
Grand Bahama,
Bahamas.

4th March 1974

Attention: Terrance Gape, Esquire

Dear Sirs,

Re: Apartment 104 "A" Silver Sands

We represent Mrs. Mary Robinson who is about to take an assignment of the above-mentioned apartment from Yule Enterprises Limited which said Company holds a ninety-nine (99) year lease on the said apartment.

We have been informed that the building in which the said apartment is situate, is subject to a mortgage held by Alliance Services Industrial and Commercial Corporation Limited.

We enclose herewith a copy of a letter dated the 13th February, 1974 over the signature of Mr. Roger Alyen, of Callenders, Orr, Pyfrom and Roberts, the Attorneys for the Vendor suggesting that permission was granted by the Mortgagee to lease the premises for ninety-nine (99) years.

We would appreciate a written confirmation of same by you as Attorneys for the Mortgagee.

Yours faithfully,
KENDAL NOTTAGE & CO.

Hedwige S.K. Bereaux

HSKB/bcc

Enclosure

Exhibits

Hackett Bundle
Section E
Letter,
Dupuch &
Turnquest to
Kendal
Nottage & Co.
12th March
1974

Hackett Bundle, Section E. Letter Dupuch & Turnquest to Kendal Nottage & Co.

DUPUCH & TURNQUEST
COUNSEL AND ATTORNEYS-AT-LAW
CHAMBERS

SHIRLEY STREET
P.O. BOX N 8181
NASSAU, BAHAMAS

12th March, 1974

Hedwige S.K. Bereaux, Esq.,
Messrs. Kendal Nottage & Co.,
Chambers,
P.O. Box F-520,
Freeport, Grand Bahama.

Dear Mr. Bereaux,

Re: Apartment 104A Silver Sands

We thank you for your letter of the 4th instant.

We confirm that it is our understanding that the subject building is under a mortgage to our clients, Alliance Services Industrial and Commercial Corporation Ltd., and that our records show no consent having been given by our clients with respect to an assignment of the subject apartment.

The relevant clause in the Mortgage, we believe, provides that written consent must be given by the mortgagee before any assignment of the premises, and we can only say that we find it curious that, as attorneys to the mortgagee, our not having indicated the withholding of consent on behalf of our clients could be construed as having given written consent.

In any event, we have written our clients and await their reply.

Yours very truly,

DUPUCH & TURNQUEST

Signed T.R.H. GAPE
TERENCE R.H. GAPE

TRHG/jg

Hackett Bundle, Section E. Letter Dupuch & Turnquest to Kendal Nottage & Co.

Exhibits

Hackett Bundle Section E Letter, Dupuch & Turnquest to Kendal Nottage & Co. 3rd May 1974

DUPUCH & TURNQUEST
COUNSEL AND ATTORNEYS-AT-LAW
CHAMBERS

SHIRLEY STREET
P.O. BOX N 8181
NASSAU, BAHAMAS

Please direct reply to our Freeport Office

3rd May, 1974

Hedwige S.K. Bereaux, Esq.,
Messrs. Kendal Nottage & Co.,
Mercantile Bank Building,
Freeport, Grand Bahama.

Dear Hedwige,

Re: Mary Robinson -- Yule Enterprises Limited Apartment 104, Silver Sands

We have been instructed by our clients, Alliance Services Industrial & Commercial Corporation Limited, that they have not in the past consented as Mortgagees to an assignment of Lease of Apartments in Silver Sands nor do they consent to the subject Assignment of Lease.

Yours sincerely,

DUPUCH & TURNQUEST

TERENCE R.H. GAPE
(Dictated by Mr. Gape and signed in his absence.)

Hackett Bundle Section D Agreement, Alliance Services Industrial & Commercial Corporation Ltd. and Gleneagles Investment Co. Ltd. 28th October 1974

COMMONWEALTH OF THE BAHAMAS

GRAND BAHAMA

Freeport

THIS AGREEMENT made this 28th day of October in the Year of Our Lord One thousand Nine Hundred and Seventy-four BETWEEN ALLIANCE SERVICES INDUSTRIAL & COMMERCIAL CORPORATION LIMITED a Company incorporated under the laws of the Commonwealth of the Bahamas and carrying on business within the Commonwealth (hereinafter called "the Vendor") of the one part AND GLENEAGLES INVESTMENT COMPANY LIMITED a Company also incorporated under the laws of the Commonwealth and carrying on business as aforesaid (hereinafter called "the Purchaser") of the other part

W H E R E A S:-

(A) By virtue of an Indenture of Mortgage dated the Fifteenth day of November, A.D. 1969 and made between Myra Investments Limited of the one part and the Vendor of the other part and recorded in Volume 1543 at pages 185 to 194 in the Registry of Records in the City of Nassau in the Island of New Providence one of the Islands in the said Commonwealth of the Bahamas the Vendor is seised of the unincumbered fee simple of the hereditaments hereinafter described in the Schedule hereto (hereinafter referred to as "the said hereditaments") subject to the right of redemption therein contained;

(B) As a result of events that have happened the Vendor is empowered to sell the said hereditaments

WHEREBY IT IS AGREED as follows:-

1. The Vendor will sell and the Purchaser will buy the fee simple of ALL the said hereditaments for a purchase price of Seven Hundred and Twenty Thousand Dollars ($720,000) in Canadian Currency (hereinafter called "the said Currency") and the sum of Seventy-two Thousand Dollars ($72,000.00) in the said Currency by way of deposit

is now paid to the Vendor (the receipt whereof the Vendor hereby acknowledges).

2. Completion hereof shall take place on or before Fourteen (14) days from the date hereof.

3. The Vendor shall produce to the Purchaser evidence of a good and marketable title to the said property and upon Seven (7) days of the receipt of the same the Purchaser shall submit to the Vendor's Attorneys any requisitions on the Vendor's title which the Purchaser may wish to raise. If the Vendor shall be unable to produce a good and marketable title to the said property then the said deposit shall be refunded to the Purchaser and this contract shall be deemed cancelled for all purposes without further and other liability of either party to the other. If the Vendor shall on or before the completion date have produced a good and marketable title to the said property and the Purchaser nevertheless fail to complete the purchase on or before the completion date then the said deposit shall be forfeited to the Vendor and this contract shall be deemed cancelled without further or other liability of either party to the other.

4. On the completion date the Vendor shall AS MORTGAGEE execute a proper Conveyance of the said hereditaments to the Purchaser in a form duly approved by the Purchaser conveying the fee simple in the said hereditaments.

5. The Purchaser shall pay the balance of the Purchase price by paying to the Vendor the amount of Six Hundred and Forty-eight Thousand Dollars ($648,000.00) in the said Currency and by executing in favour of the Vendor a First Legal Mortgage of the said hereditaments to secure the repayment to the Vendor of the sum of Six Hundred and Forty-eight Thousand Dollars ($648,000.00) in the said Currency at the rate of Ten per cent (10%) per annum payable in full on the Eighteenth day of November, A.D. 1974 and until payment in full interest shall be payable as aforesaid.

6. Should any objection or requisition whatsoever be insisted on which the Vendor shall be unable or unwilling to satisfy or comply with the Vendor may (notwithstanding any attempt to remove or satisfy the same by negotiation or litigation in respect thereof) by notice in

Exhibits

Hackett Bundle Section D Agreement, Alliance Services Industrial & Commercial Corporation Ltd. and Gleneagles Investment Co. Ltd. 28th October 1974 (cont'd)

Exhibits

Hackett Bundle Section D Agreement, Alliance Services Industrial & Commercial Corporation Ltd. and Gleneagles Investment Co. Ltd. 28th October 1974 (cont'd)

writing to the Purchaser rescind the contract upon repaying to the Purchaser the deposit without interest costs or compensation and the Purchaser shall accept the same in full satisfaction of all claims under the contract or otherwise whatsoever. The Purchaser shall in such case thereupon return to the Vendor or its Attorneys all papers belonging to the Vendor in its possession in connection with this sale. If the Purchaser within Seven (7) days after receiving notice to rescind withdraws the objection or requisition then the notice to rescind shall be withdrawn also.

7. The Vendor agrees to pay Customs Duties on the said hereditaments in the amount of Ninety Thousand Dollars ($90,000.00) or whatever lesser amount as is owed on completion hereof in consideration for which the Purchaser shall pay an additional amount of Twenty-five Thousand Dollars ($25,000.00) in the said Currency in addition to the said purchase price which said Twenty-five Thousand Dollars ($25,000.00) shall be paid on or before the completion date.

8. It is understood that certain parties may be claiming Leases on portions of the said hereditaments. The Vendor hereby represents that these Leases have never received the Vendor's previous written consent and are therefore in breach of the said Mortgage between the Vendor and the said Myra Investments Limited.

9. The Purchaser agrees that the Vendor shall convey its fee simple title to the said hereditaments but that the Purchaser will take possession itself of the said hereditaments on completion.

10. The Purchaser shall not rely on production of an Abstract of Title but shall rely on the documents of title produced by the Vendor herein.

11. This Contract shall be binding upon the Purchaser and its assigns when fully executed by both parties.

THE SCHEDULE HEREINBEFORE REFERRED TO

ALL THAT piece parcel or part of a tract of land situate in Lucaya in the City of Freeport in the Island of Grand Bahama one of the Islands in the Commonwealth of the Bahamas and containing Three and Three Hundred and Four Thousandths (3.304) acres which said Piece parcel or part of a tract of land is bounded NORTHWARDLY by a road called

and known as Royal Palm Way and running thereon Three Hundred (300) feet EASTWARDLY partly by land the property of The Grand Bahama Port Athority Limited and partly by a Road illegible and known as Acacia Road and running thereon jointly illegible Hundred and Seventy-two and Thirty-five hundredths illegible feet SOUTHWARDLY by a Road reservation and running thereon Two Hundred and Eighty-seven and Fifty hundredths (287.50) feet thence again EASTWARDLY partly by the said illegible reservation and running thereon Twelve and Five tenths (12.5) feet and partly also by land the property of Silver Point Limited and running thereon Four Hundred and Sixty-four and Eighty-seven Hundredths (464.87) feet thence SOUTHWARDLY by the Sea and running thereon Twelve and Fifty Hundredths (12.50) feet and WESTWARDLY by land the property of Bahama Reef Development Company Limited (formerly Bahama Reef Banking & Development Company Limited) and running thereon Nine Hundred and Forty-nine and Seventy-two Hundredths (949.72) feet which said parcel or part of a tract of land has such position marks boundaries and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the 8th day of November, A.D. 1968 and made between Polcan Limited of the one part and the said Myra Investments of the other part and now of record in the said Registry of Records in Book 1369 at pages 587 to 599 and is delineated on that part which is coloured Yellow of the said diagram or plan AND ALSO ALL THAT piece or lot of land situate in Freeport aforesaid which said piece parcel or lot of land forms a part of the Sub-division called and known as Bahama Reef Yacht Country Club Section II and being designated as Lot Number Thirty (30) in Block Number Eight (8) on the plats or plans of the said Sub-division which said plats or plans are now recorded in the said Registry of Records in Volume 992 at pages 352 to 357 inclusive the said piece parcel or lot of land is more particularly delineated on the diagram or plan attached to an Indenture of Conveyance dated the 16th day of December, A.D. 1968 and made between the said Bahama Reef Development Company, Limited of the one part and the said Myra Investments Limited of the other part and now recorded in the said Registry of Records in Book 1403 at pages 414 to 422

IN WITNESS WHEREOF the Vendor has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed Illegible

The Common Seal of ALLIANCE SERVICE INDUSTRIAL & COMMERCIAL CORPORATION LIMITED was affixed hereto by JOHN ENNIS the President of the said Company and the said JOHN ENNIS affixed his signature hereto in the presence of:-

Signed Illegible

IN WITNESS WHEREOF the Purchaser has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed Illegible

The Common Seal of GLENEAGLES INVESTMENT COMPANY LIMITED was affixed hereto by ERNST STERN the President of the said Company and the said ERNST STERN affixed his signature hereto in the presence of:-

Signed Illegible
ASSISTANT SECRETARY

COMMONWEALTH OF THE BAHAMAS

Grand Bahama

I, Hedwige S.K. Bereaux of the City of Freeport in the Island of Grand Bahama one of the Islands of the Commonwealth of the Bahamas Secretary of Inverugie Investments Limited (hereinafter called "the Company") make Oath and say that I was present and saw the Common Seal of the Company affixed to the annexed Assignment dated the 4th day of November, A.D., by Ernest Stern the President of the Company and that I saw the said Ernest Stern sign execute and deliver the said Assignment as and for the Act and Deed of the Company and for the purposes therein mentioned; and that I subscribed my name as the Witness to the due execution thereof. And Further that the Seal affixed and impressed at the foot or end of the said Assignment is the Common Seal of the Company and was affixed and impressed thereto by the

said Ernest Stern by order and with the authority of the Board of Directors of the Company and in conformity with the Articles of Association of the Company.

Sworn to this Third day)
of March, A.D., 1975) Signed H.S.K. BEREAUX

Before me,

RUBIE MARIE NOTTAGE
NOTARY PUBLIC

COMMONWEALTH OF THE BAHAMAS

Grand Bahama

I, Hedwige S.K. Bereaux of the City of Freeport in the Island of Grand Bahama one of the Islands of the Commonwealth of the Bahamas Assistant Secretary of Gleneagles Investment Company Limited (hereinafter called "the Company") make Oath and say that I was present and saw the Common Seal of the Company affixed to the annexed Assignment dated the 4th day of November, A.D., 1974 by Ernest Stern the President of the Company and that I saw the said Ernest Stern sign execute and deliver the said Assignment as and for the Act and Deed of the Company and for the purposes therein mentioned; and that I subscribed my name as the Witness to the due execution thereof. And Further that the Seal affixed and impressed at the foot or end of the said Assignment is the Common Seal of the Company and was affixed and impressed thereto by the said Ernest Stern by order and with the authority of the Board of Directors of the Company and in conformity with the Articles of Association of the Company.

Sworn to this Third day)
of March, A.D., 1975) Signed H.S.K. BEREAUX

Before me,

RUBIE MARIE NOTTAGE
NOTARY PUBLIC

Exhibits

Hackett Bundle Section D Assignment, Gleneagles Investment Co. Ltd. to Inverugie Investments Ltd. 4th November 1974

Hackett Bundle, Section D. Assignment Gleneagles Investment Co. Ltd. to Inverugie Investments Ltd.

COMMONWEALTH OF THE BAHAMAS

Grand Bahama

Freeport

THIS INDENTURE is made the Fourth day of November, A.D. 1974 BETWEEN GLENEAGLES INVESTMENT COMPANY LIMITED a company incorporated and existing under the Laws of the Commonwealth of the Bahamas and carrying on business within the said Commonwealth (hereinafter called "the Assignor") of the one part AND INVERUGIE INVESTMENTS LIMITED another Company also incorporated and existing under the said Laws of the Commonwealth of the Bahamas and carrying on business as aforesaid (hereinafter called "the Assignee") of the other part.

WHEREAS

By an Agreement (hereinafter called "the said Agreement") dated the 28th day of October, A.D., 1974 and made between ALLIANCE SERVICES INDUSTRIAL AND COMMERCIAL CORPORATION LIMITED (hereinafter called "the Company") of the one part and the Assignor of the other part it was agreed that the Company would sell and the Assignor would purchase the properties and hereditaments described in the said Agreement upon the terms and conditions therein contained; AND WHEREAS the Assignor has agreed for the sum of One (B$1.00) Dollar to assign the benefit of the said Agreement to the Assignee.

NOW THIS INDENTURE WITNESSETH as follows:-

That in pursuance of the said Agreement and in consideration of the sum of One (B$1.00) Dollar now paid to the Assignor by the Assignee (the receipt whereof the Assignor hereby acknowledges) plus all good and other valuable consideration the Assignor as BENEFICIAL OWNER hereby assigns unto the Assignee ALL THAT the said Agreement and the full benefit thereof and all remedies for enforcing the same TOGETHER WITH ALL the estate and interest of the Assignor in the land and property described in the said Agreement.

IN WITNESS WHEREOF the Assignor has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed ERNEST STERN
PRESIDENT

The Common Seal of GLENEAGLES INVESTMENT COMPANY LIMITED was hereunto affixed by Ernest Stern the President of the said Company and the said Ernest Stern affixed his signature hereunto in the presence of:-

Signed Illegible
ASSISTANT SECRETARY

IN WITNESS WHEREOF the Assignee has hereunto caused its Common Seal to be affixed the day and the year first hereinbefore written

Signed ERNEST STERN
PRESIDENT

The Common Seal of INVERUGIE INVESTMENTS LIMITED was hereunto affixed by Ernest Stern the President of the said Company and the said Ernest Stern affixed his signature hereunto in the presence of:-

Signed Illegible

Exhibits

Hackett Bundle Section D Conveyance, Alliance Services Industrial & Commercial Corporation Ltd. to Inverugie Investments Ltd. 5th November 1974

Hackett Bundle, Section D. Conveyance Alliance Services Industrial & Commercial Corporation Ltd. to Inverugie Investments Ltd.

COMMONWEALTH OF THE BAHAMAS

GRAND BAHAMA

THIS INDENTURE is made the 5th day of November in the Year of Our Lord One thousand Nine Hundred and Seventy-four BETWEEN ALLIANCE SERVICES INDUSTRIAL AND COMMERCIAL CORPORATION LIMITED a company incorporated under the laws of the Commonwealth of the Bahamas and carrying on business within the said Commonwealth (hereinafter called "the Vendor") of the one part AND INVERUGIE INVESTMENTS LIMITED a Company also incorporated under the laws of the Commonwealth of the Bahamas and carrying on business within the said Commonwealth (hereinafter called "the Purchaser") of the other part

W H E R E A S:-

(A) At the date of the Indenture next hereinafter recited Myra Investments Limited (hereinafter called "the Borrower") was seised of the respective hereditaments hereafter described in the Schedule hereto (hereinafter referred to as "the said hereditaments") for an estate in fee simple in possession;

(B) By an Indenture of Mortgage dated the Fifteenth day of November, A.D. 1969 and by a Deed of Confirmation dated the First day of May, A.D. 1970 (hereinafter collectively referred to as "the said Mortgage") and made between the Borrower of the one part and the Vendor of the other part the said hereditaments were granted and conveyed unto and to the use of the Vendor in fee simple subject as hereinafter mentioned for securing to the Vendor repayment of the principal sum of Six hundred and Ninety-five thousand dollars ($695,000.00) in the Currency of the Dominion of Canada or its Bahamian Dollar equivalent (hereinafter called "the said currency") and interest in accordance with the covenants and conditions therein contained which said Mortgage and Deed of Confirmation are respectively recorded in the Registry of Records

in the City of Nassau in the Island of New Providence one of the Islands of the aforesaid Commonwealth in Volume 1543 at pages 185 to 194 and in Volume 1670 at pages 113 to 119 and by the said Mortgage it was agreed that it should be lawful for the Vendor in certain events to sell the said hereditaments and to give an effectual receipt for the purchase money on any such sale;

(C) The said hereditaments are subject to the exceptions and reservations and to the restrictions and stipulations (hereinafter referred to as "the said restrictions") contained respectively in an Indenture dated the Eighth day of November, A.D. 1968 (hereinafter called "the Polcan Conveyance") and made between Polcan Limited of the one part and the Borrower of the other part and recorded in the said Registry of Records in Volume 1369 at pages 587 to 599 AND in an Indenture dated the Sixteenth day of December, A.D. 1968 (hereinafter called "the Bahama Reef Conveyance") and made between Bahama Reef Development Company Limited of the one part and the Borrower of the other part and recorded in the said Registry of Records in Volume 1403 at pages 414 to 422;

(D) By virtue of the provisions of the Mortgage and in the events that have happened the Vendor is now empowered to sell and convey the said hereditaments and to give a valid discharge for the purchase money in manner hereinafter appearing;

(E) Pursuant to such power of sale the Vendor has agreed with the Purchaser for the sale to it of the said hereditaments subject as hereinbefore mentioned at the price of Six Hundred and Thirty Thousand Dollars ($630,000.00) in the said Currency

NOW THIS INDENTURE WITNESSETH as follows:-

1. In consideration of the said sum of Six Hundred and Thirty Thousand Dollars ($630,000.00) in the said Currency now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as Mortgagee in exercise of the power of sale conferred on it by statute and all other powers enabling it hereby grants and conveys unto the Purchaser ALL THAT the said hereditaments together with the appurtenances thereunto belonging and the buildings

Exhibits

Hackett Bundle Section D Conveyance, Alliance Services Industrial & Commercial Corporation Ltd. to Inverugie Investments Ltd. 5th November 1974 (cont'd)

situate thereon and together with the benefit of the Rights of Way more particularly set out in the Polcan Conveyance and the Bahama Reef Conveyance TO HOLD the same unto and to the use of the Purchaser and its assigns in fee simple freed discharged from all rights of redemption and claims under the said Mortgage BUT SUBJECT to the said restrictions so far as the same are still subsisting and capable of taking effect

2. By way of affording to the Vendor a good and sufficient indemnity but not further or otherwise and so as not to be liable under this covenant after it has parted with possession of the said hereditaments the Purchaser hereby covenants with the Vendor that the Purchaser will henceforth:-

(i) Duly pay all sums of money payable if any under the terms of the Polcan Conveyance and the Bahama Reef Conveyance;

(ii) Duly observe and perform the said restrictions and indemnify and keep indemnified the Vendor and its assigns from and against all actions proceedings costs claims and demands in respect of any future breach of or non-observance thereof insofar as the same affect the said hereditaments and are capable of being enforced

3. The Purchaser further covenants for itself and its assigns that it will pay the outstanding Bahamas Customs Duties payable on the said hereditaments and will keep the Vendor and its assigns indemnified against any and all claims by the Bahamas Government and/or the Customs Department in respect of the said hereditaments

THE SCHEDULE HEREINBEFORE REFERRED TO

ALL THAT piece parcel or part of a tract of land situate in Freeport/Lucaya in the Island of Grand Bahama another of the Islands of the aforesaid Commonwealth and containing Three and Three Hundred and Four thousandths (3.304) Acres which said piece parcel or part of a tract of land is bounded NORTHWARDLY by a road known as Royal Palm Way and running thereon Three Hundred (300) feet EASTWARDLY partly by land the property of The Grand Bahama Port Authority, Limited and partly by a road known as Acacia Road and running jointly thereon Four Hundred and Fifty-nine and Eighty-five Hundredths (459.85) feet and partly by land the property of Silver Point Limited and running thereon Four Hundred and Seventy-seven and Thirty-

seven Hundredths (477.37) feet SOUTHWARDLY partly by land the property of the said Silver Point Limited and running thereon Two Hundred and Eighty-seven and Fifty Hundredths (287.50) feet and partly by the Sea and running thereon Twelve and Fifty hundredths (12.50) feet and WESTWARDLY by land the property of Bahama Reef Development Company Limited (formerly Bahama Reef Banking and Development Company Limited) and running thereon Nine Hundred and Thirty-seven and Twenty-four Hundredths (937.24) feet which said piece parcel or part of a tract of land has such position shape marks boundaries and dimensions as are shown on the diagram or plan attached to the Polcan Conveyance and is delineated on that part which is coloured Yellow AND ALSO ALL THAT piece parcel or lot of land situate in Freeport/Lucaya in the Island of Grand Bahama aforesaid forming part of a Sub-division called and known as Bahama Reef Yacht & Country Club, Section II and being designated as Lot Number Thirty (30) in Block Eight (8) on the plats or plans of the said Sub-division which said plats or plans are now recorded in the said Registry of Records in Volume 992 at pages 352 to 357 inclusive and which said piece parcel or lot of land is delineated on the diagram or plat attached to the Bahama Reef Conveyance and thereon coloured Red

(Seal) IN WITNESS WHEREOF the Vendor has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed Illegible
PRESIDENT

The Common Seal of ALLIANCE SERVICES INDUSTRIAL AND COMMERCIAL CORPORATION LIMITED was affixed hereto by JOHN ENNIS the President of the said Company and the said JOHN ENNIS affixed his signature hereto in the presence of:-

Signed EILEEN DEGREGORY

(Seal) IN WITNESS WHEREOF the Purchaser has caused its Common Seal to be hereunto affixed the day and year first hereinbefore written

Signed Illegible
PRESIDENT

Exhibits

Hackett Bundle Section D Conveyance, Alliance Services Industrial & Commercial Corporation Ltd. to Inverugie Investments Ltd. 5th November 1974 (cont'd)

The Common Seal of INVERUGIE INVESTMENTS LIMITED was affixed hereto by ERNEST STERN the President of the said Company and the said ERNEST STERN affixed his signature hereto in the presence of:-

Signed Illegible
SECRETARY

COMMONWEALTH OF THE BAHAMAS

GRAND BAHAMA

Freeport

I, HEDWIGE S.K. BEREAUX of the City of Freeport in the Island of Grand Bahama one of the Islands of the Commonwealth of the Bahamas Secretary of INVERUGIE INVESTMENTS LIMITED (hereinafter called "the Company") make Oath and say that I was present and saw the Common Seal of the Company affixed to the annexed Indenture of Conveyance dated the 5th day of November A.D. 1974 by ERNEST STERN the President of the Company and that I saw the said ERNEST STERN sign, execute and deliver the said Indenture as and for the Act and Deed of the Company and for the purposes mentioned in the said Indenture and that I countersigned the said Indenture to complete the due execution thereof. And Further that the Seal affixed and impressed at the foot or end of the said Indenture is the Common Seal of the Company and was affixed and impressed thereto by the said ERNEST STERN by the order and with the authority of the Board of Directors of the Company and in conformity with the Articles of Association of the Company.

SWORN to this 5th day)
of November, A.D. 1974) Signed H.S.K. BEREAUX

Before me,

Signed Illegible
NOTARY PUBLIC

COMMONWEALTH OF THE BAHAMAS

GRAND BAHAMA

I, EILEEN DeGREGORY of the City of Freeport in the Island of Grand Bahama one of the Islands in the Commonwealth of the Bahamas Assistant Secretary of Alliance Services Industrial And Commercial Corporation Ltd. (hereinafter called "the Company") make Oath and say that I was present and saw the Common Seal of the Company affixed to the annexed Indenture of Conveyance dated the 5th day of November A.D. 1974 by JOHN ENNIS the President of the Company and that I saw the said JOHN ENNIS sign, execute and deliver the said Indenture as and for the Act and Deed of the Company and for the purposes mentioned in the said Indenture and that I countersigned the said Indenture to complete the due execution thereof. And Further that the seal affixed and impressed at the foot or end of the said Indenture is the Common Seal of the Company and was affixed and impressed thereto by the said JOHN ENNIS by the order and with the authority of the Board of Directors of the Company and in conformity with the Articles of Association of the Company.

SWORN TO this 5th day)
of November A.D. 1974) Signed EILEEN DeGREGORY

Before me

Signed Illegible
NOTARY PUBLIC

Exhibits

Hackett Bundle Section E Letter, Corporate Bank & Trust Co. Ltd. to Kendal Nottage & Co. 5th November 1974

Hackett Bundle, Section E. Letter, Corporate Bank & Trust Co. Ltd. to Kendal Nottage & Co.

CORPORATE BANK AND TRUST COMPANY LIMITED
CORPORATE BANK AND TRUST COMPANY LIMITED BUILDING
LOCWOOD ROAD, FREEPORT, GRAND BAHAMA ISLAND,
BAHAMAS

November 5, 1974

The Honourable Kendal Nottage
Kendal Nottage and Company
Counsel and Attorneys-At-Law
P.O. Box F-2420
Freeport, Grand Bahama

Dear Kendal:

Re: Silver Sands Limited

The present owners of Silver Sands Limited, being Mr. Z.W. Radomsky and Mr. Jack Spantan, are endebted to Mr. Richard Hackett in the sum of $300,000.00 U.S. for funds advanced in the completion of the above named hotel. We understand that your client, Mr. Stern has been negotiating with Mr. John Ennis of John Enco Limited and Associates of Toronto, Canada or Alliance Services Industrial and Commercial Corporation Limited of the Bahamas who is aware of the advance of funds by Mr. Hackett to the corporation and approved this loan.

The collateral security for the loan was 30 apartments in Silver Sands which the owner transferred to Mr. Hackett with the approval of the mortgagee. To my knowledge, Jerry Caps of E. Dawson Roberts, who represented Silver Sands Hotel and or Myra Investments Limited and were supposed to record this transaction to properly protect Mr. Hackett's interest.

In the interest of justice we ask that you take notice of this claim and before any funds are transferred, that this said sum of money be deducted and held in trust for Mr. Hackett, or in the alternative, that you advise your clients of our position which I feel they are totally unaware of at this time.

Yours faithfully

CORPORATE BANK AND TRUST COMPANY, LIMITED

Signed Lawrence M. Wynne
President

LMW/yt
c.c. Mr. Bereaux P.O. Box 4864 NASSAU, NEW PROVIDENCE
BAHAMAS

IN THE PRIVY COUNCIL No. 9 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN:

INVERUGIE INVESTMENTS LIMITED (Defendants) — Appellants

- and -

RICHARD HACKETT (Plaintiff) — Respondent

RECORD OF PROCEEDINGS

PHILIP CONWAY THOMAS & CO.
61 Catherine Place
London SW1E 6HB.

Solicitors for the Appellants

HERBERT SMITH & CO.
Watling House,
35-37 Cannon Street
London EC4M 5SD.

Solicitors for the Respondent