

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2018/CLE/gen/01222

BETWEEN

TREVOR SUNDERLAND

Plaintiff

AND

BUTTERFIELD TRUST (BAHAMAS) LIMITED

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Giahna Soles-Hunt for the Plaintiff

John Wilson QC with Berchel Wilson for the Defendant

19 October 2020, 20 October 2020, 3 June 2021 and 31 July 2021

JUDGMENT

WINDER, J

This is the claim of the Plaintiff (Trevor) for reimbursement of funds in the amount of \$71,403.44 which was transferred to the Defendant (Butterfield) for the account of the RWK Trust (the Trust).

[1.] This action was commenced by Trevor by specially indorsed Writ of Summons on 17 October 2018. The Statement of Claim indorsed thereon provides, in part, as follows:

...

- 2 The Defendant is a Bahamian company licensed as a trust company and doing business in that capacity in The Bahamas. The Defendant is also the trustee of a Bahamian trust known as the RWK Trust.
3. The Plaintiff is a stranger to the RWK Trust but is a long-time close friend of Mr. Brian Palmer, the Protector and a beneficiary thereof. Mr. Palmer is an elderly resident of the UK in very frail health. For some years, for no reward but because of his friendship with Mr. Palmer and his physical proximity to the Defendant, the Plaintiff would occasionally forward Mr. Palmer's email requests for disbursements etc. to the Defendant, or telephone the Defendant on Mr. Palmer's behalf particularly in circumstances where Mr. Palmer had already contacted the Defendant directly but had received no timely response.
4. Notwithstanding his occasional contact with the Defendant on Mr. Palmer's behalf, the Plaintiff was not concerned with the details or amounts of Mr. Palmer's requests, the resulting transfers of funds or the execution of those transfers. The Plaintiff did not have wire transfer instructions for Mr. Palmer's bank account or the bank accounts of any other beneficiaries, and was not aware in advance of the details of any payments requested by Mr. Palmer or any other beneficiary. Most importantly, the Plaintiff had no authority whatsoever to direct the Defendant to make any payments from the corpus of the RWK Trust.
5. On or about the 18th and the 26th of May 2017, the Plaintiff received and then forwarded emails to the Defendant that appeared to have, and which he believed had, come from Mr. Palmer, requesting transfers of certain funds to a UK bank account and the payment of various invoices attached to the emails. In fact, the emails had not been sent by Mr. Palmer but by an unknown fraudster.

6. The Defendant acted on the instructions in the emails without confirming with Mr. Palmer that he had sent them. The UK bank account to which a portion of the funds were transferred was not one to which the Defendant had previously been asked to send funds, and the invoices appeared to be issued by companies and/or individuals to which no payments had ever been previously made on Mr. Palmer's behalf or on behalf of the RWK Trust. Although some of the funds were recovered, the trust suffered losses of US\$41,802.60 and GB£21,212.37 (the total equivalent to B\$71,403.44).
7. While the Defendant's efforts to recover the funds were ongoing, the Plaintiff pressed the Defendant to promptly make the trust whole but the Defendant declined to do so. On or about the 31st of July 2017, in order to protect his friend Mr. Palmer from the concern and stress caused by the losses to the trust, but reserving all his rights, the Plaintiff transferred to the Defendant sums of his own money sufficient to make the trust whole. The remaining funds lost by the trust having since proved unrecoverable, the Defendant has declined to repay the Plaintiff's funds to him despite numerous requests. The Plaintiff was not in any way liable at law or in equity to make the trust whole and the funds were therefore received by the Defendant for no consideration and the Defendant has thereby been unjustly enriched at the expense of the Plaintiff.
8. Alternatively, the Defendant holds the funds transferred to it by the Plaintiff on constructive trust for the Plaintiff and is liable to transfer those funds to the Plaintiff's order.

AND THE PLAINTIFF CLAIMS:

1. A Declaration that the Defendant has been unjustly enriched by at least the sum of Seventy One Thousand Four Hundred Three Bahamian Dollars and Forty Four Cents (B\$71,403.44) and is liable to make restitution to the Plaintiff of the sums paid to it.
2. Alternatively, a Declaration that the Defendant holds the sums paid to it by the Plaintiff on constructive trust for the Plaintiff and is liable to repay those sums to the Plaintiff.
3. Damages for breach of trust.
4. Interest pursuant to the Civil Procedure (Award of Interest) Act, 1993.
5. Costs.
6. Further or other relief as deemed just and appropriate by the Court.

[2.] Butterfield defended the action in a Defence filed on 6 December 2018. The Defence provided, in part, as follows:

...

3. It is denied that the Plaintiff is a stranger to the Trust as alleged in paragraph 3 of the Statement of Claim. The Plaintiff has always held himself out as an agent of the Trust with powers derived from a Deed of Appointment dated 15th October 2014 pursuant to which the Plaintiff was paid an annual retainer of US \$1000. To the extent that the Plaintiff was a stranger to the trust he constituted himself a *trustee de son tort* by intermeddling with trust matters.
4. Paragraph 4 of the Statement of Claim is denied. The plaintiff on a number of occasions insisted that the Defendants staff deal only with him in relation to any and all requests in connection with the RWK Trust and forbid them from contacting the beneficiaries of the Trust directly. The Plaintiff's contact with the Defendant on behalf of the RWK trust were far from occasional as the Plaintiff assumed the role of de facto protector of the Trust and all of the Defendant's contacts in relation to requests for distributions from the Trust involved the Plaintiff. Further the Plaintiff by paragraph 4 admits that he was negligent by forwarding on email requests, and thus clothing them with a veneer of authenticity, when he did not do any due diligence to confirm that the requests did in fact emanate from a beneficiary of the Trust.
5. The Defendant makes no admission as to what the Plaintiff believed as alleged in paragraph 5. The Defendant admits that the Plaintiff did forward to the Defendant certain email requests for distributions purportedly sent by Mr. Palmer which the Plaintiff stridently insisted be complied with but which as matters transpired were fraudulent emails.
6. The Defendant admits that the initial loss suffered by the trust amounted to US\$41,802.60 and GB£21,212.37 as stated in paragraph 6. The Defendant followed its established procedures and protocols in dealing with email requests for payment of funds. Upon receiving the email requests from the Plaintiff, the Defendant executed its "call-back" procedure whereby the Defendant would contact the sender of the email (in this case the Plaintiff who had previously berated the Defendants staff about contacting Mr. Palmer directly and forbade them to do so) to confirm that the request did emanate from the beneficiary concerned transaction. This call back was made to the Plaintiff by the Defendant's personnel and the Plaintiff confirmed the authenticity of the request and directed the Defendant's personnel to effect the requested transfers.
7. As to Paragraph 7, the Defendant makes no admission save that the Defendant denies that it has been unjustly enriched at the expense of the Plaintiff. The Defendant received the payment from the Plaintiff in satisfaction of a liability which the Plaintiff owed to the RWK Trust in its capacity as Trustee of the RWK Trust. Accordingly to the extent (which is denied) that the receipt of the payment amounted to unjust enrichment, it was the RWK Trust which was enriched by the Plaintiff's payment and not the Defendant in its personal capacity. Paragraph 8 of the Statement of Claim is denied. The

Defendant has not received and does not hold any funds on constructive trust for the Plaintiff.

[3.] At trial Trevor gave evidence and called Sarah Palmer (Sarah) and Gregory Palmer (Gregory) as witnesses in his case. Butterfield called Sherell Gordon (Sherell) as a witness in its case. All witnesses settled witness statements and were subject to cross examination on their statements.

[4.] Trevor's evidence, as contained in his witness statement was as follows:

- (1) He is a chartered accountant and the President of Bahamas Professional Management Services Ltd., a licenced financial and corporate service provider. He was employed with Butterfield up to 2009 when he retired. He had acted as a secretary of Butterfield between 1997 and 2009.
- (2) He has known Brian Palmer (Brian), the settlor and protector of the Trust for 20 years. Brian transferred the Trust to Butterfield in 2003 where he administered it until his retirement from Butterfield.
- (3) Brian expressed his dissatisfaction with the quality of the service offered by Butterfield resulting in Brian contacting him (Trevor) when he had a problem. Brian, due to his advanced age and illnesses, was becoming incapable of fulfilling his role as Protector. Brian asked him to act in a consultancy capacity to him as the Protector of the Trust. In accordance with Brian's request, Trevor drafted a Deed of Appointment (the Agreement) dated 15 October, 2014. A copy of the Agreement was hand delivered to Butterfield.
- (4) In November 2016 Trevor delivered a Memorandum to Butterfield which he personally received from Brian which provided instructions for specific distributions to beneficiaries of the Trust. Butterfield made a call back to Brian and Sarah to confirm the request as opposed to him.
- (5) He contacted Sherell, Butterfield's then Trust administrator, and enquired as to the reason they contacted Brian and Sarah and was advised that it was the internal policy of Butterfield. He later learned that call-backs were made to the beneficiaries and included a requisition for security questions and banking details.
- (6) On 15 May 2017 he received an email from Sherell concerning an investment related question and sought confirmation that the terms of the Letter of Wishes on file remained valid.
- (7) On 16 May, 2017 he forwarded to Sherell an email he received purportedly from Brian requesting two (2) distributions: £18,000.00 to Brian and (USD) \$26,348.20 to Brendon Ryan. He discussed Sherell's queries with Brian and provided response to her by email dated 17 May, 2017.

- (8) On 17 May 2017 Sherell telephoned him for a call back and he commented on the impracticality of Butterfield's policy. He expected Butterfield to contact Brian and confirm banking details with those held on file.
- (9) On 1 June 2017 he received an email purportedly from Brian attaching an invoice for Michael L Campbell Inc for \$19,515.70 which he forwarded to Sherell on 3 June 2017. He directed Sherell to respond directly to Brian and did not receive a call back.
- (10) On 9th June 2017 he received another email attaching an invoice to be paid and he forwarded that email to Ms. Gordon and did not receive a call back. On 13 June, 2017 he received an email purporting to be from Brian and listing payments not yet received which he forwarded to Sherell. He commented that the delay was embarrassing and conducted an investigation to ascertain whether and why payments had not been effected.
- (11) He was unable to contact Brian and directed Butterfield not to make any payments as he could not reach Brian to confirm the requests.
- (12) On 14 June he contacted Brian who confirmed that he had not sent any of the emails requesting distribution. Butterfield confirmed that monies had been transferred out of the Trust based on the fraudulent instructions.
- (13) Butterfield advised him that they were unable to retrieve the two payments made on 17 May and 25 May and advised Trevor that £21,212.37 and USD\$ 41,837.60 was required to make the Trust whole.
- (14) Given his longstanding friendship with Brian and due to Brian's health he wired the sums to the Trustee.

[5.] Under cross examination, Trevor stated:

- (1) It would have been prudent if he had called back Brian to confirm the requests.
- (2) He had in fact attempted to do a call back with Brian but was unsuccessful.
- (3) He admitted that he was preoccupied with other clients and did not give the matter his full attention. He accepted that not speaking to Brian prior to forwarding the requests to Sherell was negligent on his part. He further admitted that he did not indicate to Sherell or Butterfield that he had not been able to confirm the requests with Brian.
- (4) He admitted that his comment on Butterfield's procedure whereby he insisted that call backs were to be made to him and not Brian was "not a very smart comment".
- (5) He did not confirm the instructions to Sherell.
- (6) He admitted that from the receipt of the first set of fraudulent requests on 16 May, 2017, until the request for the delayed payment being sent to him on 5 June, 2017, he was unable to contact Brian. That whilst he was away he did not attempt to contact Brian.
- (7) He accepted that he had an obligation to alert Butterfield of the fact that he had not spoken to Brian in respect of the distribution request.

(8) He admitted that he paid the sum over to the Trust out of concern for Brian and that Butterfield never requested that he make good on the loss to the Trust. He further states that he was not paying the money on behalf of Butterfield but rather on behalf of Brian.

[6.] Sarah gave evidence that:

- (1) She was aware that her father, Brian, and Trevor were good friends and that Trevor acted as an advisor to her father regarding the Trust. Her father was the Protector of the Trust. She was one of the beneficiaries under the Trust and was not involved with the Trust until 2015 when her father's health started to decline.
- (2) She would organize payments to be made for her eldest son's benefit and she would receive a call back from Sherell on those requests.

[7.] Under cross examination Sarah stated:

- (1) She was not aware of the Agreement of 19 October, 2014 appointing Trevor as a consultant to act on Brian's behalf.
- (2) She was not aware that Trevor was involved in the Trust.
- (3) She would receive call backs for requests for herself and her family.
- (4) She accepted that based on the Agreement Trevor was acting in his capacity as consultant for the Trust.
- (5) With Trevor acting as a Consultant to Brian, if he had received a request for distribution from either herself, Brian or Gregory it would have made sense that he should have called to confirm that the request in fact came from them.

[8.] Gregory gave evidence that:

- (1) He was aware of the friendship between his father, Brian, and Trevor.
- (2) He became aware of the fraudulent distributions around 9 June 2017 when Sherell performed a call back concerning a purported request for distributions and he informed her that the requests were not legitimate.

(3) He was not aware that Trevor ever had any authority to approve distributions and could not understand why a call back was made to him as he was not a beneficiary.

[9.] Under cross examination Gregory stated that Trevor never attempted to contact him at the time of the fraudulent distribution requests. He accepted that Trevor bears some responsibility for the fraudulent distributions.

[10.] Sherell gave evidence that:

- (1) She is employed with Butterfield as a Senior Trust Officer and has responsibility for the administration and management of the Trust.
- (2) The Trust was established in September 2003 by a Declaration of Trust declared by Thorand Bank. Butterfield acquired Thorand in September 2003.
- (3) At the outset of Butterfield's relationship with the Trust, instructions were provided by Brian directly or through Trevor. Brian was the original Protector and its principal beneficiary. It was not until 15 October 2014 when Trevor was appointed as consultant that instructions in relation to the Trust started to be channeled to the Trustee via Trevor.
- (4) By the Consultancy Agreement Trevor became the primary contact for the Trust and all distributions were channeled through him.
- (5) Trevor expressed that our internal policy to perform call backs in relation to this Trust was "crazy", "impractical", "ridiculous" and "absolute garbage".
- (6) Between 16 May 2017 through the 5 June 2017 Trevor forwarded the following fraudulent distribution requests along with the invoices:
 - (a) On 16 May, 2017 two (2) distribution requests were made ("the first set of fraudulent invoices") one in the sum of £18,000 to be paid to an account in the name of a Brian Palmer accompanied by a set of banking instructions and another for \$26,348.20 payable to a Brendon Ryan accompanied by a fraudulent invoice;
 - (b) On 24 May, 2017 three (3) distribution requests were made ("second set of fraudulent invoices") accompanied by three fraudulent invoices, one

in the amount of £13, 708.40 to a Roscharn Taylor, another in the sum of \$15,489.40 to a Sheila Faye Fry, and another in the sum of \$19,515.70 to Michael L Campbell Inc;

- (7) On 16 May, 2017 I received the first set of fraudulent invoices from Trevor via email which he said were from Brian.
- (8) On 17 May, 2017 I emailed Trevor to indicate that I needed to perform a call back to verify these distribution requests and Trevor chided me for our verification policy which he clearly considered to be a waste of time. Notwithstanding Trevor's views on our call back policy I nonetheless placed a phone call to Trevor asking him to confirm the authenticity of the payments of £18,000.00 and \$26,348.20 which he did. I then asked him to confirm his date of birth and place of birth which is standard during these calls; and he continued to berate me for asking these questions. Eventually, Trevor begrudgingly gave me the requested information.
- (9) Given Trevor's confirmation nothing in these payments raised any immediate alarms for Butterfield. The first set of fraudulent invoices were therefore paid in accordance with the instructions we had received.
- (10) About a week later on the 24 May 2017 I received a phone call from Trevor informing me that he had received additional instructions from Brian requesting three additional distributions. He advised that these distributions were needed to pay for the costs of renovation to Mr. Palmer's home and the distribution was needed purportedly to settle three invoices in connection with these renovations. The invoices which were provided were, one for Roscharn Taylor in the amount of £13,708.40, another to Sheila Faye Fry in the amount of \$15,489.40, and a final payment to Michael L Campbell Inc. in the amount of \$19,515.70.
- (11) Trevor's phone call was followed up with a confirmatory email providing the written instructions to make the payments. After receipt of this email, in line with our internal call back verification procedure I called Trevor and he confirmed the instructions. As a result Butterfield executed the requested payments of £13,708.40 in favour of Roscharn Taylor and \$15,489.40 in

favour of Sheila Faye ("the paid invoices"). The payment to Michael L Campbell was not executed however as we were not in possession of the date of birth for the principal of Michael Campbell Inc. which was required as a part of our internal compliance process.

- (12) Between 26 May, 2017 and 5 June, 2017 five (5) distribution requests ("third set of fraudulent invoices") accompanied by five fraudulent invoices were made in the amount of \$42,943.36 to Chi Hui Lin, \$42,864.36 to James E. Smitherman, £19,803.00 to Gary Markwell, £13,069.20 to David Lee Samwell Tiling and \$55,500.00 to Dr. Naomi Malone.
- (13) Trevor never took any steps to verify the authenticity of the requests and forwarded them on to Butterfield with instructions that they be complied with.
- (14) When the third set of fraudulent invoices were received the call back was performed directly to the Palmers as Trevor was away from office and off Island. Gregory confirmed that all of the distribution requests accompanied by the first, second and third sets of fraudulent invoices were not legitimate requests from Brian.
- (15) Up to 11 June 2017 the perpetrators responsible for sending the fraudulent invoices were still pursuing Trevor trying to get the outstanding invoices paid and Trevor continued to press Butterfield. Trevor remained unaware of the fact that he was being duped and it is obvious that Trevor never sought to verify directly with the Palmers that the requests he was receiving and subsequently instructing Butterfield on were valid requests of the Palmers and he continued to press Butterfield to make the requested distribution which we now knew to be fraudulent.
- (16) Butterfield took all steps to recover the funds and was mostly unsuccessful save for the sum £10,496.03.
- (17) As a result of the fraud the Trust incurred a loss equivalent to \$71,403.44 which was paid back to the Trust by Trevor. Butterfield neither demanded nor requested that Trevor repay these sums.

[11.] Under cross examination Sherell stated that:

- (1) She was advised by Trevor and Brian about the Agreement. She didn't have any notes about the call. The reason for the Agreement was health concerns with Brian who had heart issues. Trevor chastised her about making call backs to Brian directly.
- (2) She couldn't recall if funds had ever been sent to Brandon Ryan before. She examined the invoice. A world check was done on Brandon Ryan and nothing came up. The banking department made further checks prior to payment. The invoice at the time did not look suspicious.
- (3) Butterfield was not a party to the Agreement. She understood the document to mean that, because of Brian's condition, Trevor acted and worked along with Brian having being appointed as a consultant.
- (4) Because the Agreement was put in place, whenever the Trustee received a request on Brian's behalf from the consultant, they would have acted on that request. In respect to a request from Brian the call back would have been made with Trevor, the consultant.
- (5) Call backs were done to Trevor and based on the Agreement that was in place. There was an incident where Butterfield received a distribution request and Brian was very irate that we called because he referred to his Deed of Appointment dated 16 October, 2014 in which he had put in place. Had Brian not altered the call back protocol by insisting that call backs be done to Trevor, the call backs would have been made to Brian.

[12.] The issues which fall for determination in this case are the following:

- (1) Whether Butterfield was unjustly enriched by the payment of \$71,403.04 by Trevor to Butterfield.
- (2) Whether Butterfield holds the \$71,403.04 on constructive trust for Trevor.

Trevor's case

[13.] Trevor's case is summarized in paragraphs 42-48 of his closing submissions as follows:

[42.] Although some of the funds were recovered, the Trust suffered losses of US\$41,802.60 and GB£21,212.37 (the total equivalent to BSD71,403.44). On 29th June 2017, Tim Colclough informed the Plaintiff that GBP21,212.37 and US\$41,837.60 were required to make the Trust whole.

[43.] While the Defendant's efforts to recover the funds were ongoing, the Plaintiff pressed the Defendant to promptly make the Trust whole, but the Defendant declined to do so.

[44.] Concerned about his friend's health, Mr. Sunderland continued to follow up with the Trustee to ascertain whether they intended to make the Trust whole. Without resolve, and in the face of an absolute denial of liability by the Trustee, the Plaintiff informed Mr. CulCough that if the Trustee was not going to make the Trust whole, the end of July, then, "I might not have any option but to reimburse Brian in full and pursue my recourse thereafter."

[45.] On or about the 31st of July 2017, the Plaintiff transferred to the Defendant the funds from his personal savings, the amounts of GBP21,212.37 and USD41,835.60 to the Trustees, sufficient to make the Trust whole.

[46.] Notwithstanding the Plaintiff's payments to Butterfield, he continued to follow up with Butterfield to resolve the matter and for his reimbursement, but it refused to respond or to discuss the matter further.

[47.] It was never Mr. Sunderland's intention to make a blanket payment to the Trustee, which the Trustee knew, it was always his intention to pursue reimbursement. The payment in was for the purpose of ensuring that the client was made whole so that the client/his long time friend did not suffer. At the material time, Mr. Sunderland was under the mistaken belief that he may have been liable for some of his actions; when in fact, it was the Trustee who was negligent.

[48.] It is the Plaintiff's case, that the Defendant unjustly benefited from Mr. Sunderland's payment as it was the one who owed the funds, if any, to the Trust. The Trustee clearly acquiesced and in fact encouraged Mr. Sunderland's payment to them when he provided the wire transfer instructions to Mr. Sunderland and Mr. Sunderland transferred the funds to the Trustee, which Ms. Gordon testified remained on the Trustee's account.

Butterfield's case

[14.] Butterfield's case is set out in its submissions as follows:

4. Liability of Trustee

4.1. It is submitted that under the provisions of the Trust deed the Defendant had the benefit of an exclusion of liability clause and thus would have incurred no liability for the loss to the Trust as a result of the fraudulently induced payments even if it had been negligent which it was not. Under paragraph 9 the Declaration

of Trust (Pg 10) that Paragraphs 8, 11, 12, 13 and 14 of the First Schedule of the Trustee Act is an integral part of the Declaration. Specifically, paragraph 12 holds that: "12. NO Trustee shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or in consequence of the failure depreciation or loss of any investment or investments made in good faith or for the negligence or fraud of any agent employed by such Trustee or by any other Trustee hereof although the employment of such agent was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by any Trustee hereof or by reason of any other matter or thing except wilful and individual fraud or wrongdoing on the part of the Trustee who is sought to be made liable."(emphasis added)

4.2. In its capacity as Trustee the Defendant has always been draped with this contractual/statutory protection. There was no allegation in the Statement of Claim nor any evidence led at trial suggesting expressly or by implication that [BUTTERFIELD] was acting other than in good faith. Nor was it pleaded or advanced at trial that there was any basis to displace the exclusion of liability to which [BUTTERFIELD] was entitled if it was so liable. To displace [BUTTERFIELD]'s exclusion right the Plaintiff would have had to plead and allege that [BUTTERFIELD] acted wilfully and individually in a way which amounted to wrongdoing. Neither of the forgoing elements could in any event have been established but having not even advanced a pleading on this point is alone dispositive of the case of the Plaintiff. Given that [BUTTERFIELD] had no legal liability to the Trust arising out of the fraudulent payments it derived no benefit from the Plaintiff voluntarily making good the loss to the Trust

5. Trustee de son tort.

5.1. The Defendant submits that by becoming a consultant to the Protector of the trust and mixing himself up in trust matters the Plaintiff constituted himself a trustee de son tort through the steps taken by him in interposing himself in the distribution process. As a trustee de son tort the Plaintiff was thus under a duty to meet the professional standard of all trustees in complying with an email request for distribution and ought to have executed a call back to the client from whom the request emanated so as to confirm the authenticity of the request. In [TREVOR]'s evidence he accepts that he did not perform such a call back and that it would have been prudent to have done so (October 19th 2020; Page 36 Line 10)

5.2. Rather than doing a call back himself after being called by Ms Gordon, or requesting that she initiate a call back to the clients to confirm the validity of the transactions [TREVOR] derided Ms Gordon and [BUTTERFIELD] call back policy. Further given [TREVOR]'s previous very senior position with the Defendant the interaction with Ms Gordon reflected was one of a superior environment of

intimidation which made it not possible for Ms. Gordon to do anything other than to comply with the direction being given by [TREVOR].

5.3. The Plaintiff was clearly negligent and his making good the loss to the Trust was in settlement of his own liability to the Trust. As pointed out in paragraph 4 above [BUTTERFIELD] was the beneficiary of a contractual/statutory exclusion of liability clause and so would have incurred no liability to the Trust. Accordingly whatever the relationship of [TREVOR] with the Trust whether a trustee de son tort or not it would be incongruous that [TREVOR]'s action in making good a loss to the Trust could somehow impose liability on [BUTTERFIELD] in circumstances where they could not otherwise be liable.

...

5.8. It is submitted that [TREVOR], by his actions, clearly constituted himself a trustee de son tort and as such he was liable in equity to make good the loss to the Trust.

...

8.1. It is the Defendant's submission that the Defendant was not and cannot be held liable for the loss occasioned to the Trust for the following reasons:

(i) The Defendant did not receive any benefit from the Plaintiff, the paid sums was paid to the Defendant in its capacity as Trustee and not for its own account.

(ii) In paying the paid sums the Plaintiff was extinguishing his own liability to the Trust as a trustee de son tort.

(iii) In any event the Defendant had no liability to the beneficiaries of the Trust by virtue of the operation of paragraph 9 of the Declaration of Trust (specifically paragraph 12 of the First Schedule of the Trustee Act) and the actions of the Plaintiff in paying the settlement amount cannot create a liability in the Defendant where none previously existed.

8.2. The Defendant submits that having regard to the foregoing argument and the evidence presented, the [Plaintiff] has not satisfied the legal threshold to set out a claim for unjust enrichment and is therefore not entitled to invoke this Court's equitable jurisdiction for restitution.

Analysis and Disposition

[15.] Trevor's principal claim is for unjust enrichment. He claims that Butterfield has been unjustly enriched by retaining funds in the amount of \$71,403.44 which he provided to make the Trust whole.

[16.] There is very little dispute between parties as to the nature of the remedy of unjust enrichment. According to the learned authors of *Halsbury's Laws of England Vol. 88 (2012) para 410*:

"It is generally accepted that there are four elements of an unjust enrichment claim: (1) the defendant must have been enriched; (2) the enrichment must have been at the expense of the claimant; (3) that enrichment must have been unjust; and (4) there are no applicable defences. The claimant must satisfy the court that the first three elements of the claim have been satisfied. All three must be satisfied before an unjust enrichment claim can succeed. The fourth element, namely the defences, is likely to assume ever increasing significance in the cases. As the courts slowly expand the grounds on which restitution can be ordered, it will fall to the defences to keep liability within acceptable bounds. In addition to these four elements it is sometimes said that there is a fifth stage to the inquiry, namely the remedies which are available to the claimant."

[17.] The U.K. Supreme Court case of *Bank of Cyprus UK Ltd v Menelaou [2015] UKSC 66* provides a most recent statement of the law of unjust enrichment. In that case Menelaou acquired ownership of 2 Great Oak Court, a property which was purchased by her parents as a gift to her. 2 Great Oak Court was purchased from the proceeds of the sale of the family home. The bank had released two charges which it held over the family home on the basis that it would be paid £750,000 and that it would take a new charge over 2 Great Oak Court. On the completion of the sale the bank was paid the £750,000 but the charge over 2 Great Oak Court had been signed on Menelaou's behalf without her knowledge. Menelaou, who was unaware of the agreement with the bank, learnt about the charge two years later. She brought an action to rectify the register which noted the charge in favor of the bank against 2 Great Oak Court. The Bank claimed that it should be subrogated to the unpaid vendor's lien in relation to the monies (£875,000) that had been owed by Menelaou's parents to the vendor of the property.

[18.] In finding for the Bank on the issue of unjust enrichment, Lord Clarke stated at paragraphs [18] and [19] as follows:

[18.] In the course of the argument, there was much discussion of the relevant legal principles. However, in my opinion it is not necessary to resolve all the possible issues which were discussed. It appears to me that this is a case of unjust enrichment. In *Benedetti v Sawiris [2013] UKSC 50, [2014] AC 938* the Supreme Court recognised that it is now well established that the court must ask itself four

questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant? See, for example, *Benedetti* at para 10, following *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 per Lord Steyn at 227 (and per Lord Hoffmann to much the same effect at 234) and *Investment Trust Companies v Revenue and Customs Comrs* [2012] EWCH 458 (Ch), [2012] STC 1150 per Henderson J at para 38 (ITC).

[19.] In that paragraph Henderson J noted that Professor Andrew Burrows QC said in *The Law of Restitution*, 3rd ed (2011) p 27 that, if the first three questions are answered affirmatively and the fourth negatively, the claimant will be entitled to restitution and that those four elements "constitute the fundamental conceptual structure of an unjust enrichment claim". In para 39, Henderson J accepted that approach, although he said that the four questions were no more than broad headings for ease of exposition, that they did not have statutory force and that there may be a considerable degree of overlap between the first three questions. I agree.

[19.] The accepted principles emanating from the authorities are therefore the following:

- (1) Has Butterfield been enriched?
- (2) Was the enrichment at Trevor's expense?
- (3) Was the enrichment unjust?
- (4) Are there any Defences available to Butterfield?

[20.] I should perhaps begin by indicating that I prefer the evidence of Butterfield in this matter. Sarah and Gregory both gave evidence on behalf of Trevor, as a result of their father's friendship with Trevor. Both of them were nonetheless of the opinion that Trevor was not blameless and that he bore some responsibility for the fraud. They both felt Trevor ought to have confirmed the instructions which he forwarded.

[21.] I accept the submission of Butterfield that Trevor fails on the first element required to be proven in an unjust enrichment claim, namely whether Butterfield has been enriched. According to Butterfield:

6.5. In *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2017] UKSC 29 [TAB 8] Lord Reed stated at 51:

"Where...the defendant has not received a benefit directly from the claimant, no question of agency arises, and the benefit does not consist of

property in which the claimant has or can trace an interest, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense”

6.6. As the paid sum in question were received by the Defendant in its capacity as Trustees and subsequently returned to the Trust, there was no benefit received by the Defendant. The Defendant was never obligated to reimburse the Trust.

6.7. The Plaintiff accordingly fails in establishing the first element of the unjust enrichment and as observed by Halsbury's all three elements must be established to maintain the claim. It follows that elements 2 and 3 of the test do not arise.

The Plaintiff would have been settling a liability owed by him to the Trust in respect of his own negligence as a trustee de son tort but in any event if anyone was enriched it was the Trust and not [BUTTERFIELD] and given the Plaintiff's responsibility for the loss to the Trust it could not be regarded as unjust for the Trust to retain the payment made by the Plaintiff.

6.8. It is submitted that the Plaintiff cannot satisfy the Court of any benefit direct or otherwise received by the Defendant. The funds were paid to the Defendant in their capacity as Trustees and was not paid or received by the Defendant for its own purposes. If a claim of unjust enrichment can be made out, and it is submitted that it cannot, it would be a claim against the Trust.

6.9. The Defendant retained no benefit from the funds having been paid into the Trust and the Defendant was never liable for the loss which was occasioned to the Trust.

[22.] The Trust was a discretionary trust for which Brian was Protector and the principal beneficiary. Incidentally, the Declaration of Trust was executed by Trevor on behalf of Butterfield. Salient terms of the Declaration of Trust provided:

4. Principal Trusts

- (1) The Trustees shall hold the Trust Fund and its income upon trust to pay, transfer or apply the whole or any part of it to or in favour or for the benefit of all or any one or more of the Beneficiaries in such shares and in such manner as the Trustees shall in their absolute discretion think fit.
- (2) The Trustees shall accumulate any income which is not paid, transferred or applied under sub-clause (1) and add it to the capital of the Trust Fund.
- (3) Subject to the preceding trusts and to the exercise of the power in sub-clause (1), the Trustees shall at the end of the Trust Period hold the Trust Fund and its income upon trust for such of the Beneficiaries as are living at the end of the Trust Period and if more than one in equal shares absolutely PROVIDED that if any of such beneficiaries shall have died prior to the end of the Trust Period leaving issue living at the end of the Trust Period such issue shall take by substitution and if more than one in equal shares per stirpes that share of the Trust Fund which his or her or their parent would have taken if such parent had survived to the end of the Trust Period.

5. Overriding powers of appointment

Notwithstanding the trusts and powers contained in Clause 4 the Trustees shall have power at any time or times before the end of the Trust Period:

- (1) to apply all or any part of the Trust Fund or its income for any purpose which the Trustees may think to be for the benefit of any one or more of the Beneficiaries then living;
- (2) to transfer or pay all or any part of the Trust Fund or its income to any one or more of the Beneficiaries then living for his or her or their absolute use and enjoyment freed and discharged from the trusts, powers and provisions of this Declaration of Trust;
- (3) to appoint that all or any part of the Trust Fund or its income shall be held on new trusts in favour or for the benefit of all or any one or more of the Beneficiaries in such shares and such manner generally as the Trustees shall in their absolute discretion think fit.

[23.] Trevor and Brian entered into the Agreement for the provision of consultancy services by Trevor to Brian. The agreement provided as follows:

**COMMONWEALTH OF THE BAHAMAS
New Providence**

THIS DEED OF APPOINTMENT is made the 15th Day of October A.D. 2014 BETWEEN BRIAN PALMER of 60A, Lower Road, Chalfont St Peter, Bucks SL9 9AR, United Kingdom (hereinafter called the Protector) of the one part and TREVOR SUNDERLAND of the Pilot House Condo – Apt 508, East Bay Street, Nassau, New Providence, Bahamas (hereinafter called the Consultant) of the other part.

WHEREAS:-

- (a) By Deed of Declaration dated 10th September 2003 in the name of RWK Trust appointing Thorand Bank & Trust Ltd (now known as Butterfield Trust (Bahamas) Limited (hereinafter called the Trustee) of the said trust established in accordance with the laws of the said Commonwealth.
- (b) Pursuant to the provisions of clause 7 of the Deed of Declaration whereby Brian Palmer was appointed the Protector of the RWK Trust.
- (c) In consideration of the Protector retiring or becoming incapable of discharging his duties, the Protector wishes to appoint a Consultant to act in coordination with him as Protector or if necessary to act on the Protector's behalf and exercise such powers as defined by the Deed of Declaration.
- (d) The Protector retains the right to terminate the services of the Consultant at any time by written notification to the Trustees.
- (e) Compensation for Consultant Services will be at an annual retainer of USD \$ 1,000.00 per annum, if more than 4 hours time is required within a calendar year the additional time will be invoiced at the rate of USD

\$200.00 per hour. Such compensation agreement is subject to amendment at any time in writing between the two parties.

Agreed _____ (Signed)

Accepted _____ (Signed)

[24.] On the evidence which I accept, whilst Butterfield was not a party to the Agreement its existence had been made known to Butterfield by both Trevor and Brian. Indeed, the termination of the Agreement was by delivery of a written notification to Butterfield. Trevor's evidence in chief was that he personally delivered a copy to Butterfield. I accept that Brian appraised Butterfield, through Sherell, by telephone of the relationship.

[25.] The purpose of the Agreement was for Trevor to be Brian's agent in relation to the trust due to Brian's health and medical challenges. I accept that by the conduct of the parties the Agreement was effective as of the date of execution, and not conditional on any incapacity or retirement of Brian. The evidence, which I accept, was that Brian's health challenges were already such that he preferred Butterfield to communicate directly with Trevor. Trevor was empowered to act in conjunction with Brian in relation to the Trust. I accept Sherell's evidence that Trevor was the point person in relation to Brian and the Trust and that this was made clear in her communication with Brian.

[26.] Trevor was adamant that the moneys were paid into the Trust in order to make it whole given his longstanding friendship with Brian. Under cross examination he confirmed that Butterfield never requested that he make good on the loss to the Trust. He was not paying the money on behalf of Butterfield but rather on behalf of Brian.

[27.] Trevor submitted that he "was under the mistaken belief that he may have been liable for some his actions; when in fact, it was the Trustee who was negligent". Respectfully, despite his counsel's admirable efforts on his behalf, I found that these payments were properly made as a result of an acceptance by Trevor that he bore some responsibility and blame for the fraud being perpetrated on the Trust's account, and rightfully so. I am satisfied that the fraud could not be levied at the feet of the Butterfield but as a result of the negligence/carelessness of Trevor as the Consultant/agent of Brian.

[28.] Trevor was the proximate cause of the loss suffered by the Bank. Trevor was aware that the purpose of the call back protocol, which he loathed, was to verify the authenticity of a transaction. Firstly, as the Consultant/agent for Brian he ought not to have forwarded the requests for payments/distributions to Butterfield until he confirmed their authenticity. Secondly, and more egregiously, he ought not to have confirmed the authenticity of the payment request to Butterfield until such time as he had confirmed it with Brian.

[29.] I did not accept Trevor's evidence that there was any effort to reach Brian prior to the fraud being uncovered. I certainly did not believe his evidence that there was any expectation that Butterfield would contact Brian, given the ruckus which had previously attended to Sherell's efforts to contact Brian independently for call backs, since Trevor's appointment. Trevor himself acknowledged that it would have been prudent to have called Brian to confirm the instructions and it was negligent for him not to do so. He also acknowledged that he was preoccupied with other clients at the time and did not give the matter his full attention. As funds were indeed not paid to the Bank for its own benefit or purposes but were paid to Butterfield in their capacity as Trustees of the discretionary Trust. I am satisfied therefore that it cannot be said that Butterfield had been enriched. Trevor was repaying the losses occasioned to his principal as a result of his negligence. Butterfield was never liable for the loss which was occasioned to the Trust. In the absence of Butterfield being enriched the plea of unjust enrichment must fail.

[30.] Section 90 of the Trustee Act provides:

90. A trust instrument may incorporate by reference any of the provisions set out in the Schedule..

Paragraph 12 of the Schedule to the Trustee Act provides:

12. NO Trustee shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or in consequence of the failure depreciation or loss of any investment or investments made in good faith or for the negligence or fraud of any agent employed by such Trustee or by any other Trustee hereof although the employment of such agent was not strictly necessary or

expedient or by reason of any mistake or omission made in good faith by any Trustee hereof or by reason of any other matter or thing except willful and individual fraud or wrongdoing on the part of the Trustee who is sought to be made liable.

(Emphasis added)

Paragraph 9 of the Declaration of Trust provides:

9. Protection for Trustees and Protector

The immunities, exculpatory provisions and indemnities in favour of trustees set out in Paragraphs 8, 11, 12, 13 and 14 of the First Schedule to the Trustee Act shall form an integral part of this Declaration of Trust and shall extend *mutatis mutandis* to any former Trustee and the Protector and any former Protector.

In the circumstances therefore, it would also appear that Butterfield was insulated from liability in respect of any claim by beneficiaries in paying any of the settlement amounts. There is no evidence that, in the actions of Butterfield, there was any willful and individual fraud or wrongdoing on its part.

[31.] Trevor claims, in the alternative, that Butterfield holds the moneys on constructive trust for him. He relies on an extract from the learned authors of Halsbury's Laws of England 4th edition Vol. 48 at par 584, which states:

"A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust."

[32.] In discussing the interrelation between claims for constructive trusts and unjust enrichment, the learned authors of *Underhill and Hayton Law of Trust and Trustees (2017) 19th edition* stated at Article 32:

Article 32

CONSTRUCTIVE TRUSTS TO REVERSE UNJUST ENRICHMENT

32.1

(1) Constructive trusts may be imposed in response to the unjust enrichment of a defendant at a claimant's expense.

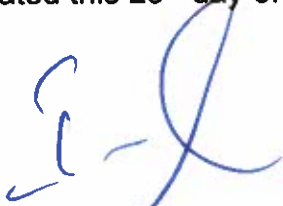
32.2 Claims in unjust enrichment arise under English law when a defendant is enriched at the expense of a claimant in circumstances which make his enrichment unjust. To establish that the defendant's enrichment at his expense is relevantly unjust, a claimant cannot appeal to some broad abstract notion of fairness: he must

demonstrate that the case falls within a recognised category of case where restitution on the ground of unjust enrichment has previously been awarded, or else that restitution could be justified by a principled extension from such a case.”

[33.] Having found that Butterfield was not enriched and that Trevor, as Consultant/agent for Brian had an obligation to make the Trust whole, any claim for a declaration as to the existence of a constructive trust must also fail.

[34.] In all the circumstances therefore Trevor’s claim is dismissed with costs to Butterfield to be taxed in default of agreement.

Dated this 23rd day of May 2022

A handwritten signature in blue ink, appearing to read 'I. Winder', is written over the date line.

Ian R. Winder

Justice