In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 430

IN THE MATTER OF A MORTGAGE DATED 1 FEBRUARY 2010 BETWEEN GAYLE ANN VENTURES (as Mortgagor) OF THE ONE PART AND FIRST BERMUDA GROUP LTD (as Mortgagee) OF THE OTHER PART (such deeds now assigned to CLARIEN BANK LIMITED (formerly Capital G Bank Limited)

BETWEEN:

CLARIEN BANK LIMITED — **Plaintiff**

-and-

GAYLE ANN VENTURES — **Defendant**

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr. Benjamin McCosker of Walkers (Bermuda) Limited for the Plaintiff**

Mr. Cameron Hill of Westwater Hill & Co. for the Defendant

Date of Hearing **20-21 October 2020**

Date of Judgment **22 January 2021**

JUDGMENT

Scope of duty of care owed by banker to customer; whether duty exists to advise the customer of prudence of a mortgage loan; whether duty exists to investigate customer's ability to service a loan; whether banker/customer relationship gives rise to fiduciary obligations; allegations of predatory lending; creation of equitable mortgages; formal requirements for the execution of the deeds by companies; section 23 of the Companies Act 1981

HARGUN CJ

Introduction

1. These proceedings were commenced by way of Originating Summons filed on 26 October 2015. The claim against the Defendant ("**the Defendant**" or "**Ms. Ventures**") arises in circumstances where the Plaintiff's predecessor bank, First Bermuda Group Limited ("**FBG**"), granted Ms. Ventures a loan in the principal sum of $842,000 over a 20 year term (the "**2010 Loan**"), secured by way of a mortgage (the "**2010 Mortgage**") over the property located at 24 and 26 Blue Hole Hill (the "**Property**"). FBG assigned the 2010 Loan to Capital G Bank Limited ("**Capital G**") on 30 September 2011, and on the same day also assigned the 2010 Mortgage to Capital G. On the 9th of April 2014 Capital G changed its name to Clarien Bank Limited ("**the Plaintiff**" or "**Clarien**").

2. On 1 February 2016, Ms. Ventures filed a Generally Endorsed Writ of Summons which makes allegations in relation to a separate loan in the sum of $1.5 million granted to her by Capital G on 10 August 2005 (the "**2005 Loan**"). The 2010 Loan refinanced some of the outstanding balance of the 2005 Loan, the remainder of which was retired by way of sale of a separate property, the effect being that the 2005 Loan was discharged, in full, on

or about 1 February 2010. By her separate action, Ms. Ventures seeks damages from Clarien for wrongful selling of a financial product, the restitution of sums paid by Ms. Ventures as a consequence of the fees, charges, penalties and penalty interest, and a declaration that the 2005 Loan was illegal and/or unenforceable. Ms. Ventures has also counterclaimed against Clarien, alleging that FBG owed Ms. Ventures a duty of care in relation to the 2010 Loan and breach of that duty causing loss and damage to Ms. Ventures.

3. The 2010 Loan remains in default, no payment having been made since January 2014, with a payoff figure as at 1 July 2020 of $1,338,493.59. Ms. Ventures has, during the 6 years since ceasing payments, continued to enjoy the exclusive possession of the Property and the benefit of the rental income derived from the Property. Ms. Ventures' position is that she owes Clarien no money whatsoever.

4. On 25 November 2016, Chief Justice Kawaley ordered the consolidation of the two proceedings, with the consolidated proceeding to continue as a writ action.

5. Clarien has elected not to pursue its claim to enforce its legal mortgage, and instead has advanced its case based upon the existence of an equitable mortgage it claims it holds over the Property, as well as seeking a money judgment against Ms. Ventures.

6. The issues which were argued at the hearing and which required determination by the Court are as follows:
    a. Did FBG hold an equitable mortgage over the Property as a result of agreeing to make the 2010 Loan to Ms. Ventures?
    b. Have the 2010 Loan and the equitable mortgage over the Property been properly assigned to Clarien so that Clarien is in a position to enforce the 2010 Loan in its name and is entitled to take possession of the Property?

c. Are Ms. Ventures' claims in respect of the 2005 Loan time barred under the Limitation Act 1984?

d. If not:

i. Were there any implied terms governing the 2005 Loan and, if so, what were those terms?

ii. Did Capital G owe any duties to Ms. Ventures in connection with the 2005 Loan and, if so, what was the content of those duties?

iii. Is Ms. Ventures estopped from making claims in respect of the 2005 Loan by virtue of the equitable doctrine of laches?

iv. Has Ms. Ventures waived her rights to challenge the calculation of the amounts owing under the 2005 Loan by reason of the payment of all amounts owing under the loan?

e. Did FBG owe a duty of care to Ms. Ventures in respect of the 2010 Loan and, if so, what was the content of that duty of care? If such duty exists, was it breached by FBG and, if so, what damages flowed from that breach?

Procedural History

7. These proceedings were commenced by Originating Summons dated 26 October 2015 and filed by Clarien seeking an order that Ms. Ventures pays to Clarien the sum due under the 2010 Loan and an order that the 2010 Mortgage may be enforced by sale. Clarien also sought an order for delivery by Ms. Ventures to Clarien of possession of the Property.

8. On 1 February 2016 Ms. Ventures filed a Generally Endorsed Writ of Summons, making claims against Clarien in respect of the 2005 Loan.

9. At the first directions hearing on 24 March 2016, Kawaley CJ ordered that Ms. Ventures file her responding evidence by 21 April 2016, Clarien to file its evidence in reply by 19 May 2016, and the matter be set down for review on 2 June 2016. The Court encouraged the parties to attempt to agree further directions for the exchange of expert evidence.

10. On 13 May 2016 Clarien filed a summons seeking to strike out Ms. Ventures' Defence in circumstances where Ms. Ventures was more than 3 weeks in default of the deadline for filing her evidence as ordered by Kawaley CJ on 24 March 2016.

11. On 25 November 2016, at the second directions hearing, Kawaley CJ ordered the consolidation of the two proceedings, with the consolidated proceedings to proceed as a writ action with the two affidavits of Patrice James and the Originating Summons standing as the Statement of Claim and Writ of Summons respectively. Orders were also made requiring parties to, *inter alia,* exchange lists of documents within 14 days from the close of pleadings. The question of the need and scope of any expert opinion evidence was reserved.

12. On 23 December 2016, Ms. Ventures filed her Defence and Counterclaim.

13. On 21 March 2017, Clarien filed its Reply and Defence to Counterclaim.

14. On 1 June 2017, at the third directions hearing, parties were ordered to exchange lists of documents within 28 days and to exchange dates for trial within 14 days.

15. On 3 October 2017 Clarien filed its List of Documents.

16. On 9 November 2017 the matter came before Hellman J for further directions in circumstances where Ms. Ventures was in default of the previous directions orders, having refused to provide trial dates or exchange her List of Documents. Hellman J made a peremptory order, requiring Ms. Ventures to serve her List of Documents on or before 23 November 2017, failing which her Defence and Counterclaim would be struck out. Hellman J awarded to costs of the hearing to Clarien.

17. On 22 August 2018, there was a further directions hearing in relation to this matter which lasted for 2 hours. Mr. Hill, on behalf of Ms. Ventures, had sought in correspondence that Clarien agree that Ms. Ventures be allowed to produce expert evidence in relation to whether Clarien and FBG had breached their respective duties of care to Ms. Ventures and that Clarien provide electronic discovery. In response, Clarien had issued a summons seeking an order that there be no expert evidence and no electronic discovery and the matter be set down for trial. At the conclusion of that hearing I refused to make an order that Ms. Ventures be debarred from adducing expert evidence, but allowed Clarien to consider whether it wished to strike out the counterclaims by Ms. Ventures in respect of which expert evidence was sought by Mr. Hill. But for the issue of expert evidence and electronic discovery, I would have set this matter down for trial in August 2018. At this hearing there was no suggestion by Mr. Hill that Ms. Ventures did not have the financial means to obtain expert evidence.

18. On 19 December 2019, counsel for Clarien wrote to counsel for Ms. Ventures, offering to consent to Ms. Ventures being permitted to adduce expert evidence, and to voluntarily producing electronic documents, in exchange for Ms. Ventures agreeing dates for trial in 2020. As no response was received, there was a further directions hearing on the 13 February 2020. Mr. Hill, for Ms. Ventures, stated that he needed 28 days (after electronic discovery) to prepare an expert's report and thereafter the matter could be set down for trial. At that hearing I ordered, by consent, that Ms. Ventures be given leave to adduce expert evidence on the subject of "*practice in Bermuda as to what a competent mortgage lender and banker would do in relation to the ability of one being able to service the loan and what a competent banker would do in terms of collection on the default of the borrower*." At the suggestion of Mr. Hill I also ordered that there be an exchange of witness statements within 14 days. I also ordered that the parties exchange dates for a three-day trial. There was no suggestion at this hearing by Mr. Hill that Ms. Ventures did not have the financial means to obtain an expert report and/or prepare a witness statement.

19. On 14 February 2020, Clarien provided electronic documents to counsel for Ms. Ventures by email. On 19 February 2020, Ms. Ventures attended the offices of Walkers (Bermuda) Limited ("**Walkers**") to inspect the documents in the Plaintiff's List. On 20 February 2020, Ms. Ventures attended the offices of Clarien to inspect the original deeds. On 21 February 2020 the Ms. Ventures attended again the offices of Walkers to inspect the documents in the Plaintiff's List.

20. On 4 March 2020, counsel for Clarien wrote to counsel for Ms. Ventures seeking exchange of witness statements.

21. On 11 March 2020, the Registrar advised the parties that the trial of this matter had been fixed for 3 days on 13-15 July 2020.

22. On 24 March 2020, counsel for Clarien again wrote to counsel for Ms. Ventures seeking exchange of witness statements.

23. On 23 June 2020, counsel for Clarien again wrote to counsel for Ms. Ventures seeking exchange of witness statements and confirming that Clarien would not contest its claim in respect of the legal mortgage in order to preserve the trial date.

24. On 7 July 2020, counsel for Ms. Ventures wrote to counsel for Clarien indicating that they "*will not be in a position to proceed*" with the trial.

25. On 8 July 2020, counsel for Clarien filed with the Court Clarien's skeleton argument and authorities bundle, together with a procedural chronology, *dramatis personae* and Statement of Issues for determination at the trial.

26. At the hearing on 9 July 2020, after hearing counsel for the parties, the Court vacated the trial fixture for 13-15 July 2020 and advised the parties that the matter be set down for an "*expedited hearing*". Mr. Hill advised the Court that he needed 28 days (after any outstanding electronic discovery) to file and exchange witness statements and the expert report. There was no suggestion at this hearing by Mr. Hill that Ms. Ventures' financial position was such that she was unable to prepare witness statements or provide expert evidence. By Notice of Hearing dated 27 August 2020, this matter was set down for trial for 2 days during the period 20-21 October 2020.

27. In breach of the terms of the order made on 13 February 2020, the Court did not receive a skeleton argument from Mr. Hill 7 days before the hearing. A document was received the night before the hearing, with even pages missing, which ended abruptly at paragraph 58 without any conclusion. It appeared to be the first draft of an incomplete document. On the second day of the hearing Mr. Hill presented a complete document of 60 paragraphs and at the conclusion of his submissions he sought leave of the Court to correct typographical errors in that document. The Court gave leave to Mr. Hill to correct typographical errors in that document. A week after the hearing Mr. Hill submitted what he described as *"updated and improved submissions of the Defendant",* comprising 94 paragraphs. Mr. Hill must have appreciated that this document was not in accordance with the limited leave given to him to correct typographical errors.

28. In the end, Ms. Ventures did not file any witness statement or file any expert evidence. Mr. Hill explained to the Court that this was due to the fact that Ms. Ventures simply did not have the financial means to incur such costs. This submission was made despite the fact that it was Mr. Hill himself who had sought, over the objections of Clarien, that Ms. Ventures be allowed to file expert evidence. At no stage prior to the trial there was any suggestion by Mr. Hill that Ms. Ventures may not have the financial means to file expert evidence. Furthermore, Ms. Ventures has not made any payments in relation to the 2010 Loan for the last 6 ½ years. Had she complied with the contractual obligation to pay $6,278 per month Ms. Ventures would have paid the sum of $489,684 during this period.

In cross-examination, Ms. Ventures, in response to the question whether she had saved any money as she was not making any payments in relation to the 2010 Loan, told the Court that "*I do have a little money set aside for it."* In these circumstances, in the exercise of my discretion, I reject Mr. Hill's submission that at the conclusion of the trial, the Court should adjourn the matter to allow Ms. Ventures a further opportunity to file expert evidence. In coming to this conclusion I have also taken into account the legal and factual findings made by the Court in relation to the claims for breach of duty of care (see paragraphs 39-43, 63-72 and 89-101 below).

29. Hearing of this matter was scheduled to take place in open court on 20-21 October 2020. As Mr. Hill had recently travelled to the United Kingdom, the Court advised the parties that the hearing would take place via Zoom in accordance with the recently published COVID-19 policy of the Government. Specifically in relation to Government workers, the policy provided that "*Ideally employees should not return to work until they received their 14 day test results. Employees should work remotely if possible. If this is not possible, employees should wait for a negative day 8 test result before the employee returns to work following travel."*

30. Mr. Hill resisted that the hearing should be conducted remotely. Mr. Hill argued that his firm had been served with a Notice of Hearing which requires the parties be available at the commencement of the hearing at the Government Administration Building and he intended to be present at the appropriate time and place. He also argued that the as he was not a Government employee, the Government policy did not apply to him. Finally, he argued that the cross examination of Mr. Geoffrey Faiella was key to his client's case and should be live in order that the Chief Justice weigh the quality and reliability of his evidence carefully. A Zoom appearance, he argued, would greatly prejudice his client.

31. In order to accommodate Mr. Hill's concerns, the Court directed that all witnesses give their evidence in Court before me but the witnesses be examined by counsel remotely via

Zoom. Accordingly, Mr. Faiella was present in the Court, so that he could be observed by me, during his cross-examination by Mr. Hill.

Ms. Venture's background

32. Ms. Ventures has owned and operated a number of businesses in Bermuda under the banner of Tempest Cave Ventures, including:
    a. Tempest Cave Housekeeping Services, a contract domestic services company which Ms. Ventures operated from at least 2003 to 2010 ("**TCHS**");
    b. Coastal Maintenance and Construction Limited, a landscaping and maintenance company which Ms. Ventures operated from at least 2005 to 2010 ("**CMCL**"); and
    c. Tempest Cave Properties, Ms. Ventures' primary business venture, which involves the sub-letting of rooms and apartments which are located on the Property and has been in operation from 1999 to present date ("**TCP**"). The Property is the premises for TCP's commercial lodging business and it appears that Ms. Ventures has resided at the Property from time to time.

33. The Defendant advised the Court that she was originally known as Gayle Ann Cook and that she changed her name by deed poll to Gayle Ann Weyland and subsequently changed her name by deed poll to her present name, Gayle Ann Ventures. Ms. Ventures maintains a LinkedIn profile which summarises her professional experience. The profile records that Ms. Ventures was the Chief Executive Officer of Bermuda Glassblowing Limited from January 1990 to 2005, and the owner and Chief Executive Officer of Tempest Cave Ventures from 2004 to present. On her website, Ms. Ventures describes herself as *"a globally focused consultant and coach that assists people to be more successful financially, physically, emotionally and spiritually."*

The 2005 Loan

34. The terms of the 2005 Loan are set out in a letter dated 10 August 2005, which was accepted by Ms. Ventures on that same date (the "**2005 Facility Letter**"). The relevant terms included the following:
    a. principal sum of $1,500,000;
    b. term of 21 years;
    c. interest payable monthly in arrears at a variable rate of 7.25% per annum, which would automatically adjust to a new higher rate of 2% above the prevailing variable rate in the event of delinquency for a period of 90 days;
    d. monthly payments of $11,610;
    e. late fees chargeable in the event of failure to meet the monthly payment, which fee may vary from time to time;
    f. security in the form of the registered first legal mortgage over both 16 Blue Hole Hill and the Property;
    g. Ms. Ventures to maintain a comprehensive insurance policy for the full replacement value of the secured properties;
    h. facility repayable on demand;
    i. Ms. Ventures agreed to Capital G, upon written notice, having the right to assign the relevant mortgage; and
    j. events of default included any breach of the terms and conditions of the 2005 Credit Facility Letter.

35. On 1 June 2016, Ms. Ventures filed her First Affidavit and set out at paragraphs 27, 28 and 34 her case in relation to the 2005 Loan:

    "27… prior to 2005 I had taken out a number of loans with a number of institutions and private individuals. I operated my family business from the premises on 16 Blue Hole Hill. Ostensibly, the Bermuda Glass Blowing Studio allowed me to generate some income to allow me to meet any obligation under the

loans. In fact, I had little, if any, ability to service the loans. The loans made to me throughout the relevant period were made in the knowledge that the outstanding balance would increase and that Clarien would simply arrange to pay itself [from] the proceeds of sale of my home and my business. The taking of excessive security placed Clarien in a position where they carried out no meaningful inquiries into my creditworthiness and once the loans had been made it became in their interest to see arrears accumulate (rather than call the loans quickly) because they would be secure that repayment would happen because of the security.

28. In short, this was a predatory loan and Clarien knew, or ought to have known that I would not be able to service the loan. Clarien did not carry out any investigations into my ability to repay. At the time I did not have paid employment and my repayment history on my pre-existing loans was erratic to say the least. Clarien carried out no investigation into how I would repay the loans and the mechanisms that I had at my disposal to generate income. I am aware that Banks around the world simply made loans where there was no realistic possibility of the borrower making the necessary payments and the loan made to me in 2005 and 2010 fell into that category.

34. My personal finances had deteriorated to the extent that I was no longer able to service my then existing loans, which were numerous. The 2005 Loan was used to consolidate my then existing borrowing. I cannot now completely recall the exact sums involved but I do recall that the proceeds of the loan were used to pay a number of loan obligations. I was told by an employee of Clarien that this solution was in my best interests and would be the best solution to my difficulties. The said representation was false and Clarien intended all along to allow the loan to increase, execute against the security to their own benefit."

36. Ms. Ventures was cross-examined in relation to the information which she provided to Capital G when she sought a loan in the amount of $1,500,000 and that Credit Presentation is dated 4 July 2005. Ms. Ventures accepted that the information contained

in that document was provided to Capital G by Ms. Ventures. Ms. Ventures had an existing loan with Capital G in the outstanding amount of $716, 293. The Credit Presentation records that:

> *"Ms. Weyland [Ms. Ventures' former name] is requesting a new loan of $1,500,000, to assist with the following: (1) refinance loan… with [Clarien] in an amount of $716,293…(2) refinance loan with the Bank of Bermuda in an amount of $55,000, (3) refinance loan with private mortgage holder in an amount of $530,000, (4) pay outstanding legal fees… in an amount of $26,000, (5) pay outstanding debts for the old Bda Glassblowing in an amount of $75,000 (6) pay Ted Gauntlet in an amount of $7000, (7) pay Bda Credit Association in an amount of $8000, (8) pay BELCO in an amount of $30,000, and (9) injection made through Capital G that is outstanding on loan clearing."*

37. The Credit Presentation records that Ms. Ventures was aware that there would be a slight increase in the monthly payments ($12,626 from the existing $11,000 a month) but Ms. Ventures desired that all debts the consolidated under one financial institution:

> *"Mrs. Weyland advised that at present she pays approximately $11,000 p/m. She is aware that there will be an increase in monthly payments if a request is approved but states that she would like to have the debt consolidated under one financial institution*." (emphasis added)

38. It is clear from the Credit Presentation that the Credit Committee of Capital G took into account the following relevant factors:
    a. On the basis that the loan to Ms. Ventures is extended for a period of 21 years, it will still comply with the requirement that the loan be repaid prior to borrower's age exceeding 65 years old.
    b. Ms. Ventures resides at 24 Blue Hole Hill, Bailey's Bay, Hamilton Parish and has been self-employed for 24 years.

c. Ms. Ventures' monthly income was rental income of $9,000 per month from Bermuda Glassblowing property and that sum would soon increase to $12,000 per month, rental income of $8,675 per month from the Tempest Cave property, and expected income of $7,500 per month income from the recently acquired cleaning contract. All this information was included in Ms. Ventures' Personal Financial Statement provided to Capital G by Ms. Ventures. On the basis of this information the Credit Committee noted that Ms. Ventures will have a disposable income of approximately $8,050 per month, after the loan repayment of $12,626 per month to Clarien, which should be "*adequate for living expenses*". The Credit Committee also noted that Ms. Ventures' Debt Service Ratio had improved even if it was above 50% (at 63.5%).

d. Ms. Ventures advised Clarien in relation to her capital assets in the context of this loan application so that this information could also be taken into account by Clarien. She advised that her estimated total assets were $3.634 million, her estimated total liabilities were $1.46 million and her estimated net worth was $2.175 million. In relation to these capital assets Ms. Ventures provided Clarien with a valuation from Roderick DeCouto Real Estate dated 5 August 2004 in respect of 24 and 26 Blue Hole Hill where the property was valued at BD$1,650,000 gross. She also provided a valuation by Thomas B. Moss Real Estate dated 5 August 2004 in relation to the same property and Mr. Moss valued it at $1,750,000.

39. I found Ms. Ventures to be an unsatisfactory witness. The evidence she gave did not accord with the contemporaneous documentation she had provided to Clarien. It appeared to me that she was more of an advocate seeking to convince the Court that (i) Clarien had carried no investigation of her financial position to determine whether she could service the 2005 Loan; and (ii) had it done so, Clarien would not have made the 2005 Loan. This advocacy position led her to downplay the financial information she had herself provided to Clarien. It became even more difficult when she made identical allegations against FBG in relation to the 2010 Loan in circumstances where she had provided detailed

financial information to FBG (see paragraphs 75 to 84 below). In the end, her credibility in relation to the allegations against Clarien and FBG, in my judgment, was severely shaken.

40. In light of the information Ms. Ventures provided to Capital G and in light of the analysis carried out by the Credit Committee, as appears from the Credit Committee Report, it is not realistic to contend that; "*[Capital G] knew, or ought to have known that I would not be able to service the loan. [Capital G] did not carry out any investigation into my ability to repay."* On the basis of the information provided by Ms. Ventures, the Credit Committee of Capital G calculated that after making the monthly payment due under the 2005 Loan, Ms. Ventures would be left with $8,050 per month or $96,600 per annum for living expenses.

41. Capital G of course knew that Ms. Ventures had outstanding indebtedness. The outstanding indebtedness is set out in the Credit Presentation under the heading *"Purpose*". In addition to the major loan outstanding, the indebtedness included outstanding legal fees to Conyers Dill & Pearman, unpaid invoices to Ted Gauntlet, outstanding indebtedness to the Bermuda Credit Association in the amount of $8,000 and unpaid electricity bills to BELCO in the amount of $30,000. In addition, Ms. Ventures had a credit history with Clarien and in relation to that account, the Credit Committee noted that *"Mrs. Weyland [Ventures] has a mortgage with us. Current balance: $707,415. History: 6x (7 days), 10x (15 days), 23x (30 days) 10x (60 days), 6x (90 days) & 23x (120 days). Currently one day delinquent in an amount of $3,103."*

42. Ms. Ventures criticised Capital G for not taking into account, that in preparing the financial information presented to Capital G, for the purposes of obtaining the 2005 Loan, Mrs. Ventures *"was being somewhat optimistic."* When pressed she accepted and asserted that the information which she provided to Capital G was basically true. She also accepted that at the time she did not believe that she could not make the payments under

the 2005 Loan: *"I thought I could*." Ms. Ventures also accepted that she knew that Capital G relied upon that information. She explained that when she was providing this financial information to Capital G she had *"no idea that my husband's then best friend of 20 years was going to deliberately bankrupt my company. You don't expect that from family. You don't expect your sister to deliberately go into business and compete against you and try to break you*." If these are indeed causes or explanations for Ms. Ventures' subsequent financial difficulties, Capital G cannot be held liable for any loss or damage resulting from those financial difficulties.

43. Ms. Ventures, as noted above, has alleged in her First Affidavit that an unidentified employee of Capital G had represented to her that the 2005 Loan would be in her "*best interests*" and would be *"the best solution to [her] difficulties*". Mr. Faiella, VP Legal, Head of Legal and Compliance and the person principally responsible for the oversight of the conduct of this litigation by Clarien in recent years, states in his witness statement that he has been unable to locate any file note, memorandum or other contemporaneous record suggesting that such advice, or any advice whatsoever, was provided to Ms. Ventures in connection with the 2005 Loan. Whilst there is contemporaneous correspondence in relation to a number of complaints made by Ms. Ventures with respect to the 2005 Loan, there is no suggestion in any of that correspondence that Clarien suggested that it was in Ms. Ventures' *"best interests"* that she should enter into this loan arrangement. To the contrary, the Credit Committee memorandum states clearly that it was Ms. Ventures who *"would like to have all debt consolidated"* and *"wishes to apply for a higher amount".* The first time this allegation appears to have been made is when Ms. Ventures filed her First Affidavit on 1 June 2016, 7 months after she had been served with the Originating Summons issued on behalf of Clarien seeking enforcement of the 2010 Loan and sale of the mortgaged property. On the balance of probabilities, I find that Clarien did not advise Ms. Ventures that the 2005 Loan was in her best interests and would be the best solution to her financial difficulties.

44. The history of the 2005 Loan and its eventual repayment to Capital G in February 2010 is reflected in the contemporaneous documentation attached to the witness statement of Mr. Faiella. The documentation shows that the 2005 Loan fell into default almost immediately. On the 9th of August 2006, Ms. Ventures wrote to Clarien stating that she was *"encountering a short-term cash flow difficulty"* and would be *"$9000 short on the Mortgage amount of this month".* Ms. Ventures' explanation for the shortfall included that she had paid for renovations and purchased a new vehicle out of the funds which were required to be applied against the 2005 Loan.

45. On 22 November 2006, Clarien sent a Past Due Notice to Ms. Ventures, informing her that her loan account was 52 days past due and that a total past due sum of $16,865.20 was owing.

46. By December 2006, Ms. Ventures was seeking to refinance the 2005 Loan, which had fallen significantly in arrears. On 20 December 2006, Kathryn Lloyd-Hines, Head of Lending at Capital G, responded to Ms. Ventures' request to refinance the loan and advised:

> *"The loan is currently in arrears and whilst it is only 1 month's payment that occurred months ago, the fact is that arrears have not been caught up which supports our concern of the reliability of the rental or other income and your not making allowances for the unforeseen related to the maintenance of the properties in a reserve account. It is evident from your letter of Aug 06 that rather than keeping the loan current, funds were directed to other seemingly more important obligations or business needs.*
>
> *In order for the Bank to agree to the release of collateral and the important revenue source, we must see debt reduction and certainly be satisfied that the remaining debt service resources."*

47. On 31 January 2007, Capital G sent a Second Past Due Notice to Ms. Ventures, informing her that her loan account was 61 days past due and that a total past due sum of $36,715.85 was owing.

48. On 26 February 2007, Capital G sent a Final Past Due Notice to Ms. Ventures, informing her that her loan account was 87 days past due and that the total past due sum of $36,739.85 was owing.

49. On 16 July 2007, Ms. Ventures wrote to the Credit Committee of Capital G seeking the release of Capital G's security over 16 Blue Hole Hill in exchange for a balloon payment of $300,000, with Capital G to retain its security over the Property.

50. On 5 and November 2007, Ms. Brown of Capital G prepared a memorandum to the Credit Committee in relation to Ms. Ventures' 2005 Loan and recommended:

> *"In my opinion we have given Ms. Ventures enough chances. We have refinanced a problem loan in the past created a new loan with new history and now the loan is 88 days delinquent.*
>
> *…*
>
> *I recommend giving Ms. Ventures a chance (approx… 2 months) to re-finance the entire debt held with us and if she is unable to re-finance, we should demand the loan."*

51. On 21 December 2007, Capital G wrote to Ms. Ventures requiring her to take action within the next 3 months by either (i) refinancing the 2005 Loan with another financial institution; or (ii) selling 16 Blue Hole Hill and using the proceeds to pay down the 2005 Loan.

52. In May 2008, Ms. Ventures voluntarily sold 16 Blue Hole Hill for the sum of $1,150,000. The sale resulted in a significant reduction in the principal of the 2005 Loan. Monthly payments were reduced from $11,677.70 to $5,625 as a result. The revisions to the original Credit Facility Letter were memorialised in a letter from Capital G to Ms. Ventures dated 6 May 2008 and which was accepted by Ms. Ventures by signing that letter on 12 May 2008.

53. Just over a year later, Ms. Ventures again fell into default. On 10 June 2009, the 2005 Loan was in default and the interest rate was increased from 6.25% to 8.25% as a collection penalty.

54. On 8 July 2009, Capital G sent a Past Due Notice to Ms. Ventures, informing her that her loan account was 68 days past due and that a total past due sum of $10,117.01 was owing.

55. On 27 July 2009, Capital G sent a second Past Due Notice to Ms. Ventures, informing her that her loan account was 87 days past due and that a total past due sum of $5,277.01 was owing.

56. On 11 August 2009, Capital G sent a Final Past due Notice to Ms. Ventures, informing her that her loan account was 102 days past due and that a total past due sum of $9,882.01 was owing.

57. On 1 September 2009, Ms. Ventures requested of Capital G that arrears on the mortgage be added to the principal amount and explained that:

> *"Due to my inability to obtain any kind of credit facilities or loans, I have used some funds from the mortgage payments to renovate a studio apt that was not in rentable condition. This renovation is now complete, and the unit is rentable.*

As it is a "capital improvement" to the property I am requesting the 3 payments, July, Aug, and September be added to the Capital and amortized.

As of October30th I should be back to a regular payment Schedule."

58. On 14 September 2009, Capital G sent a Final Demand to Ms. Ventures, informing her that her loan account was 136 days past due and that the total balance of $685,517 was due and owing.

59. By a facility letter dated 30 January 2010 (the "**2010 Facility Letter**") FBG agreed to grant Ms. Ventures financing of $842,000 for the purposes of refinancing her mortgage with Capital G and to purchase a property in Canada. As security for the loan granted by FBG, Ms. Ventures signed a deed of mortgage dated 1 February 2010 in relation to the Property providing security to FBG, in accordance with the requirement of the 2010 Facility Letter. Accordingly, Capital G was paid the outstanding amount under the 2005 Loan by Ms. Ventures in February 2010 and the relationship came to an end at this time. There was no suggestion by Mrs. Ventures that when paying the outstanding amount under the 2005 Mortgage to Capital G in February 2010 that she was reserving any rights in relation to the 2005 Loan. The first time any issues in relation to the 2005 Loan were raised, after the payment of the outstanding amount in February 2010, was when Ms. Ventures swore her First Affidavit on 1 June 2016.

60. In her First Affidavit Ms. Ventures made the following claims in relation to the 2005 Loan:

    a. She claimed (at paragraph 20 and 21) that she believes that she was overcharged *"because of the manner in which they approach delinquent accounts, applied eye watering charges and penalties to the loan account."* She stated that the sums actually overcharged will be the subject of expert evidence but that she believed that she had been significantly overcharged.

b. Ms. Ventures claimed (at paragraph 24) that Capital G had miscalculated the sums so that the balance has been wrongly increased by $48,633.93. She claimed that this sum was made up of errors of calculation and penalties and charges arising, particularly, when the loans, and particularly the 2005 Loan, fell into arrears. She stated that she had engaged the services of a forensic accountant to carry out an analysis of the payments claimed by Clarien.
c. Ms. Ventures also claimed (at paragraphs 27- 38) breach of duty alleging that Capital G did not carry out an investigation into her ability to repay and that such a failure made it inevitable that there would be a default and escalation of the debt occurred as a result of her known inability to pay.

61. As far as the claim for overcharging is concerned, Ms. Ventures has produced no evidence in relation to this claim which the Court can properly accept. Despite the fact that paragraph 20 of her First Affidavit stated that this claim would be the subject of expert evidence, no such expert evidence was tendered by her at the trial. Secondly, the additional charges for delinquent accounts were set out on page 1 of the 2005 Facility Letter providing that "*in the event of the loan becomes delinquent for a period of 90 days, the Bank will have the right to automatically adjust the rate to a new higher rate of 2% above the current rate, in order to compensate the Bank for the additional managerial and administrative costs created by the loan's delinquency."* I am unable to accept Ms Ventures' evidence that she did not pay attention to the "*fine print*" of the 2005 Facility Letter and in any event such an assertion would be legally irrelevant. Third, this claim in any event would be time barred under the Limitation Act 1974.

62. As far as the claim for sums charged in error is concerned, Ms. Ventures again has produced no evidence which the Court can properly accept. Despite the fact that in paragraph 24 of her First Affidavit she advised the Court that she had engaged the services of a forensic accountant to carry out an analysis of the payments claimed by Clarien, no such evidence was tendered by Ms. Ventures at the trial. In his final submissions, Mr. Hill advised the Court that he was abandoning the claim as he appreciated that he faced an uphill battle under the Limitation Act 1974.

63. As far as the claim for breach of duty of care is concerned, I consider that there is no factual basis for making this claim. In relation to the allegation that Capital G made no attempt to determine whether Ms. Ventures could service as the loan, I have already held that the allegation is factually incorrect. The Credit Committee of Capital G in fact engaged in that exercise and determined that Ms. Ventures could indeed service the loan and still have $8,050 per month for living expenses. In my judgment, Capital G, in the absence of any red flags, was entitled to rely upon the financial information which Ms. Ventures had provided to Capital G in support of her application to obtain the 2005 Loan. There were, in my judgment, no red flags to indicate to Capital G that the financial information which Ms. Ventures had provided was obviously untrue. In relation to the factual allegation that Capital G took it upon itself to advise Ms. Ventures that the loan was in her best interests, I have already found that, on the balance of probabilities, Capital G gave no such advice. I also find that there is no factual basis for alleging that Capital G was contributorily negligent in relation to the alleged damage suffered by Ms. Ventures.

64. Secondly, the acts complained of, in support of the duty of care claim, allegedly took place in July 2005 and that these proceedings were not commenced until 26 October 2015 and the Counterclaim not filed until 23 December 2016. In my judgment the claim for breach of duty is time barred under the Limitation Act 1974. Mr. Hill mentioned that the claim was not barred as there was "continuing loss". However, the submission was not developed and I am unable to see how this provides an answer to the limitation defence.

65. Third, at common law, a banker is under no obligation to advise the customer in relation to whether it is prudent for the customer to enter into the loan contract. Whilst the position may differ as a consequence of statutory provisions designed to modify the common law, the position at common law is that a banker is under no obligation to warn a customer as to the potential financial consequences of entering into a loan or mortgage transaction and, in the absence of red flags, is under no obligation to carry out an

investigation in relation to the information provided by the customer to the bank in order to determine whether the information is in fact correct.

66. In *Williams and Glyn's Bank v Barnes* [1981] Com LR 205, Gibson J held that, in the absence of special circumstances, there was no such duty to advise the customer. In that case, it was submitted for Mr. Barnes that the bank was under a duty to him to advise him as to the prudence of borrowing GBP 1 million for the purchase of shares in a company, when it knew, or ought to have known, that the company's business was exposed to serious risk. It was said that the relationship of banker and customer created a relationship of sufficient proximity to give rise to an obligation in the bank to consider, and to advise upon, the prudence of a loan for which the customer asked, in particular where, as in the case of this bank, the bank held itself out as having the skills necessary to form an opinion upon the prudence of the borrowing from the customer's point of view. In relation to the submission Gibson J held:

> *"In such circumstances, no duty in law arises upon the Bank either to consider the prudence of the lending from the customer's point of view, or to advise with reference to it. Such a duty could arise only by contract, express or implied, or upon the principles of assumption of responsibility and reliance stated in Hedley Byrne, or in cases of fiduciary duty. The same answer is to be given to the question even if the Bank knows or ought to know that the borrowing and the application of the loan, as intended by the customer, are imprudent…*
>
> *The central reason why the principles of Donoghue v Stephenson cannot be extended to the transaction of lending in the way contended for by the Defendant is that, in this case, the Defendant asked for the loan; the Bank lent the money; and the Bank did not act other than that which the Bank was asked to do. Neither the Defendant nor [the company] was required to borrow. The suggestion that a Bank, dealing with the businessman of full age and competence, without being asked, or assuming the responsibility to advise, must consider the prudence from the point of view of the customer of a lending which the Bank is asked to make, as*

a matter of obligation on the Bank, and in the absence of fiduciary duty, is in my judgment impossible to sustain."

67. To the same effect is the binding decision of the Privy Council in *National Commercial Bank (Jamaica) Limited v Raymond Hew* [2003] UKPC 51, where the decision of the Privy Council was delivered by Lord Millett:

> *"13. The legal context in which this question falls to be decided is well established. In Banbury v Bank of Montreal [1918] AC 626 Lord Finlay LC said at p 654:*
>
> > *"While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business ... If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently."*
>
> *In relation to a failure to advise a customer, Warne & Elliott Banking Litigation (1999) states at p 28:*
>
> > *"A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given."*
>
> *14. It is, therefore, not sufficient to render the Bank liable to Mr Hew in negligence that Mr Cobham knew or ought to have known that the development of Barrett Town with the borrowed funds was not a viable proposition. It must be shown either that Mr Cobham advised that the project was viable, or that he*

assumed an obligation to advise as to its viability and failed to advise that it was not. Their Lordships have examined the transcripts of the trial with care, and have failed to find any evidence to support any such finding."

68. The Privy Council decision in the *National Commercial Bank* has been followed and applied in Bermuda by Kessaram AJ in *HSBC Bank of Bermuda Limited v Leroy Scott Wales* [2018] Bda LR 116 where the learned judge set out the common-law position at [25]:

> *"25. It is not in my view correct to say that by granting them the Mortgage Loan the Bank was implicitly advising the Defendants that the purchase of the property was a sound investment which they could afford to make. There is nothing in the evidence to suggest that the relationship between the Bank and the Defendants in this case was other than the conventional relationship of lender/borrower. The parties' mutual rights and obligations were contained in the Offer to Finance letter dated 5th March 2008. It is plainly on its face not a contract to provide advice. If there was no duty on the Bank contractual or otherwise to advise the Defendants (no basis for such a duty was put forward by the Defendants), it is difficult to see how it can be inferred from the mere making of the loan that the Bank considered and advised that the investment was sound. In this regard I would adopt the words of Lord Millett on appeal to the Privy Council in the case of National Commercial Bank (Jamaica) Ltd v Hew et al [2003] UKPC 51 at [22] where he said:*
>
> *"This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound".*

69. To the extent that it is faintly suggested, on behalf of Ms. Ventures, that a fiduciary relationship may have arisen as between Capital G and Ms. Ventures, the authorities make it clear that in the ordinary case the banker and customer relationship gives rise to no such fiduciary relationship.

70. In *Foley v Hill* (1848) 2 HLC 28, the House of Lords held that the relationship of a banker and customer does not partake of a fiduciary character, nor bear any analogy to the relation between principal and agent, who is quasi trustee for the principal in respect of the particular matter for which he is appointed as agent.

71. A modern authority to the same effect is the Court of Appeal decision in *Fahad AL Tamimi v Mohamad Khodari* [2009] EWCA Civ 1109, where Wilson LJ held at [42]:

> *"The relationship between a lender and a borrower is not in principle a fiduciary relationship. The relationship between a bank manager and a customer may in certain circumstances acquire a fiduciary character: see Snell's Equity, 31st ed., 7 – 09,10. But there is no ground for discerning any such acquisition here nor indeed for concluding that the relationship of the parties qua bank manager and customer governed their transactions. On the judge's findings, the parties did not allow the latter relationship to affect their transactions beyond conferring upon the claimant, in the event of the defendant's specific consent, an administrative facility to secure repayment (of only some of the loans, be it noted) by a mechanism presumably convenient to both of them. There is no material from which to infer an understanding of subordination of the interests of the claimant to those of the defendant or (in the words of Millett LJ in Bristol and West Building Society v. Mothew [1998] Ch.1 at 18B) of single-minded loyalty on the part of the former to the latter. The situation was no different from that in which a*

debtor hands to his creditor his wallet, or lends to him his cash card and equips him with his pin number, in order to enable him to secure repayment. The judge was right to conclude that the relationship between the parties was not fiduciary."

72. In the circumstances there is, in my judgment, no viable counterclaim which Ms. Ventures can pursue arising out of the 2005 Loan.

2010 Loan

73. On 15 November 2009, Ms. Ventures sent a letter to FBG formally requesting the refinancing of the 2005 Loan with Capital G. In that letter Ms. Ventures stated:

"My Mortgage is currently with Capital G Bank and I wish to re-finance with another institution.

And I would like to add $150,000 to the First mortgage for the Purchase of a Property freehold in Nova Scotia, Halifax."

74. In cross-examination, Ms. Ventures confirmed that it was her decision to seek financing from FBG and that was suggested to her by a friend of hers. She accepted that she provided a substantial amount of financial information to FBG and signed a declaration that the information she had provided was true. Ms. Ventures advised the Court: *"It was true at the time, it was the best information."*

75. Ms. Ventures' letter of 15 November 2009 also attached a personal financial summary prepared by Ms. Ventures, at the time when the 2005 Loan was still in existence with Capital G, which stated that her:
    a. personal net worth was $2,525,535;
    b. sole liability was the Capital G Mortgage in the sum of $675,000;
    c. disposable income each month after all expenses (including loan repayments) was $4,967;
    d. total net income for the 2009 calendar year was $47,132.38;
    e. her forecast total net income for the 2010 calendar year was $60,475.50 (or $63,375.50 on the basis that she did not proceed with the purchase of the property in Canada).

76. Ms. Ventures' letter included a financial summary in relation to TCP, provided on TCP letterhead, in the following terms:

> *"TCP (Tempest Cave Properties) has been in existence now for 10 years. It is made up of primarily of house-sharing (renting rooms for shared living and sometimes storage) and to apartments, Tempest Cave Apt #24A, and #26 Tempest Cave Cottage.*
>
> *It began in 1999, when my former husband and I mutually agreed to divorce.*
>
> *It has steadily grown from year to year, despite the economy, and personal financial hardships."*

77. Ms. Ventures summarised the gross income of TCP from 1997 to 2010, which range from approximately $70,000 to $210,000. Ms. Ventures stated:

> *"We are expecting a better year for 2010 because I have renovated the Cottage, and I never have much of a problem staying for as her share with "working folk"*

and in my prices remain stable and affordable. I anticipate the levels staying around $100,000 TO $150,000 over the next 10 years."

78. Ms. Ventures' letter also included a financial summary in relation to TCHS, provided on to TCHS letterhead, in the following terms:

"TCHS (Tempest Cave Housekeeping Services) has been in existence now for 7 years.

It began in 2003, one year before I closed down Bermuda Glassblowing Limited.

It has steadily grown from year to year, despite the economy, and personal financial hardships. Please note that I have also had a "living wage" taken before net profits approximately $30,000 increasing to $45,000 in 2008, and $55,000 in 2009."

79. Ms. Ventures summarised the gross sales of TCHS from 2003 to 2009, which ranged from approximately $80,000 to $330,000, Ms. Ventures also summarised net profit for the same date range, which ranged from an approximate $4,000 loss to an approximate $27,000 profit. She added that the forecast for the calendar year 2010 was an approximate profit of $125,000:

"We are expecting a bumper year for 2010 simply because we will have 10 cleaners or more on a steady basis. Profit increases with volume like compounded interest. At 2010 budget the percentage is 28% versus 10% and 15% previously."

80. Ms. Ventures' letter also included a financial summary in relation to CMCL, on CMCL letterhead, in the following terms*:*

"CMCA began in 2005, to supplement TCHS client base, and developed into a separate company in January 2008 when it was incorporated.

It has had a chequered growth from year to year, and a summary of gross income year is listed."

81. Ms. Ventures summarised the gross income of CMAC from 2005 to 2009, which ranged from approximately $48,002 to approximately $134,000. Ms. Ventures also summarised net profit for the same date range, which ranged from "*breakeven*" to approximately $13,000 for the same period. Ms. Ventures also attached an unsigned letter from Gary and Alma Gauntlet dated 12 November 2019, indicating that they anticipated purchasing TCHS from Ms. Ventures for the sale price of $200,000.

82. On 15 November 2009, Ms. Ventures also completed a Loan and Mortgage Application Form seeking loan financing from FBG. Ms. Ventures' application form stated that she had monthly income of her $21,521 with a total expenditure of $7,880 and that the current amount owing under existing mortgage was $678,556.24 as at 6 November 2009. She stated her net worth as $2,574,443.80. The loan application confirmed that she was seeking a total sum of $828,556.24, comprising of $678,556.24 to discharge the existing mortgage with Capital G, together with $150,000 as the purchase price for a new home. Ms. Ventures also provided that 2008 income statement and a schedule of her personal financial statement in support of her loan application. The declaration to the Loan Application stated that:

"I/We declare that the information provided herein to First Bermuda Group Ltd is true and complete in all material respects.

The information given in this application is true and accurate to the best of my/our knowledge and belief. It is understood that additional information may be

required and that I/We may be asked to discuss the details of this application in a personal interview."

83. On 8 December 2009, FBG obtained a Basic Credit Report in respect of Ms. Ventures from Bermuda Credit Association Ltd ("**BCA**"), which confirmed her credit rating to be "A", meaning that BCA had no record of any debts owing by Ms. Ventures. FBG did not run a credit check against Ms. Ventures' previous names because Ms. Ventures did not disclose to FBG her former aliases.

84. Based on the information provided in Ms. Ventures' Loan and Mortgage Application and the supporting financial information, FBG assigned the credit risk on the facility as an "A", with the total debt service ratio of between 31% and 40% and a loan to value ratio of between 26% and 50%.

85. On 13 January 2010, FBG sent a letter to Ms. Ventures confirming the approval of financing in the amount of $842,000 *"… For the purposes of refinancing your mortgage with Capital G Bank and to purchase property in Canada"* (the "**2010 Facility Letter**").

86. The 2010 Facility Letter also confirmed that *"should any of the financial information pertaining to this application change at any time this office must be notified immediately with regard to ensuring the continued servicing of this debt."* Finally, the 2010 Facility Letter stated that *"all charges, legal or otherwise, incurred by us in connection with this debt will be for your account."*

87. The principal terms of the 2010 Facility Letter were as follows: (i) principal sum of $842,000; (ii) a 20 year term, maturing February 2030; (iii) 6.5% effective rate interest, subject to the change with one month's notice; and (iv) monthly payments of $6,278 due 28 February 2010 and each month and thereafter. The 2010 Facility Letter concluded by asking Ms. Ventures to sign the letter confirming her agreement to the terms and conditions set out in that letter. Ms. Ventures did so on 15 January 2010.

88. The security for the loan was a first legal mortgage of the Property. Ms. Ventures executed the deed of mortgage made under seal on 1 February 2010 ("**2010 Deed of Mortgage**").

89. Ms. Ventures repeats, in essence, the same allegation against FBG in relation to the 2010 Loan as she has made against Capital G in relation to the 2005 Loan. At paragraph 49 of the First Affidavit she repeats the allegation that FBG made no meaningful investigation as to her ability to pay.

90. Secondly, at paragraph 50 that she repeats the allegation that FBG made representations to her, which representations were false, and which FBG had no grounds to believe were true. She says that FBG made express representations that the loan being offered was suitable for her needs and that she would be able to fund the loan payments.

91. In cross-examination, Ms. Ventures told the court that she was "*shocked*" that FBG had approved her application for a loan because had FBG carried out any investigation they would have realised that she could not service the loan. She said that it was the same position as the 2005 Loan.

92. I am entirely unable to accept Ms. Ventures' evidence to the effect that FBG carried out no investigation in relation to Ms. Ventures ability to service the loan or that they made a representation to Ms. Ventures that the loan offered was suitable for her needs and that she would be able to fund the loan payments.

93. First, Ms. Ventures provided to FBG a substantial amount of information relating to her financial affairs. The information was provided with the understanding that FBG would be relying upon that information in considering whether or not to make the loan. Ms. Ventures expressly acknowledged that the information she had provided to FBG was correct in all material respects. Based upon that information FBG concluded, and was entitled to conclude, that Ms. Ventures could indeed service the loan. Ms. Ventures represented to FBG that she had a disposable income each month after expenses (including loan repayments to Capital G) of $4,967 per month.

94. Second, FBG in fact obtained a Basic Credit Report in respect of Ms. Ventures from BCA, which confirmed her credit rating to be "A", meaning that BCA had no record of any debts owing by Ms. Ventures. FBG carried out a detailed analysis of Ms. Ventures' financial position and assigned a credit risk on the facility as an "A", with a total debt service ratio of between 31% and 40% and a loan to value ratio of between 26% and 50%. On the basis of the information provided to FBG by Ms. Ventures, FBG was entitled to come to that conclusion.

95. Third, a substantial reason why Ms. Ventures' application for the loan was not declined is that Ms. Ventures was not frank with FBG in relation to her financial affairs. As part of the information provided to FBG, Ms. Ventures provided a spreadsheet of the total income and expenses actually incurred by TCP. The spreadsheet represented that TCP had paid the mortgage repayments to Capital G in the amount of $6,000 per month for the

entire calendar year 2009 and was current with the repayments with Capital G. As Ms. Ventures accepted in cross-examination, this information was untrue. Capital G had not received any payment in relation to the mortgage for the last 4 months and Capital G had served the Final Demand notice and threatened legal proceedings to recover the loan. Had the true position been presented to FBG by Ms. Ventures it is unlikely that FBG would have made an offer in terms of the 2010 Loan. Ms. Ventures had no explanation as to why this obviously relevant information in considering whether or not to FBG should grant a replacement loan was misrepresented to FBG.

96. Fourth, a file note dated 11 January 2010, made by Rebecca DeAllie, a loan officer at FBG, refers to an interview with Ms. Ventures and records that Ms. Ventures was seeking a facility in the amount of $830,000, which after legal and establishment fees would result in an initial loan of $842,000. The file note further the records:

> *"Ms. Ventures is looking to refinance her mortgage with Cap G & borrow an additional $150,000. Ms. ventures had a few problems with Cap G which left her with "bad feelings" towards them, however, <u>they confirmed that her a/cs are in order & they are happy to continue the relationship with her.</u> Ms. Ventures has a couple of business enterprises which are not effected [sic] by the economy & this lending is well within her means to maintain."* (emphasis added)

97. It is clear to me that the information recorded in the file note by Ms. DeAllie does not reflect the true position. The information recorded suggests that the mortgage repayments with Capital G were "*in order*" which was not the case in January 2010. The note also records that Capital G were *"happy to continue the relationship*" with Ms. Ventures which was also not the case as Capital G had served a Final Demand on 14 September 2009 stating that unless the outstanding amount was paid by 24 September 2009 legal proceedings would be commenced to recover the loan without further notice.

98. Ms. Ventures denied that she had attended an interview with Ms. DeAllie although she accepted that she had had a conversation with her. Ms. Ventures denied that she had told

Ms. DeAllie that the account with Capital G was "*in order*" and that Capital G was "*happy to continue their relationship*" with Ms. Ventures. I am satisfied that the information recorded by Ms. DeAllie in her file note of 11 January 2010 was information provided to her by Ms. Ventures. This information is consistent with the information provided by Ms. Ventures, in the form of the spreadsheet relating to actual income and expenditure of TCP for the calendar year 2009, which inaccurately purports to show that the mortgage payments to Capital G had been made on time and were current. Again, if FBG had been provided the accurate information that there was serious default in the mortgage repayments with Capital G, and that Capital G had served a Final Demand notice and was threatening legal proceedings for the recovery of the entire loan, it is likely that FBG would not have made the offer in terms of the 2010 Loan.

99. I am unable to accept that FBG made a representation to Ms. Ventures that the 2010 Loan was in her best interests and that she would be able to service the loan. The position is that Ms. Ventures approached FBG, according to her at the suggestion of a friend, in circumstances where Capital G was threatening the proceedings to recover the 2005 Loan. It was Ms. Ventures who provided all the financial information to FBG which was designed to show that Ms. Ventures had more than sufficient income to service the proposed loan and in addition had substantial capital available to her. The file note made by Ms. DeAllie records that the reason why Ms. Ventures is leaving Capital G and looking to refinance the loan is because Ms. Ventures has "*bad feelings*" towards Capital G. There is no mention in any of the contemporaneous correspondence or documentation which suggests or hints that FBG might have represented to Ms. Ventures that the 2010 Loan was in her best interests. The first time Ms. Ventures alleged that such a representation had been made, by an unnamed person on behalf of FBG, was when she filed her First Affidavit on 1 June 2016, 7 months after these proceedings had been commenced for the recovery of the 2010 Loan.

100. In the circumstances, I am satisfied that there is no sufficient factual basis for alleging the existence of duty of care or that there was any breach of that duty. I also find that there is no factual basis for alleging that FBG was contributorily negligent and that it should share in the alleged damage suffered by Ms. Ventures.

101. Further, as noted at paragraphs 66 to 68 above, FBG was under no obligation to advise Ms. Ventures in relation to whether it was prudent for her to enter into the 2010 Loan. FBG was under no obligation to warn Ms. Ventures as to the potential financial consequences of entering into the loan and mortgage transaction and was under no obligation to carry out an investigation in relation to the information provided by the Ms. Ventures to FBG in order to determine whether the information was in fact correct.

102. The historical record of Ms.Ventures payments to FBG under the 2010 Loan is similar to her record of payments to Capital G under the 2005 Loan. Ms. Ventures made payments in accordance with the 2010 loan agreement for 11 months, until February 2011, at which time partial payments began to be made in varying amounts, some over and some under the specified monthly payment amount of $6,278.

103. On 9 May 2011, Ms. Ventures sent an email to Ms. DeAllie in relation to her loan account, which was significantly in arrears. Ms. DeAllie responded, confirming that the loan account required payment of a further $6,516 in order to bring it up to date. Ms. DeAllie's email also enclosed a schedule of the funds received in respect of the 2010 Loan dating back to mid-March in order that Ms. Ventures could cross-reference against her own payment records.

104. On 8 July 2011, Ms. Ventures sent a letter to Ms. DeAllie indicating that she would pay a total of $7,300 per month going forward in order to address the arrears in respect of the 2010 Loan.

105. On 22 September 2011, Ms. DeAllie sent an email to Ms. Ventures following up on overdue payments on the loan account and pointed out that FBG had only received $1,000 so far for that month and that her account was in arrears in the amount of $12,428.

106. On 30 September 2011, as part of the amalgamation of Capital G and FBG, these two corporate entities, entered into the Asset Transfer Agreement and the Deed of Assignment, details of which are considered at paragraphs 144 to 170 below. On 30 September 2011, Capital G gave written notice to Ms. Ventures advising her that:

> *"We are writing with respect to the January 4, 2011 amalgamation of First Bermuda Group Ltd. with the Capital G group of companies of which the Bank is a member.*
>
> *This letter serves as notice, that with effect from the date of this letter, FBG assigned to your mortgage documentation, as detailed in a Deed of Assignment, to the Bank.*
>
> *A copy of the Deed of Assignment is attached for your records."*

107. On 12 February 2012, Ms. DeAllie sent an email to Ms. Ventures, requesting that she "*let me know the amounts and dates of the payments which you will be making this month so that I can keep an eye out for them*". Ms. Ventures responded the same day, confirming that $3,500 would be paid and requested that Ms. DeAllie forward to her "*an updated set of accounts please on the mortgage*." On 13 February 2012, Ms. DeAllie forwarded the requested copies of Ms. Ventures' savings account statement and loan account statement from October 2011 to February 2012.

108. On 15 July 2012, Ms. Ventures sent an email to Ms. DeAllie seeking further financing of $60,000 for the purposes of a 50% down payment on a condominium which Ms. Ventures

was seeking to acquire in Ecuador. Ms. Ventures also requested an updated mortgage payment schedule, and information as to how many further $7,500 monthly payments she needs to make before the monthly payments revert to $6,300.

109. Ms. Lina Arauja, a senior collections officer of Capital G, replied to Ms. Ventures on 17 July 2012 advising her that the Bank was not prepared to advance any further funds as Ms. Ventures account was currently in arrears and if she wished to take the matter further she would need to come and see one of the lenders. Ms. Arauja also advised that the Bank did not receive the regular monthly payments for May or June and that the amount in arrears was $8,198.

110. Ms. Ventures replied on 18 July 2012 to Ms. Arauja at Capital G, asserting that she had made payments for May and June, and that her arrears should be $1,800 and not $8,198. Ms. Ventures also requested to inspect the original deeds to the Property because she was "*concerned about their security and a rumor about the fire? I would like to review them personally please*."

111. On 24 July 2012, Ms. Araujo advised Ms. Ventures that the Bank had received a payment of $2,000 on 23 July 2012 and that the current arrears balance had been reduced to $6,198. In relation to Ms. Ventures' continuing requests for loan account information, Ms. Araujo pointed out that all the information which Ms. Ventures was seeking is set out in the quarterly statements which are sent to Ms. Ventures.

112. During the period from December 2012 to July 2013, Ms. Ventures, according to the documentation in the possession of Capital G, remained in arrears of payments under the 2010 Loan. In January and March 2013, payments of only $500 were received, and no payment was received for June 2013. The minimum relevant payment which was required in accordance with the 2010 Facility Letter was $6,278 per month.

113. On 11 July 2013, Ms. Ventures sent a letter to Capital G requesting a modification to her mortgage terms. The modifications requested by Ms. Ventures were:

> *"Interest-free Mortgage for One Year.*
>
> *That the Arrears portion of the interest be "retired"*
>
> *And that the interest rate be dropped from 6.75 to 3% for 6 months the remaining Term of the Mortgage, and be changed to a fixed instead of floating mortgage."*

114. On 12 July 2013, 22 November 2013 and on various occasions thereafter, meetings were held between Capital G and Ms. Ventures in respect of the delinquency of the 2010 Loan and accommodations which could be made by Capital G to assist Ms. Ventures in bringing her loan account current.

115. At the meeting on 12 July 2013, Ms. Ventures, according to the screen shot of Capital G's client interaction file, Ms. Ventures agreed to a payment plan of $10,000 a month, $3,722 higher than the standard monthly payment, in order to reduce the arrears which had accrued on her loan account. At the meeting on 22 November 2013, Ms. Ventures denied that she had entered into a payment plan with Capital G.

116. On 22 November 2013, Capital G sent a Final Past Due Notice to Ms. Ventures. The letter stated that Ms. Ventures' loan account was 295 days past due, with a total past due payment of the sum of $63,091.98. The letter further advised that:

> *"We regret to note that the agreed monthly payment plan of $10,000.00 has not been maintained as per our meeting held July 12th, 2013 and, hence your account continues to be in arrears.*
>
> *Your failure to respond with the required payment has impacted your credit standing with the Bank. Failure to respond within 10 business days…of this letter*

will result in a final demand of the loan and the Bank taking the necessary action to recover the full debt."

117. From the contemporaneous documentation, as exhibited to Mr. Faiella's Witness Statement, it appears that in early 2014, Ms. Ventures began making claims that the interest rate had been unlawfully increased, that she had made payments which had not been recognised by Capital G and that she did not understand how interest was calculated. Ms. Ventures' payments on the 2010 Loan, which were intermittent since February 2011, ceased entirely in January 2014 and never resumed.

118. Around this time Ms. Ventures advised Clarien that a Mr. Porpiglia, a business associate and a friend of Ms. Ventures, was prepared to assume the mortgage payments and refinance the 2010 Loan. On 25 March 2014, Ms. Ventures sent a letter to Capital G and advised as follows:

> *"Mr. Porpiglia is now on the Island, and available to meet with the Bank before the end of March. Mr. Porpiglia group of Investors will pay the Mortgage out and develop the Property.*
>
> *He requires the following to enable this to happen.*
>
> *Mr. Porpiglia requires that the total amount owed to Capitol as of 30th March 2014 be clarified to him in writing. As of 1st April 2014, he requires that the confirmed amount be in the form of an interest-free loan until such time that the full payment of the Mortgage will be paid. Before the end of March 2014 he will have a letter of understanding on purchasing of the property for $900,000. Therefore, in such a scenario paying off the full mortgage will be the first item on the agenda.*
>
> *In conclusion, if there is no interest in this offer, Mr. Porpiglia can only offer 50% of the value of the mortgage as an outright purchase.*

Mr. Porpiglia also points out that the market environment…he anticipates that Capitol G would be appreciative, to receive the full amount of their investment back without spending funds on extensive Litigation, not knowing if they will ever get the full amount repaid, or not." (emphasis added)

119. On 4 April 2014, Ms. Ventures attended a meeting with Capital G in relation to the 2010 Loan and according to the written note of that meeting, Ms. Ventures stated that she had a purchaser for the Property willing to offer $1.4 million; that she and Mr. Porpiglia were considering splitting the mortgage payments 50/50; and that she continued to raise concerns that Capital G did not "*own the property*".

120. On 7 May 2014, Ms. Ventures again wrote to "Capitol G Bank" and the letter is signed by her and by Mr. Porpiglia in his capacity as the "*Property Manager*". In that letter they assert that they have reviewed the history of the FBG payments made by Ms. Ventures but that history is very incomplete. They assert that "*We are missing approx. 2.5 years of payments*." The handwritten note by Ms. Eve of Capital G records *that "GV [Ms. Ventures] to provide copies of deposit slips to "match up""*

121. On 17 May 2014, Ms. Ventures and Mr. Porpiglia wrote to Clarien (the name having been changed from Capital G) taking certain issues and making certain proposals in relation to the outstanding loan:

"Please be advised that the documents in our possession does not clarify Capitol G, or Clarien Bank to be the mortgagee, nor have we signed any agreement with the above Companies.

…

We have no interest in knowing what business has transpired with Capitol G, in the past year. And all the extra charges which have been added by Capitol G's

administration, are, in our opinion void. Clarien must honor the FBG mortgage platform.

We are prepared to honor and continue payment on the format agreed by us with FBG Mortgage which now stands at $521,822 which was the current standing as of 1 May 2014.

Or to renegotiate a Mortgage with Clarien Bank for $500,000 for 16 years at 6%."

122. Clarien maintains that the assertion as to the sums owing under the 2010 Loan as at 1 May 2014 is incorrect because it fails to take into account that the 2010 Loan was interest-bearing, and that the payments made by Ms. Ventures serviced both the interest and the principal components of the 2010 Loan. In cross-examination, Ms. Ventures stated that the extra charges referred to in the letter of 17 May 2014 were a combination of the miscalculations and overcharges. She advised that further details would have to be provided by the forensic accountant, who Ms. Ventures had apparently instructed. No such evidence was provided to the Court at the trial of this matter.

123. On 5 June 2014, Ms. Ventures sent a letter to Clarien offering the following "*suggestions for resolution":*

" Re-negotiate a New Deed of assignment at $500,000.

Re-negotiate a new Mortgage at $500,000 with terms that are manageable and reasonable. E.g. 20 years 5.5%.

OR

Add my son, James Cooker [19-year-old]'s 2 Mortgage extend to 25 years which would make the payments approx. $3,700 a month, with permission to make balloon payments should the economy improve."

124. On 1 July 2014 Ms. Ventures and Mr. Porpiglia sent a letter to *"To Capitol G Bank trading as Clarien Bank, And To Whom It May Concen"* threatening criminal proceedings:

> *"I do understand that there was an amalgamation between your corporate parties. However, please note that…We have no notification as to a date from FBG as to when FBG is selling our loan to another entity.*
>
> *As far as we know, it is as though they have vanished and do not exist anymore?*
>
> *Therefore you need to prove to me, that you took over my personal loan agreement and what the balance was when it was sold?*
>
> *I would suggest for your management to refrain from behaving like my mortgagee or they could face charges…*
>
> *To avoid facing criminal charges… Please show the manner in which you acquired my deeds and exactly how you came to be in possession, when my deed was [reconveyed] to me on 1st of February 2010." (*emphasis added)

125. This review of the history of the 2010 Loan confirms to the Court that there is no factual basis for alleging that FBG took it upon itself to give advice to Ms. Ventures in relation to whether it was prudent to enter into this loan. The reality, in my judgment, is that economic conditions changed in Bermuda which made it more difficult to service the loan. At one stage in the cross-examination, Ms. Ventures volunteered information that at the time she applied for the 2010 Loan she thought that she could service it but the 2008 recession, which impacted the local economy in Bermuda post 2010, made it virtually impossible to meet the monthly payments. If that is indeed the factual position it is difficult to argue that Ms. Ventures' present financial difficulties are due to any breach of duty of care owed by the FBG. In this regard, I accept the submission made by Mr. McCosker that there are striking similarities between the factual position in this case and the factual position in the

New South Wales case of *Westpac Banking Corporation v Diagne* [2014] NSWSC 822, where the court held that the real cause of the borrowers' failure to make the mortgage payments was not due to any breach of duty of care owed by the Bank but that the borrowers failed to adequately plan and budget for their business venture, leading to their inability to service the loan.

126. In relation to the outstanding amount under the 2010 Loan I am satisfied that the correct amount due is as claimed by Clarien. Mr. Faiella has produced a 30-page computer printout of all the payments made by Ms. Ventures and all the charges made against that account throughout the currency of the 2010 Loan. At the hearing, Ms. Ventures was unable to challenge a single entry as being inaccurate. No evidence has been produced on behalf of Ms. Ventures which the Court can accept as contradicting the evidence presented by Clarien. Ms. Ventures advised the Court that the discrepancies which she complained of, in respect of overcharges and missing payments, would be set out in the forensic accountant's report. No such report was sought to be adduced at the trial of this matter. It may well be that part of the confusion on the part of Ms. Ventures is due to the fact that, as she told the Court, she was not in the habit of opening statements sent to her by the Banks. In all the circumstances, I am satisfied that Clarien has established the amounts claimed and there is no acceptable countervailing evidence.

Clarien's claim for monetary judgment, order for sale and possession of the Property

127. Clarien's claim for the monetary judgment, order for sale and possession of the Property relates to the 2010 Loan granted by FBG to Ms. Ventures**.** The loan was granted under the terms set out in the 2010 Facility Letter from FBG to Ms. Ventures dated 15 January 2010. By the terms of that letter, FBG agreed to grant Ms. Ventures financing in the sum of $842,000. The letter further provided that the loan is granted for a period of 20 years and the interest will be calculated at the rate of 6.5%. Security for the loan was agreed to be a First Legal Mortgage stamped to cover the borrowed amount. The letter expressly

provided that notwithstanding the foregoing and in accordance with normal lending practice, the facility granted was repayable on demand. Ms. Ventures agreed to those terms by signing a copy of that letter on 15 January 2010.

128. Pursuant to the terms of the 2010 Facility, Letter Ms. Ventures executed a legal mortgage of the Property in favour of FBG on 1 February 2010. The document records that the deed was "SIGNED SEALED and DELIVERED by the above-named GAYLE ANNE VENTURES." The deed was recorded and registered in the office of the Registrar General under section 3 of the Registrar General (Recording of Documents) Act 1955 on 7 July 2010. The relevant terms of the 2010 Mortgage included:

    a. Ms. Ventures represented that she was "seised of the land described in the 7th Schedule hereto", which Schedule accurately describes the Property (recital 1);
    b. Ms. Ventures as the beneficial owner of the Property conveyed the Property to FBG in fee simple (clause 1);
    c. Ms. Ventures covenanted with FBG to pay FBG the principal sum of $842,000, together with interest at a variable rate of 6.5% per annum, subject to a change with one month's notice, by way of 240 monthly payments of $6,278 (clause 2(a), read in conjunction with Schedule One, Three and Five);
    d. Ms. Ventures covenanted with FBG to keep the Property comprehensively insured and to punctually pay all premiums and other monies necessary for that purpose (clause 2(b));
    e. Ms. Ventures indemnified FBG, its agents and appointees in respect of costs and damages occasioned by any breach, non-observance or non-performance of any of the covenants or stipulations in the 2010 Mortgage, as well as any legal expenses incurred in FBG enforcing Ms. Ventures' obligations under the 2010 Mortgage (clauses 2(h) and 4(c));

f. Ms. Ventures granted FBG a power of sale over the Property, without requiring any consent of or notice to Ms. Ventures in the event of a breach of the 2010 Mortgage by Ms. Ventures (clause 4(a));
g. Ms. Ventures granted FBG the right of possession in the exercise of its power of sale (clause 4(f)); and
h. Ms. Ventures agreed to pay a delinquency charge to FBG in the event of any overdue payment pursuant to the 2010 Mortgage (clause5).
i. The 2010 Mortgage placed restrictions upon Ms. Ventures' ability to assign the 2010 Mortgage, but no such restrictions upon FBG's ability to do so.

129. Ms. Ventures disputes whether a legal mortgage was created on 1 February 2010. The basis of this contention is as follows. Ms. Ventures accepts that she instructed attorneys on her behalf in relation to the deed of mortgage and indeed executed the deed of mortgage on 1 February 2010. It is also accepted that the previous mortgagee, Capital G, executed a deed of reconveyance on that date conveying the freehold to Ms. Ventures. However, it appears that Capital G would not deliver the deed of reconveyance to Ms. Ventures' attorneys until Ms. Ventures paid Capital G the sum of $4,110 on account of premiums paid for the insurance of the Property, which was the responsibility of Ms. Ventures. From a file note made by Capital G, it appears that Ms. Ventures was prepared to pay this sum but would not do so until she received some accounting information she had previously requested from Capital G. The end result of this minor disagreement was that the 2010 Deed of Mortgage, whilst signed and sealed on 1 February 2010, was not "*delivered*" until late March 2011. On this basis, Ms. Ventures contends that there was no legal mortgage created on 1 February 2010.

130. In order to preserve the trial date, Clarien has elected not to pursue its claim based upon a legal mortgage but has elected to pursue its claim on the basis that, at all material times, there existed an equitable mortgage. Clarien claims that it is able to assert a good claim

for an equitable mortgage on three separate bases: that Ms. Ventures was contractually obliged to mortgage the Property in favour of FBG; then Ms. Ventures executed a deed of mortgage and if that deed fails because it was not executed properly, FBG would still have the benefit of an equitable mortgage; and that at all relevant times the mortgagee was in possession of the deeds to the Property.

131. In relation to the creation of equitable mortgages, the editors of *Snell's Equity*, 34th edition, state the position at page 973:

> *"Where a mortgage is created but the mortgagee gets no legal estate, his mortgage is an equitable mortgage. This will occur either because the mortgagor has only an equitable interest or because the mortgage is not created with the formalities required for a legal mortgage."*

132. The basis for the jurisdiction to find the existence of an equitable mortgage is explained by *Samuel Miller* in the text "*The Law of Equitable Mortgages*":

> *"An equitable mortgage is that species of security which by reason of the legal estate in the property pledged not being vested in or obtainable by the holder of the security, can only be rendered available in a Court of Equity. It may be created either by deed, or by deposit of deeds, and the subject of it may either be the property itself, or an equity of redemption. An equitable mortgage by deed is usually created by the holder of an estate who has already mortgaged it, and who executes a second, or any further mortgage, or charges his equity of redemption, or by a party entitled to an estate held in trust; and this deed is executed with the same formalities as a legal mortgage; but an equitable mortgage by deposit of deeds may be created by simply placing his deeds in the hands of its creditor.*

An equitable mortgage may also be constituted by any writing from which the intention can be gathered; and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity and gives right for further assurance."

133. In *Bank of Scotland plc v Waugh* [2014] EWHC 2117 (Ch) Behrens J held at [83]:

"A document, which for some defect of form (but which is otherwise valid) fails to take effect as a legal mortgage will (subject to section 2 of the 1989 Act) be a good equitable mortgage. The basis of this is the court's power specifically to perform a contract to create a legal interest in land. See Fisher & Lightwood Law of Mortgage 13th Ed at para 3.6 and the cases cited at footnotes 1 and 2."
(section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 deals with the requirement that a disposition of land can only be made in writing and is, in material terms, reflected in section 3 of the Bermuda Conveyancing Act 1983).

134. Paragraph 3.6 of *Fisher & Lightwood Law of Mortgage*, 15th ed, referred to above, provides in material part that:

"3.6 An otherwise valid document, which for some defect of form fails to take effect as a legal mortgage will, subject to what follows, be a good equitable mortgage…

If the mortgage fails to take effect in law because it is not made by deed, then it will be enforceable in equity only if it is nevertheless a contract for the grant of a mortgage capable of specific performance.

…

The other way in which an attempt to create a legal mortgage may fail is because, though the mortgagor correctly executes a mortgage deed, he does not have a legal estate in the land, for example if his estate is equitable only. In that case, the deed will be sufficient to create an equitable mortgage over the equitable interest he does have."

135. On the basis of the above authority and commentaries I accept that there was in existence a valid equitable mortgage, as of 1 February 2010, in relation to the Property and in favour of FBG as the mortgagee. This is on the basis that (i) the facility letter dated 13 January 2010 clearly obliged Ms. Ventures to provide a legal mortgage in relation to the Property as security for the loan; (ii) the deed of mortgage executed by Ms. Ventures on 1 February 2010 clearly intended to provide a legal mortgage in respect of the Property to FBG and if that deed is ineffective because Ms. Ventures did not have the legal estate in the Property on that date, it should nevertheless result in a valid equitable mortgage of her equitable interest; and (iii) title deeds to the property have been in the continuous possession of Ms. Ventures' lenders since at least 2005. In this regard it appears to be uncontroversial that the deeds to the Property were in the possession of Capital G from 2005 until they were delivered to FBG on in March 2011. After the Deed of Assignment was executed on 30 September 2011, the deeds to the Property have once again have been in the possession of Capital G (now named Clarien). This evidence was supported by the Vault Record, an electronically generated document, confirming that the deeds have been in the possession of Clarien since 20 September 2012.

136. Mr. McCosker correctly submits that Clarien, as an equitable mortgagee, is entitled to possession and to exercise the power of sale. As noted above, the deed of mortgage expressly provides for these remedies. In addition, Clarien is entitled to rely upon the statutory provisions. In this regard it is to be noted that Order 88, rule 1(2) of RSC 1985 expressly applies to equitable mortgages:

"(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely—

(a) payment of moneys secured by the mortgage,

(b) sale of the mortgaged property,

(c) foreclosure,

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,

(e) redemption,

(f) reconveyance of the property or its release from the security,

(g) delivery of possession by the mortgagee.

(2) In this Order "mortgage" includes a legal and an equitable mortgage, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly."

137. The power of sale is also given to the mortgagee, in the event of default, under section 30(1) of the Conveyancing Act 1983:

"30(1) A mortgagee shall have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further— (i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby;"

138. Judge Purle QC, sitting as a High Court Judge, makes clear in *Swift 1st Ltd v Colin and Ors* [2011] EWHC 2410 (Ch) that the statutory powers of sale in section 30(1) is available to an equitable mortgagee:

> *"14 The Land Registry have taken the point in correspondence that, as the charge was unregistered, it took effect in equity only and that, as an equitable mortgage, albeit made by deed, the power of sale did not arise. This, it seems to me, is erroneous. The power of sale, as I have said, arises under section 101 of the 1925 Act, and that merely requires that a mortgage be made by deed, which this one was"* (Section 101 of the 1925 Act is, in material terms, same as section 30(1) of the Conveyancing Act 1983).

139. Mr. McCosker submits that the two constituent elements of the mortgage, the creation of a security interest and a promise to pay, are severable and the failure of one element will not void the other or otherwise invalidate the instrument. I accept this submission, which is supported by the decision of Ground CJ in *E&C Well Drilling Ltd v Hayward* [2011] Bda LR 1 and my own decision in *Julius Sämann Ltd v Just Add Bermuda and Others* [2019] Bda LR 100.

140. In *E&C Well Drilling* it was contended that the lender company had no express land holding power and no ministerial consent and therefore, it was argued, that the mortgage was unlawful and unenforceable. It was further argued that as a result the underlying debt itself was unenforceable. Ground CJ rejected this contention and held at [17]:

> *"Were I wrong on that, I would nevertheless have held that the debt itself was unaffected by any defect in the security and was still due, and I would (subject to a point made in the next paragraph) have given judgment accordingly. Mr. Diel*

argues that the debt would be rendered irrecoverable by any illegality in the mortgage, but that is to confuse the debt and the security for its repayment. As Halsbury's Laws (op. cit.) states at para. 302 –

"Every mortgage implies a debt and a personal obligation by the mortgagor to pay it."

The personal obligation to pay is severable from the security, and survives it. That is demonstrated when the security is discharged by sale, and the proceeds are insufficient. In such a case the mortgagor remains personally liable for the balance."

141. Mr. McCosker submits that, given the clear default under the loan, there is no reasonable basis upon which the Court can deprive Clarien of its entitlement to an order of possession and the right to exercise its power of sale in the present circumstances. He submits that the possessory jurisdiction is narrowly circumscribed. He relies upon the decision in *BDC v Brown* [1994] Bda LR 35 where Ground CJ held at p.10:

"However, that is now somewhat academic, as the power of sale has arisen again as a result of new arrears since that payment. The power having arisen the mortgagees are entitled to possession in order to facilitate its exercise. The law is that once a power of sale has arisen and become exercisable the court has no power to defer possession or sale on terms that the mortgagor pay the arrears and thereafter keep up to date with payments: see Birmingham Citizens Permanent Building Society -v- Caunt (supra)."

142. In *Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 Ch 883, referred to by Ground CJ above, Russell J described the narrowly circumscribed jurisdiction at page 912 as follows:

> *"Accordingly, in my judgment, where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the* sole exception *is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring."*

143. Having regard to these authorities, I agree that, on the basis that the power of sale has arisen and become exercisable, the Court will award possession and the right to exercise the power of sale to Clarien. This conclusion is of course subject to the consideration of the main point taken by Mr. Hill, namely, whether Clarien is the appropriate party to enforce the 2010 loan and the security given in relation to that loan. I now turn to consider that remaining issue.

Clarien's right to maintain this action

144. The real substance of the opposition, as it transpired at the hearing, against a judgment in favour of Clarien, was that Clarien had not produced sufficient evidence to show that the amalgamation transaction in fact took place and therefore it cast doubt upon the validity of the Deed of Assignment and the subsequent Deed of Confirmation. Mr. Hill accepted that Ms. Ventures was liable to repay the monies due under the 2010 Loan but his case was that those monies were not due to Clarien. He accepted that if Clarien was not the appropriate party to enforce the 2010 Loan obligations against Ms. Ventures, then separate subsequent proceedings will have to be taken to recover the amounts due under the 2010 Loan. As I understood his submission, in the absence of satisfactory evidence

that the loan had been assigned to Clarien the Court was bound to conclude that the 2010 Loan remained with FBG.

145. In relation to this submission, the following points were made and developed by Mr. Hill:

(a) The issues whether the amalgamation in fact took place and whether the Deed of Assignment was effective were joined in the pleadings and expressly referred to in paragraph 3 of the Defence: *"The Plaintiff is put to strict proof of the validity, scope, and effect of these transactions insofar as they are said to vest in the Plaintiff any right with respect to the Deed of a Mortgage dated 1 February 2010 (hereinafter the "Mortgage").*

(b) It follows from paragraph 3 of the Defence that in relation to the issue of whether amalgamation had taken place, Clarien was obliged to put before the Court all the internal corporate documentation which would be required to implement the amalgamation under the Companies Act 1981 and to comply with the internal procedural requirements under their respective bye-laws. In particular, in order to discharge the burden of proof, Clarien was obliged to produce evidence of the requisite written resolutions of the Board of Directors of the respective companies and shareholders authorising the transaction and, the relevant filings with the Registrar of Companies to amend the Memorandum of Association. Mr. Hill submitted that Clarien's failure to produce these documents necessarily means that Clarien has not discharged the burden of showing that the amalgamation transaction in fact took place.

(c) In relation to the amalgamation transaction and the assignment of the mortgage to Clarien, the Court was referred to three documents executed by the relevant parties. First, an Asset Transfer Agreement dated 30 September 2011 between FBG as transferor and Capital G as transferee of certain assets defined in that agreement. Second, a Deed of Assignment dated 30 September 2011 between FBG as assignor and Capital G as assignee of the 2010 Mortgage. Third, a Deed of Confirmation, dated 5 September 2014, between FBG and Clarien confirming

that the assignment of *inter alia* the 2010 Mortgage was fully effective in the sense that it conveyed title to the Property in fee simple. Mr. Hill does not contend that these documents are forgeries or that they were not executed by the relevant officers of the respective companies. His argument is that the documents do not have the effect contended for and in that sense they are not effective.

(d) In relation to the Asset Transfer Agreement Mr. Hill contended, as a matter of construction of the document, that the agreement was legally unenforceable because it was not supported by consideration. Counsel argued that whilst assets were being transferred from FBG to Capital G, Capital G itself was under no obligation to perform anything of any substance. Accordingly, Counsel submitted, the agreement was not supported by valuable consideration and therefore legally unenforceable.

(e) In relation to the Deed of Assignment Mr. Hill made two points. First, Clarien had produced no evidence by way of the resolution of the Board of Directors authorising FBG to execute this Deed of Assignment. Second, the execution page of the Deed refers to "THE COMMON SEAL OF FIRST BERMUDA GROUP LTD is affixed hereto" when in fact no such seal is affixed to the document.

(f) In relation to the Deed of Confirmation, I understood Mr. Hill to accept that the document was properly executed in the sense that it was signed by the respective authorised signatories and appeared to be sealed. Mr. Hill submits that the document that purports to be a deed (in that the formal requirements for execution of deeds have not been complied with) cannot be brought back to life by a deed of confirmation in the substance and form of the Deed of Confirmation relied on.

(g) The Court has to be satisfied on the balance of probabilities that FBG successfully conveyed the interests to Clarien, which Clarien is seeking to enforce in these proceedings. Mr. Hill submitted that Clarien had failed to discharge its burden of proof in relation to this issue.

146. I am unable to accept this submission. The starting point in relation to this issue is that none of the parties to the transaction have taken the position that the amalgamation has

not taken place. The parties to the Assets Transfer Agreement have not sought to argue that the agreement is not supported by consideration and therefore legally unenforceable. By all accounts the agreement appears to have been carried out. The parties to the Deed of Assignment have not sought to argue that the agreement is in any way unenforceable. The parties to the Deed of Confirmation, which was entered into because "*doubts have arisen as to whether the Assignment was fully effective",* have not sought to argue that the Deed of Confirmation does not achieve its express objective.

147. In the ordinary course a third party is entitled to assume that a corporate entity has complied with its internal procedural requirements to properly effect the transaction (*Royal British Bank v Turquand* (1856) 119 ER 886). There is no positive evidence which suggests that the internal procedural requirements required to implement the transaction have not been complied with.

148. As noted above, the transaction was effected and evidenced by the Asset Transfer Agreement, the Deed of Assignment and the Deed of Confirmation. As also noted, Mr. Hill does not contend that these documents are forgeries. He challenges their validity by reference to certain specific legal issues.

149. In relation to the Asset Transfer Agreement, Mr. Hill argues that the agreement is invalid and unenforceable because it is not supported by valuable consideration. He argues that the Asset Transfer Agreement, when properly construed, imposes no obligation upon Clarien. I am unable to accept Mr. Hill's construction of the Asset Transfer Agreement. The Balance Sheet of FBG, which appears as Schedule 1 to the Agreement, shows that FBG had liabilities of $174,887,914.14 (comprising the monies deposited by its customers and which have to be repaid to the customers) and assets of $173,050,043.55 (comprising the monies lent by FBG to customers for mortgage and

consumer loans and other loans which had to be repaid to FBG). As can be seen, at the time of the consolidation, FBG would appear to be balance sheet insolvent. The commercial object of the Asset Transfer Agreement was to assign and transfer all the assets of FBG to Clarien and for Clarien to assume all the liabilities of FBG to its customers.

150. The transfer of assets to Clarien was achieved by the provisions contained in clause 2.2 which provided:

> *"2.1 The Transferor [FBG] hereby assigns and transfers to the Transferee [Capital G] and the transferee shall assume from the Transferor, free from all encumbrances other than those expressed in this Agreement, the following*
>
> *i) the Assets;*
> *ii) all of the Transferor's rights against third parties, including rights under any warranties, conditions, guarantees or indemnities relating to any of the assets and rights in respect of debts, loans, securities and other amounts owing to the Transferor at the date hereof (whether or not invoiced)"* (emphasis added).

151. The effect of clause 2.1(ii) is to assign all the loans which FBG has made to its customers and that includes the 2010 Loan to Ms. Ventures. Clause 2.1(ii) constitutes a valid assignment "*by writing under the hand of the assignor*" in accordance with the terms of section 19(d) of the Supreme Court Act 1905. Irrespective of the validity of the Deed of Assignment which seeks to assign the loan *and* the security, there is a valid assignment of the 2010 Loan under the Asset Transfer Agreement and, as a result, Clarien is entitled to monetary judgment.

152. Clause 2.3 of the Agreement recognizes that certain assets (such as security interests in land represented by mortgages including the mortgage of Ms. Ventures' Property) require

transfer by means of some other method such as a deed or assignment will be transferred by that means in accordance with Bermuda law.

153. In exchange for FBG agreeing to transfer all its assets to Clarien, Clarien agreed to discharge all the liabilities of FBG to its customers (liabilities being greater than the assets). This was achieved, it seems, by clause 2.1 which provided that "*In consideration of the transfer of the Assets by the Transferor, the Transferee shall pay all costs associated with the ongoing maintenance of the Transferor in compliance with applicable laws."* Mr. Hill argues that costs referred to in clause 2.1 is referring to fees such as annual fees payable to the Registrar of Companies. I am unable to agree. The "*maintenance*" of a deposit taking company "*in accordance with Bermuda law*" necessarily entails that the deposit company remains in position so that it can discharge its liabilities to its creditors (customers who have deposited monies with the deposit taking company). The interpretation urged by Mr. Hill leads to entirely perverse results. It would mean that all the assets of FBG have been transferred to Clarien but all the liabilities, in excess of $174 million, remain with FBG. That would be a commercially nonsensical result and the transaction would be in clear breach of Part IV A of the Conveyancing Act 1983 and liable to be set aside on the ground that the purpose of the transfer to Capital G was to place FBG's assets beyond the reach of its creditors (the customers who had deposited funds with FBG). Not a single former customer of FBG has complained that he/she has not been able to access his/her deposits with FBG and now Clarien.

154. Further, in any event, to the extent that the Asset Transfer Agreement seeks to *assign* the loans FBG has made to its customers (its assets), such as the 2010 Loan to Ms. Ventures, there is no requirement that such an assignment be supported by consideration.

The Asset Transfer Agreement complies with the requirements of section 19(d) of the Supreme Court Act 1905.

155. The Deed of Assignment is dated 30 September 2011, the same date as the Asset Transfer Agreement. In the recital it is recorded that "*The Assignor is a party to a contract with the person (the "Borrower"...) As identified in schedule I ("Contract") of this Deed. The Assignor has agreed to assign the Contract to the Assignee and the Assignee agrees to accept such assignment."* The reference to the agreement to assign is a reference to clause 2.3 of the Asset Transfer Agreement. The "Contract" is further particularised in Schedule 1 and refers to the Mortgage Deed dated 1 February 2010, executed by Ms. Ventures as the mortgagor and FBG as the mortgagee, relating to the Property. Under the Mortgage Deed, Ms. Ventures covenanted with FBG to pay FBG the principal sum of $842,000, together with interest at a variable rate of 6.5% per annum, by way of 240 monthly payments of $6,278 (clause 2(a), read in conjunction with Schedule One, Three and Five).

156. The operative part of the Deed of Assignment provides that "*The Assignor unconditionally, irrevocably and absolutely assigns or its rights, title, interest, and benefits in and to the Contract to the Assignee with effect from the Effective Date*." The Effective Date is defined as 30 September 2011.

157. On the execution page of the Deed of Assignment it is stated that "*IN WITNESS WHEREOF the parties, or their authorised representatives, have duly executed this Deed of Assignment as a deed, which takes effect on the Effective Date."* The document is signed by the Secretary of FBG and Capital G (in each case being Mr. Peter Hardy) but

no seal is affixed to the document despite the fact that the document states that "*THE COMMON SEAL OF FIRST BERMUDA GROUP LTD. is affixed hereto in the presence of*."

158. Mr. Hill submits that the document executed by the secretary of FBG and Capital G is ineffective as a deed because it does not comply with the statutory requirements relating to formal requirements for the execution deeds by companies. Section 23 of the Companies Act 1981:

"(1) A company may, in writing, authorize any person, either generally or in respect of any specified matter, as its agent, to sign or execute deeds, instruments or other documents on its behalf in any place inside or outside Bermuda.

(2) A deed, instrument or document signed or executed by an authorized agent on behalf of the company binds the company.

(3) A company may, but need not, have a common seal and one or more duplicate common seals for use in any place inside or outside Bermuda.

(4) If a common seal or duplicate common seal is to be affixed to a deed, instrument or document, the affixing of the seal shall be attested to by the signature of at least one person who is a director or the secretary of the company or a person expressly authorized to sign, or in such other manner as the bye-laws of the company may provide.

(5) A deed, instrument or document to which the common seal, or duplicate common seal, of the company is duly affixed binds the company."

159. Mr. Hill appeared to accept that it may be possible for a company to execute deeds without affixing a seal if the authorised person was so authorised under section 23(1). He says that here Clarien has produced no evidence that the person who executed the

document on behalf of FBG and Capital G was so authorised. He further argues that, in any event, it is clear from the face of the document that it was contemplated by both FBG and Capital G that the document would be executed under seal. Finally, Mr. Hill makes the point that both companies, as the Deed of Confirmation shows, do have common seals and use them in executing deeds. He submits that in this circumstance the Court should conclude that the Deed of Assignment does not comply with the requirements of section 23.

160. Mr. McCosker invites the Court to assume that the necessary authority must have been given to the secretary to sign on behalf of the respective companies without the necessity of affixing the seal. The point taken by Mr. Hill is taken in the unusual circumstances where both parties to the Deed of Assignment accept the validity of the document as a deed. Furthermore, the parties to the Deed of Assignment have recorded the document as a deed, on 4 February 2014, in the office of the Registrar General under section 3 of the Registrar General (Recording of Documents) Act, 1965. Clearly, the parties to the Deed of Assignment have proceeded on the assumption that the document executed by them complied with the formal requirements for execution of deeds by companies.

161. In the end, and with some hesitation, I have come to the conclusion that, in the absence of evidence from FBG and Capital G that the secretary was authorised to execute the document as a deed without affixing the seal, the document, as executed, does not comply with the formal requirements of section 23. However, this formal defect is remedied, in my judgment, by the Deed of Confirmation executed on 5 September 2014.

162. I should add that I do not accept Mr. Hill's submission that the Deed of Assignment is not supported by consideration. As noted at paragraph 153 above the Asset Transfer Agreement is plainly supported by consideration. The Deed of Assignment is a

transaction contemplated by clause 2.3 of the Asset Transfer Agreement. Both the Asset Transfer Agreement and the Deed of Assignment were executed on the same date, 30 September 2011, and are to be construed as a single transaction (see paragraph 4.027 of *Chitty on Contracts,* Vol 1 33rd ed., referred to in paragraph 14 of *Julius Sämann Ltd v Just Add Bermuda Ltd* [2019] Bda LR 100). In the circumstances, the Deed of Assignment is in fact supported by consideration.

163. The Deed of Confirmation clearly complies with the formal requirements of section 23 in that it is signed by two authorised signatories on behalf of FBG and Clarien (Capital G's name having been changed) and the common seals of both companies are affixed to the document. Mr. Faiella, VP Legal of Clarien, confirmed that the signatures on the document are the signatures of Mr. Ian Truan and Mr. David Carrick on behalf of FBG and Mr. Ian Truan and Mr. James Gibbons on behalf of Clarien. He also confirmed that Mr. Ian Truan and Mr. James Gibbons continue to be directors of Clarien.

164. In the Deed of Confirmation, FBG is defined as the "Assignor" and Clarien is defined as the "Assignee". The recital to the Deed of Confirmation records that:

> *"3. By a Deed of Assignment dated the 30th day of September 2011 (the"Assignment") and made between (1) the Assignor and (2) the Assignee for the consideration therein mentioned the Assignor purported to be assign the Mortgages and the Further Charges and the Freehold Properties and the Leasehold Properties thereby secured under the Assignee in the manner therein expressed;*
>
> *4. Doubts have arisen as to whether the Assignment was fully effective as it failed to expressly convey the Freehold Properties in fee simple and/or assign the Leasehold properties for the residue of the unexpired terms of the leases therein referred to unto the Assignee."*

165. The operative part of the Deed of Confirmation provides that:

> *"5. The Assignor has agreed to join in this deed in order to convey the Freehold Properties unto the Assignee and also to assign the Leasehold Properties unto the Assignee in the manner appearing below.*
>
> *NOW THIS DEED WITNESSES that IN PURSUANCE of the agreement fifthly above recited and in order to confirm the Assignment the Assign no as Mortgagee;*
>
> *(h) CONVEYS AND CONFIRMS unto the Assignee ALL the Freehold Properties TO HOLD the same UNTO the Assignee in fee simple, and*
> *(i) ASSIGNS AND CONFIRMS unto the Assigning ALL THAT the Leasehold Properties TO HOLD the same UNTO the Assignee for the residue now unexpired of the term of years granted in each case by each of the Leases;*
>
> *SUBJECT TO all rights or equity of redemption as is or are now subsisting in the said land under or by virtue of the Mortgages respectively."*

166. Page 19 of the Deed of Confirmation confirms that it applies to the mortgage executed by Ms. Ventures, as the mortgagor, on 1 February 2010 in respect of the Property and registered in the Book of Mortgages #763 at page 92.

167. Mr. Hill submits that the Deed of Assignment cannot be brought back to life by a Deed of Confirmation in the substance and form of the Deed of Confirmation relied on. I am unable to accept this submission. The clear purpose and effect of the Deed of Confirmation, as gathered from the words used, is to ensure and confirm that FBG's title to the Property, conveyed to it under the 2010 Mortgage, is assigned and conveyed to

Clarien. That was the intended object of the Deed of Assignment. Any defects in terms of formalities of execution or words of conveyance used in the Deed of Assignment have been remedied by the Deed of Confirmation. Section 10 of the Conveyancing Act 1983 (based upon section 66 of the UK Law of Property Act 1925) gives statutory recognition that deeds of confirmation can indeed achieve the result sought to be achieved in this case. Section 10 provides:

> *"(1) A deed containing a declaration by the owner of the legal estate that his estate shall go and devolve in such a manner as may be requisite for confirming any interests intended to affect his estate and capable of subsisting at law, which at some prior date were expressed to have been transferred or created, and any dealings therewith which would have been legal if those interests had been legally and validly transferred or created, shall, to the extent of the estate of such owner, operate to give legal effect to the interests so expressed to have been transferred or created and to the subsequent dealings aforesaid."*

168. The customers of FBG were advised of the "*Capital G and First Bermuda Group Amalgamation*" by letters dated 21 January 2011, on the letterhead of Capital G and FBG together with 2 pages of "*Frequently Asked Questions*." The letter advised the customers:

> *"Capital G is pleased to announce the amalgamation with the First Bermuda Group which was effective on January 4, 2011…*
>
> *The amalgamation aligns the strengths of both Groups to bring our clients enhanced products and services and strategically expands our operations in Bermuda. The newly combined Group has assets in excess of $1.4 billion with healthy capital levels and an experienced and talented management team. With that constraint, security and an expanded network of reliable banking services that you can trust."*

169. Mr.Faiella, who gave evidence on behalf of Clarien and is the person with the oversight of the conduct of this litigation on behalf of Clarien in recent years, confirmed that, to the best of his information and belief, the amalgamation transaction did take place. He based this conclusion on the existence and implementation of the Asset Transfer Agreement, the Deed of Assignment, the Deed of Confirmation, the fact that customers were advised of the amalgamation in terms of the letter dated 21 January 2011 and that the name of Capital G was changed to Clarien.

170. In light of all this evidence, the Court entertains no doubt that the amalgamation transaction did indeed take place. As noted above, the parties to the amalgamation transaction do not dispute its existence. There is no credible evidence suggesting that it did not take place. Further, and in any event, for the purposes of these proceedings, the Court is concerned with the validity and effect of only three documents: the Asset Transfer Agreement, the Deed of Assignment and the Deed of Confirmation. The Court is satisfied that these documents were executed by the relevant parties and their legal effect is as set out above.

171. Finally, Mr. Hill argues that any claim based upon the existence of an equitable mortgage should be rejected by the Court on the basis that a party that comes to court seeking application of the equitable jurisdiction must do so with clean hands and here, it is said, the Plaintiff does not come with clean hands. The factual basis for saying that the Plaintiff does not come with clean hands is, as I understand it, that it was Capital G itself which prevented the creation of the legal mortgage by not surrendering the Deed of Reconveyance and that Capital G wrongfully added the sum of $4,110 (on account of insurance premiums) to the 2010 Mortgage. Again, I am unable to accept the submission. First, the claim for equitable mortgage relies upon a number of distinct bases, including that Ms. Ventures contractually agreed to mortgage the Property as security under the terms of the 2010 Facility Letter and in fact executed a deed of mortgage. Second, for the

maxim to apply the conduct complained of must have an immediate and necessary relation to the equity sued for. Here, it is said that the equitable mortgage arises as a result of Ms. Ventures' contractual obligation to do so and the fact that she executed a deed of mortgage. The fact that a legal mortgage would have been created if Capital G had provided the Deed of Reconveyance at the appropriate time is no answer to the claim for an equitable mortgage. Lastly, it would be wholly disproportionate to deny Clarien's claim based upon allegedly unauthorised charge of $4,110. Accordingly, I reject the submission that I should refuse relief on the basis that the Plaintiff does not come to the Court with clean hands.

Conclusion

172. In conclusion, the Court orders that:

(1) the Defendant's Counterclaim is dismissed;

(2) the Defendant pays to the Plaintiff the following sums:

a. Principal outstanding in the amount of $796,339.42;

b. Interest outstanding in the amount of $422,271.24;

c. Late fees in the amount of $8,150.00;

d. Administration fees in the amount of $300.00;

e. *Per diem* interest from 20 October 2020 to the date of Judgment;

(3) the said Mortgage may be enforced by sale;

(4) the Defendant deliver to the Plaintiff, within 90 days of this Judgment, possession of the mortgaged property more particularly set out in the Schedule attached to the Originating Summons; and

(5) subject to any application by the Defendant within the next 21 days, the Defendant shall pay the Plaintiff costs of this action on an indemnity basis pursuant to the terms of the Mortgage.

Dated this 22 day of January 2021

NARINDER K HARGUN

CHIEF JUSTICE