Neutral Citation Number: [2020] CA (Bda) Civ 15

Case No: Civ/2021/3

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE HARGUN
CASE NUMBER 2015: No. 430

Sessions House
Hamilton, Bermuda HM 12

Date: 03/09/2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
and
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

GAYLE ANN VENTURES

Appellant

- v -

CLARIEN BANK LIMITED

1st Respondent

Mr Cameron Hill (Westwater Hill & Co.) for the Appellant
Mr Benjamin McCosker (Walkers (Bermuda) Limited) for the Respondent

Hearing dates: 17 June 2021

- -

APPROVED JUDGMENT

CLARKE P:

1. On **22 January 2021** the Chief Justice handed down his judgment against the defendant, Gayle Ann Ventures ("**Ms Ventures**"), the Appellant, in favour of Clarien Bank Ltd ("**Clarien**"), the Respondent, by way of enforcement of a loan and a mortgage. The judgment, which followed a trial on 20 and 21 October 2020, ordered Ms Ventures to pay Clarien a sum exceeding $ 1.2 million by way of principal, interest, and fees; and ordered that the mortgage, the subject of the action ("the **2010 Mortgage**"), be enforced by sale, and that Ms Ventures should deliver up possession of the mortgaged property and pay the costs on an indemnity basis.

2. On **2 March 2021** Ms Ventures appealed to this court. On **24 March 2021** the Registrar gave directions for the settlement of the Record of Appeal ("the **Appeal Directions Order**"). These directions required Ms Ventures, *inter alia*, (a) to pay into court the hearing fee and the fee to be deposited for the forwarding of the record of appeal in the total sum of $ 500 on or before 1 April 2021; (b) to procure a transcript of the proceedings below, which was to be included in the Record of Appeal; (c) to pay within 21 days $ 5,000 into her counsel's trust account to be held as security for the Respondent's costs of the appeal; (d) to prepare and serve a copy of the Record of Appeal, excluding the Skeleton Arguments and Joint Authorities Bundle, on the Respondent by 1600 on 9 April 2021; (e) to provide a copy of her skeleton argument and list of authorities to the Respondent by 1600 on 23 April 2021l; (f) to lodge the Record of Appeal, the parties' skeleton arguments and the Joint Authorities bundle on 5 May 2021. The Order provided for liberty to apply by way of filing a Form 31TC.

3. Ms Ventures failed to pay either the $ 500 or the $ 5,000 by the dates specified or at all. Nor did she ever serve a transcript[1] or a Record of Appeal. She did not avail herself of the liberty to apply provision in order to seek any extension of the dates provided for in the Appeal Directions Order.

4. On **20 April 2021** Clarien filed a Notice of Motion seeking dismissal of the Appeal pursuant to Order 2, rule 17 (1). On **23 April 2021** Ms Ventures was due to provide a copy of her skeleton argument and list of authorities; but failed to do so. On the same day she filed a Notice of Motion seeking an order that the conditions of the Appeal Directions Order be waived, or that an extension of time for compliance be granted ("**the Appeal Directions Relief Application**").

5. On **29 April 2021** the matter came before Bell J.A. who declined to grant the relief contained in the Appeal Directions Relief Application. He also declined to entertain an application, made for the first time orally at the hearing, for liberty to proceed as a poor person and directed that, if any such application was to be pursued, the Appellant would need to file a Notice of Motion. On **30 April 2021** Justice Bell dismissed the appeal pursuant to Order 2, Rule 17, having received from the Registrar the certificate of non-compliance specified thereunder, signed by her on 29 April 2021.

[1] In paragraph [52] pf her affidavit of 25 May 2021 she had said that she had managed to make provision for obtaining the transcript because a payment plan had been agreed between her and an acquaintance.

6. Ms Ventures then made the following applications by Notice of Motion, all of which are before us:

   (a) to restore the appeal pursuant to Order 2 Rule 17 (4);

   (b) for an order pursuant to Order 5 Rule 1 and/or the inherent jurisdiction of the Court that the conditions set by the Registrar should be waived, or that an extension of time for compliance be granted**; "the Renewed Appeal Directions Relief Application**");

   (c) for an order pursuant to Order 2 rule 33 declaring that she may proceed with the appeal as a poor person ("**the Poor Person Application**"), which, if successful would mean that she would not be obliged to make the deposit or to give the security provided by Order 2 Rules 9 and 10.

The facts

7. The underlying facts go back a fair way and are of some complexity. The facts found by the Chief Justice are comprehensively set out by him in his scholarly judgment. I shall set out below only those that are necessary for consideration of the appeal.

8. First Bermuda Group Limited **("FBG")** and Capital G Bank Limited ("**Capital G")** were Bermuda banks. On **30 January 2010** FBG loaned Ms Ventures $ 842,000 for a 20-year term, which was secured by the 2010 Mortgage over the property located at 24 and 26 Blue Hole Hill (the "**Property**"). On **30 September 2011** FBG assigned the 2010 Loan and the 2010 Mortgage to Capital G. On **9 April 2014** Capital G changed its name to Clarien Bank Ltd.

9. There had been an earlier loan from Capital G. On 10 August 2005 Capital G had loaned Ms Ventures $ 1.5 million for 21 years ("the **2005 Loan**") and had taken security over 16, 24 & 26 Blue Hole Hill. In August 2006 Ms Ventures said that she was in financial difficulties. After a number of defaults, on 21 December 2007 Capital G demanded that she either refinance the 2005 Loan or sell 16 Blue Hole Hill and pay down the 2005 Loan. In May 2008 16 Blue Hole Hill was sold and the 2005 Loan was partially paid down. Further default followed under the 2005 Loan and in January 2010 the new arrangements with FBG were made.

10. The Chief Justice summarised the position as follows:

> *"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) a principal sum of $842,000; (ii) a 20-year term, maturing in February 2030; (iii) 6.5% effective rate interest, subject to change with one month's notice; and (iv) monthly payments of $6,278 due 28 February 2010 and each month 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 (the "2010 Mortgage")."*

11. Ms Ventures made payments to FBG under the 2010 Loan for 11 months until February 2011 at which time she began to make partial payments in varying amounts, some over and some under the specified monthly payment amount of $6,278. The judgment sets out in [103] ff the sequence of correspondence with her about arrears. Ms Ventures ceased making payment entirely in January 2014 and never resumed.

12. One of the principal matters that the Chief Justice had to consider was whether FBG took upon itself to give advice to Ms Ventures in relation to whether it was prudent to enter into the 2010 loan. Having reviewed the relevant history, he concluded that there was no factual basis for such a conclusion [125]. He was also satisfied that the outstanding amount under the 2010 Loan was the amount claimed by Clarien to be due [126].

The Amalgamation

13. On **4 January 2011** there was an amalgamation between Capital G and FBG. As a result, FBG became a subsidiary of Capital G.

14. On **21 January 2011** customers of FBG were notified of the amalgamation in a letter which began with the following:

> *"Capital G is pleased to announce the amalgamation with First Bermuda Group which was effective on 4 January 2011."*

and contained the following:

> *"This year will be a transition year. Work has started behind the scenes to align the two organisations seamlessly with minimal disruption to our clients. In the short-term, FBG will operate under the management of Capital G, as a wholly-owned subsidiary of Capital G Bank Limited. However, all products and services will remain the same and client transactions will remain independent of each other*

while work is done behind the scenes to integrate FBG fully into Capital G. Expect this to occur later this year."

15. Then, as the judgment records:

> *"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 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.*"

The evidence of Geoffrey Faiella, Clarien's Head of Legal and Regulatory Compliance was that, after this notice, when payments were made by Ms Ventures, they were paid to Clarien: see [80] of his affidavit of 29 June 2020.

16. The Chief Justice summarised Clarien's claim for monetary judgment, and an order for sale and possession of the Property in the following terms:

> "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.*

17. The judge then recorded Ms Ventures' position as to whether a legal mortgage was created on 1 February 2010 in the following terms:

> "*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*[2]*. 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*[3]*. On this basis, Ms. Ventures contends that there was no legal mortgage created on 1 February 2010."*

18. The judge then recorded that, in order to preserve the trial date, Clarien had elected not to pursue its claim based upon a legal mortgage on the basis that at all material times there existed an equitable mortgage on three grounds: (i) Ms Ventures was contractually obliged to mortgage the Property in favour of FBG; (b) Ms Ventures executed a deed of mortgage and, if that deed failed for want of proper execution , FBG would still have the benefit of an equitable mortgage and (c) that at all relevant times the mortgagee was in possession of the deeds to the Property.

19. As to that, following citation of authority and legal commentaries, the judge accepted [135] 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* [sic]*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*

[2] The deed is at page 745 of the Record of Appeal.
[3] The letter from Capital G enclosing it is at page 125 of the Record of Appeal and is dated 8 March 2021.

> *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".*

20. In those circumstances, as he held, Clarien as equitable mortgagee, was entitled to possession of the Property and to exercise the power of sale. The deed of mortgage expressly provided for those remedies; and Clarien was entitled to rely on the provisions of Order 88, rule 1 (2) of the RSC 1985, which applies to equitable mortgages, and section 30 (1) of the *Conveyancing Act 1983*, the powers of sale conferred by which apply to equitable mortgagees: *Swift 1st Ltd v Colin & Ors* [2011] EWHC 2410 (Ch). Having regard to these and other authorities the judge held that, on the basis that the power of sale had arisen and become exercisable, the Court would award possession and the right to exercise the power of sale. This was, however, subject to consideration of Mr Hill's main point that Clarien was not the appropriate party to enforce the loan or the security therefor.

21. The real substance of the opposition by Ms Ventures to the granting of the relief sought was that it was said that Clarien had not produced sufficient evidence to show that the amalgamation transaction had taken place; and this cast doubt on the validity of the Deed of Assignment and the subsequent Deed of Confirmation. Accordingly, the amounts due under the Loan were not due to Clarien.

22. The Chief Justice summarised Mr Hill's submissions thus [145]:

> *"(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.

23. In order to understand these submissions it is necessary to set out the relevant provisions of the three agreements

The Asset Transfer Agreement

24. The Asset Transfer Agreement (the "ATA") was made on 30 September 2011 between FBG, as transferor, and Capital G, as transferee. As the Chief Justice recorded, by paragraph [3] of her Defence and Counterclaim Ms Ventures had put Clarien to strict proof of the validity, scope and effect of the amalgamation between FBG and Capital G and the assignment of the rights and

obligations of FBG to Clarien insofar as they were said to vest in Ms Ventures any rights with respect to the Deed of Mortgage of 1 February 2010. In its Reply and Defence to Counterclaim of 21 March 2017 Clarien pleaded and relied on the Deed of Assignment and the Deed of Confirmation. It did not plead or rely on the ATA.

25. The ATA was not included (inadvertently, we were told[4]) in Clarien's list of documents of **3 October 2017**, the completeness of which was deposed to by Mr Faiella in his affidavit of **21 June 2018.** But it was exhibited to and referenced in the witness statement of Mr Faiella of **29 June 2020**. Mr Faiella gave evidence and was cross examined at trial. It is apparent that the Chief Justice accepted his evidence.

26. On **13 February 2020** an order was made by the Chief Justice that witness statements be filed and served within 14 days from the date of access to the electronic documents which Clarien was to provide to Ms Ventures. That access was provided on **14 February 2020,** so that the date for exchange of witness statements in accordance with the order became **28 February 2020.** There was an agreed short extension such that witness statements were due to be exchanged on Monday **2 March 2020**. On **4 March 2020** Walkers, for Clarien, asked Mr Hill, for Ms Ventures, to confirm that he was now ready to exchange. Similar requests for exchange were made on **24 March** and **25 June 2020**. It is apparent that Clarien was reluctant to produce its witness statement before it got Ms Ventures' witness statement[s] in return. Mr Kevin Taylor of Walkers confirmed that to be the position in [23] of his affidavit of **6 July 2020**. It is equally apparent that it had no intention of concealing the ATA, since it was exhibited to Mr Faiella's statement from Ms Ventures, and Walkers was prepared to exchange statements no later than early March.

27. At a hearing on **9 July 2020** the Court vacated the trial fixture of 13-15 July, on account of the ill health of Ms Ventures, and the hearing was later set down for trial on **20-21 October 2020**. In the event Ms Ventures elected about a week before the trial to file no further witness statement, and to rely on earlier statements; and not to rely on any expert evidence, having, it was said, no financial means to arrange a new witness statement. As a result, Mr Faiella's witness statement with the ATA was received by Ms Ventures on, we were told, the day before the trial.

28. A copy of the ATA which we have in the papers before us was marked in MSS: "*Per Brian Myrie: this document is not to be copied to Ms Ventures".* Mr Myrie had been Clarien's general counsel up to mid-2015 i.e. more than 2 years before the discovery exercise was undertaken. We were told (as we understand was the Chief Justice by Mr Faiella at trial) that he wrote this in circumstances where Ms Ventures had frequently been coming, unannounced, to the Bank to examine documents, and to ensure that Clarien did not inadvertently provide to Ms Ventures documents related to the Bank's merger activity as opposed to documents related to Ms Ventures' mortgage account.[5]

[4] We do not know of what the supposed inadvertence consisted other than that a letter from Walkers of 23 March 2021 (page 87 of Exhibit GAV-01) refers to the agreement having been covered by an email which contained privileged communications between Clarien and its attorneys: but we have no other evidence of that.
[5] See the letter from Walkers of 23 April 2021 at page 89 of Exhibit GAV-01.

29. The recitals to the ATA are as follows:

> *"(A) The Transferor is a wholly owned subsidiary of the Transferee; and*
>
> *(B) The Transferor is desirous of transferring all of the assets and rights owned by the Transferor, including those assets included in the balance sheet of the Transfer as set out at Schedule 1, and the Transferee accepts the transfer of those assets, subject to and in accordance with this Agreement,"*

30. Clause 1 contained a definition of certain terms, including the following:

> ***"Asset**" means all and every asset, right, and benefit of the Transferor included in the balance sheet of the Transferor as set out at Schedule 1 as well as the Assumed Liabilities, Goodwill, IT Systems, Contract, Intellectual Property Rights, the Properties, any right of action to which the Transferor may be entitled (whether in contract, tort or otherwise) and the Records but shall exclude the Excluded Liabilities;*
>
> *"**Assumed Liabilities**" means the rights and benefits of the Transferor at the date hereof in relation to the Assets;*
>
> *"**Business**" means the business of deposit taking carried on within the ordinary course of business by the Transferor;*
>
> ***"Excluded Liabilities**" means all the liabilities or obligations of or relating to the Transferor's Business or Assets other than the Assumed Liabilities;*
>
> *"**Properties**" means any freehold or leasehold properties and any rights in or to real estate of or relating to the Transferor's Business,*
>
> ***"Schedule 1"** means the schedule attached to this Agreement containing the balance sheet of the Transferor."*

31. Clause 2 provided as follows:

> ***"TRANSFER OF ASSETS***
>
> *2.1 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.*
>
> *2.2 The Transferor hereby assigns and transfers to the Transferee 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, loans, securities and other amounts owing to the Transferor at the date hereof (whether or not invoiced);

iii) all other assets, rights or benefits of the Transferor relating to or connected with or belonging to or required or intended for use in, the Business or in the Properties which are not otherwise included in Schedule 1

2.3 The Properties and such other Assets that require transfer by means of some other method other than as provided under this Agreement shall be transferred by such deed, contract or assignment as is required to effectively transfer the Property or such other assets in accordance with Bermuda law.

2.4. The following shall be excluded from this Agreement:

2.4.1. the Excluded Liabilities;

2.4.2 the Creditor Debt;

2.4.3 any asset, right or obligation owned by any of the Subsidiaries;

2,.4.4 all contracts and arrangements relating to the Business. entered into outside the ordinary course of business;

2.4.5 any tax for which the Transferor is liable, whether or not due at the date hereof and any liabilities of financing charges related business; and

2.4.6 the Transferor's accounts and accounting records which do not relate exclusively to the business."

32. Clause 3 provided as follows:

"3 COSTS

The Transferee shall be responsible for the payment of all costs in connection with the negotiation, preparation, execution and performances [sic] associated with this Agreement including but not limited to legal expenses, taxes, regulatory fees, auditor and accounting fees in addition to any sums necessary for the maintenance by the Transferors of Bermuda law minimum capital requirements until the Transferor is fully wound up".

33. Clause 6 provided as follows:

> ***"6 FURTHER ASSURANCE AND INDEMNITY***
>
> *...*
>
> *6.2. The Transferee shall assume any and all liability and obligations for and shall indemnify and hold harmless the Transferor its directors, officers and employees, both present and former, in respect of any and all claims, obligations and other liabilities arising out of or in respect of the cost of transferring the Transferor's Business (including reasonable legal fees) and assets to the Transferee, whether or not any claims, obligations or liabilities are known at the date of this Agreement and whether such claims, obligations or liabilities arise prior to or after the date of this Agreement and the Transferee shall indemnify and hold harmless the Transferor, its directors, officers and employees, both present and former, against actions, suits, proceedings, claims, demands, costs and expenses which may be taken or made against or be incurred or become payable by the Transferor or any of its directors, officers and employees, both present and future, in the course of or in connection with the transfer of the Transferor's business and assets to the Transferee (the "indemnity"). If any proceeding is instituted in respect of which the indemnity may be sought, the Transferor shall promptly notify the Transferee in writing setting forth full particulars of the basis of the claim for indemnity."*

34. Schedule 1 to the ATA contained a Balance Sheet of FBG as of 23 August 2011. The liabilities comprised various accounts and deposits totalling $ 174,887,918.14. The Assets comprised various loan accounts and loans totalling $ 173,050,043.55. One of the items was "*Loan Account FA 163,481,148,45",* which included Ms Ventures' debts under the 2010 Loan. As is apparent from these figures FBG was at that date balance sheet insolvent to the tune of $ 1,837,874.59.

The Deed of Assignment

35. On **30 September 2011** ("the **Effective Date**") a deed ("the **Deed of Assignment**") was purportedly executed between FBG, as Assignor, and Capital G, as Assignee. It recited:

> *"(A) The Assignor is party to a contract with the person (the "Borrower" which term shall include the singular and the plural) as identified in Schedule 1 ("Contract") of this Deed.*
>
> *(B) The Assignor has agreed to assign the Contract to the Assignor and the Assignee agrees to accept such assignment"*

The Schedule, which was headed "*Contract details*" identified Ms Ventures as the borrower and contained the following table:

Document Name and Date	**Summary of Security**
Mortgage Deed dated February 1, 2010	Nos 24 and 26 Blue Hole Hill in Hamilton Parish CR 04, Bermuda together with the

	dwelling houses erected thereon known as "Caliban" (Assessment Nos 08-0007015 and 08-007112)

36. Clause 1 provided:

> "1 ***ASSIGNMENT***
>
> *1.1 The Assignor unconditionally, irrevocably and absolutely assigns all its right, title interest, and benefits in and to the Contract to the Assignee with effect from the Effective Date.*
>
> *1.2 The Assignee agrees that it shall accept the assignment referred to in clause 1.1. "*

37. The Deed of Assignment had the following attestation clause:

> "***IN WITNESS WHEREOF*** *the parties, or their authorised representative, have dully executed this Deed of Assignment as a Deed which takes effect on the Effective Date"*

Beneath that were the words:

> *"**THE COMMON SEAL OF FIRST BERMUDA GROUP LTD** is affixed hereto in the presence of…"*

There then followed the manuscript signature of Peter Hardy above the words *"Secretary*". This was repeated for Capital G Bank Limited. The same signature was applied for both companies. However, the seals of the two companies were not affixed.

The Deed of Confirmation

38. A deed ("the **Deed of Confirmation**") was entered into on **5 September 2014** between FBG ("the Assignor") and Clarien, as Capital G had now become, ("the Assignee"). Recital 1, when read with the Schedule, recorded the 2010 Mortgage and the conveyance of the freehold properties therein described (i.e. 24 and 26 Blue Hole Hill) to FBG in fee simple and the assignment of the Leasehold Properties therein described for the residue then unexpired of the terms of years of the leases[6], for redemption upon payment of the sums due under the 2010 Mortgage. Recital 3 recorded the Deed of Assignment of the 2010 Mortgage of 30 September 2011. Recitals 4 and 5 recorded that:

[6] There do not in fact appear to be any leasehold properties covered by the 2010 Mortgage.

> "*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.*
>
> *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."*

39. The Deed of Confirmation then provided:

> *"NOW THIS DEED WITNESSES that IN PURSUANCE of the agreement fifthly above recited and in order to confirm the Assignment the Assignor as Mortgagee:*
>
> *(i) CONVEYS AND CONFRIMS unto the Assignee ALL THAT the Freehold Properties TO HOLD the same UNTO the Assignee in fee simple, and*
>
> *(ii) ASSIGNS AND CONFIRMS unto the Assignee 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*

The Chief Justice's conclusions

40. The Chief Justice did not accept Mr Hill's submissions for a number of reasons.

41. First, as he observed [146], none of the parties to the transaction had taken the position that the amalgamation had not taken place. The parties to the ATA had not sought to argue that the agreement was not supported by consideration and was, therefore, legally unenforceable. Nor had the parties to the Deed of Assignment argued that it was in any way unenforceable; nor had the parties to the Deed of Confirmation sought to argue that the Deed did not achieve its express objective. Further:

> *"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".*

42. In relation to the ATA the Chief Justice declined to accept the submission that the ATA imposed no obligation upon Clarien. As he held [149], the commercial object of the ATA 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. The transfer of assets was, he held, achieved by the provisions in clause 2; and the effect of clause 2 (i) was to assign to Clarien all the loans which FBG had made to its customers, which included the 2010 loan to Ms Ventures. The clause constituted 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 sought to assign the loan and the security, there was a valid assignment of the 2010 Loan under the ATA and, as a result, Clarien was entitled to monetary judgment.

43. As to the question of consideration the Chief Justice said this:

> "*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*."

44. Lastly, on this topic, the Chief Justice held that there was no requirement that an assignment of the loans that FBG had made to its customers should be supported by consideration.

45. I agree with much of the above analysis. As to the first matter, there seems to me to be no sound basis for saying or supposing that the amalgamation did not go through. The parties to it do not say so. We have been shown no evidence that suggests that it did not; and, if the amalgamation had not in fact occurred, it seems highly unlikely that the market and, indeed, the interested public, would have been ignorant of that fact. Further, as the Chief Justice observed, the ATA, Deed of Assignment and Deed of Confirmation and the notice of 21 January 2011 all serve to confirm the fact of the amalgamation. It was not, as it seems to me, necessary for the Court to have before it (or for Clarien to disclose) the entire suite of transactional documents by which the amalgamation took place. In the light of the evidence before him, which included that of Mr Faiella, who

confirmed that to the best of his information and belief the amalgamation had taken place, the Chief Justice entertained no doubt that it did – a view which, in my judgment he was entitled to hold.

46. As to consideration it is plain that consideration was given. The ATA says so in terms in clause 2. Consideration was clearly provided by Capital G by the obligations contained in clauses 2.1, 3 ("*The Transferee shall be responsible for*….) and 6.2. The need for consideration is satisfied by the provision of any consideration which is real, as was the case here, and not illusory. The amount of value of the consideration is not relevant. In any event, it does not seem to me that consideration was in fact required. A debt, like other property, can be transferred without reward.

47. The ATA is not a masterpiece of the draftsman's art. It assigns the "*Assets*". These are defined so as to include the "*Assumed Liabilities*" but to exclude the "*Excluded Liabilities*". This is curious phraseology, since a liability is, in effect, the opposite of an asset. The former is an obligation to pay and the latter is an entitlement to receive. An assignment of assets which includes liabilities is strange in itself. Further, a liability to depositors owed by FBG cannot be replaced vis-a-vis the depositor without the assent of the depositor to what is, in effect, a form of novation. But Bank A can agree with Bank B that, as between the two of them, Bank B will be responsible for seeing that the liability is honoured, so that the liability of Bank A is, as between it and Bank B, assigned to Bank B.

48. The definition of "*Assumed*" and "*Excluded*" "Liabilities" produces the following result when the meaning of the defined words is substituted for the words themselves (in bold):

> *""Assets" means all and every asset, right and benefit of [FBG] … included in the balance sheet of [FBG] as set out in Schedule 1 …as well as* ***the rights and benefits of the [FBG] at the date hereof in relation to the Asset****s … but shall exclude* ***all the liabilities or obligations of or relating to [FBG's] Business or Assets other than the rights and benefits of [FBG] at the date hereof in relation to the Assets****."*

49. This makes little sense. It includes in the definition of Asset what is described as an "*Assumed Liability*", which is, itself, defined in terms of a right. It then excludes from being an asset that which is, in fact, a lability ("*all the liabilities or obligations of or relating to the Transferor's Business or Assets")*, and then, by the words "*other than the Assumed liabilities",* excludes from that exclusion that which is not a liability at all ("*the rights and benefits of the Transferor at the date hereof in relation to the Assets*"). Put more simply, if what was being assigned was an assumed liability, which was not to include an excluded liability, the result would be expected to be the assignment of some form of liability and not no liability at all.

50. It seems to me well possible that there has been a mistake in that the draftsman meant to define "*Assumed Liabilities*" as meaning, "*all the liabilities or obligations of the Transferor at the date hereof in relation to the Assets*". That would simply incorporate the description of liabilities in the "*Excluded Liabilities*" definition and apply it to the "*Ass*ets". That would make the passage incorporating the definitions read:

> *"Assets" means all and every asset. included in the balance sheet ...**as well as the liabilities or obligations of the Transferor at the date hereof in relation to the Assets** ... but shall **exclude all the liabilities or obligations of or relating to the Transferor's Business or Assets other than the liabilities or obligations of the Transferor at the date hereof in relation to the Assets**."*

51. By this means Capital G would, as between it and FBG, be responsible for all the liabilities of FBG as at the date of the ATA in relation to the assets included in the balance sheet (which could be said to include the deposits of depositors, which would finance those assets), but not for liabilities relating to the business or assets other than those which came within that description.

52. We were told by Mr McCosker that the "*Assumed Liabilities"* was meant to include the liabilities in the balance sheet. There was, however, no case put forward before the Chief Justice which relied on the principle of construction which allows a court, as part of the process of interpretation, to correct obvious mistakes in the written expression of the intention of the parties provided it is clear (a) that the words used are a mistake; and (b) what correction needs to be made to cure the mistake: see *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111 and Chapter 9.01- 9.04 of Lewison on *The Interpretation of Contracts.* This approach was neither pleaded nor argued.

53. In those circumstances it is necessary for us to reach what answer we can on the basis of the words which the parties have used. On that basis it does not seem to me possible to hold, as the Chief Justice did, that "*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",* if that is taken to mean that, as between FBG and Clarien, the liabilities of FBG to its depositors as at 30 September 2011 became at that moment liabilities of Clarien. This is because, on this footing, the Excluded Liabilities i.e. all the liabilities or obligations of or relating to FBG's Business were excluded from "*Assets*", and the exclusion of "*Assumed Liabilities*" from "*Excluded Liabilities*" does not allow for the inclusion of any liabilities since the definition of "*Assumed Labilities*" does not include anything that is a liability at all. This is underlined by the fact that clause 2.4.1. provides, in terms, that the Excluded Liabilities shall be excluded from the ATA.

54. Mr Hill contended before the Chief Justice that the construction of clause 2 which, in the end, the Chief Justice adopted, was implausible because, if a transfer of liabilities was what was intended, it would have been done by express and clear wording as opposed to the "opaque" manner in which, Mr Hill submits, it was, on the Chief Justice's analysis, done. But there is, as it seems to me, a stronger ground against the interpretation adopted by the Chief Justice, on which Mr Hill relies, which is to be derived from the references to "*Excluded Liabilities*".

55. That does not seem to me, however, to be the end of the analysis. I bear in mind, in this context, the commercial nonsense which would result from an interpretation that all the assets of FBG went to Clarien but there was no provision relating to its liabilities to depositors as at the date of the balance sheet. Clause 2.1. can, and in my view, should be interpreted, as meaning, not that the liabilities of FBG to depositors as at 30 September 2011, became at that moment, and as between FBG and Clarien, the liabilities of Clarien, but that Clarien would pay all costs associated with

maintaining FBG in accordance with applicable laws which could include, if the need arose, ensuring that FBG remained in a position to discharge its liabilities to its creditors.

56. Further, in addition to clause 2 it seems to me that clause 6.2 would provide an indemnity to FBG if the transfer of FBG's assets to Clarien led to an inability to service its depositors. Under that clause Clarien was to assume any and all liability and obligation for, and to indemnify FBG in respect of, any claims, obligations and other liabilities arising out of the transfer of FBG's Business, i.e. its business of deposit taking, to Clarien; and to indemnify FBG against any claim or demand which might be taken or made against it or become payable by FBG in connection with the transfer of FBG's business to Clarien. That would seem to me wide enough to cover any claim by an existing depositor of FBG that his deposit had not been paid to him as a result of the transfer of FBG's assets to Clarien.

57. Ms Ventures' case has oscillated from (i) asserting, at trial, that the ATA should be excluded from evidence and, when that failed, advancing the submissions on it which the Chief Justice rejected; to (ii) asserting after the trial that the circumstances surrounding its appearance give rise to the suspicion that it was fabricated "*a posteriori*" , an allegation which I did not understand to be pursued before us, and which appears to me to be wholly implausible; and (iii) seeking to contend that the appeal should be allowed in order that Ms Ventures may plead and contend that the amalgamation was, or may have been, a scheme to defraud, or, at least, imperil creditors of FBG by transferring its assets, but making no provision for its liabilities to be met by Clarien, or anyone else – in effect an intentional bankruptcy of a deposit taking entity – with the result that the Court should not lend its name to enforcing such a transfer which formed part of such an amalgamation. It must be left to FBG to bring a claim.

58. As to (i) Ms Ventures' strongest point is that the ATA was never pleaded and was only produced at the last moment when exhibited to Mr Faiella's affidavit. Although Ms Ventures could have had it much sooner, if she had either exchanged witness statements or said that she was not going to adduce any on a date earlier than she did, and thereby complied with the order of the Court, the ATA was plainly a discloseable document, and, indeed, has had to be relied on by Clarien in the light of the Chief Justice's decision in respect of the Assignment Agreement: see below. Clarien may well have thought that the Assignment Agreement was the significant document but, even then, the ATA, which gave rise to it, was a relevant document. Mr Hill relies on the fact that it was never pleaded, nor put on any list, (and that an affidavit was sworn as to the completeness of the list that was filed) and was, in the event, produced at the last moment, as disentitling Clarien to rely on it, not least because he could not make the more fulsome submissions that he would have been able to make if he had had more time.

59. Because we have no transcript of the proceedings before the Chief Justice we have no record of the argument before the Chief Justice, his response thereto and his ruling thereon. But it seems to me that it was open to the Chief Justice to take the view that, in all the circumstances, it was not unfair to admit the ATA and that he is not shown to have gone beyond what he could, as a matter of discretion, permit.

60. As to (iii) in my judgment there is no sound basis upon which Ms Ventures should be allowed the latitude which she seeks. On the Chief Justice's findings, with which, subject to the qualification and addition which I have mentioned, I agree, Clarien was not free from obligations in relation to the deposits in FBG. Further if there had been some improper scheme, by which depositors in FBG were put at risk, it seems to me inconceivable that this would not have become public knowledge, or, at the least, known and acted on by the relevant regulatory authorities, such as the Bermuda Monetary Authority, either in 2011 or in the decade that has followed. I would also note that the way in which the argument appears to have been put to the Chief Justice – see [171] of the judgment – was that Clarien did not come with clean hands because it was Capital G which prevented the creation of a legal mortgage by not surrendering the Deed of Reconveyance in 2010 and wrongfully adding a sum for insurance premiums to the 2010 Mortgage – a submission which the Chief Justice was entitled to reject for the reasons which he gave.

The Deed of Assignment

61. As to the Deed of Assignment section 23 of the *Companies Act 1981* provides:

> *"(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."*

62. The Chief Justice concluded, with some hesitation, that, in the absence of evidence from FBG and Capital G that the secretary was authorised to execute the documents as a deed, without affixing the seal, the document as executed did not comply with the formal requirements of section 23. He did so in circumstances where Mr Hill appeared to him to accept that it was possible for a company to execute deeds without affixing a seal if the authorised person was so authorised under section 23 (1). Mr Hill also submitted that it was contemplated by both parties that the document would be executed under seal. The Chief Justice's hesitation was no doubt attributable , at least in part, to the fact, which he recorded, that the parties to the Deed of Assignment had 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;* and that, as he said, clearly, the parties to the Deed of Assignment had proceeded on the assumption that the document executed by them complied with the formal requirements for execution of deeds by companies.

63. Not without similar hesitation I would agree with the Chief Justice's conclusion that the Deed is ineffective, and would go a little further. The document in this case does not purport to be signed by the secretary on behalf of the companies. It provides for execution by the affixation of the common seals of the two companies in the secretary's presence. His signature is (purportedly) no more than an attestation of that affixation. But his signature cannot attest to what never occurred.

The Deed of Confirmation

64. The Deed of Confirmation complied with the formal requirements of section 23: see [163] of the judgment. In relation to that the Chief Justice held as follows:

> "*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."*

65. I agree with this analysis. The Deed of Assignment purported to, but did not, in fact assign the Mortgage from FBG to Capital G, although it was plainly intended that that was what was to happen. By the Deed of Confirmation FBG, which had in the interim become the holder of the legal title of the Property conveyed it to Clarien.

66. The overall result of what occurred was that the Property was in 2005 conveyed by Ms Ventures to Capital G (Clarien) by way of mortgage. In 2010 it was purportedly conveyed by her to FBG

under the 2010 Mortgage; but as she had not then obtained a reconveyance to her from Capital G (Clarien), FBG was then only, as the Chief Justice held [135], an equitable mortgagee of Ms Ventures' equitable interest. But in 2011 Ms Ventures obtained title to the Property from Clarien when a deed of reconveyance was delivered to her. The effect was that the conveyance which she had made to FBG in the 2010 Mortgage was a conveyance of the Property which she had become entitled to have conveyed to FBG as legal owner, as FBG itself became. The Property was then thought to have been assigned by FBG to Clarien by the Assignment Agreement which purported to assign the 2010 Mortgage. In fact, the Assignment Agreement did not do that, for want of due execution. It was also debatable whether, if duly executed, it would in fact have conveyed the freehold – see recital 4 of the Confirmation Agreement, as a result of which doubt the Confirmation Agreement had, itself, been made. This agreement made clear beyond peradventure that FBG conveyed the Property to Clarien.

67. Thus, by virtue of the ATA Clarien became the assignee of the Loan. In addition, the contractual rights contained in the 2010 mortgage were assigned to Clarien by the ATA: see clause 2.2. They also come within the definition of "*Properties*" which are part of the *"Assets*" assigned. And Clarien came to enjoy the freehold by the route that I have described.

68. The Appellant points out that the Deed of Confirmation did not mention the defective execution of the Assignment but referred to other problems. It would seem likely that the defect had not been picked up at the time of the Deed. The omission cannot however deprive the Deed of its confirmatory effect.

Restoration of the Appeal

69. Order 2 Rule 17 provides:

> "(4) *An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored. Any such application may be made to the Court and the Court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit".*

70. I am not persuaded that there is good and sufficient cause why we should order that the dismissed appeal should be restored because it does not in my view have a reasonable prospect of success.

71. In those circumstances neither the Renewed Appeal Directions Relief Application nor the Poor Person Application arise for decision. As to the former Mr Hill indicated that he might be prepared to finance the appellant in the sum of $ 5,000 but had reached no final decision on that and invited the court to make an order that unless the sums due were paid within a short period of time (a matter of days), the appeal would not be restored. In relation to the latter. Order 2 Rule 33 provides that "*no party shall be permitted to proceed as a poor person unless he satisfies the Court that he had a reasonable probability of success*". I do not think that the Court can be so satisfied unless it takes the view that the chances of success exceed 50%. As is apparent from what I have said in the previous paragraph I am far from so satisfied.

72. In those circumstances, I would not restore the appeal, which must stand dismissed. Subject to any submissions that may be made in writing within 14 days I would order that the costs of the three applications listed in paragraph 6 above shall be paid by the Appellant to the Respondent such costs to be taxed, in default of agreement, on the indemnity scale.

KAY, J.A.

73. I agree.

BELL, J.A.

74. I also agree.