[2010] UKPC 28
Privy Council Appeal No 0026 of 2010

JUDGMENT

E. Anthony Ross *v.* Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited

From the Court of Appeal of St Christopher and Nevis

before

Lord Phillips
Lord Mance
Lord Collins

JUDGMENT DELIVERED BY
Lord Mance
ON

23 November 2010

Heard on 12 October 2010

Appellant	*Respondent*
Frank E. Walwyn	Karl Hudson-Phillips QC Mr Thomas Roe
(Instructed by Barlow Lyde & Gilbert LLP)	(Instructed by Collyer Bristow LLP)

LORD MANCE:

1. In these proceedings, Mr E. Anthony Ross, claims against the Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Ltd (in liquidation) US$410,000 and interest in respect of two certificates of deposit expressed to mature on 10 December 1981. Mr Ross obtained judgment at first instance, but this was set aside in the Court of Appeal on 25 January 2010. Section 99 of the Constitution scheduled to the Saint Christopher and Nevis Constitution Order, 1983 (SI 1983/881) provides that an appeal shall lie to the Privy Council from decisions of the Court of Appeal as of right where the matter in dispute involves $5000 or upwards. Mr Ross has on 5 March 2010 filed a notice of appeal with the Privy Council, maintaining that he is entitled to appeal to the Privy Council as of right, without needing to seek or obtain leave from the Court of Appeal or the Privy Council. The first issue is whether that is correct. The second issue, if it is not, is whether the Board should grant Mr Ross special leave or permission to appeal under the Judicial Committee Acts 1833, section 3 and 1844, section 1.

2. The Board pays tribute to the quality of the submissions which it has received from Mr Frank Walwyn for Mr Ross and from Mr Hudson Phillips QC and Mr Thomas Roe for the Bank. For reasons which follow, the Board concludes in relation to the first issue that, even in respect of appeals expressed to be as of right under the Constitution, it remains necessary either to obtain leave from the Court of Appeal or, that lacking, to obtain special leave from the Privy Council, and in relation to the second issue that special leave should be granted for an appeal to the Privy Council in the present case.

3. It is common ground that prior to 21 April 2009 - when the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (SI 2009/224) ("the 2009 Order") brought the new Judicial Committee (Appellate Jurisdiction) Rules 2009 ("the 2009 Rules") into effect - Mr Ross's stance on the first issue would have been incorrect. He would have needed to seek and obtain leave from the Court of Appeal or, that lacking, the Privy Council. Rule 2 of Schedule 2 to The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982/1676: revoked in its entirety by the 2009 Order) provided in unqualified terms that:

> "2. No appeal shall be admitted unless either –
>
> > a) leave to appeal has been granted by the court appealed from; or

> b) in the absence of such leave, special leave to appeal has been granted by Her Majesty in Council."

4. The combination of section 3 of the Judicial Committee Act 1833 and section 1 of the Judicial Committee Act 1844 confirmed that the Privy Council had a general power to grant special leave to appeal to it. But the established practice in cases where the local Constitution provided for an appeal as of right was for leave to be sought in the first instance from the local Court of Appeal. The practice can be traced back to the 19th century, before Privy Council procedure was formalised in general rules: see e.g. *Ex p Rolfe* (1863) 2 W & W, I E & M 51; Macpherson's *The Practice of the Judicial Committee of Her Majesty's Most Honourable Privy Council* (Henry Sweet, 1873) and Bentwich's *The Practice of the Privy Council in Judicial Matters*, 3rd ed. (1937) pp.107-111.

5. The grant of leave by the court appealed from for an appeal as of right was "not, however, a matter of discretion for that court": *Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd* [1998] 1 WLR 202, 204E. The purpose of seeking leave to appeal from the court appealed from was to confirm that the appeal was as of right, and to impose such limited conditions as might be permitted by the local Constitution and law. This is confirmed by article 5 of The Saint Christopher and Nevis Appeals to the Privy Council Order - as the West Indies Associated States (Appeals to the Privy Council) Order 1967 (SI 1967/224) may be cited (see The Saint Christopher and Nevis Constitution Order 1983 (SI 1983/881), Schedule 2 para 8, and The Saint Christopher and Nevis Modification of Enactments Order 1983 (SI 1983/882), Schedule, para 9). The Board will refer to this Order as the Privy Council Appeals Order 1967. Under article 5, the only permissible conditions involved the provision of security for costs not exceeding £500 and other conditions as to the time for steps to procure the preparation of the record and despatch it to England.

6. Where leave was not obtained, for whatever reason, from the local Court of Appeal, then special leave could still be sought from the Privy Council. Bentwich (at p110) describes the 19th century position as follows:

> "Where the Court below should have granted leave to appeal, the question in dispute being of the appealable value, but it has refused, a petition should be presented addressed to Her Majesty in Council by way of appeal from such refusal, and asking that such order may be set aside and leave to appeal be granted: cf *Wilson v Callender*, 9 Moo 100; *Bank of Australasia v Harris*, 16 Moo 97; *Re Sibmarain Ghose*, 8 Moo 257."

The position was codified in slightly different terms, better reflecting the terms of the 1833 and 1844 Acts, in a single set of rules by the Judicial Committee Jurisdiction and Procedure: General Rules as to Appeals Rules 1908 (SR & O 1908, 405). Rule 2 provided:

> "All appeals shall be brought either in pursuance of leave obtained from the court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a petition in that behalf presented by the intending appellant".

Rule 2 of the 1982 Rules (para 2 above) effectively re-enacted this provision. Upon an application for special leave, if the Privy Council concluded that leave should have been granted as of right by the Court of Appeal, that would be a most material factor. But the Privy Council could, exceptionally, refuse special leave even in such a case, "as, for example, where it was clear that the appeal was wholly devoid of merit and was bound to fail": *Crawford v Financial Services Institutions Ltd.* [2003] UKPC 49; [2003] 1 WLR 2147, para 23.

7. The 2009 Rules contain no precise analogue of Rule 2 of the 1982 Rules. Rules 10, 11 and 18 of the 2009 Rules read:

> "**Permission to appeal**
> **10.** In cases where permission to appeal is required, no appeal will be heard by the Judicial Committee unless permission to appeal has been granted either by the court below or by the Judicial Committee.
>
> **Filing of application for permission to appeal**
> **11.**—(1) Every application to the Judicial Committee for permission to appeal shall be made in the appropriate form.
> (2) An application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later).
> ……
>
> **Form and filing of notice where permission not required**
> **18.**—(1) Every notice of appeal shall be made in the appropriate form.
> (2) The notice of appeal together with the requisite number of copies must be filed within 56 days of the date of the order or decision of the court below or of the date of the order or decision of that court granting permission to appeal (if later).

(3) The grounds of appeal may not (without the permission of the Registrar or the Judicial Committee) differ materially from those for which permission to appeal has been granted.
(4) The appellant must—
(a) serve a copy of the notice of appeal on each respondent before it is filed; and
(b) at the same time as the notice of appeal is filed, file a certificate of service.
(5) The appellant must also file
(a) a copy of the order appealed from and
(b) (if separate) a copy of the order granting permission to appeal and
if the order appealed from is not immediately available, the notice of appeal should be filed without delay and the order filed as soon as it is available."

8. The combination in Rule 10 of the opening words ("In cases where permission to appeal is required") and the provision that in such cases no appeal will be heard unless permission has been granted either by the court below or by the Privy Council suggest that there must be cases in which no permission to appeal is required from either the court below or the Privy Council. Rule 11(2) deals with cases where permission is required from the Privy Council, and is not therefore in point. Rule 18 is less clearly suggestive than Rule 10 of a conclusion that there may be cases in which no permission to appeal at all is required. It is true that para (2) requires a notice of appeal to be filed "within 56 days of the date of the order or decision of the court below or the date of the order or decision of that court granting permission to appeal (if later)". These two alternatives may be said to read more harmoniously, if the first contemplates a situation where no permission at all need be sought rather than one where permission has been sought and refused below. On the other hand, paras (3) and (5)(a) contemplate on their face that permission to appeal will have been granted below.

9. By Rule 3 of the 2009 Rules, it was envisaged that the Privy Council would issue Practice Directions "to supplement these Rules" and "to provide general guidance and assistance for counsel, agents and the parties". Practice Direction 1 contains this description of the Privy Council's jurisdiction:

"Section 2 The Jurisdiction of the Judicial Committee
I. *Commonwealth Jurisdiction*
A. APPEALS TO HER MAJESTY IN COUNCIL
2.1 An appeal lies from the countries listed at paragraph 2.2 *[which include St. Christopher and Nevis]* of which The Queen is head of

> State and from UK overseas territories and Crown Dependencies as follows.
> (1) By leave of the local Court of Appeal. The circumstances in which leave can be granted will depend on the law of the country or territory concerned. Leave can usually be obtained as of right from final judgments in civil disputes where the value of the dispute is more than a stated amount and in cases which involve issues of constitutional interpretation. Most Courts of Appeal also have discretion to grant leave in other civil cases.
> (2) By leave of Her Majesty in Council. The Judicial Committee has complete discretion whether to grant leave. It is mostly granted in criminal cases (where leave cannot usually be granted by the Court of Appeal) but it is sometimes granted in civil cases where the local Court of Appeal has for any reason refused leave."

10. Practice Direction 1 therefore contemplates the continuation of the old practice, whereby, even in cases where the appeal was under the local Constitution expressed to be as of right, application for leave to confirm this would be made in the first instance to the local Court of Appeal appealed from, and, failing the grant of such leave, special leave would then be sought from the Privy Council itself. Under Rule 3 of the 2009 Rules, Practice Direction 1 is supplementary to and intended to reflect the sense of the Rules, and it is entitled to some weight in their interpretation, although it would have to yield to the Rules if there was any clear conflict between it and them: compare, in the context of the English Civil Procedure Rules, *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478; [2002] 1 WLR 997 and *R(Mount Cook Land Ltd.) v Westminster City Council* [2003] EWCA Civ 1346; [2004] C P Rep 12; [2004] 2 P & CR 22.

11. The Privy Council sits as the final court of appeal of any jurisdiction from which it hears appeals. But appeals to the Privy Council are regulated by a combination of provisions with different legal bases. Here, the Constitution prescribes the cases in which an appeal is open to the Privy Council; the Privy Council Appeals Order 1967 continues to provide powers and procedures covering applications to the Court of Appeal for leave to appeal in circumstances where the appeal is as of right; and the 2009 Order covers the powers of and procedures before the Privy Council itself.

12. Paras 4 to 7 of the Privy Council Appeals Order 1967 (see para 5 above) read as follows:

> "4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision

to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.

5. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only –

(a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

6. A single judge of the Court shall have power and jurisdiction –

(a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;

(b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision.

7. Where the decision appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said decision shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said decision to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

13. The 2009 Rules para 5 provide in relation to the Privy Council Appeals Order 1967 as well as various other, presently irrelevant, orders that

> **"Partial revocations**
> **5.** The instruments listed in column 1 of the following table (which have the references listed in column 2) are revoked only and in so far as they relate to the powers of the Judicial Committee of the Privy Council and the procedure to be adopted by it with respect to proceedings before it."

This formulation reflects a distinction between powers and procedures locally and before the Privy Council. It leaves untouched the provisions of the Privy Council Appeals Order 1967, so far as those provisions provide for and regulate the obtaining of leave for appeal from the local Court of Appeal. It is true that those provisions are in terms giving powers in respect of applications for leave, rather than expressly requiring such applications to be made locally. But the absence of any other like provisions in the 2009 Rules or elsewhere suggests that the Privy Council Appeals Order 1967 must have been intended to continue to regulate such applications. The alternative, that the 2009 Rules were intended to supersede rules 4 to 7 of the Privy Council Appeals Order 1967 in any case where the Constitution granted an appeal as of right would mean that no formal procedures had been provided for such appeals, and that the onus of confirming whether the criteria for an appeal as of right was, or could at a litigant's option be, thrown onto the Privy Council, without any formal basis for imposing conditions and without any requirement to seek or obtain leave from the court appealed from or the Privy Council.

14. In considering whether this can have been the effect of the 2009 Rules, it is important to bear in mind the constitutional developments occurring in and after 1967, which involved the attainment by St Christopher and Nevis of full independence. The Privy Council Appeals Order 1967 came into operation on the same day (27 February 1967) as The Saint Christopher, Nevis and Anguilla Constitution Order 1967 (1967 SI No. 228) brought into effect the main part of a

Constitution of those territories. Section 100 of that Constitution was the predecessor (with a lower limit of $1,500) of section 99 of the 1983 Constitution (para 1 above). Shortly after the enactment of the two 1967 Orders, Her Majesty's Government in the United Kingdom ceased to have any presently relevant responsibility for the government of St Christopher, Nevis and Anguilla, and it was provided that (subject to limited exceptions) no Act of the United Kingdom Parliament should extend to those territories without their consent: see the West Indies Act 1967, a statute of the Westminster Parliament, sections 2 and 3.

15. In 1983 St Christopher and Nevis attained fully sovereign status, and the 1983 Constitution was enacted. The full history is recounted in *Attorney-General for Saint Christopher and Nevis v Rodionov* [2004] UKPC 38; [2004] 1 WLR 2796, paras 12-13. The Privy Council Appeals Order 1967 had by para 3 provided that:

> "An appeal shall lie to Her Majesty in Council from decisions of the Court given in any proceeding in a State in such cases as may be prescribed by or in pursuance of the Constitution of that State."

However, in 1983, as the Board noted in *Rodionov* (para 13):

> "Reflecting the new independence of St Kitts, paragraph 8 of Schedule 2 to the 1983 Constitution provided that the 1967 Appeals to Privy Council Order should have effect as if section 3 …. were revoked. The provisions governing appeals were now to be found in the Constitution itself, not in a general Order applying to the Associated States and referring to the individual constitutions of each state."

Schedule 2, para 2(2) of the 1983 Constitution further provided:

> "Any existing law enacted by any legislature with power to make laws at any time before 19th September 1983 shall have effect as from that date as if it were a law enacted by [the St Christopher and Nevis] Parliament".

The Privy Council Appeals Order 1967 falls in these circumstances to be regarded as an integral part of the law of St Christopher and Nevis so far as it regulates matters within the jurisdiction of that state.

16. The constitutional position since at least 1983 has thus been that the Constitution and law of St Christopher and Nevis provide for appeals as of right and contain procedures regulating applications to the Court of Appeal and conferring on that Court powers in relation to such appeals. Neither the Constitution nor such procedures are capable of being affected by the 2009 Order. The 2009 Order was accordingly expressed to revoke the Privy Council Appeals Order 1967 "only if and in so far as" it related to "the powers of the Judicial Committee … and the procedure to be adopted by it with respect to proceedings before it". The procedures contained in the Privy Council Appeals Order 1967 do not expressly mandate an application to the Court of Appeal in respect of appeals as of right. But they reflect the long-standing practice for such an application to be made. The reasons for this practice are understandable and they and the procedures contained in the Privy Council Order 1967 would be undermined if appeals could simply be lodged as of right with the Privy Council without it being necessary to obtain permission for an appeal from either court.

17. The Board concludes in these circumstances that the 2009 Order should be understood and read as not intending to disturb the practice existing hitherto whereby leave has been required either from the court appealed from or, that lacking, from the Privy Council itself. The omission from the 2009 Order of express provision to this effect and the wording of rules 10 and 18 do not compel any contrary conclusion – particularly in the light of Practice Direction 1 which makes clear the contemplation that the previous practice regarding appeals as of right should continue. On this basis, Mr Ross is not entitled to appeal to the Privy Council without obtaining permission, either from the Court of Appeal or from the Privy Council.

18. In the ordinary course, such permission would have been expected to be sought in the first instance from the Court of Appeal. But Mr Ross's stance, that no permission at all is now required, was properly arguable under the 2009 Rules, despite the Board's rejection of it in this advice. Indeed, it carried the endorsement of another decision of the Court of Appeal (on an appeal from Anguilla) in *Edwin M. Hughes v La Baia Ltd* (23 February 2010). In that case, the court actually declined to deal with applications for leave to appeal to the Privy Council and for a stay of execution, taking the view that, as a result of the 2009 Rules, the correct course, and an essential pre-condition to the exercise of any power it might have to impose conditions or order a stay, was the filing of an appeal directly with the Privy Council. It therefore seems likely that any application by Mr Ross to the Court of Appeal for leave to appeal would have met with short shrift. The Board in these circumstances agreed to treat the matter before it as an application for special leave and to address the second issue identified at the outset of this advice.

19. Having considered the judgment of the Court of Appeal, the Board concludes that the case is appropriate for an appeal to the Privy Council. Had he

applied to the Court of Appeal, Mr Ross would have been entitled to appeal as of right, and the proposed appeal is clearly arguable. The Board will therefore humbly advise Her Majesty that Mr Ross should be granted special leave to appeal to the Privy Council. The parties are at liberty to make written submissions within 21 days with regard to any consequential issues and costs.

[2012] UKPC 3
Privy Council Appeal No 0026 of 2010

JUDGMENT

E. Anthony Ross (Appellant) *v* Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited (Respondent)

From the Court of Appeal of St. Christopher and Nevis

before

Lord Phillips
Lord Walker
Lord Clarke
Lord Dyson
Lord Wilson

JUDGMENT DELIVERED BY
Lord Walker
ON

15 February 2012

Heard on 17 January 2012

Appellant
Charles McBryan Finlay QC
Frank E Walwyn

(Instructed by Clyde & Co. LLP)

Respondent
Karl Hudson-Phillips QC
Thomas Roe
Sylvester Anthony

(Instructed by Collyer Bristow LLP)

LORD WALKER :

The course of the litigation

1. This appeal is brought in an action which has now been on foot for almost 29 years. The only claim in the action appeared to be straightforward. It was for the recovery, with interest and costs, of the sum of US$410,000 loaned to the respondent, Bank of Commerce (St Kitts Nevis) Trust and Savings Association Ltd ("the Bank"), by two companies incorporated in Curacao, Alminton Company NV and Mill Valley Finance Construction Company NV ("the Companies"). The Companies are no longer in existence, although that important fact has received little attention for most of the course of the litigation. The Bank has now been in liquidation for nearly 27 years. That is one reason, but not the only reason, why this apparently straightforward claim has been unresolved for so long.

2. The other clue to the complicated and protracted course of the litigation is that the action was not brought by the Companies. It was commenced in 1983 by Mr E Anthony Ross, a Canadian lawyer who was at the time practising in Halifax, Nova Scotia. More recently he has been resident in St Lucia, and the Board was told that from October 2006 until September 2009 he was a management judge of the Eastern Caribbean Supreme Court.

3. In his statement of claim Mr Ross referred to a number of documents, of which the most important were (1) two certificates of deposit (each for US$205,000) issued by the Bank, one to each of the Companies, on 6 November 1981; (2) a security agreement ("the security agreement") dated 6 November 1981 executed by the Bank in favour of Mr Dennis Byron; (3) an agreement under seal ("the 1982 deed") dated 11 October 1982 (but actually completed on 18 November 1982) between Mr Byron and Mr Ross; and (4) a notice of assignment and formal demand ("the 1982 notice") served on the Bank by Mr Ross on 19 November 1982. These are summarised and considered at paras 14 to 23 below. The Bank's defence contained little more than bare denials, but it did expressly deny (on unspecified grounds) the validity of the 1982 deed. It also expressly denied that Mr Ross had any account with the Bank. It asserted that Mr James A Molans, a Miami attorney, had agreed to extend the period of the loans provided that they were secured by a deposit of title deeds, and that the period had been extended. Mr Byron was at that time a barrister practising in St Kitts and Anguilla; he has since had a distinguished judicial career, being knighted in 2000, and he is referred to in this advice by his title at the material time.

4. Directions for trial were given on 20 March 1984. There is then a gap in the official record of almost exactly seventeen years. It appears from the agreed statement of facts that on 9 May 1985 an order was made for the Bank's compulsory winding up, but the record does not contain a copy of that order. The liquidator appointed by the order was Mr Walter B Simmonds, a local accountant.

5. The Board was told (but there is no evidence and no finding on this point) that the Bank had a serious deficiency of assets, but that at some stage in the liquidation further assets of substantial value were realised as a result of misfeasance proceedings. That may possibly be the reason for a renewal of interest in these proceedings. In any event, on 22 March 2001 Master Rawlins made an order adjourning Mr Ross's proceedings for nearly four months "in order to facilitate any applications which may be made to take the matter forward." The hearing was attended by counsel for the Bank, presumably instructed by the liquidator, but there is no indication that she objected that as a result of the liquidation the action had been stayed for nearly sixteen years under section 122 of the Companies Act (c335) as then in force. On 16 January 2004, on an application attended only by counsel for Mr Ross, Baptiste J granted a stay for a period not exceeding six months. Again, there is no indication that the judge adverted to the fact that the action was already automatically stayed. His order also gave Mr Ross leave to intervene in other proceedings (suit no 5 of 1985, presumably the liquidation proceedings) "for the purpose of obtaining current and future information and reports from the liquidator as to the status and proposed procedure for the winding up of [the Bank]".

6. On 19 May 2006 Belle J gave Mr Ross leave to continue these proceedings. The Bank was represented by counsel, but there is no indication whether the application was opposed, or why the judge thought fit to deviate, especially after such extraordinary delays, from the normal practice and procedure in winding-up cases. On 17 November 2006 Belle J directed the liquidator to file and serve an affidavit within seven days. There is no sign that that order was ever complied with. No such affidavit is included in the record. On 1 December 2006 an application by Mr Ross for summary judgment was dismissed.

7. On 16 March 2007 Belle J made an elaborate order giving directions for trial. In consequence of this order witness statements were produced (for the plaintiff) from Mr Ross himself, from Sir Dennis Byron (who was then a permanent judge of the United Nations International Criminal Tribunal for Rwanda); from Mr Molans; and from Mr John Kelsick (a Montserrat barrister who witnessed the execution of the 1982 deed). Mr Simmonds put in a witness statement on behalf of the Bank. The trial took place before Belle J on 17 and 18 December 2007.

8. The pleadings, which had remained unamended for 24 years, gave no clear picture of the issues between the parties. But the main issues can be pieced together from the witness statements and the parties' skeleton arguments.

9. The skeleton argument on behalf of Mr Ross stated that he was the assignee of Sir Dennis Byron as an agent and trustee of the Companies and/or of their attorney, Mr Molans. It noted the Bank's challenge to the validity of the 1982 deed, which the skeleton argument described as "transferring all of the rights and privileges relating to the deposits from Sir Dennis Byron, as solicitor and agent of the Beneficiary Companies, to the Claimant". Paragraph 24(c) of the skeleton argument set out part of the evidence relied on in the following terms:

> "The testimony of Molans, the Claimant, Sir Dennis Byron and John Kelsick setting out the circumstances surrounding and the actual execution of the [1982 deed] (with Sir Dennis Byron as assignor, the Claimant as assignee and Kelsick as an attesting witness), assigning to the Claimant all of the rights and interests of the Beneficiary Companies in the Deposits. This was done with the knowledge and approval and in the presence of Molans and certified by the Beneficiary Companies, on the face of the Assignment, as having their approval and consent."

10. The Board must point out that these passages exemplify two problematic elements in the way Mr Ross's case has been presented in the course of the litigation. One is reliance on oral evidence as a means of construing commercial documents. The very important distinction between admissible evidence of the commercial matrix of fact, and inadmissible evidence of what the parties intended, seems to have been ignored. The other problem area is uncertainty as to the case that Mr Ross has been running. It seems to have been his case throughout that the Companies only had equitable interests in the two sums of US$205,000 deposited with the Bank. But there has been uncertainty about whether his case is that the 1982 deed operated as an assignment of the Companies' beneficial interest in the deposits, or only as an assignment of Mr Byron's rights and powers as a fiduciary agent. The two passages quoted from the skeleton argument are not easy to reconcile. From the plaintiff's closing submissions as recorded in the judgment it is a matter of conjecture whether counsel was contending for anything more than a transfer of the fiduciary agency. The latter analysis is the one urged on the Board by Mr Finlay QC (who appeared for Mr Ross before the Board, but did not appear below).

11. The liquidator's case as presented at trial had two limbs. One (reflected mainly in the liquidator's witness statement) was that there was no proper record of the deposits in the Bank's books, and that as liquidator he could admit to proof only claims that were properly documented. He did however exhibit to his witness statement two receipts dated 6 November 1981 for US$45,000 from each of the

Companies and a ledger page stating a balance of US$410,000 (apparently due to the Bank of America, New York) as at December 1981.

12. The liquidator also exhibited to his witness statement a memorandum dated 17 July 1981 signed by Mr Eugene Walwyn, the President of the Bank, and sent by him to the Bank's executives. It contained the following passage referring to Mr Molans:

> "I have introduced Bank of Commerce to him through our Miami Office. His clients are Columbian Companies dealing in South America and getting their money out of Guatemala and El Salvador. He will only come to St Kitts when he has cash to deposit. We will have to meet him in St Maarten at short notice. The accounts to be opened are [names of five companies, including the Companies]."

The memorandum goes on to stress the need for "utmost secrecy to protect the customer". This may go some way to explaining the arrangements made with the Bank by Mr Molans, Mr Byron and Mr Ross. They were (to say the least) lacking in transparency.

13. The skeleton argument on behalf of the liquidator repeated the lack of proper records, but also put forward the other limb of the liquidator's case. This was that the creditors were the Companies, and they were not parties to the proceedings. Even if the deposits were made by Mr Molans as agent for the Companies, Mr Ross had no title to sue for them.

The essential documents

14. It is now necessary to refer in more detail to the essential documents on which Mr Ross relies. They do not fit easily together as a coherent scheme. The documents executed on 6 November 1981 were as follows:

> (1) There was a certificate of deposit in a standard printed form, numbered 958, issued by the Bank in favour of Mill Valley Finance Construction Company NV and recording the deposit of $205,000, maturing on 10 December 1981, at an annual rate of 10% until maturity.
>
> (2) There was a similar certificate, numbered 959, issued to Alminton Company NV.

(3) The security agreement was entered into by the Bank (defined as the Debtor) in favour of Dennis Byron (referred to as Trustee and defined as the Secured Party). It was a typewritten document but it appears to have been (apart from the Bank being the debtor rather than the secured creditor) a standard-form document used by the Bank to secure bank lending when there was collateral in the form of shares, stock, bonds or similar property lodged with the Bank. The document was headed "Security Agreement: Secured Party in Possession" and it referred (inappropriately in the circumstances) to the Secured Party exercising its banker's lien. It was not appropriate for an equitable mortgage of real property (there was no reference to letting, rents, rates, repairs or other such matters). It did not make any specific reference to any particular property as forming part of the collateral.

(4) There were two letters dated 6 November 1981 written on behalf of the Bank, one to Mr Molans and the other to Mr Byron. Each was signed on behalf of Mr Walwyn by Mr R D H Lewis, a senior bank official. Each letter acknowledged receipt of the deposits (together with some other deposits not in issue) and each named the Companies as creditors. The letter to Mr Byron also stated "the Bank has given you an equitable mortgage on its premises at The Circus, Basseterre and The White House, St Peter's to secure the said repayments."

Copies of these two letters were not included in the record as originally prepared and certified, but copies of them (together with other documents that are in the original record) were admitted before the Board, without opposition, in order to enhance the record.

15. The record includes copies of two conveyances dated 23 June 1981 by which the properties mentioned above were conveyed to the Bank in consideration of the sums of US$198,000 and US$279,000 respectively. Mr Molans said in his witness statement that the title deeds were handed over by Mr Lewis on 6 November 1981. Sir Dennis Byron said in his witness statement that the deeds were delivered to him, and he appears to have advised (in a letter also dated 6 November 1981) that the Bank had a good title. The Board was told that both properties have been sold many years ago, apparently without any part of the proceeds of sale being used to extinguish or reduce the amount due in respect of the deposits. There is no evidence or finding as to how this happened. Sir Dennis Byron may have been in a position to explain but he was not asked about it in the course of his brief oral evidence.

16. Belle J accepted the evidence of Mr Ross and his witnesses as to the circumstances in which the 1982 deed was entered into. Mr Byron had been appointed as a judge and it was not appropriate for him to continue to act in connection with the security agreement. Belle J did not however make any finding

about the sequence of events leading up to the 1982 deed being executed by Mr Byron and Mr Ross. The 1982 deed states that it was made "as of 11 October 1982". Mr Molans and Mr Ross gave evidence that on 13 October 1982 they had a meeting with Mr Walwyn, presented the certificates of deposit, and asked for payment. Mr Walwyn said that the Bank could not pay at once, and asked for 90 days' respite. He wrote a letter dated 13 October 1982 addressed to the Companies, and also to Mr Byron, recording this, and confirming that Mr Byron, as trustee for the Companies, had a valid equitable mortgage.

17. Although they were not named as parties, the 1982 deed was executed on behalf of the Companies by a company called Domi NV, described as the managing director of each of the Companies. This execution took place and was notarised on 11 November 1982. The evidence of Mr Molans and Mr Ross was that on 18 November 1982 they attended on Mr Byron at his judge's chambers in Plymouth, Montserrat, and the agreement was executed as a deed by Mr Byron and Mr Ross in the presence of Mr Kelsick, who made an affidavit of due execution. On 19 November 1982 Mr Ross personally served the 1982 notice on the Bank.

18. The Board was not told who drafted the 1982 deed. Its terms are so unusual and obscure that they must be set out at length. After commencing as stated in para 16 above it continues as follows:

> "WHEREAS the Transferor, acting in his capacity of Solicitor for James A. Molans (duly authorized agent and Attorney for ALMINTON COMPANY, N.V. and for MILL-VALLEY FINANCE CONSTRUCTION COMPANY, N.V.) did, by document under seal dated the 6th day of November, 1981, and entitled 'SECURITY AGREEMENT: SECURED PARTY IN POSSESSION', which document together with other related correspondence signed on the same date as part of the same transaction are attached hereto as Schedule 'A', become an equitable mortgagee of certain lands and premises and identified in Schedule 'A' attached hereto;
>
> AND WHEREAS pursuant to the terms and conditions as expressed in the said 'Security Agreement', the security was held by the Transferor on trust from ALMINTON COMPANY, N.V. and for MILL-VALLEY FINANCE CONSTRUCTION COMPANY, N.V. jointly and severally;
>
> NOW THIS AGREEMENT WITNESSETH THAT in consideration of the premises and other good and valuable consideration to the Transferor, receipt of which is hereby acknowledged, the Transferor, with the approval and consent of ALMINTON COMPANY, N.V. and

> MILL-VALLEY FINANCE CONSTRUCTION COMPANY, N.V. as represented by these presents, hereby sell, assign and transfer unto the Transferee and without restricting the generality of the aforementioned, any and all rights and/or privileges, current and/or contingent and the like, at law and/or in equity, to the Transferee, and that the documents referred to in the Schedule including the said memorandum have been handed to the said Transferee to the intent that the within-mentioned sums of Two Hundred and Five Thousand (US$205,000) United States Dollars and Two Hundred and Five Thousand (US$205,000) United States Dollars respectively as described in Schedule 'A' together with interest thereon and all related cost, fees and expenses and the securities therefore should be, and the same are transferred to the said Transferee."

Schedule A consisted of the documents included in the bundle admitted before the Board in order to enhance the record (some of which were already in the record).

19. It will be apparent that there are two recitals, the main operative part (down to "to the said Transferee") and then a further declaratory provision (from "to the intent that" to the end). It will also be apparent that the main operative part is devoid of any words identifying what "rights and privileges" are to be transferred. Taken literally and construed against the grantor, it would have the absurd result of vesting in Mr Ross the entirety of Mr Byron's worldly goods. To avoid that absurdity, it is necessary to look at the recitals and the declaratory provision.

20. The first recital refers to the security agreement as having had the effect (together with other relevant documents) of making the Transferor an equitable mortgagee of the freehold premises mentioned above. As already noted, the security agreement does not itself identify any collateral at all, but with the related documents it does provide evidence of an equitable mortgage by way of deposit of deeds (which apart from a relatively modern English statute which does not apply in St Kitts, could be effected without any written instrument at all: *United Bank of Kuwait Plc v Sahib* [1997] Ch 107, 132). The second recital states that under the terms and conditions expressed in the security agreement the security (that is the freehold properties) were held by the Transferor on trust from (presumably "for") the Companies "jointly and severally". As just noted, the security agreement does not contain any such terms or conditions; and the expression "jointly and severally" is contradictory as a description of a property right (as opposed to an obligation).

21. Nevertheless the recitals, though badly expressed, work together to indicate that the subject-matter of the agreement is an equitable security by deposit of title deeds held by the Transferor for the benefit of the Companies. That is a strong argument for interpreting the main operative part of the deed as directed to the same subject-matter – that is, the security. In that context the final declaratory provision

also must be taken as referring to the stated sums as what was secured by the equitable mortgage. The fact that the transfer is said to be made "with the approval and consent" of the Companies (not by them, though they executed the 1982 deed) points the same way. If the intention was to effect an assignment of the Companies' legal and beneficial interests as creditors, there was a much simpler and more straightforward way of achieving that. There is no stated consideration for the transfer. The opening words of the operative part seem to be little more than a ritual incantation.

22. During the hearing Lord Phillips raised with Mr Finlay whether the final declaratory provision should, despite the ineptness of the rest of the language, be construed so as to operate as an assignment of the Companies' full legal and beneficial interest as creditors. The principle "ut res magis valeat quam pereat" encourages courts to construe commercial documents so as to give them the fullest possible effect, even if they are defective in part. Mr Finlay did not directly accept the invitation to put forward that argument. He went no further than to say that it showed that the Companies were "on side" in confirming the assignment.

23. On an issue of construction the Board is not bound by counsel's concession. But the whole thrust of Mr Finlay's case was that Mr Ross is claiming as a trustee and agent, not as beneficial owner. The Bank's insistence on secrecy, in order to protect their customers, seems to have dictated the unusual form of the transactions. Mr Hudson-Phillips QC, leading counsel for the Bank, also referred to the position of alien landowners as mortgagees under the Aliens Landholding Regulation Act as of possible relevance, but in the absence of any evidence or finding on that point the Board gives no weight to it. The principal submissions for the Bank were made with admirable conciseness by Mr Hudson-Phillips' junior, Mr Roe.

The judgments below

24. At the end of the second day's hearing Belle J announced that judgment would be given for Mr Ross for reasons to be delivered later. He gave his reasons in writing on 18 March 2008. The Board has already mentioned some of the points on which the judge made findings, and some of those on which he made no findings. The judge was critical of the case put forward on behalf of the liquidator. He observed in para 13 of his judgment:

> "This case is largely about the force and effect of documents. For example the assignment of the agency, the deposit certificates, letters promising to pay the sums due on the certificates, whether the Companies ratified or passed resolutions approving the assignment of the agency or indeed approved the agency agreement in the first place.

> The Liquidator is focused on the form of these documents it seems and not on the substance of the entire course of dealings."

25. The Board finds the judge's own approach to have been flawed. He relied too much on Mr Ross and his witnesses for their view of the effects of a number of commercial documents, some of which were either inappropriate (as the security agreement was) or ill-drafted and obscure (as the 1982 deed was). The judge should have focused on the certificates of deposit as the essential documents evidencing loans in respect of which the Companies were creditors, both at law and in equity. The elaborate and awkward machinery adopted for the equitable mortgage did not operate to divest the Companies' interests as creditors at law and in equity.

26. In ordering the liquidator to pay out the full sum claimed by Mr Ross, rather than directing that the liquidator should admit a proof in that sum, the judge seems to have fallen into a further fundamental error as to the way that a compulsory winding-up should be conducted. But, like the Court of Appeal, the Board finds it unnecessary to go further into that point.

27. The Court of Appeal allowed the Bank's appeal in a judgment given by the Hon Michael Gordon QC JA (Ag), with which Rawlins CJ and George-Creque JA agreed. The essence of his judgment is in para 26:

> "At its highest, as a result of the 1982 Agreement, the respondent stood in the shoes of Sir Dennis. Not only is there an absence of a perfect documentary trail to the ownership of the beneficial interest in the US$410,000, there is no documentary trail at all."

He went on to point out that a fiduciary owner is not permitted to take the trust property for himself, even if the only beneficial owner has ceased to exist.

28. Before the Board Mr Finlay put the security agreement in the forefront of his argument. But as already indicated, the security agreement was a standard-form document pressed into service for a purpose for which it was ill-adapted, that is to provide written evidence of the security, the equitable mortgage by way of deposit of title deeds. The certificates of deposit of the two sums of US$205,000 were the essential documents evidencing the loans, and the Companies themselves were the creditors. Mr Finlay made clear, and the Board accepts, that Mr Ross is not seeking to claim the sum of US$410,000, with interest, for himself. Mr Finlay referred to the possibility of the Companies being restored to the register in Curacao. But it is four years since Mr Molans gave evidence that the Companies no longer exist, and there is no indication that any action whatsoever has been taken to attempt to restore them to the register.

29. The Board concurs in the analysis adopted by the Court of Appeal. As long as they continued in existence, the Companies were the Bank's creditors both at law and in equity. The certificates of deposit are in evidence and there is no suggestion that they were endorsed in favour of any third party. The security agreement did no more than evidence the Bank's entering into an equitable mortgage by deposit of the two title deeds with Mr Byron as security. The 1982 deed operated as a transfer of that security, and nothing more. As Gordon JA (Ag) put it, there was no documentary trail at all establishing Mr Ross's claim to legal or beneficial ownership of the two sums of US$205,000 which the bank owed to the Companies.

30. For these reasons the Board will humbly advise Her Majesty that the appeal should be dismissed. Any submissions as to costs should be made in writing within 28 days.