



Neutral Citation Number: [2020] EWCA Civ 907

Case No: A2/2019/1938

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN LIVERPOOL**  
**CHANCERY APPEALS**  
**HIS HONOUR JUDGE HODGE QC**  
**(SITTING AS A JUDGE OF THE HIGH COURT OF JUSTICE)**  
**[2019] EWHC 2646 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/07/2020

**Before:**

**LORD JUSTICE FLOYD**  
**LORD JUSTICE HENDERSON**  
and  
**LORD JUSTICE FLAUX**

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**Between:**

|                                       |                          |
|---------------------------------------|--------------------------|
| <b>ANTHONY LESLIE HANCOCK</b>         | <b><u>Appellant</u></b>  |
| <b>- and -</b>                        |                          |
| <b>PROMONTORIA (CHESTNUT) LIMITED</b> | <b><u>Respondent</u></b> |

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**Mr Hugh Sims QC and Mr Graham Sellers (instructed by Joanna Connolly Solicitors) for  
the Appellant**

**Mr Jamie Riley QC and Mr James McWilliams (instructed by Addleshaw Goddard LLP)  
for the Respondent**

Hearing date: 20 May 2020  
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**Approved Judgment**

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 14 July 2020*

## **Lord Justice Henderson :**

### **Introduction**

1. The basic issue on this appeal is whether the appellant, Mr Hancock, has shown a strong enough case to persuade the court to set aside a statutory demand dated 20 October 2016 (“the Statutory Demand”) requiring payment of an alleged debt of approximately £4.09 million, served on him by the respondent, Promontoria (Chestnut) Limited (“Promontoria Chestnut”), as long ago as 8 November 2016.
2. The alleged debt represented the unsecured balance due under loans originally made to Mr Hancock by Clydesdale Bank PLC (trading as Yorkshire Bank) (“the Bank”) under a series of facility letters dated between November 2006 and December 2011 as amended (“the Facility Letters”). The total amount said to be due under the Facility Letters at the date of the Statutory Demand was £10,898,772.54. Promontoria Chestnut claimed to have acquired title to the loans by assignment, and it was also the registered assignee of 21 legal charges over residential properties mostly in Liverpool (“the Legal Charges”) which Mr Hancock had originally granted to the Bank as security for the loans. Promontoria Chestnut estimated the value of the charges as at 12 October 2016 to be £6.809 million, leaving an unsecured balance of £4,089,772.54 due from Mr Hancock.
3. It follows that Promontoria Chestnut was in principle entitled to seek to enforce payment of this unsecured debt by service of a statutory demand, which (if unsatisfied) would lead in due course to the presentation of a bankruptcy petition, provided that Promontoria Chestnut had itself acquired good title to the debts owed by Mr Hancock under the Facility Letters.
4. In the Statutory Demand, Promontoria Chestnut claimed to be entitled to all of the Bank’s rights under the Facility Letters by virtue of a Deed of Assignment dated 28 November 2014 (“the Deed of Assignment”). The parties to the Deed of Assignment were the Bank’s parent, National Australia Bank Limited (“NAB”), defined as the “Seller”, the Bank itself, defined as “Clydesdale”, and Promontoria Chestnut, defined as the “Novated Buyer” or the “Buyer”.
5. It is no longer in dispute in these proceedings either (a) that the Deed of Assignment was duly executed by the parties to it, or (b), on the assumption that the debts due from Mr Hancock under the Facility Letters were the subject of a valid legal assignment to Promontoria Chestnut, that written notice of the assignment was given to Mr Hancock on 3 December 2014 by Promontoria Chestnut, acting through its managing agent Engage Commercial (the trading name of a company called Pepper (UK) Limited). Nor is it in dispute that the debts owed by Mr Hancock under the Facility Letters remain unpaid. We were told that the amount due including interest now exceeds £12 million. Furthermore, it is common ground that legal title to the Legal Charges was transferred by the Bank to Promontoria Chestnut on the same date as the Deed of Assignment, using the requisite Land Registry Form TR4 for that purpose, and that Promontoria Chestnut was then registered at HM Land Registry as the proprietor of the charges. In its capacity as legal chargee, Promontoria Chestnut appointed fixed charge receivers over the relevant properties in 2015, and since then the rental income from them has been paid to Engage Commercial.

6. Against this unpromising background, it is nevertheless Mr Hancock's contention that there is a genuine triable issue about the title of Promontoria Chestnut to the underlying debts which he admittedly owes under the Facility Letters. The argument depends, for such force as it may have, upon the fact that the copy of the Deed of Assignment put in evidence by Promontoria Chestnut in the proceedings brought by Mr Hancock to set aside the Statutory Demand has been heavily redacted, and upon the explanation for those redactions provided by the solicitor with conduct of the matter on behalf of Promontoria Chestnut, Mr Timothy Cooper, who is a partner and member of Addleshaw Goddard LLP based in Edinburgh.
7. Although that is now the issue which divides the parties, it was not the basis upon which Mr Hancock first applied to set aside the Statutory Demand. He made the application, through solicitors then acting for him, in the County Court at Liverpool on 24 November 2016. Under rule 6.5(4) of the Insolvency Rules 1986, as then in force, the court hearing such an application may set aside the demand if (relevantly):

“(b) the debt is disputed on grounds which appear to the court to be substantial.”

It is well established, by authority which I need not set out, that the burden lies on the applicant to establish the existence of a substantial dispute, and that the test which the court applies is similar to that on an application for summary judgment under CPR rule 24.2: see, for example, Collier v P & M J Wright Ltd [2007] EWCA Civ 1329, [2008] 1 WLR 643, at [9] and [38] per Arden LJ (as she then was).

8. In his first witness statement in support of the application, dated 24 November 2016, Mr Hancock set out the grounds upon which he then sought to rely. The grounds did not include any challenge to the right of Promontoria Chestnut to sue on the assigned debt arising from any alleged uncertainty about the scope or nature of the assignment, but rather contended (among other matters) that Mr Hancock was entitled to rely on various assurances which he said had been given to him by the Bank, and that his relationship with Promontoria Chestnut was unfair within the meaning of section 140B of the Consumer Credit Act 1974. Mr Hancock exhibited to his statement a series of letters from Engage Commercial which provided statements of account since the assignment of the loans. He complained about the way in which some of the figures had been calculated, but he appeared to accept that the assignment had taken place. He also referred, without comment, to Engage Commercial's letter of 3 December 2014 which had given him notice of the assignment.
9. The application was heard by District Judge Wright on 15 June 2017, when Mr Hancock was still represented by Clarions, Solicitors of Leeds. All of Mr Hancock's grounds were rejected by the District Judge, on the basis that he had failed to show the existence of a triable issue. In relation to the question of alleged unfairness, the District Judge said, at [52]:

“I do not believe that the applicant can make a valid complaint about any of the terms that the bank or the respondent have relied on. None of the terms seem unduly onerous or unfair. It seems quite normal for overdraft facilities and commercial mortgages to be payable on demand; for there to be a right to appoint a receiver on default; and, as I have said, so far as the complaint

about assignment is concerned, I cannot see that that can succeed because the respondent has acted responsibly, and there have been demand letters, appointment of a receiver, the first statutory demand which was withdrawn, and then this second statutory demand after a long default, so I do not accept that there can be an arguable case of unfairness in relation to the behaviour of the respondent.”

10. Promontoria Chestnut’s evidence before the District Judge had consisted principally of the first witness statement of Matthew Parr dated 21 February 2017. Mr Parr was a senior manager in the commercial loan servicing division of Engage Commercial. In his evidence, he briefly explained the commercial background to the Deed of Assignment:

“As to the background to the Deed of Assignment, the Bank was, along with Yorkshire Bank, one of the UK banking subsidiaries of NAB. As part of its process of “de-risking”, NAB invited bids to acquire its non-performing real estate loan portfolio known as Project Chestnut. Cerberus Capital Management L.P. (“Cerberus”) successfully secured the portfolio with the winning bid. The portfolio was then vested in Promontoria, Promontoria being a company within the operational group of Cerberus...”

Mr Parr had also exhibited a copy of the Deed of Assignment, but in a redacted form. He described it as “a commercially sensitive document” and said that the redacted parts were “not relevant to the issues in this matter”.

11. The next step was an application by Mr Hancock for permission to appeal to the High Court. New solicitors and counsel were instructed on his behalf, and seven proposed grounds of appeal were advanced. As Barling J later observed, in a careful and detailed judgment which he delivered on 1 August 2018 after two full days of argument on the permission application and related matters, Mr Hancock had now “jettisoned virtually all the points raised unsuccessfully in the court below”, and the set aside application had been recast “so as to raise a multiplicity of new arguments”: see [2018] EWHC 2934 (Ch) at [8]. The first of those grounds, and the only one for which Barling J granted permission, was that the District Judge was wrong to find that Promontoria Chestnut had proved title to the debts in the statutory demand: *ibid*, at [31]. This was a new argument, because, as Barling J rightly said, the assignment had been accepted as valid in the court below, and there had been no challenge to the title of Promontoria Chestnut to sue.
12. Later in his judgment, Barling J reviewed the points which Mr Hancock wished to argue in support of the first ground. After dismissing a number of those points, at [44] to [54], including one which sought to contradict the evidence in Mr Hancock’s own witness statement that he had received notice of the assignment on 3 December 2014 from Engage Commercial, the judge identified three remaining issues relating to proof of title at [56] to [58]. Those issues were, in short: (a) whether the “relevant asset group” referred to in clause 2.1 of the Deed of Assignment included the loans to Mr Hancock; (b) the fact that, by virtue of clause 1.5 of the Deed, the assignment appeared to be expressly conditional upon the terms of a sale and purchase agreement whose contents were unknown; and (c) the possible implication from the definition of Promontoria

Chestnut as “the Novated Buyer or the Buyer” that, prior to the Deed of Assignment, there had been an earlier novation to Promontoria Chestnut from an unknown and unidentified third party. The judge then said, at [60]:

“I ask myself whether, if these three points concerning the assignment and proof of title were not (as they are) wholly new points, I would give permission on this ground to appeal. With very considerable hesitation I have concluded that the answer is yes. The position in relation to these three arguments, and only these three, is sufficiently in doubt to render it appropriate for the appellant to have permission to pursue them on appeal ...”

13. Barling J also made ancillary directions, which included an extension of time for appealing, the grant of permission to raise the new arguments on appeal, and directions for further evidence. Pursuant to the last of these directions, Mr Cooper made his first witness statement on 4 January 2019. That statement contains the evidence upon which Promontoria Chestnut now mainly relies. Mr Cooper also made a second statement on 11 February 2019, responding to certain points made by Mr Hancock’s solicitor, Ms Connolly, in her second statement dated 28 January 2019.
14. The appeal was heard by His Honour Judge Hodge QC, sitting as a judge of the High Court, in Liverpool on 30 July 2019. Mr Hancock was represented by Graham Sellers and Victoria Roberts of counsel, and Promontoria Chestnut by Jamie Riley QC. In an extempore judgment, the neutral citation of which is [2019] EWHC 2646 (Ch), the judge dismissed the appeal. I will need to return later to aspects of the judge’s reasoning, but, in short, he was satisfied that the debt which formed the subject matter of the statutory demand was not genuinely disputed on grounds which appeared to the court to be substantial, and that there was no genuine triable issue as to the entitlement of Promontoria Chestnut to sue on the loan facilities that were granted by the Bank to Mr Hancock: see the judgment at [30].
15. Mr Hancock now brings a second appeal to this court, upon limited grounds for which permission was granted by David Richards LJ on 10 December 2019. The grounds for which permission was granted are these:
  - Ground 1(a): the judge wrongly concluded that the redacted Deed of Assignment was sufficient to prove the respondent’s title;
  - Ground 1(b): the judge wrongly concluded that the respondent had adduced sufficient evidence to prove its chain of title and its corresponding status as lawful assignee;
  - Ground 1(c); the judge wrongly concluded that the court was able to see all relevant parts of the Deed of Assignment (which was in any event heavily redacted) and to see that the respondent had established its title;
  - Ground 1(f): the judge wrongly concluded that there was no genuine triable issue as to the respondent’s title;
  - Ground 1(g): the judge wrongly concluded that there was no genuine dispute as to the alleged debt within the meaning of rule 6.5(4)(b) of the Insolvency Rules 1986 (as then in force); and

Ground 6: the judge failed to appreciate and/or understand the relevance and importance of clause 1.5 of the Deed of Assignment.

16. In the written reasons which he gave for granting permission to appeal on those grounds, David Richards LJ said that the appeal:

“... raises an issue not previously considered by the Court of Appeal, namely whether a party is entitled on grounds of irrelevance to redact parts of an agreement or other document which the court is asked to construe on the basis only of a solicitor’s statement that such parts are irrelevant. The authorities on redaction in relation to the production of documents on disclosure are arguably not applicable, or are applicable only with qualification, to a document with legal effect which the court must construe. This raises an important point of principle.

This issue arises in acute form in the present case, because the claimant has redacted parts of the agreement which form part of the clause(s) which the court is required to construe.”

17. Due to the coronavirus pandemic, we heard the appeal remotely on 20 May 2020. We had the benefit of clear and helpful written and oral submissions from counsel on both sides, Hugh Sims QC (leading Graham Sellers) for Mr Hancock, and Jamie Riley QC (leading James McWilliams) for Promontoria Chestnut.
18. I have already summarised most of the relevant background in this introductory section of my judgment. I will now say a little more about the facts before coming to the redactions to the Deed of Assignment which lie at the heart of the dispute.

### **Factual background**

19. Since the early years of this century, Mr Hancock has owned a portfolio of mainly buy-to-let residential properties in Liverpool, together with his main residence at The Old Rectory, Acrefield Road, Liverpool which he has owned since 1981. He lives there with his partner, who has a beneficial interest in the property. The properties in the portfolio are of varying style and value, ranging from large detached houses to flats and terraced houses. Mr Hancock originally received funding for the portfolio from Allied Irish Bank, but in 2006 he moved his banking facilities to the Bank which thereafter made the loans to him which are the subject of the Facility Letters. Mr Hancock provided legal charges to the Bank over the properties in the portfolio.
20. Nothing turns on the detailed provisions of the Facility Letters. They are fully described in the evidence of Mr Parr, and there is a helpful summary of them in the judgment of Barling J at [11] to [16]. It is enough to note that the loans were all freely assignable by the Bank, and either had fixed repayment dates or were repayable on demand. The last in time of the facilities was an overdraft facility of £425,000 granted on 28 December 2011 and expiring on 31 January 2012.
21. By 2013, the Bank evidently had some concerns about the viability of the portfolio and the ability of Mr Hancock to service the loans. In that year, the Bank appointed Deloitte

to act on its behalf to monitor and manage the lending on the portfolio. Mr Hancock says in his evidence that he reported to Deloitte on a weekly basis, and he ensured that all rental payments he received for portfolio properties were passed to them. Recommendations were made for certain properties to be sold, and by the end of 2014 four sales had been completed and others were being arranged.

22. Around this time, Mr Hancock says he was informed by Deloitte that the funding provided by the Bank “may have been assigned”, and he then received the letter from Engage Commercial dated 3 December 2014 to which I have already referred. The letter informed Mr Hancock that the portfolio loans had been assigned, with all related rights and benefits, to Promontoria Chestnut, which was “an affiliate of Cerberus Global Investors”. Engage Commercial said they had been appointed to provide portfolio and asset management services in respect of Mr Hancock’s facilities, and that they would also be responsible for managing the direct relationship with him on behalf of Promontoria Chestnut. Mr Hancock was reminded that “the terms and conditions of your facilities remain in full force and effect”, and that he was “expected to continue to make payments in accordance with the terms of the facilities.”
23. In or about January 2015, Mr Hancock attended a brief meeting with representatives of Engage Commercial and Cerberus, and in March 2015 he was notified of the appointment by Promontoria Chestnut of fixed charge receivers over the properties. There has never been any complaint by Mr Hancock or the Bank about the appointment of the receivers.
24. The circumstances which led to the transfer of Mr Hancock’s loans to the Cerberus group are set out in more detail by Mr Cooper in his evidence. Cerberus is a leading global private investment firm, which manages investments worth many billions of pounds for a wide range of established investors, including public and private sector pension and investment funds, charitable foundations, insurance companies and sovereign wealth funds. The group has its headquarters in New York, and it operates a network of offices throughout other parts of the USA, Europe and Asia.
25. One of the investment strategies pursued by Cerberus is the acquisition of portfolios of non-performing loans (“NPLs”) which are in default and which banks or other financial institutions wish to remove from their balance sheet.
26. Mr Cooper describes the typical process by which a portfolio of NPLs is marketed, and the considerations of commercial confidentiality to which this gives rise:

“Typically, the process involves the bank or financial institution announcing a sale of the NPL portfolio and inviting bids from funds and other investors to acquire the portfolio. This is obviously a competitive process involving a whole variety of factors and considerations of which the key examples in general terms are pricing, legal structure, warranties and undertakings and tax. The proposals which are made as part of a bid are therefore commercially sensitive and confidential. If the details of a bid were to become public or fall into the hands of a competitor then this would be highly prejudicial to the chances of the bid becoming successful as other potential investors could immediately seek to tailor their bid to be more attractive in order

to secure the acquisition ahead of rivals. Disclosure of the bid details could also be catastrophic for an investor's prospects of successfully bidding for portfolios in the future as rival funds and investors in the market will have access to key information regarding the investor's business model including details of pricing, legal and tax structures. It goes without saying that once a bid has been successful, it would be equally damaging and dangerous for a successful investor if the transactional documents were made public since the documents would reveal the details of the successful bid and assist rival investors in making their bids more competitive in respect of future offerings."

27. As to the acquisition of the Chestnut portfolio, Mr Cooper explains that in 2014, as part of their strategy of "de-risking", NAB and the Bank invited bids to acquire their NPL portfolio of £625 million held under the name of Project Chestnut UK. In July 2014 it was announced that Cerberus had secured the portfolio with the winning bid. The sale and purchase, and the transfer of the Chestnut portfolio, were then structured as follows:

(1) The entire Chestnut portfolio was the subject of a sale and purchase agreement ("the SPA") dated 27 July 2014, whereby a Cerberus company incorporated in the Netherlands called Promontoria Holding 97 B.V. ("Holding") agreed to buy the portfolio from NAB and the Bank. This was a contract to buy, and not the instrument by which legal title to any of the loan assets was transferred.

(2) With regard to the transfer of legal title, it was agreed that a wholly-owned subsidiary of Holding would be incorporated in Ireland to which various sub-groups or pools of NPLs within the Chestnut portfolio would be transferred. It was for this purpose that Promontoria Chestnut was established.

(3) After the SPA had been concluded, it was agreed by NAB, the Bank and Holding that the pool of loan assets would not be transferred to Holding and then by Holding to Promontoria Chestnut, but instead the sale of the loan portfolio was novated to Promontoria Chestnut. This was effected by a separate Novation Agreement.

(4) The actual transfer of the loan assets from NAB and the Bank to Promontoria Chestnut was then effected by deeds of assignment in respect of different pools of loan assets. One of those deeds was the Deed of Assignment with which we are concerned.

28. Mr Cooper says in his evidence that both the SPA and the Novation Agreement are highly confidential documents, and he exhibits neither of them even in redacted form. Mr Cooper does, however, exhibit the Deed of Assignment in the redacted form which I will describe below. In response to any complaint which might be made by Mr Hancock and his lawyers that they had not been able to see the SPA or the full, unredacted version of the Deed of Assignment, Mr Cooper gave the following assurances (in paragraph 27 of his first statement):

"(1) I have read unredacted versions of the Deed of Assignment, the SPA and the Novation Agreement by which the sale and purchase was novated from Holding to Promontoria.

(2) Neither the SPA nor the Novation Agreement are the documents or legal instruments by which title to the debts owed in relation to the Chestnut portfolio including the Facilities was transferred to Promontoria.

(3) The only document pursuant to which the Bank's rights, interests and remedies in respect of the Facilities was transferred is the Deed of Assignment.

(4) Neither the SPA nor the Novation Agreement would be documents of which disclosure and inspection would be required pursuant to CPR Part 31 were Promontoria's claim to be the subject of legal proceedings brought pursuant to Part 7 of the CPR.

(5) There has been no novation by the Bank to a third party of the loan agreement entered into by the Bank and Mr Hancock and pursuant to which the Facilities were granted.

(6) Were this matter to be the subject of such proceedings, I would be the partner with conduct of the proceedings on behalf of Promontoria who would have supervisory control of the disclosure process.

(7) I am a solicitor, officer of the Court and partner of Addleshaw Goddard with over 20 years of litigation experience and I provide the above confirmations with full knowledge of my duties to the Court and the requirements of disclosure pursuant to CPR Part 31."

29. On 29 April 2015, Promontoria Chestnut served a first statutory demand on Mr Hancock, but this was subsequently withdrawn (with a reservation of all rights) in May 2015. In the continuing absence of any payment, a letter of demand was then sent to Mr Hancock on 3 October 2016 requiring payment of £10,898,772.54. This demand again failed to elicit any response, so a second statutory demand was served on 8 November 2016. That is the demand which is the subject of the present proceedings.

### **The Deed of Assignment and the redactions to it**

30. As I have said, the parties to the Deed of Assignment were NAB, the Bank and Promontoria Chestnut. The deed is described on its front sheet as "Assignment and Assumption Deed". There is then a contents page, in which the contents of clauses 3, 4 and 5 have been completely redacted. The operative part of the deed states that it is dated 28 November 2014 and made between the three parties, defined respectively as the "Seller", "Clydesdale" and the "Novated Buyer" or the "Buyer". There are no recitals, and the agreement between the parties is then set out in eight operative clauses. After those clauses, there is a single schedule, divided into three parts, and execution pages in which the signatures and many of the details of the signatories (such as the addresses and occupations of witnesses) are redacted.

31. Clause 1 of the operative clauses is headed “Interpretation”. Sub-clause 1.1 is headed “Definitions”, and begins by stating that:

“Words and expressions used in this Deed shall (unless otherwise expressly defined) have the meaning given to them in the Sale and Purchase Agreement”,

before setting out a list of further definitions. It is unclear whether “the Sale and Purchase Agreement” is itself defined in the list which follows, but there is a block of redacted text where such a definition, were it included, would come alphabetically. In any event, it is clear from Mr Cooper’s evidence that the Sale and Purchase Agreement referred to must be the SPA.

32. There is a further reference to the SPA in sub-clause 1.2, headed “Construction”, which provides that:

“Clause 1.2 (*Construction*) of the Sale and Purchase Agreement shall be incorporated in this Deed as if set out in full herein.”

33. The references to the SPA in clauses 1.1 and 1.2 give rise to an initial concern, to which we received no satisfactory answer from Mr Riley. The point is that these are not mere cross-references to the SPA, but incorporations by reference of specific definitions and a specific clause (clause 1.2) contained in it. Those definitions, and that clause, therefore form an integral part of the Deed of Assignment itself, and without sight of them the reader is denied access both to an important part of the “dictionary” used by the drafter of the Deed of Assignment and to whatever guiding principles of construction were contained in clause 1.2 of the SPA. Furthermore, the very fact that clause 1.2 of the Deed of Assignment has not been redacted as irrelevant presumably implies that the incorporated clause 1.2 of the SPA may be relevant to the interpretation of the Deed of Assignment.

34. Returning to the further definitions contained in clause 1.1, at least the following appear to be of potential relevance:

(1) “**Relevant Documents**” means, “in respect of a Specified Loan Asset, each facility, loan or credit letter or agreement ..., security document, [*etc*] in each case governed by English law or any other law (other than Scots law) and relating to that Specified Loan Asset...”.

(2) “**Relevant Borrower Asset Group**” means, in relation to any Specified Loan Asset, “the Borrower Asset Group to which that Specified Loan Asset relates.”

(3) “**Relevant Loan Asset**” means “a Relevant Pool A Loan Asset or a Relevant Pool B Loan Asset”.

(4) “**Relevant Pool A Loan Asset**” means a loan asset or debt claim described in Part I of the Schedule to the deed.

(5) “**Relevant Pool B Loan Asset**” means a loan asset or debt claim described in Part II of that Schedule.

(6) “**Settlement Date**” means 28 November 2014, or such other date as may be agreed by the Parties in writing.

(7) “**Specified Loan Asset**” means:

“(a) a Relevant Loan Asset; and...” [*followed by two lines of redacted text which must contain a further part of the definition introduced by “(b)”*].

(8) “**Specified Pool B Loan Asset**” means “a Relevant Pool B Loan Asset or a Relevant Pool B Loan Asset (as defined in the Scottish Assignment)”

35. Clause 1.5 is headed “Relevant Pool B Loan Assets”, and states that:

“The Parties agree that Part II of Schedule 1 (*Relevant Loan Assets*) is included in this Deed solely for the purpose of identifying the Relevant Pool B Loan Assets and that such information is included in this Deed without prejudice to, and at all times subject to, the terms of the Sale and Purchase Agreement and any limitations contained therein.”

36. Clause 2 then provides as follows:

## **2. ASSIGNMENT AND ACCEPTANCE**

### **2.1 Assignment**

Subject to the terms of this Deed and in consideration for the payment by the Buyer to the Seller of the Purchase Price for each Relevant Borrower Asset Group, with effect on and from the Effective Time in relation to each Specified Loan Asset comprised within that Relevant Borrower Asset Group:

(a) each of the Seller and Clydesdale assigns absolutely to the Buyer the following in relation to each such Specified Loan Asset comprised within that Relevant Borrower Asset Group:

(i) all of its right, title, benefits and interests under, in or to each Relevant Document ...;

(ii) each of the Seller’s and/or Clydesdale’s rights in its capacity as Lender (if any) under, to and in connection with the Relevant Documents to demand, sue for, recover, receive and give receipts for all monies payable or to become payable to it in its capacity as Lender (howsoever and whenever arising);

(iii) the right to exercise all rights and powers of the Seller or Clydesdale (as applicable) in its capacity as the Lender (if any) under, to and in connection with the Relevant Documents...; and

(iv) all Ancillary Rights and Claims in respect of the Relevant Documents...

but, for the avoidance of doubt, excluding the Excluded Liabilities;

(b) each of the Seller and/or Clydesdale (as applicable):

(i) are released of all of their respective obligations under the Relevant Documents; and

(ii) resigns from each Relevant Document in its capacity as the Lender,

but, in each case and for the avoidance of doubt, other than in respect of, and excluding, the Excluded Liabilities; and

(c) the Buyer becomes a party to each Relevant Document in the capacity of the Lender and is bound by obligations equivalent to those from which the Seller and/or Clydesdale (as applicable) are released under paragraph (b) above but, in each case and for the avoidance of doubt, other than in respect of, and excluding, the Excluded Liabilities.

## **2.2 Acceptance**

The Buyer agrees that with effect on and from the Effective Time:

(a) it accepts the assignment of the rights, title, benefits, interests, powers and Ancillary Rights and Claims referred to in paragraph (a) of Clause 2.1 (*Assignment*) above; and

(b) it shall assume, perform and comply with the terms of and the obligations of the Lender under the Relevant Documents as if originally named as a party in the Relevant Documents in place of the Seller and/or Clydesdale (as applicable) but, in each case and for the avoidance of doubt, other than in respect of, and excluding, the Excluded Liabilities.”

37. Clauses 3, 4, 5 and 6 are then redacted in their entirety, in a passage which occupies about one full page in A4 format of the document. Clause 7, dealing with counterparts, and clause 8, dealing with governing law and jurisdiction, are not redacted, and call for no particular comment, except to note that there is a discrepancy with the contents page where those clauses are numbered 6 and 7 respectively. It therefore seems probable (as Mr Cooper has confirmed) that an additional clause was inserted in the course of negotiations, and it was included in the redacted passage.
38. The Schedule is headed “Relevant Loan Assets” and is divided, as I have said, into three parts. Part I, headed “Relevant Pool A Loan Assets”, has been left blank in the copy of the deed before the court, presumably on grounds of irrelevance. Part II, headed “Relevant Pool B Loan Assets”, has again been left blank, apart from two passages in microfiche type which are illegible as they stand, but can be made legible by

magnification. As magnified, they reveal, under the heading Project Chestnut, two groups of Pool B properties connected with Mr Hancock, including a list of 27 properties which comprises, as I understand it, all of those contained in his portfolio and charged to the Bank at the relevant time. Part III of the Schedule is headed “Relevant Pool B Loan Assets (Title Numbers)”, and has again been left blank apart from a sub-section headed “Pool B (Initial Transfer Asset Group)”, which then lists in an unredacted passage the title numbers which correspond to the properties listed under Mr Hancock’s name in Part II of the Schedule. For example, one of the title numbers given is MS410704, which is the title number of a property in Allerton Road, Liverpool, which Mr Hancock charged to the Bank on 12 September 2006.

*Mr Cooper’s evidence about the Deed of Assignment and the redactions to it*

39. I have already referred to the passages in Mr Cooper’s evidence which describe the commercial background to the Deed of Assignment, and which explain why copies of the SPA and the Novation Agreement were not disclosed to Mr Hancock and his advisers. I will now refer to some further passages in his evidence where Mr Cooper explains how Promontoria Chestnut puts its case on the redacted Deed of Assignment, and where he comments on particular redactions.
40. I begin by noting that the redacted copy of the Deed of Assignment exhibited to Mr Cooper’s statement is the same as the redacted copy previously exhibited by Mr Parr. In paragraph 9 of his statement, Mr Cooper says that the copies “have been redacted because it is a commercially sensitive and confidential document which in many respects is not relevant to the remaining issues in this matter.”
41. In paragraphs 15 to 17, Mr Cooper seeks to explain how clause 2.1(a) of the Deed, read with the convoluted definitions which I have quoted, makes it clear that Promontoria Chestnut thereby acquired good title to the relevant loan assets and debt claims listed in Part II of the Schedule. He then refers to the discrepancy which I have noted between the contents page of the Deed and the numbering of the actual clauses, saying that he had sought, and obtained, confirmation from Linklaters LLP (who acted for the Cerberus Group in relation to the acquisition of the portfolio from the Bank) that the contents page was prepared prior to execution, “and before a new section 6 relating to the transfer mechanism was added to the main body of the Deed of Assignment. This had a consequential effect on the numbering ...”.
42. Following the assurances given in paragraph 27 of his statement (which I have quoted at [28] above), Mr Cooper deals specifically with the redactions to the Deed:

“28. In addition to the above confirmations, I also confirm to the Court that the parts of the Deed of Assignment which have been blanked out in the copies exhibited are not “relevant” in the sense that they would not be required to be disclosed pursuant to CPR 31.6 for the following reasons:

28.1 The significance of the Deed of Assignment is that it establishes Promontoria’s standing and legal title to the debts owed under the Facilities. For the reasons which I have explained above, the unredacted parts of the Deed of Assignment

establish that the Bank's rights and remedies under the Facility and Mortgages have been effectively assigned.

28.2 The redacted parts do not support Promontoria's claim as they relate to other aspects of the agreement between Promontoria and the Bank and NAB which do not establish the assignment of the latter's rights and are confidential. If it were the case that the redacted parts supported Promontoria's claim, then I confirm to the Court that they would not have been redacted.

28.3 Equally, the redacted parts are not adverse to Promontoria's case in establishing its entitlement under the Facilities. The Court can take comfort in that being the case because:

(a) The assignment provisions in Clause 2.1 of the Deed of Assignment are almost fully unredacted and, together with the relevant parts of the definitions section, set out a clear and comprehensive agreement for the assignment of the Bank's rights and remedies.

(b) The redacted provisions are under differently headed sections indicating that they relate to different aspects of the agreement other than the assignment and transfer of the Bank's rights and interests.

(c) Without waiving any privilege or confidentiality, the redactions have been made with the advice of established and specialist commercial law firms, namely Linklaters LLP and my firm, Addleshaw Goddard. The redactions have been made responsibly on professional advice...

(d) If any party had a real and legitimate interest in challenging the interpretation and effectiveness of the Deed of Assignment it would be the Bank or NAB. As I have explained above, the acquisition of the loan portfolios from NAB and the Bank was at the time publicised and the Bank is aware that Promontoria has issued a large number of claims and taken other legal measures in order to realise the portfolio and enforce the assigned rights. I can confirm to the Court that based on my experience of having conduct of many such claims, at no point has the Bank or NAB sought to challenge the validity of the Deed of Assignment or its effect in transferring the Bank's rights and interests to Promontoria."

43. With regard to clause 1.5 of the Deed of Assignment, while rightly recognising that its effect "is largely a matter for legal submission", Mr Cooper comments in paragraph 40:

"The purpose of Clause 1.5 is simple and straightforward; it identifies the Relevant Pool B Loan Assets which are the subject of the assignment pursuant to Clause 2.1. Therefore, from Part II

of Schedule 1 it is possible to identify the Facilities and related securities and guarantees etc which the Bank assigned. However, as I have explained above, the Deed of Assignment is the instrument for the transfer of title by the Bank to Promontoria to give effect to the sale of the Chestnut portfolio. Again, without waiving privilege or confidentiality, that sale was conditional upon payment of purchase consideration and other terms relating to the nature and quality of the Loan Assets included in the portfolio. In other words, Clause 1.5 underlines the fact that the Deed of Assignment is the relevant and distinct instrument of transfer of the Loan Assets, it transfers those Loan Assets which have been sold and subject to the terms of that sale... what Clause 1.5 certainly does not do is provide that the Bank's rights in relation to the Relevant Pool B Loans Assets are not being assigned despite the fact that Clause 2.1 states that they are."

Mr Cooper then repeats, in paragraph 41, that "the combination of Clause 1.5 and the terms of the SPA does not prevent an absolute assignment of all the Bank's rights and remedies in respect of the Facilities and the Mortgages."

44. Finally, Mr Cooper deals specifically with the description of Promontoria Chestnut as the "Novated Buyer", with the aim of dispelling any inference that the Bank might have entered into a novation of the relevant facilities with an unknown third party before entering into the Deed of Assignment. Mr Cooper assures the court that "this speculation is without any foundation". Because the phrases "Buyer" and "Novated Buyer" were not expressly defined in the Deed of Assignment, they have the meanings given to them in the SPA. Mr Cooper continues (in paragraph 43):

"... the sale of the Chestnut portfolio under the SPA was structured so that Holding agreed to buy the Loan Assets and agreed to set up an Irish registered company, namely Promontoria, to which the Loan Assets were to be transferred and which would enter into a novation of the SPA. In this way, Promontoria became the "Buyer" and in particular the "Novated Buyer"."

45. I observe from this explanation that the novation, whereby Promontoria Chestnut replaced Holding as the buyer of the portfolio, may have been planned as part of a sequence of linked transactions from the outset. But the important point, for present purposes, is that Mr Cooper firmly negates any suggestion that there may have been a novation involving the Bank and a third party before the SPA was entered into. Furthermore, as he correctly points out in paragraph 45 of his statement, any such novation would have required the consent of Mr Hancock, who would have had to enter into a new agreement with the Bank and the third party if his contractual relationship with the Bank under the Facility Letters was to be replaced by a corresponding relationship with the third party. Mr Hancock has provided no evidence of any such agreement.

**Does the evidence show that there is a substantial dispute about the title of Promontoria Chestnut to Mr Hancock's debts?**

46. It is clear from the redacted Deed of Assignment, read in the light of Mr Cooper's evidence, that (a) the loans made by the Bank to Mr Hancock under the Facility Letters were included in the list of Relevant Pool B Loan Assets in Part II of the Schedule to the Deed, and (b) the title numbers of the properties which Mr Hancock charged to the Bank as security for the loans were listed in Part III of the Schedule. It follows that each loan was a "Relevant Loan Asset" as defined in the Deed. As such, each loan also fell within the unredacted first limb of the definition of "Specified Loan Asset", which states in apparently unqualified terms that "Specified Loan Asset" means "(a) a Relevant Loan Asset; and...".
47. Clause 2.1(a) then contains, on the face of it, an absolute assignment by each of NAB and the Bank, to Promontoria Chestnut, of all of their respective rights (as set out in sub-paragraphs (a)(i) to (iv)) "in relation to each Specified Loan Asset comprised within that Relevant Borrower Asset Group". The assignment was expressly stated (a) to be subject to the terms of the Deed, (b) to be made in consideration for the payment by Promontoria Chestnut to NAB of the Purchase Price for each Relevant Borrower Asset Group, (c) to take effect on and from the Effective Time (defined as "the Settlement Date immediately following the receipt by the Seller of the Purchase Price for the Specified Loan Assets"), and (d) to exclude the Excluded Liabilities (another defined term, but nobody has suggested that anything turns on it).
48. The assigned rights in relation to each Specified Loan Asset (and thus in relation to each Relevant Pool B Loan Asset, including Mr Hancock's loans) include, as one would expect, all of the Bank's rights and powers in its capacity as the lender under each "Relevant Document", a term which is very widely defined in relation to each Specified Loan Asset and would clearly include both the Facility Letters and the charges given by Mr Hancock to secure the loans.
49. The drafting of the Deed is rather convoluted, and not always easy to follow. I have little doubt that the transaction could have been framed in much simpler language. Nevertheless, I consider that the drafting leaves no room for any reasonable doubt that the loans to Mr Hancock, and the rights of the Bank in relation to the loans and the charges securing them, were prima facie included in the assignment. The loans were included in the list of relevant Pool B Loan Assets, and one of the purposes of the Deed must have been to transfer title to them from the Bank to Promontoria Chestnut. After all, the deed was described as one of "assignment and assumption", and clause 2.1(a) was obviously intended to make a substantial transfer of loan assets from the Bank to Promontoria Chestnut. This is reinforced by the express acceptance of the assignment by Promontoria Chestnut in clause 2.2, and the transfer is further evidenced in the present case by the notice of assignment given by Promontoria Chestnut (through Engage Commercial) to Mr Hancock a few days later, on 3 December 2014. Nor would it be plausible to suggest that any of the conditions which had to be satisfied before the assignment came into effect remained unsatisfied for any significant period of time. The notice of assignment would not have been given before the purchase price had been paid and the Effective Time had occurred, nor would the Bank have transferred the charges (as it did) to Promontoria Chestnut on the same day as the Deed of Assignment if it had not received payment for the loan assets transferred.

50. What, then, are the arguments relied on by Mr Hancock as showing the alleged existence of a substantial dispute about the title of Promontoria Chestnut to require payment of his admitted indebtedness under the Facility Letters, when the Statutory Demand was served on him nearly two years later on 8 November 2016?
51. The first argument turns on the redacted definition of Specified Loan Asset. Without sight of the redacted second limb in part (b) of the definition, submit counsel for Mr Hancock, it is impossible to be sure whether it modifies or in some other material respect detracts from the apparently clear statement in part (a) that Specified Loan Asset means a Relevant Loan Asset (and therefore includes a Relevant Pool B Loan Asset). The problem is exacerbated, so the argument runs, by the use of the conjunctive “and”, rather than the disjunctive “or”, to link the two limbs of the definition. With the redaction in place, the court is being asked to speculate, and it is unclear whether Relevant Pool B Loan Assets do in fact fall within the definition.
52. The judge was unimpressed by this argument. He held, at [21], that “any surmise and speculation arising out of the redacted documents is answered by the compelling evidence contained within the two witness statements of Mr Cooper.” He said there was nothing to suggest that Mr Cooper’s certification of the propriety of the redactions, in his capacity as a competent senior solicitor, must be wrong, and continued, at [22]:
- “I would endorse the observations of Her Honour Judge Moulder (as she then was) in the case of *Promontoria (Chestnut) Limited v Iliad Group Limited* [2017] EWHC 2332 (QB) at para 51 to the effect that a witness statement from a partner of an established law firm, signed with a statement of truth, and exhibiting a deed of assignment and clearly stating that, pursuant to that deed, the bank’s rights in respect of a loan document were assigned to the claimant, is sufficient evidence upon which the court is entitled to rely. I am satisfied that, just as in the case before Judge Moulder, there is no evidence before this court which calls into question the veracity of Mr Cooper’s witness statement.”
53. I respectfully agree. If it were the case that the second limb of the definition of Specified Loan Asset qualified in any material way the first limb of the definition, it would have been impossible for Mr Cooper to give the confirmations contained in paragraph 27 of his first statement (quoted at [28] above), or to say what he did about the redactions in paragraph 28 (quoted at [42] above). In particular, Mr Cooper could not have said that the unredacted parts of the deed of Assignment establish that the Bank’s rights and remedies under the Facility Letters and the charges have been effectively assigned, or that the redacted parts were not adverse to Promontoria Chestnut’s case in establishing its title under the facilities: see paragraphs 28.1 and 28.3. It is also inconceivable that Mr Cooper would have given the evidence he did if the second limb of the definition had any material effect on the scope and meaning of the first limb.
54. That apart, I am unable to think of any good reason why the parties should have included the Relevant Pool B Loan Assets in Part II of the Schedule, or why the language of the assignment in clause 2.1 should have included all of the Bank’s rights in relation to those loan assets, if the effect of the second limb of the definition of Specified Loan Asset were somehow to exclude them from the scope of the assignment. In truth, it is Mr Hancock’s argument on this point which is founded upon speculation,

and I find it telling that Mr Sims was unable to provide any plausible suggestion of how the redacted wording might have modified or materially qualified the Bank's assignment to Promontoria Chestnut of its rights in respect of Mr Hancock's loan portfolio. I remind myself that, on an application to set aside a statutory demand, the burden lies on the applicant to establish the existence of a substantial dispute. The creditor does not have to begin by proving its title to sue, as it would if it were seeking to recover the debt by a court action brought under Part 7 of the CPR.

55. Mr Hancock's next argument is based on clause 1.5 of the Deed of Assignment, which records the parties' agreement that Part II of the Schedule is included "solely for the purpose of identifying the Relevant Pool B Loan Assets", and that "such information is included... without prejudice to, and at all times subject to, the terms of the Sale and Purchase Agreement and any limitations contained therein": see [35] above. This is admittedly a rather strange provision if read in isolation, and in ignorance of the terms of the SPA and its commercial background. However, it is clear from the language of the clause itself that (a) inclusion of a loan asset in Part II of the Schedule is intended to be for identification purposes only, and (b) such inclusion is subject to the terms of the SPA and any limitations contained in it. As to the first point, there is no dispute that Mr Hancock's loans are correctly identified and included in Part II of the Schedule. As to the second point, there is nothing to suggest that the terms of the SPA had any relevant impact, by the date of the Statutory Demand, on the apparently clear assignment of title to Mr Hancock's loans and the securities for them effected by clause 2.1(a) of the Deed. Furthermore, the effect of clause 1.5 needs to be assessed in the light of Mr Cooper's evidence, including his observations in paragraph 40 of his first statement (quoted at [43] above). Viewed in that context, I remain wholly unconvinced that the clause gives rise to any substantial doubt about the title of Promontoria Chestnut to demand payment of the outstanding indebtedness from Mr Hancock in November 2016. The judge below came to essentially the same conclusion at [26] and [27] of his judgment, which I do not need to set out.
56. Mr Hancock's third argument relies on the alternative descriptions of Promontoria Chestnut in the Deed of Assignment as the "Novated Buyer" or the "Buyer". It is clear from the former description, although not from any other provision visible in the redacted Deed, that there must at some prior stage have been a novation involving Promontoria Chestnut, which in turn (it is said) implies that there may have been at least one intermediate stage in the chain of title between the Bank and Promontoria Chestnut, with a corresponding possibility that title to Mr Hancock's debts was disposed of separately before the Deed of Assignment was executed.
57. The answer to this argument is again provided, in my judgment, by Mr Cooper's evidence. He explains that there was indeed an intermediate novation, whereby the sale originally agreed between NAB, the Bank and Holding was novated in such a way that Promontoria Chestnut stepped into the shoes of Holding. The commercial reasons for the novation remain obscure, particularly if (as I have suggested may have been the case) the novation formed part of the plan from the outset. Mr Sims speculated that there may have been an underlying tax planning motive, but there is no evidence to substantiate that suggestion, and even if there were, it would be irrelevant. What matters is the clear evidence of Mr Cooper that there was no prior disposal of Mr Hancock's debts to a third party, such that they could not be included in the later assignment of the same debts to Promontoria Chestnut. This is hardly surprising, because if there had been

any such intermediate assignment, it is impossible to understand how Mr Hancock's debts could properly have been included in the Schedule to the Deed of Assignment, or how notice of their assignment could properly have been given by Promontoria Chestnut to Mr Hancock. I therefore conclude that the third argument, like the other two, has no real substance, and that there is nothing to displace the natural conclusion from the unredacted parts of the Deed of Assignment that Mr Hancock's loans, and all the Bank's rights in relation to them, were thereby transferred from the Bank to Promontoria Chestnut. My conclusion on this point is again substantially the same as that of the judge, who said in [28] that "the short point is that there was no novation of the loan facilities between the Bank and [*Mr Hancock*]", but, rather, any novation was of the SPA, with Promontoria Chestnut replacing Holding as the purchaser.

*Mr Hancock's application to adduce fresh evidence*

58. I will deal at this point with some submissions made on Mr Hancock's behalf about the reliability of Mr Cooper's evidence, and a related application by Mr Hancock for permission to adduce fresh evidence on the appeal in the form of a third witness statement by his solicitor, Ms Connolly. The application was not made until 20 April 2020, so it was adjourned to be heard with the appeal. The submissions centre on an alleged contradiction between Mr Cooper's evidence in these proceedings and a witness statement which he made on 28 November 2019 in related proceedings brought by Promontoria Chestnut against Mr Hancock and his partner for possession of their main residence at The Old Rectory. Promontoria Chestnut's title to bring the possession proceedings depends on the same underlying transactions as its right to demand payment of Mr Hancock's outstanding indebtedness under the Facility Letters, although the main focus in the possession proceedings is on the transfer of the legal charge over the Old Rectory from the Bank to Promontoria Chestnut.
59. The possession proceedings were begun on 1 March 2017, but they have still not come to trial. The claim against Mr Hancock's partner was settled by consent on 20 February 2020. Other applications were listed for hearing at an adjourned pre-trial review which was heard remotely by His Honour Judge Hodge QC on 8 April 2020, including applications by Promontoria Chestnut to strike out Mr Hancock's defence and for summary judgment on the claim, and an application by Mr Hancock for permission to rely upon a counterclaim for rectification of the charge registered against the Old Rectory at HM Land Registry. Having regard to the provisions of CPR PD 51Z, the judge ordered at the pre-trial review that the trial of the claim listed for late April 2020 be vacated, the claim be stayed until 26 June 2020, and the applications which I have mentioned be adjourned to be relisted on the first available date after 17 July 2020.
60. In his first witness statement in the possession proceedings, dated 28 November 2019, Mr Cooper said (at paragraph 19):

"Although I have not seen an unredacted copy of the Form TR4, I am informed by Linklaters that the redacted parts of the exhibited Form TR4 concern

19.1 the identity and signature of the signatories to the Form TR4; and

19.2 title numbers and charges which relate to other borrower connections.”

61. Mr Hancock now asks for permission to adduce that statement by Mr Cooper as evidence on the present appeal, because of its alleged inconsistency with the evidence given by Mr Cooper in paragraph 34 of his first statement in the present proceedings on 4 January 2019, where he expressly confirmed that he *had* “seen an unredacted copy of the Form TR4” and stated that:

“the redacted parts of the exhibited Form TR4 also concern confidential and commercially sensitive or irrelevant information either (a) referring to commercial terms between the transferors and transferee which do not affect the act of transfer of the registered proprietorship of the Mortgages, (b) the identity and signature of the signatories to the Form TR4 and (c) titles and charges which relate to other borrower connections.”

62. Mr Cooper’s answer to Ms Connolly’s evidence on this point is contained in his third statement dated 30 April 2020. He explains that, when he said in his first statement of 4 January 2019 that he had seen an unredacted copy of the Form TR4, he was referring to the main body of that document (which contained the operative provisions in nine numbered boxes and ended with its execution by the parties as a deed in box 10), and not to the continuation sheet which gave details of all the charges transferred. The four pages of the continuation sheet (in Form CS) had always been redacted in the versions which Mr Cooper had seen, with the exception of the details relating to Mr Hancock’s charges which were unredacted. Mr Cooper goes on to explain how he came to word his statements differently in January and November 2019. In short, he had not saved a copy of the version of the Form TR4 sent to him by Linklaters in January 2019 in either hard copy or electronic form, and when he came to make his statement in November 2019 in the possession proceedings he was provided by Linklaters with another version, which was obviously another copy of the same document, but differed in respect of some of the redactions made to the main part of the Form TR4. A further complication was that Mr Cooper had meanwhile exhibited a second, less redacted, version to his second statement in February 2019. All three versions, however, had appended to them a continuation sheet in precisely the same redacted form.
63. Mr Cooper accepts, with the benefit of hindsight, that in his first statement he should have made it clear that the CS Form attached to the TR4 which he exhibited was redacted as to third party title numbers, and he apologises to the court for any confusion caused by the different wording in his two statements. He also points out, correctly, that no complaint has ever been made by Mr Hancock about the redactions of details of third party charges in the continuation sheet to the Form TR4 (which was a single transfer dated 28 November 2014 by the Bank and NAB to Promontoria Chestnut of all the Legal Charges).
64. With the benefit of Mr Cooper’s explanation, it seems clear to me that he was guilty of no more than a slight and immaterial inaccuracy when he said in his first statement that he had seen an unredacted copy of the Form TR4. He had indeed seen an unredacted version, with the sole exception of the irrelevant details of third party mortgages contained in the continuation sheet. While any error in evidence given to the court by a solicitor is to be regretted, and Mr Cooper was right to apologise for it, I do not accept

that the error casts any doubt on his credibility, or that it has any relevance to the issue whether the Deed of Assignment effected a valid transfer of Mr Hancock's loan portfolio from the Bank to Promontoria Chestnut.

65. For these reasons, although Mr Cooper's second statement in the possession proceedings post-dated the hearing below and obviously could not have been adduced at that hearing, I am satisfied that it does not fulfil the familiar requirements for the admission of fresh evidence on an appeal: see CPR rule 52.21(2)(b) and the principles set out by this court in Ladd v Marshall [1954] 1 WLR 1489 which still encapsulate the relevant considerations. The second of those principles is that the evidence must be such that, if given, it would probably have an important influence on the result of the case. Since that condition is clearly not satisfied, I would refuse permission for Mr Cooper's statement of 28 November 2019 in the possession proceedings to be received as evidence on the present appeal.

*Section 136 of the Law of Property Act 1925*

66. A further aspect of the case which needs to be considered is the effect in law of the notice of the assignment given to Mr Hancock on 3 December 2014. Section 136 of the Law of Property Act 1925 provides, so far as material, that:

“(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice -

- (a) the legal right to such debt or thing in action;
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice -

- (a) that the assignment is disputed by the assignor or any person claiming under him; or
- (b) of any other opposing or conflicting claims to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act, 1925.”

The reference to interpleading should now be read subject to CPR Part 86, headed “Stakeholder Claims and Applications”, which has replaced the provisions which formerly governed interpleader actions.

67. The significance of section 136(1), in the present context, is that if the Deed of Assignment constituted an absolute assignment by the Bank to Promontoria Chestnut of Mr Hancock’s debts to the Bank, then the giving of express notice in writing of that assignment to Mr Hancock on 3 December 2014 had effect, subject only to any prior equities, to transfer the legal title to the debts, together with all legal and other remedies for them, and to enable Promontoria Chestnut to give a good discharge to Mr Hancock for the debts without the concurrence of the Bank. Furthermore, if Mr Hancock had notice that the assignment was disputed by the Bank, or any other person claiming under the Bank, or if he had notice of any other opposing or conflicting claims to the debts, he had two statutory remedies open to him: he could either pay the money into court, or commence a stakeholder claim under CPR Part 86.
68. There is not a shred of evidence that the Bank has ever disputed the validity of the assignment to Promontoria Chestnut, even though it took place over five and a half years ago, or that Mr Hancock has ever asked the Bank to confirm that it no longer has any claims against him in respect of the debts. Nor has Mr Hancock provided any credible evidence of the existence of any other opposing or conflicting claims to the debts. In those circumstances, he would be fully protected by section 136 if he were to make payment to Promontoria Chestnut, and his assertion that the debt is disputed on substantial grounds has a correspondingly hollow ring to it.

### **Redaction of documents which the court has to construe**

69. Subject to what follows, the conclusions which I have so far reached would be sufficient to explain why this appeal must in my view be dismissed. In the light of Mr Cooper’s evidence, I am satisfied that Mr Hancock is unable to demonstrate the existence of any substantial dispute about the title of Promontoria Chestnut to demand payment by him of his accrued indebtedness under the Facility Letters. It remains to consider, however, whether there is some overriding principle which precludes Promontoria Chestnut from relying on a redacted version of the Deed of Assignment in the present case, even if (as I would provisionally hold) the court can safely conclude on the balance of probabilities that none of the redactions casts any serious doubt on the title of Promontoria Chestnut to Mr Hancock’s debts.
70. Mr Sims argues that there is indeed such a principle, which comes into play whenever the court is asked to construe a contractual document which has been partially redacted by the party who wishes to rely on it. In general terms, it is elementary that a written contract has to be construed as a whole, in the light of admissible evidence of the relevant background facts (or surrounding circumstances) known to both parties at or before the time when the contract was made, but excluding evidence of prior negotiations: see Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173, at [8] to [15] per Lord Hodge JSC (with whose judgment the other members of the Supreme Court agreed). As Lord Hodge put it at [10], with my emphasis of the words “as a whole”:

“The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their

agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract *as a whole* and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.”

Furthermore, the exercise is a unitary one, which “involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated”: *ibid*, at [12].

71. How, then, asks Mr Sims, can this unitary exercise be performed when the court does not have before it the entirety of the relevant contract? Furthermore, he submits, it is no answer to say that the redactions to the document are certified by an experienced solicitor as being irrelevant to the question which the court has to decide. Construction of a written document is a matter of law for the court, and questions of relevance require an evaluative judgment which it is for the court, not the solicitor of one of the parties, to perform.
72. In the present context, Mr Sims makes the submission in two alternative ways. His primary submission is that the court should simply refuse to engage with the construction of the Deed of Assignment in its redacted form, because the court is not in a position to construe it as a whole. His secondary submission, if the court thinks it appropriate to adopt a more pragmatic approach, is that the primary rule should be the starting point, but the court may in its discretion depart from it by devising a bespoke solution in order to meet the concerns of commercial confidentiality articulated by Mr Cooper. This could be done, for example by establishing a “confidentiality ring” within which the Deed of Assignment could be made available in its unredacted form to the court and a limited number of lawyers on each side.
73. It quickly became apparent in oral argument that the primary submission was unrealistic if taken as a rigid rule which admits of no exceptions. For example, Mr Sims readily accepted that there could be no reasonable objection to the redaction, on grounds of irrelevance, of details of third party loan assets and title numbers in the schedule to the Deed of Assignment. Those personal details were of no concern to Mr Hancock, their disclosure might arguably infringe the privacy of the third parties concerned, and it would be fanciful to suppose that they could have any bearing on the construction of the operative clauses of the Deed. Similarly, redaction of personal details of signatories and/or attesting witnesses would obviously be irrelevant to any issue of construction of the body of the Deed, although such details could be highly relevant if there were an issue concerning its due execution.
74. Redactions to the body of the Deed, however, are more problematical. I have much sympathy with the general thrust of the submission, which I take to be that where the court is called upon to resolve a question of construction of a contractual document, the document must in all normal circumstances be placed before the court as a whole, and it is not for the parties or their solicitors to make a pre-emptive judgment about what parts of the document are irrelevant. Sometimes, as with the details of third party transactions contained in the Schedule to the Deed of Assignment, it may be obvious that they can properly be omitted or blanked out; but even then a clear explanation must

in my view be provided of the nature and extent of the omissions, and the reasons for making them. In general, irrelevance alone cannot be a proper ground for redaction of part of a document which the court is asked to construe, and there must be some additional feature (such as protection of privacy or confidentiality, but no doubt there are others too) which can be relied upon to justify the redaction.

75. Considerations of confidentiality, by contrast, give rise to very different considerations. Seldom, if ever, can it be appropriate for one party unilaterally to redact provisions in a contractual document which the court is being asked to construe, merely on grounds of confidentiality. If it is obvious that the provisions in question would on any reasonable view be completely irrelevant to the issue of construction, and if the reasons for taking that view can be clearly and fully articulated by the solicitor acting for the party seeking the redaction, I am inclined to accept that the redaction may be defensible. But the reason why it would be defensible is that the provisions are clearly irrelevant, not that they are confidential. Confidentiality alone cannot be a good reason for redacting an otherwise relevant provision in a contractual document which the court has to construe, and there are other ways in which problems of that nature can be addressed. I have already given the example of a confidentiality ring. Another solution, if the parties all agree, could be for the judge alone to see the document in its unredacted form.
76. Returning to the present case, the main features of the redacted Deed of Assignment which in my judgment potentially give rise to concern are:
- (a) the redacted definitions in clause 1.1, including in particular the redacted second limb of the definition of “Specified Loan Asset”;
  - (b) the complete deletion of clauses 3 to 6 inclusive; and
  - (c) the failure to provide the court with (at least) the relevant definitions in the SPA, and clause 1.2 of the SPA, which (as I have already explained) are incorporated by reference in clauses 1.1 and 1.2 of the Deed of Assignment: see [33] above.
77. At this point, however, it is necessary to remember the procedural context in which the question of construction arises, as well as the very limited nature of that question. We are concerned with an application by Mr Hancock to set aside a statutory demand, where the burden lies on him to show the existence of a substantial dispute about the title of Promontoria Chestnut to demand payment from him. Mr Hancock admits that he owes the debts set out in the Statutory Demand, and he can no longer dispute that he received written notice in December 2014 of the assignment of those debts by the Bank to Promontoria Chestnut. Apart from his complaints about the redactions in the Deed of Assignment, Mr Hancock has been unable to produce any credible evidence casting doubt on the title of Promontoria Chestnut to the debts, and he would be fully protected by section 136(1) of the Law of Property Act 1925 if he paid the money demanded. This is not a case where Promontoria Chestnut has to prove its title to sue Mr Hancock, and even if it were, Promontoria Chestnut would only need to rely on the Deed of Assignment in order to establish the absolute assignment of the relevant debts to it by the Bank. It is only in that limited sense that a question of construction of the Deed of

Assignment arises. Furthermore, since Mr Hancock was not himself a party to the Deed, or to the SPA which preceded it, the question relates to a transaction between third parties rather than to an agreement under which Mr Hancock assumed rights and obligations of his own.

78. Viewed in that context, the redactions to the Deed of Assignment seem to me to fade into relative insignificance. For the reasons which I have already given, the unredacted parts of the Deed are in my judgment sufficient to show that title to Mr Hancock's debts was indeed assigned by the Bank to Promontoria Chestnut. In a case of the present type, it would therefore be wrong to lay down any overriding principle based on the redactions to the Deed. I have little doubt that the redactions were far more extensive than they needed to be, and Mr Cooper's evidence would have been of greater assistance to the court if he had condescended to greater detail about the specific reasons for particular redactions. He could, for example, have explained, without revealing any confidential information, why the second limb of the definition of "Specified Loan Asset" was redacted, and why it had no impact on the generality of the first limb of the definition. Similarly, he could, and in my view should, have provided a general explanation of the contents of clauses 3 to 6 of the Deed, explaining why they were considered confidential, and why they were on any view irrelevant to the question of title to Mr Hancock's loans. Furthermore, Mr Cooper should clearly in my view have disclosed the relevant parts of the SPA which were incorporated by reference. In a different context, these criticisms, and others of a similar nature, might arguably have precluded Promontoria Chestnut from placing reliance on the Deed of Assignment in the redacted form which we have seen. In the present context, however, I am satisfied that the redactions have not caused any injustice to Mr Hancock, and the doubts which he has sought to raise about Promontoria Chestnut's title to demand payment from him are unfounded.
79. Before leaving this part of the case, there are two further matters which I need to consider. The first is the recent decisions of the High Court (Marcus Smith J) in Promontoria (Oak) Limited v Nicholas Michael Emanuel and Nicola Jane Emanuel [2020] EWHC 104 (Ch) ("Emanuel I") and [2020] EWHC 563 (Ch) ("Emanuel II"). The second is the question whether, and (if so) to what extent, an analogy can usefully be drawn, when considering the redaction of a document which the court has to construe, with established principles which govern the redaction of documents on disclosure in litigation.
- (a) *The Emanuel case*
80. On 30 January 2020, Marcus Smith J handed down his reserved judgment in Emanuel I. As the title of the case suggests, it concerned another company in the Promontoria/Cerberus group, which I will call Promontoria Oak. That company brought possession proceedings against the defendants, Mr and Mrs Emanuel, who owned a residential property in Cornwall and had charged it to Clydesdale Bank as security for business loans. Promontoria Oak claimed as the assignee of Clydesdale Bank, relying upon a Deed of Assignment dated 16 September 2016 ("the 2016 Assignment"). As in the present case, Promontoria Oak put in evidence a significantly redacted version of the 2016 Assignment, alleging that the redactions contained commercially sensitive material which had no bearing upon the existence and effectiveness of the assignment. Again as in the present case, written notice of the assignment was given to the Emanuels, by a letter from Clydesdale Bank also dated 16

September 2016. An earlier letter from Clydesdale Bank to the Emanuels, in June 2016, had informed them that there would be an assignment to a different company in the Cerberus group, Promontoria Holding 170 BV, and that the transfer was expected to take place on 16 September 2016. The subsequent letter of that date informed the Emanuels that Promontoria Oak was successor in title to the holding company, but no explanation was given of the legal process by which this had occurred.

81. Promontoria Oak's claim was heard by Mr Recorder Willetts over three days in May 2018. By his judgment dated 16 July 2018, he held that Promontoria Oak was entitled to possession of the Cornish property and a money judgment for the sums found to be due. The Emanuels then appealed to the High Court, and their appeal was heard by Marcus Smith J on 3 December 2019. By the date of the hearing, the property had been sold under protest by the Emanuels and without prejudice to their arguments on the appeal. They had permission to pursue three grounds of appeal, the first of which was that the Recorder had been wrong to admit the redacted version of the 2016 Assignment into evidence. In the alternative, the second ground was that he had been wrong to conclude that the redacted deed proved title, while the third ground was that Promontoria Oak had adduced insufficient evidence to prove its chain of title.
82. At the hearing before Marcus Smith J, the parties were represented by the same leading counsel as in the present case, with Mr Sims appearing for the Emanuels and Mr Riley for Promontoria Oak. The conclusion reached by the judge, in Emanuel I, was that grounds 2 and 3 failed, but ground 1 succeeded. In a careful and thoughtful judgment, the judge set out the reasoning which led him to that conclusion. I do not propose to review the judge's reasoning in this judgment, because we were told that there is a pending application by Promontoria Oak for permission to appeal to this court which I would not wish in any way to influence. I would, however, draw attention to a striking feature of the judge's process of reasoning. He began by considering grounds 2 and 3 together, and rejected them on the basis that the judge had clearly been entitled, on the evidence adduced before him, to reach the conclusion which he did: see the judgment at [33] to [36]. That, one might have thought, would have been the end of the matter, but the judge nevertheless concluded that the appeal should succeed on ground 1, having regard to the evidence that could have been, but was not, adduced at the trial by Promontoria Oak, including in particular the unredacted 2016 Assignment. In this connection, the judge considered that the recorder's decision to permit Promontoria Oak to rely on the redacted deed "was so flawed that it must be set aside": see [52], and the reasons for that conclusion set out at [54] to [75].
83. Apart from the pending application for permission to appeal, it is also relevant to note that there are in any event significant differences between the facts in the Emanuel case and the present case. Promontoria Oak had to establish its title to sue, as the claimant in Part 55 proceedings for possession and a money judgment. By contrast, Mr Hancock is seeking to set aside a statutory demand, and the burden is on him to show the existence of a substantial dispute. Furthermore, there was no evidence from Promontoria Oak's solicitors to explain the commercial background to the 2016 Assignment, and the procedure by which an intended assignment to a Dutch holding company in the Cerberus group was replaced by an assignment to a Promontoria company established in Ireland. Presumably, as in the present case, there was a novation of the original agreement, but in the absence of an explanation that critical step in the history was left wholly obscure. Nor was there any evidence from a solicitor such as

Mr Cooper giving reasons for at least the majority of the redactions, and (importantly) informing the court that he had inspected an unredacted version of the assignment and was therefore able to give the court assurances of the kind which I have described. Finally, the parties to the litigation and the assignment relied upon in the two cases were of course different, although it is fair to say that the redactions appear from the judgment of Marcus Smith J to have been broadly similar to those in the present case.

84. Nor was the judgment in Emanuel I the end of the story. At a hearing to deal with consequential matters on 25 February 2020, Promontoria Oak successfully argued that its claims for possession and a money judgment should be upheld on the alternative ground that, regardless of the assignment, it had title to sue and recover possession in its capacity as registered proprietor of the legal charge granted by the Emanuels over their property. Marcus Smith J gave his reasons for reaching this further conclusion in a subsequent reserved judgment (Emanuel II) which he handed down on 19 March 2020. That judgment, too, is subject to an outstanding application for permission to appeal, this time by the Emanuels, and again I wish to say nothing which might prejudice the disposal of that application.

(b) *The redaction of documents on disclosure – an analogy?*

85. It has been settled law in this jurisdiction for well over a century that a litigant giving disclosure of documents is entitled to redact parts of a document which are irrelevant, and in all normal circumstances a certificate to that effect by the party's solicitor will be treated as conclusive. As Hoffmann LJ explained in G.E. Capital Group Ltd v Bankers Trust Co [1995] 1 WLR 172 at 174B:

“It has long been the practice that a party is entitled to seal up or cover up part of a document which he claims to be irrelevant. *Bray's Digest of the Law of Discovery*, 2<sup>nd</sup> ed. (1910), pp.55-56 puts the matter succinctly:

“Generally speaking, any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production; the party's oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are relevant, or to schedule the whole document and to seal up those parts which are sworn to be irrelevant; ...”

The oath of the party giving discovery is conclusive, “unless the court can be satisfied – not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case – that the affidavit does not truly state that which it ought to state:” per Cotton LJ in *Jones v Andrews* (1888) 58 L.T. 601, 604.”

86. To similar effect, Leggatt LJ said in the same case, at 176H:

“The plaintiffs are obliged to disclose the relevant parts of documents, but not the irrelevant... For over a century litigants

have been permitted to cover up or blank out irrelevant parts of documents. The court will not ordinarily disregard the oath of the party that the parts concealed do not relate to the matters in question.”

87. In the Disclosure Pilot for the Business and Property Courts (CPR PD 51U) express provision is now made in paragraph 16.1 for the redaction of a part or parts of a documents:

“on the ground that the redacted data comprises data that is –

(1) irrelevant to any issue in the proceedings, and confidential;  
or

(2) privileged.”

Paragraph 16.2 then provides that any redaction “must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process.” A party who wishes to challenge the redaction must apply to the court by an application notice supported where necessary by a witness statement: *ibid.* It will be noted that redaction is permitted under paragraph 16.1 only where the relevant material is both irrelevant and confidential. Confidentiality alone is not enough.

88. On behalf of Promontoria Chestnut, Mr Riley submits that these principles should also be applied where the redacted document in question is one that the court is being asked to construe. He naturally accepts the principles of construction restated by Lord Hodge in Wood v Capita (*loc.cit.*), but points out that not every part of the document will be relevant or will inform the court’s construction of it. He submits that a redaction may properly be made in such circumstances, at any rate if it is certified by a solicitor or other officer of the court. He also points out that the usual rules on disclosure, including the established principles of redaction, will apply to any documents forming part of the admissible background material which the court may take into account in the process of construction. Why then, he asks, should different principles be applied, when contracts are documents like any other?
89. These submissions have a superficial attraction, but as I have already indicated I can only accept them to a very limited extent. There is in my judgment a clear distinction between the rules which apply when a party is giving disclosure of documents, in the ordinary course of litigation, and the process of construction which a court has to embark upon when considering the meaning or legal effect of a document. Since the process of construction requires the document as a whole to be considered, the starting point must always be that the entire document should be made available to the court, and any redactions to it on grounds of irrelevance should either be forbidden or, if permitted at all, convincingly justified and kept to an absolute minimum. Except in the clearest of cases, the question of relevance to the process of construction is one that the court should be left to decide for itself. Certification by a solicitor provides an important safeguard, but where the question is one of the correct interpretation of a written document, it is not normally appropriate for a solicitor, however experienced, to pre-judge which parts of the document the court may find useful in performing its task,

except perhaps in relation to material that on no reasonable view could have any bearing on the exercise. In all normal cases, the entire document should be placed before the court; and if, exceptionally, any redactions are made, they should be fully explained and justified by the party making the redaction, with sufficient particularity for the court to be able to rule on the need for the redaction if it is challenged.

90. I have so far spoken only of redaction for irrelevance. Redaction on the grounds of confidentiality alone is a very different matter, and as at present advised I find it hard to see how it could ever be justified where the confidential material forms a relevant part of the document which the court is asked to construe. As I have already said, there are other ways of dealing with problems of confidentiality, such as the use of confidentiality rings which have become a familiar feature of competition and intellectual property cases.
91. In many contexts, application of the criteria which I have outlined above might well (I say no more) lead to the conclusion that redactions similar to those in the present case were so extensive, and of such a nature, that the court could not safely resolve an issue of construction of the document in question, even if the redactions were accompanied by explanatory evidence and assurances of the kind given by Mr Cooper. In the particular context of the present case, however, I have concluded, for the reasons already given, that the redactions cannot, without more, enable Mr Hancock to make good his challenge to the Statutory Demand. As so often, context is everything, and sweeping generalisations are to be avoided. I will therefore content myself with saying that, in most circumstances, it is unlikely to be helpful to draw an analogy between the established principles which apply in this jurisdiction to the redaction of documents on disclosure in civil proceedings, on the one hand, and the particular problems posed by redaction of a document which the court is being asked to construe, on the other hand.

### **An alternative argument: the respondent's notice**

92. By a respondent's notice, Promontoria Chestnut invites the court to uphold the judgment below on alternative grounds similar to those accepted by Marcus Smith J in Emanuel II. In short, the argument is that, regardless of the Deed of Assignment, Promontoria Chestnut has good title to sue Mr Hancock for the debts set out in the Statutory Demand because it has been duly registered at HM Land Registry as proprietor of the Legal Charges granted by Mr Hancock to the Bank as security for his borrowing. The charges contained covenants to repay the sums owed under the Facility Letters, and in the absence of a contrary stipulation by the Bank the benefit of those covenants was transferred together with the charges. Reliance is placed on section 114(1)(a) of the Law of Property Act 1925 and section 58 of the Land Registration Act 2002.
93. In view of my conclusions rejecting Mr Hancock's grounds of appeal, it is unnecessary for Promontoria Chestnut to rely on this alternative argument and I prefer to say nothing about it. The issue may well arise for decision if permission to appeal is granted in Emanuel II, and for that reason alone it would be undesirable for us to embark upon an obiter examination of the topic. The argument also faces the difficulty that no reliance was placed upon it in the Statutory Demand, where Promontoria Chestnut's title to sue was unambiguously said to arise from the Deed of Assignment alone.

**Overall conclusion**

94. For all the reasons which I have given, I would dismiss Mr Hancock's appeal.

**Flaux LJ:**

95. I agree

**Floyd LJ:**

96. I also agree.