Neutral Citation Number: [2019] EWHC 2410 (Ch)

Case No: CH-2019-000095

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Royal Courts of Justice Rolls Building
London, EC4A 1NL

Date: 13/09/2019

Before :

Mr Justice Mann

- -

Between :

IAN GEORGE NICOLL	**Appellant**
- and -	
PROMONTORIA (RAM 2) LIMITED	**Respondent**

- -
- -

Mr Gareth Darbyshire (instructed by Kennedys Law) for the appellant
Mr James Bickford Smith (instructed by Addleshaw Goddard) for the respondent

Hearing dates: 8th August 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Mann :

1. This is an appeal from an order and decision of ICC Judge Burton dated and given on 18 March 2019 in which she dismissed an application to set aside a statutory demand served by the respondent ("Promontoria") on the appellant ("Mr Nicoll"). Permission to appeal was given (by me) on 8 July 2019 on limited grounds relating to the effect of redactions in documents affecting or governing an assignment to Promontoria in circumstances which will appear. There is also a cross-appeal by Promontoria on a procedural matter, namely whether or not the point which arises on this appeal, and which was determined by the judge below, should ever have been allowed to have been run in the first place.

2. Because of that procedural matter, and because of additional complications introduced by fresh evidence which I permitted to be adduced on this appeal, it is necessary to set out some of the background in more detail than would otherwise have been necessary.

3. The debt in respect of which the statutory demand was served originally arose as between Mr Nicoll and the Co-operative Bank as evidenced in various facility letters between September 2010 and May 2013. A sum of well over £10,000,000 was lent, and security was taken. The overall balance was repayable in May 2015 but it was not paid.

4. On 29 July 2016 the Co-Operative Bank assigned (or purport to assign – the effectiveness of the assignment is in issue in these proceedings) their debt and security to Promontoria, along with the debts of others. Notice of assignment was given by both Co-operative Bank and Promontoria in a single document on 2 August 2016.

5. Promontoria pursued Mr Nicoll for the debt by serving a statutory demand dated 27 January 2017, demanding the sum of £10,533,024.51. The demand actually refers to the deed of assignment. On or about 27 February 2017 (the precise day is not clear from the handwriting on the document, but nothing turns on it) Mr Nicoll applied to set aside that statutory demand in the County Court at Chelmsford. The supporting witness statement complains about conduct which is said to demonstrate pressure on him to sell the charged property at an undervalue. It is not very clear from that supporting witness statement what the complaint really was, but it seems ultimately to have developed into a dispute about the value of the security. Paragraph 4 of that supporting witness statement has a relevance to the procedural question to which I have referred. So far as relevant it reads:

> "4. The Statutory Demand is not relevant to the cross-charge as it is disputed by myself as it was (purportedly) assigned when it should never have been because the Co-operative bank solicited me to sell the original land at a massive undervalue for circa £2-million."

The word "purportedly" betokens some sort of challenge the assignment, but it is significant to note that it is not the same challenge as ended up being made before the judge below.

6. That witness statement was met by a witness statement of Mr Stephen Wood of Capita, who manage the Promontoria portfolio. He produced various facility letters and legal charges. He also produced a highly redacted form of the deed of assignment of Mr Nicoll's debt, explaining that the redactions were because it was a "commercially sensitive document". He explained that he was producing the document in order to explain the basis of the claim and the context in which the deed of assignment came to be executed as part of the chronology (paragraph 16).

7. I shall come to the wording of the deed of assignment in due course, but in order to make sense of one aspect of the procedural chronology it is relevant to observe at this stage that the deed of assignment contained a number of references to a document described as the "Loan Sale Deed" (hereafter "LSD") which was said to have preceded it. The "Effective Assignment Date" in relation to the assignment of the loans was defined by reference to a definition which appears in the LSD, which was not produced at the time (no doubt because the particular point as to the completion date around which this appeal turns had not arisen at that point).

8. The dispute on the statutory demand was not resolved for two years until it eventually became before ICC Judge Burton, the matter having been transferred to the High Court in London in the meanwhile. In order to resolve various points about the valuation of the security (points raised by Mr Nicoll), a single joint expert was appointed and he reported. The judge heard the dispute as it was then formulated over two days on 31st January and 1 February 2019.

9. Two weeks previously, on or about 18th January 2019, Mr Nicoll signed and served (on 21st January 2019) a witness statement raising what the judge saw as three issues – an issue under the Consumer Credit Act based on unfairness, a challenge to the valuation evidence and a challenge to the effectiveness of the assignment based on an inability to work out whether the completion date for assignment had actually occurred. Towards the end of the first day of her hearing, ICC Judge Burton ruled on the extent to which she was going to deal with those matters. She ruled that she would not entertain any challenge to the report of the single joint expert, and she would not allow the Consumer Credit Act issue to be raised either. She also dealt with the extent to which she would allow a point to be raised about the effectiveness of the assignment.

10. At this point the matter becomes attended with some difficulty. As will appear, the judge allowed the effectiveness point to be taken, but only to a certain extent. Promontoria seeks to cross-appeal (or, so far as appropriate, rely on a respondent's notice) based on an averment that the judge erred in allowing the point to be raised at all. The problem with that is that there is no transcript of her judgment on that point. I have been provided with each side's notes of the judgment (and of the hearing either side of it), but they lack a certain degree of clarity as to what the decision was and how far it went. However, doing the best I can with those notes, it seems that the judge determined that she was not prepared to allow a challenge to the effectiveness of the assignment based on a failure to produce other documents (basically the LSD). She seems to have considered that such a claim should have been made much earlier and not as late as the January witness statement. But she acknowledged that there had been a prior challenge to the validity of the assignment. The notes do not identify clearly what she was talking about in that context, but the only thing she can have been talking about is the use of the word "purportedly" in Mr Nicoll's initial witness

statement supporting his application to set aside the statutory demand. That inference is supported by what she went on to say in her final form of judgment on the outstanding issues. The notes of the rest of the hearing indicate that the judge allowed submissions to be made as to the effectiveness of the assignment but not in so far as they could only have been met by the production of additional documents (again, effectively the LSD). She had indicated in her interim judgment that she would not have done anything which would have necessitated an adjournment of the proceedings, by which she presumably meant something which would have compelled Promontoria to seek an adjournment to put in more material.

11. Having then so ruled, the judge heard submissions on the issues which she permitted to be raised and delivered her main judgment. She ruled first that Promontoria did not have the benefit of an estoppel in support of the effectiveness of the assignment as vesting the debt in Promontoria, but went on to rule that the assignment was good in any event (in effect, that Promontoria did not need any estoppel). She then ruled against Mr Nicoll in his submissions that the value of security held by Promontoria exceeded the amount of the debt. Thus the application to set aside the statutory demand failed. The first and third of those decisions are not challenged in this appeal. This appeal concerns the second of them (effectiveness).

12. Mr Nicoll sought to appeal on various bases. I myself gave him permission (at an oral hearing) but limited to 2 points only. The first was the effect of the absence of an expressly identified completion date in the assignment deed, and the second was the effect of the redaction of the signatures on the copy of the assignment deed originally exhibited by Mr Wood. In the light of further evidence submitted on this appeal, the second of those points no longer arises.

13. Permission to appeal having been granted, Promontoria made an application to adduce fresh evidence on the footing that the question of the effectiveness of the assignment had been bounced upon it at the last minute, when it did not have an opportunity to put in evidence, and it now wished to do so. I had myself anticipated the likelihood of that being done, and on 31st July I ordered that they be at liberty to adduce fresh evidence. The application was not opposed by Mr Nicoll. It is as a result of that evidence that the signature redaction point no longer arises.

14. Before turning to the appeal itself it is first logically necessary to consider the cross-appeal. That cross-appeal is to the effect that the judge should never have embarked on a consideration of any challenge as to the effectiveness of the deed of assignment and that to do so was an error of law on the facts of this case. If that appeal were to succeed then it would cut the ground from under Mr Nicoll's appeal because it would mean that he has no point to appeal about.

15. For Promontoria, Mr Bickford Smith took his point either by way of cross-appeal or by way of respondent's notice. It seems to me that the point is only available to him on a cross-appeal. While he was seeking to uphold the decision of the judge to dismiss the application to set aside the statutory demand, he was not really seeking to do that for reasons different from or additional to those given by the lower court within CPR 52.13(2). He was really seeking to uphold the decision on the basis that the point which is now relied on in the appeal should never have been in play in the first place. That turns out to be a challenge to the decision of the judge to allow the effectiveness point to be taken at all, and that in turn turns out to be a challenge to the

interim judgment that the judge gave during the course of the proceedings as identified above. It seems to me that that can only be challenged by a cross-appeal and not by a respondent's notice.

16. I have already indicated the principal difficulty in dealing with this point, namely that there is no full record of exactly what the judge decided at this point in her reasoning in the interim judgment. However, it would not be sensible to introduce yet more delay into this already far too long drawn out matter by adjourning so that a proper transcript can be obtained. I am not even sure that it would be right to do so in any event because, if they had wanted to get one, I consider that Promontoria could probably have got one in time for this appeal hearing. I consider that in all the circumstances I can and should deal with the matter on the basis of the material that I have.

17. As well as the judge's decision during the course of argument, the point re-emerges in paragraph 13 of her judgment, and it is on this paragraph that Mr Bickford Smith focuses his fire. In that paragraph the judge said as follows:

> "13. At the start of the hearing, in the absence of expert evidence disputing the joint expert's report, I dismissed an application for permission to challenge it and determined that in so far as matters raised in a further witness statement of Mr Nicoll concerned arguments not already before the court, they should be excluded from the decision-making process. I noted, however, that Mr Nicoll's application to set aside the Statutory Demand, by the use of the phrase "*purportedly assigned*" and "*purported creditor*" had, from inception, called into question the validity of the Assignment. Whilst the court would not, at the eleventh hour, require Promontoria to put in evidence a document referred to in the Assignment (a redacted copy of the Assignment having been in evidence since May 2017), Miss Muth [counsel for Mr Nicoll] could nevertheless pursue Mr Nicoll's argument calling into question the validity of the Assignment."

18. Mr Bickford Smith took issue with the first part of the judge's reasoning, namely her noting that the validity question had already been raised. She seemed to have decided that, since it was already an issue, she would allow it to be run (though, as will appear, she did not allow it to be run to its fullest extent). That was an error because the use of the phrases that she relied on was not in the context of the sort of effectiveness attack which is now mounted, but in support of a different effectiveness attack. Mr Bickford Smith submitted that the judge was thereby starting from the wrong point. The current effectiveness point was never suggested as a point until Mr Nicoll's witness statement two weeks before the hearing before the ICC Judge. Accordingly, he submits that this was a decision by the judge which, albeit discretionary, started from a flawed premise and therefore could not and should not be supported.

19. Mr Darbyshire for Mr Nicoll resisted the cross-appeal. He said that there was a point taken at the outset about the validity of the assignment and it was right for Mr Nicoll to be allowed to pursue it. In any event, if the problem was that Promontoria did not

have an opportunity to put in evidence to meet the point, then that has now been fixed by the opportunity that it has had, and which it has taken, to adduce fresh evidence on this appeal. That is the sort of evidence which it would doubtless have produced at first instance had that been appropriate. Accordingly, there is no procedural disadvantage to Promontoria bearing in mind where we now are.

20. Having considered the documentation and submissions carefully, I agree with Mr Bickford Smith on this point. The decision of the judge below was one of case management, and it is now well established that the exercise of discretion in that area is particularly hard to challenge on appeal. However, where it is plain that the exercise of the discretion starts from a false premise or understanding then, like any other discretion, its exercise can be impeached. In my view that is true of the present case. It is true that Mr Nicoll sought to put the effectiveness of the assignment in issue in his first witness statement. However, the point that he took was entirely different from that which he took before the judge at first instance. As the extract from his witness statement above demonstrates (para 5), it related to dealings between him and the bank. It is not actually very easy to see what he was complaining about, but he was certainly not complaining about validity or effectiveness on the grounds that he subsequently took. Indeed, at the time of that witness statement he could not have been doing so, because he had not by then seen the deed of assignment. Accordingly, when Judge Burton noted that the validity was "from inception" called into question, she seems to have failed to identify that the point was entirely different. The point that was being taken by the date of the hearing before her was a new point, introduced late. It would have required additional evidence in order to meet it. The judge herself acknowledged that she would not allow the introduction of matters not hitherto before the court (see her first sentence of paragraph 13), and in my view the new attack on the effectiveness of the assignment fell into that category. She ought to have applied the principle to that new question and not allowed it to be run if (as she was entitled to, and which she apparently did), she was not allowing new points requiring new evidence (rightly, in my view). It is the sort of matter which would have required additional evidence in order to meet it. True it is that Promontoria did not seek an adjournment once the point was confirmed as being in play at the hearing, but that is not the point.

21. Had the judge gone about the matter consistently, in the manner foreshadowed in the first sentence of paragraph 13, she would and should inevitably have refused to entertain the point relating to the completion date. In fact she seems to have adopted some sort of halfway house. According to the notes of the hearing, she allowed the effectiveness to be challenged but not in so far as the challenge relied on the failure of Promontoria to produce an additional document (the LSD). That means that she should not have allowed the point about the completion date to be taken at all. That point turned on the absence of the LSD (where the date was defined) so according to her own logic she should not have allowed it to be taken at all. Yet she did allow it to be advanced. What she ought to have done is to have acknowledged that it was a point raised late which required further evidence to meet it; that Promontoria was disadvantaged by not having that evidence (which she did implicitly acknowledge); and she should therefore have determined that the point should not be taken at all.

22. In the circumstances I consider that Promontoria should have permission to cross-appeal and I would allow that cross-appeal. That is sufficient to dispose of this appeal

because it means that the one point which would otherwise have been open to Mr Nicoll on this appeal is no longer open to him, so the decision of the ICC Judge not to set aside the statutory demand would stand.

23. However, having said that, and in the light of the argument that I heard on the substantive appeal, it would be wrong to leave this appeal at that point without considering the substantive appeal. I shall therefore do so. In order to do that I have to set out some of the terms of the documentation and show how its disclosure developed.

24. The deed of assignment as originally produced by Mr Wood, and as it was before ICC Judge Burton, is a relatively short document. The central relevant concept is "Assignment Effective Date". Before getting to that the document contains certain relevant recitals:

> "(A) The Assignor has agreed to sell, and the Assignee has agreed to purchase, the Assigned Assets on the terms and conditions as set out in the Loan Sale Deed."

25. Clause 1 contains relevant definitions:

> "1.1 Construction
>
> 1.1.1 Unless otherwise defined herein, capitalised terms used herein shall bear the meaning given to them in the Loan Sale Deed.
>
> 1.1.2 Clause 1.2 (Construction) of the Loan Sale Deed shall be incorporated in this Deed as if set out in full herein.
>
> …
>
> 'Assignment Effective Date' means the Completion Date.
>
> …
>
> 'Loan Sale Deed' means the loan sale deed between, among others, (a) the Assignor and (b) the Assignee dated on or around the date hereof. "

26. The expression "Completion Date" is not defined in the assignment deed, so one has to look to the LSD for that. The redacted copy then sets out a number of other defined terms before running up against a substantial redaction, which it turns out hides perfectly standard terms which I shall describe hereafter. It is a complete mystery to me as to why anyone would have thought it worthwhile, let alone proper, to delete those paragraphs, but that is what Promontoria did. I shall return to that point below.

27. Paragraph 4 contains the assignment provision:

> "4. With effect on and from the Assignment Effective Date in respect of each Relevant Loan Asset:

> 4.1 The Assignor hereby irrevocably assigns absolutely to the Assignee: [all relevant contractual and property rights]."

28. Under clause 5 the Assignee agreed to accept the rights assigned and to perform the obligations of the lender under the various assigned transactions.

29. Paragraph 7 refers to a "Notice":

> "Upon the Assignment Effective Date, the relevant Assignor shall deliver a notice in the form set out in Schedule 6 to the Loan Sale Deed in accordance with the terms of that Loan Sale Deed."

30. There are then the executions of the document, and as I have already observed, the signatures of the representatives of the assignor and the assignee were redacted.

31. The other relevant document before the judge below was the notice of assignment, which was dated 2 August 2016. It came from both the Co-operative Bank and from Promontoria and was addressed to Mr Nicoll and his wife. So far as relevant it read:

> "Dear Sirs
>
> 1. On and with effect from 29 July 2016 (the "Relevant Date"), the Assignor assigned to the Assignee all of its rights, title and interest in and to:
>
> [all facility letters, credit documents and charges]
>
> 2. As from the Relevant Date, all payments that would otherwise have been payable to the Assignor are due, payable and owed to Assignee, Capita Mortgages Services Ltd is servicing the loan assets on behalf of the Assignee and will confirm to you how to make loan payments (if relevant)."
>
> 3. [Capita contact details provided.]
>
> 4. This notice is effective upon delivery to the addressee."

32. The instructions from Capita did not accompany that document, but they seem to have been sent out the next day. That document, to which I will refer below, was not (as far as I can tell) before Judge Burton.

33. Before turning to consider the effect of the additional evidence filed by Promontoria, I shall first consider the validity of the judge's decision based on the material that she had. Faced with those documents, and some ancillary information, the judge below considered that she had sufficient evidence to uphold the validity of the assignment against the submissions of counsel for Mr Nicoll that she did not. At paragraph 31 she said:

> "31. I am, however, satisfied on the balance of probabilities, that the Facilities and accompanying security were assigned by

> the Bank to Promontoria entitling Promontoria to serve the Statutory Demand:
>
> a) Mr Wood's first witness statement unequivocally stated that by the Assignment, Promontoria acquired the Bank's rights under the Facilities and accompanying security. His evidence has not been directly challenged;
>
> b) the provisions set out in the unredacted parts of the copy of the Assignment were sufficiently detailed, in isolation, to suggest that the debt due from Mr Nicoll had been assigned to Promontoria from the Assignment Effective Date, and whilst I was unable to determine the Assignment Effective Date (as it appears to have been defined in the Loan Sale Deed) the fact that the bank sent notices of assignment to Mr Nicoll on 2 August 2016, stating that the bank had assigned its rights title and interest to Promontoria on and with effect from 29 July 2016 is sufficient, again on the balance of probabilities, for me to be satisfied, that the Assignment Effective Date had by then passed and that the Facilities and accompanying security are not excluded from the Assignment as Excluded Assets; and
>
> c) Since service of the notice of assignment, Promontoria has been the party corresponding with Mr Nicoll in respect of sums due under the Facilities. Whilst Mr Nicoll raised a spectre of doubt concerning Promontoria's title to the debt claimed in the Statutory Demand by referring to the debt as having been purportedly assigned to Promontoria he was nevertheless sufficiently content with Promontoria's claim under the Facilities to make a payment to Promontoria pursuant to the December Standstill Letter and not to challenge the charges registered in Promontoria's name against the title to the Lodge Care Home."

34. Mr Darbyshire's first attack on this line of reasoning turns on the judge's use of the concept of balance of probabilities. He pointed out, correctly, that the correct test (as acknowledged by the judge herself in paragraph 15 of her judgment) was whether there was a real prospect of success in establishing that the Assignment Effective Date had not been reached. The effect of the judge's decision was that it had "probably" been reached, but that left open the real possibility that it had not. In those circumstances there was a good arguable case (or a real prospect of success in arguing) that it had not, and that meant Mr Nicoll ought to have succeeded in setting aside the statutory demand on the footing that it had not been demonstrated that the assignment had actually taken place. The test that the judge applied was appropriate for a trial, but not for an application to set aside a statutory demand. Because the definition of Assignment Effective Date depended on the LSD, without that latter document it could not be demonstrated that that date had occurred.

35. On analysis, it seems to me that the question that the judge was deciding was one of mixed fact and law, with a heavy emphasis on fact. The ultimate question of law was whether or not the assignment was complete. That is a question of law. That was

approached through a consideration of whether the Assignment Effective Date had been reached. That was essentially a question of fact. One would normally seek to ascertain that fact by looking to see what that date was in the LSD. I would expect to find a definition which amounted to a question of fact (though as it transpired it was not quite as simple as that). That bit of the enquiry was therefore essentially one of fact. It was therefore necessary to consider what had been proved, and to what standard.

36. Mr Bickford Smith realistically accepted that it was not good enough for him to be able to establish that that date has been reached "on the balance of probabilities". He accepted that he had to go farther than that, and he submitted that there was enough evidence to enable him to say that Mr Nicoll did not have an arguable case that it had not. He relied principally on the terms, and the fact, of the notice of the assignment, which he also vested with an additional significance to which I refer briefly below. He also relied on the assignment of the security and the fact that Mr Nicoll had been paying, and Promontoria had been accepting, payments under the arrangements. Of equal significance would be the fact that Co-operative Bank was not receiving, and had not apparently expected to receive, any payments after the date of the notice. All that meant that Mr Nicoll had no realistic prospect of establishing that the Assignment Effective Date had not been reached, or otherwise that the assignment was not complete.

37. I agree with Mr Bickford Smith. The question of whether the Assignment Effective Date had been actually reached was, as I have observed, a question of fact. Again as I have observed, one would normally expect that to be established by producing the LSD and seeing what it was. That did not happen before the first instance judge (because the point was not in play in sufficient time to enable Promontoria to realise that it ought to produce that document). Nonetheless, in my view there was sufficient evidence to enable Promontoria to establish, beyond the balance of probabilities and so as to remove any arguable case to the contrary, that the relevant date had been reached, or that the parties to the assignment had at least treated it as having been reached. The key document is, in my view, the notice. That notice, emanating from the assignee and, crucially, the assignor, clearly specifies that the assignment has taken effect and has been effective. That means that one of two things must be the case. Either the effective date has been reached so as to render the assignment complete, or, if it had not, then the parties nonetheless treated the assignment as being effective. Either way, so far as Mr Nicoll as debtor is concerned, the assignment was treated by the parties, as a matter of evidence, and in fact, as being complete. That strong piece of evidence is backed up by the other features relied on by Mr Bickford Smith, namely the actual transfer of the supporting securities and the fact that since the notice Promontoria had been collecting the monies (or such monies as Mr Nicoll paid) and the Co-operative Bank had not been seeking to do the same. The overwhelming inference of fact is that the parties to the assignment were treating it as being effective, and that the Assignment Effective Date had been reached. In my view that was established beyond the balance of probabilities; it was established to a sufficient degree to make Mr Nicoll's case to the contrary insufficiently arguable to raise some form of triable issue.

38. Mr Bickford Smith had an additional point about the notice which was to the effect that the service of the notice meant that the possible invalidity of the assignment was

actually none of Mr Nicoll's business. He was not actually entitled to see the assignment deed, and certainly not entitled to query its effectiveness if the parties to it were not doing so. In that connection he relied on *Ennis Property Finance Limited v Thompson* [2018] EWHC 1929 (Ch), a decision of Mr Andrew Hochauser QC sitting as a Deputy Judge of the Chancery Division. The issue (or one of the issues) in that case was whether or not the claimant had sufficiently established that an assignment of a debt had taken place. At paragraphs 49ff the judge records the submissions of the defendants to the effect that redactions and the absence of evidence of other matters meant that the claimants (assignees) had not established that the assignment had actually taken effect. The claimants met that case by a submission recorded at paragraph 60:

> "60. The difficulty that Mr Thompson [the first defendant] faces is that, once completion under the Deed of Assignment took place, the assignment crystallised. The only parties who can take any point on whether or not completion took place on 20 April 2015 are BoS [i.e. the assignor] and the Claimant. Mr and Mrs Thompson have an interest in the issue only insofar as they need (a) to know who to pay; and (b) to make sure they are not asked to pay twice. Both BoS and the Claimant have made clear their position over and over again: their consistent and unchanging position is that completion took place on 20 April 2015."

39. The deputy judge accepted that analysis:

> "66. In my judgment, the Claimant's analysis in relation to the chain of assignment set out at paragraph 56 – 60 above is correct. I find that the claimant has established that there was a valid assignment by BoS to the Claimant of the Facilities, the charge over the Property and the Guarantees. If there was any doubt about the matter, which in my view there is not, the BoS letter of 2 November 2017 makes the position clear."

40. The letter of 2 November 2017 is set out in paragraph 62 of the judgment. In that letter the assignor is recorded as acknowledging clearly that it considered that the assignment was effective and it did not dispute its validity.

41. I agree with Mr Bickford Smith that that authority supports a finding that the assignment in the present case should be treated as complete. In that case a slightly different set of documents was treated as providing evidence that all matters relevant to completion of the assignment had been carried out, or, at the very least, it was none of the business of the debtor to challenge an assignment whose validity and effectiveness was not being challenged by either of the actual parties to it. Applying that to the present case, the terms of the notice, which, it will be remembered, emanated from both assignor and assignee, made it clear that the parties to the assignment considered it to be complete. In the face of that, Mr Nicoll is not entitled to challenge the title of Promontoria. This point is both an evidential and legal one, but that does not matter for present purposes.

42. In order to bolster his submissions on that case, Mr Bickford Smith went so far as to say that the debtor under an assigned debt normally has no right to see, let alone challenge, the assignment (at least if he receives notice from the right people), notwithstanding a dictum of Lord Denning to the contrary in *Van Lynn Developments v Pelias Construction Co Ltd* [1969] 1 QB 607 at 613C. I do not consider that I have to embark on the potentially wide-ranging enquiry as to the accuracy of that proposition in order to support my determinations above.

43. All that material means that the evidence before the judge at first instance was sufficient to justify her overall conclusion, albeit not via her conclusion about the "balance of probabilities". That would dispose of the appeal so far as the appeal (contrary to my earlier finding) is still live on the point.

44. So far I have been considering the question on the footing of the material before Judge Burton. It will be remembered that Promontoria had the opportunity, which it took, of providing fresh evidence for the purposes of this appeal. It would have been expected that they would have attempted to fill in the gaps which were pointed out at the hearing before Judge Burton and in particular to make clear how it was that the Completion Date under the LSD (and therefore the Assignment Effective Date under the assignment deed) had been reached. Unfortunately, in some respects they seem to have made the position more difficult to understand.

45. In its additional evidence, Promontoria provided various documents or part documents. It provided certain documents going to the question of due execution of the deed of assignment. It is those documents that mean that the point was no longer live by the time of the appeal before me. It then provided a less redacted version of the deed of assignment. It unredacted clause 2 which dealt with "Inconsistency". It provided:

> "2.1 This deed is subject to the terms of the Loan Sale Deed, save to the extent otherwise expressly set out herein.
>
> 2.2 If there is any inconsistency between the terms of this Deed and the terms of the Loan Sale Deed, the terms of the Loan Sale Deed shall prevail."

46. That clause becomes relevant once there is a challenge to the effectiveness because it reinforces the need to look to the LSD in respect of definitions. Clause 3 was also unredacted – that excluded the effect of the Contracts (Rights of Third Parties) Act 1999. As I have already observed, it is a mystery why those paragraphs were deleted. The witness statement to which the documents were exhibited was that of a Ms Widdowson, a solicitor in the firm of solicitors acting for Promontoria. She said the redactions in the various documents were because the redacted parts were "either irrelevant to the matters at issue or commercially sensitive." There cannot be anything remotely commercially sensitive about clauses 2 and 3, and although they might have been technically irrelevant to the issues at the time, it is baffling that anyone would bother to have them redacted. Mr Darbyshire described Promontoria's tendency to redact as "neurotic". I find it hard to disagree with that word. Clauses 10.2 and 10.3 were also unredacted. They deal with the jurisdiction of the English courts to hear disputes arising in relation to the document. My remarks about redactions apply to them too.

47. The next document that was produced was a very small part of the LSD. It transpires that it was dated 30 June 2016 and was between the Co-operative Bank and Mortgage Agency Services Number One Ltd as Sellers, and Promontoria Holding 186 BV (not the same company as the claimant and ultimate assignee), described as the "Initial Buyer". Very few of the terms of that agreement are apparent. The most material disclosed parts are definitions of "Completion" and "Completion Date", and perhaps the definition of "Buyer".

48. "Buyer" is defined as follows:

> "Buyer means
>
> (a) before the Novation Date, the Initial Buyer; and
>
> (b) on and from the Novation Date, the Novated Buyer."

49. No definitions of the capitalised terms are provided, and Promontoria has not disclosed any provisions of the document relating to novation.

50. "Completion" and "Completion Date" are defined as follows

> "Completion - means the completion of the sale and purchase of the Loan Assets and assumption of the Loan Obligations by the Buyer on the Completion Date in accordance with clause 5 (*Completion*) and the other terms of the Transaction Documents
>
> Completion Date - means 29 July 2016 provided that the Sellers and the Buyer have complied with their obligations under clauses 3, [short redacted word or words] or unless this Deed has been terminated by the Sellers all the Buyer
>
> [further redacted block of text, apparently within the definition of Completion Date] "

51. No subsequent part of the document has been disclosed save for schedules identifying Mr Nicoll's loans and the signature page.

52. The third significant document is the letter from Capita of 3 August 2016, referred to above, which gave directions for further payments to be made to them on behalf of Promontoria. The letter is addressed to Mr Nicoll and is headed:

> "Your loan facilities with Promontoria (Ram 2) Ltd (formerly your loan facilities with The Co-operative Bank plc ("Co-op")) under Borrower Entity Mr Ian George Nicoll (your "facilities")"
>
> And it goes on:
>
> "As detailed to you in a recent letter, Co-op sold amounts owing to it in respect of your Facilities and the facility letter(s), guaranteed(s), security documents and all other rights and obligations relating to the Facilities… to Promontoria (Ram 2)

> Limited. This transfer has now taken place and the purpose of this letter is to tell you how this affects you.
>
> We write to inform you that Capita Mortgages Services Ltd… Has been appointed by Promontoria (Ram 2) Ltd to provide various loan management, administrative and relationship management services in connection with the Facilities.
>
> This appointment was effective from 29th July 2016 (the 'Appointment Date'). From the Appointment Date, Capita will take over the day to day management of the loans, which will include managing the collection of repayments in relation to the Facilities."
>
> Various administrative provisions then follow.

53. As Mr Darbyshire pointed out, these documents, in the form produced, are a little surprising. One would have imagined that, having been faced with a challenge based on the absence of a completion date, and that being one of the two bases on which permission to appeal was given, Promontoria would have sought to put the matter clearly beyond doubt in the further evidence which was provided for in the permission order. However, it cannot be said they have gone that far. The definition of Completion Date has a date, but it is a conditional date (conditional on compliance with obligations) with no clear statement in the supporting witness statement that those conditions were fulfilled by that (or any) date. Furthermore, the definition contains a short, or conceivably two short, redacted word or words in the position shown in the citation above. If the intention was to identify the clause in the agreement which defined completion date it seems to me to be completely inappropriate to redact a word or words in the middle of the clause. Redaction on the grounds of irrelevance is not justified if the clause as a whole does not make sense without it, and it is very difficult to imagine the commercial sensitivities surrounding that redaction. In addition, the sub-paragraph below the first part of the definition, which presumably bears in some way on the definition, has been completely redacted. At the very best that leaves one feeling uncomfortable as to what the provisions as to the completion date actually are.

54. There is also the oddity that the buying counter-party to the LSD is a Dutch company, not the assignee under the assignment. That means that the LSD as produced is technically not the document as described in the deed of assignment, which referred to a deed between the assignor and Promontoria, not the Dutch company. It is also pretty marginal as to whether the LSD, being dated 30th June, is "on or around" the same date as the deed of assignment.

55. In her witness statement Ms Widdowson observed that Promotoria was not a party to the LSD, and explained that that was because it was intended that a wholly-owned subsidiary would be incorporated to acquire the bank's rights and the non-performing loans "hence the definition of Novated Buyer" (which definition was not actually supplied).

56. This explanation is not really what one would expect if Promotoria was trying to deal conscientiously with apparent discrepancies in the documentation. One would have

expected her to comment on the party discrepancies between the documents and explain them, even if that explanation is that the differences were overlooked. One might even have expected some positive averment to the effect that the conditions referred to in the definition of the Completion Date had been fulfilled if that were the case, or that they were waived, but nothing like that appears.

57. One is therefore left with the documentary discrepancies and such limited information as one can glean from Ms Widdowson's witness statement in trying to make sense of this matter. I remind myself that the relevant question is whether there is an arguable case that the assignment has not yet taken place by reason of lack of clarity in the operation of the "Completion Date" reference in the assignment deed. If there were any relevant factual certainties which remain as a result of Promontoria's excessive caginess about redactions then it would certainly not be appropriate to lean in Promontoria's favour in relation to them if that is what would be necessary for Promontoria to succeed.

58. As Mr Darbyshire pointed out, there are two issues which might be said to stand in the way of a determination that the completion date of the assignment had taken place. The first is that the completion date is defined by reference to a document which is not (or not obviously) the LSD. The second is that even if one looks at the LSD the completion date is not defined in absolute terms; it requires the fulfilment of various conditions. The redacted words may or may not be important.

59. The lack of a full explanation of those matters is surprising in this litigation, for the reasons given above. However, I do not consider that either of them raises a sufficient question of arguability to get Mr Nicoll home on this appeal. Were it not for the effect of the notice of assignment, and matters ancillary to that, I would have considered that Mr Nicoll would have succeeded on the point. However, those matters mean that he does not. The question is not whether Promontoria have provided a chain of proof through the wording of the documents. If that were the question then Promontoria would fail. The question is whether Promontoria has demonstrated that there is a completed assignment. I consider that it has. The crucial matter is the notice of assignment, against the background of the assignment document. The assignment documentation demonstrates a clear intention to assign even if the documents do not match up as they ought to. The notice of assignment provides clear evidence that the assignment has taken place. There is no positive evidence which in terms demonstrates fulfilment of the conditions in the LSD, and little direct evidence of how the novation arrangements worked. However, the notice of assignment contains a clear statement by both parties (and more significantly, for these purposes, by the assigning bank) that there has been an assignment, and a clear direction that Mr Nicoll should pay Promontoria. The assignee's agent (Capita) then provides further corroboration of that, and it is undisputed that the supporting security has been assigned by relevant documents at HM Land Registry. That seems to me to provide sufficiently cogent evidence for these purposes that there has been an assignment. The two participants are satisfied that the assignment is complete, and Mr Nicoll has no legitimate interest in challenging that. He has a clear direction as to who should be paid, and the idea that he would get a discharge by paying the Co-operative Bank in these circumstances is a highly unlikely one. He himself had previously accepted who should be paid when he entered into agreements with Promontoria, though those agreements are not evidence of the satisfaction of

completion events. They do, however, add to the unlikelihood of its being established at a trial that the assignment had not in fact taken place.

60. This conclusion is essentially an evidential one. I assume, for these purposes, that *Ennis* does not establish conclusively that Mr Nicoll has no legitimate interest in the terms of the assignment. Mr Darbyshire relied on *W F Harrison v Burke* [1956] 1 WLR 419 in support of his submission that the conditions for assignment were not fulfilled. He submitted that that case held that a notice of assignment which got the date of the assignment wrong was not a valid notice, with the result that the assignment was not good as against the debtor. He pointed out that the notice of the assignment gave the assignment date as being 29th July 2016. If the effective date was in fact a different date (which is possible since it could not be established from the evidential material) then the notice was defective in line with *Harrison*. That was an issue which needed to be tried.

61. I do not consider that to be correct. *Harrison* was a case in which the notice of the assignment (given by the assignee only) specified the date of the assignment document and got it wrong. The date of the notice also pre-dated the assignment by one day. Lord Denning held that the mis-statement of the date of the assignment meant that the notice was bad with the effect that the assignee had not proved good title to the debt. Morris LJ held that the notice was bad because it pre-dated the actual assignment. Parker LJ agreed with both judgments. The present case is different. The notice of assignment does not specify the date of the deed of assignment. It specifies the date on which the assignment took place, which is different. While it is true that Promontoria has not produced evidence which in terms shows what the effective date of the assignment was, the notice clearly shows that both parties agree and accept that the assignment has taken place, and is sufficient evidence for present purposes. In the light of that it does not seem to me to be arguable that a trial might find differently. It is mere speculation.

62. Mr Darbyshire also sought to use *Harrison* in conjunction with clause 7 of the assignment deed (see above) which provides for the service of a notice by the assignor. He drew attention to the fact that the notice of assignment was dated 2nd August but claimed the assignment had effect from 29th July. He sought to say that the notice was therefore not in compliance with clause 7 of the deed of assignment, which cast further doubt on the Assignment Effective Date. I am not sure I fully follow that point. If it depends on the proposition that the clause requires the notice to be given on the actual Assignment Effective date, I disagree. In my view, on its true construction it requires the notice to be given on or after the date. Yet again the redaction policy of Promontoria means that it is not possible fully to understand the clause because the relevant parts of the LSD have not been disclosed, but what is apparent is clear enough. It certainly does not assist Mr Darbyshire. In fact, if anything a combination of the clause and the notice assists Promontoria, because it further reinforces the notion that the parties to the assignment accepted that the assignment was effective because the overwhelming likelihood is that the parties accepted that the notice was served (so far as the assignor is concerned) pursuant to this clause.

63. I therefore find that, despite the unnecessary difficulties caused by Promontoria's redaction policy, there is no arguable case that the Assignment Effective Date has not occurred and that the assignment has been demonstrated sufficiently clearly to be

effective. That makes it unnecessary for me to consider Mr Bickford-Smith's submissions to the effect that the notice itself is a sufficient equitable assignment , based on *William Brandt's Sons & Co v Dunlop Rubber Company Ltd* [1905] AC 454.

Conclusion

64. I therefore determine that Mr Nicoll's appeal fails and falls to be dismissed, and that Promontoria's cross-appeal succeeds.

65. I would, however, wish to return to one of the recurring themes of this judgment, which is Promontoria's redaction policy. Promontoria have redacted on the basis that material is irrelevant or commercially sensitive (my emphasis), according to Ms Widdowson's evidence. Commercial sensitivity by itself is not a reason for a redaction if the material is relevant. Irrelevant material might be the subject of proper redaction whether commercially sensitive or not. However, over-enthusiastic and ill-thought out redaction of the kind which seems to me to have occurred in this case is not to be encouraged or supported. I have pointed out above some clauses which, although irrelevant to the debate, are clauses which in my view no reasonable litigant who did not want to encourage suspicion would want to redact. Redacting words in the middle of a relevant clause is highly questionable, at least in the absence of an explanation as to the nature of and reasons for the redaction so that their relevance or irrelevance can be judged by the other side. It seems to me that Promontoria's judgment on redaction is questionable. When it produced the redacted form of the deed of assignment it understandably redacted details of a lot of non-Nicoll loans which were the subject of the deed from the Schedule. Mr Nicoll's loans were identified in the Schedule, but there was still a redaction of an apparently single word in each description of the facility. When I questioned what that redaction was it turned out that what was redacted was a statement of the facility limits, and the explanation that was given was that they were irrelevant to the dispute and appeared in other documents. No confidentiality was claimed as against Mr Nicoll. In my view that redaction was completely misplaced. It is true that it was technically irrelevant, but then so was a lot of the other information appearing on those schedules. This sort of misplaced detailed redaction is not to be encouraged. The redactions in this case might have stood in the way of Promontoria's succeeding. If Promontoria wishes to risk success by implementing an overly enthusiastic and inappropriate redaction policy, then to that extent that is a matter for Promontoria. It would be the loser if it turns out badly for it. However, it is also the case that unnecessary and inappropriate redactions are capable of prolonging disputes quite unnecessarily, and the court has its own interests in making sure that that does not happen. It is apparent from the list of authorities submitted to me that Promontoria is engaged in quite a lot of litigation about the portfolios of debts assigned by the Co-operative Bank and (apparently) other banks (indeed, the existence of a lot of litigation was a reason advanced by Ms Widdowson for the redactions – Promontoria dislikes the promulgation of information about the documentation and it is said that this happens to a significant extent), and it is to be hoped that its redaction policies do not give rise to further unnecessary and time-wasting debates in other cases.