SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2021] SC GLW 59

CA60/19

JUDGMENT OF SHERIFF S REID

in the cause

GIOVANNI GUIDI

Pursuer

against

PROMONTORIA (CHESTNUT) LTD

Defender

Glasgow, 1 October 2021

The sheriff, having resumed consideration of the cause:

1. Repels the defender's preliminary pleas (pleas-in-law 1, 2 & 3); Sustains the pursuer's preliminary pleas (pleas-in-law 3 & 4) in respect of the defender's averments anent its alleged title to the Standard Security and its alleged entitlement to serve the Charge; *quoad ultra* Repels the pursuer's preliminary pleas;

2. *quoad* crave 1, Grants decree for production as craved, whereby, Ordains the defender to lodge in process, within 21 days of the date hereof, the pretended charge for payment of the sum of £450,258.97 served upon the pursuer at the instance of the defender on 15th November 2016 ("the Charge"); Reserves to pronounce further thereon;

3. *quoad* crave 3, Grants decree as craved, whereby, Finds and Declares that the defender has no right or title to the standard security granted by the pursuer in favour of the Clydesdale Bank dated 11th July 2011 and registered in the Land Register of Scotland on 15th

July 2011 over the pursuer's registered interest as proprietor of 7 Sweethope Gardens, Bothwell, Glasgow G71 8BT under title number LAN100490, and also registered in the Books of Council and Session on 18th February 2016 ("the Standard Security"), and has no title to sue upon, enforce or otherwise take action against the pursuer on the footing thereof;

4. *quoad ultra* Allows parties a proof of their respective averments on dates to be hereafter assigned;

5. *ex proprio motu* Finds that the defender is in default of the obligation incumbent upon it in terms of rule 21.1(1) of the Ordinary Cause Rules 1993 ("OCR 1993") in respect that, without leave of the court, it has failed to lodge in process, complete and unredacted, the Assignation founded upon by it (or a true copy thereof certified in terms of section 6 of the Civil Evidence (Scotland) Act 1988 ("the 1988 Act"));

6. *ex proprio motu* Ordains the defender, within 21 days of today's date, either (i) to lodge in process, complete and unredacted, the Assignation founded upon and adopted by it in its pleadings (or a true copy thereof certified in terms of section 6 of the 1988 Act) or (ii) to seek and obtain leave of the court to lodge a redacted certified copy thereof in discharge of the obligation incumbent upon it in terms of rule 21.1(1), OCR 1993; UNDER CERTIFICATION that if the defender fails to do so, decree by default may be granted against it as craved; Reserves to pronounce further thereon;

7. *ex proprio motu* Ordains the defender, within 21 days of today's date, either (i) to lodge in process, complete and unredacted, the Sale & Purchase Agreement referred to by it in its pleadings (or a true copy thereof certified in terms of section 6 of the 1988 Act) or (ii) to seek and obtain leave of the court to lodge a redacted certified copy thereof in discharge of the obligation incumbent upon it in terms of rule 21.1(1), OCR 1993; UNDER

CERTIFICATION that if the defender fails to do so, decree by default may be granted against it as craved; Reserves to pronounce further thereon;

8. Finds the defender liable to the pursuer in the expenses of the diet of debate on 18 & 19 March 2021, together with preparation therefor, all as taxed; Allows an account thereof to be given in; and Remits the same, when lodged, to the auditor of court to tax and to report.

SHERIFF

NOTE:

Summary

[1] This action raises two discrete conundrums that have generated much litigation and academic discussion in recent years.

[2] The first issue concerns the extent to which an assignation of an all-sums due standard security must follow the form and wording of the statutory forms in schedule 4 to the Conveyancing & Feudal Reform (Scotland) Act 1970 ("the 1970 Act") (including whether such an assignation must state a precise sum due by the debtor to the assignor at the date of the assignation); and, the consequence, if any, of departing from that statutory prescribed wording.

[3] The second issue is whether a party founding upon a document in its pleadings, or incorporating its terms therein, must lodge the document (or at least a true copy of the document) in process, whole and unredacted; and, if so, the consequence, if any, of its failure to do so.

[4] These issues arise in the context of a bulk assignation by Clydesdale Bank plc ("the Bank") to the defender, Promontoria (Chestnut) Ltd ("Promontoria"), of multiple book debts and securities, and the subsequent enforcement of those securities by Promontoria against the debtor ("Mr Guidi").

[5] In summary, Mr Guidi challenges the right and title of Promontoria to a standard security and a personal guarantee granted by Mr Guidi to the Bank. He avers that Promontoria had no entitlement to enforce the instruments against him, specifically by serving a charge for payment upon Mr Guidi, leading ultimately to his sequestration. He seeks production and reduction of the charge, and declarator that Promontoria has no title to the standard security and the personal guarantee.

[6] In defence, Promontoria founds its title expressly upon a "redacted" certified copy assignation lodged in process, the terms of which are also adopted as incorporated therein *brevitatis causa*. Promontoria avers that the redactions are justified due to "commercial sensitivity", and exclude only "irrelevant" material.

[7] In response, Mr Guidi submits that this redacted document, insofar as it purports to assign the standard security, is ineffective in law to do so for, broadly, three reasons. Firstly, he submits that the defender has failed to aver the purification of various suspensive conditions within this supposed assignation. Secondly, he claims that the redacted document is disconform to the statutory wording prescribed by the 1970 Act due to its failure to state the precise sum due owed by Mr Guidi (as debtor) to the Bank (as assignor) at the date of the supposed assignation. Thirdly, more generally, he argues that Promontoria cannot aver a relevant title to the standard security and personal guarantee without lodging in process a complete and unredacted copy of the supposed assignation.

[8] The matter called before me at a debate. Having considered matters at length, I have concluded that Promontoria has failed to aver a relevant title to the standard security and, by extension, a relevant entitlement to serve the charge upon Mr Guidi. (The charge proceeded upon a warrant for summary diligence deriving from a clause of consent to registration for execution in the standard security.) Accordingly, I have granted decree for production of the charge for payment (crave 1), as a precursor to reduction (per rule 54.4, OCR 1993), and for declarator that Promontoria has no title to enforce the standard security (crave 3).

[9] By way of brief explanation, firstly, the mechanism by which a heritable security in the form of a standard security can be assigned is prescribed by statute, in terms of the Conveyancing & Feudal Reform (Scotland) Act 1970 ("the 1970 Act"), sections 14 & 53, and Schedule 4. The document upon which the defender expressly founds is, indubitably, an assignation of sorts, but it is not an assignation that conforms to the prescribed statutory form for the assignation of a standard security. It is disconform to the prescribed mechanism because it is, in form, a multilateral contract or deed subject to reciprocal obligations and conditions, that does not bear to effect a *de praesanti* transfer of real rights in security over heritable property, and is not capable of being registered in the Land Register to achieve that end; whereas, on a proper interpretation of the 1970 Act, the prescribed form of assignation is intended to be a unilateral deed, that effects a *de praesenti* transfer of the heritable security right, and is apt for registration in the Land Register to achieve that end. In my judgment, the disconformity is both manifest and material. The consequence of this *ex facie,* material disconformity is that the assignation founded upon by Promontoria, whatever else it may achieve, is not effective to divest the Bank (as assignor) of its right and title to the standard security or to vest that right and title in the defender (as assignee). It

may well create rights *in personam* between the Bank and Promontoria *inter se*, whereby the defender is entitled to demand (and the Bank is obliged to grant) an effective assignation of the heritable security to Promontoria; but, until that occurs, as between Promontoria and third parties (including the debtor), the assignation founded upon in the Defences is not effective to vest in Promontoria the Bank's right and title to the standard security or, by extension, to entitle Promontoria to execute diligence on the back of that heritable security.

[10] Secondly, though it does not alter my first conclusion, I have rejected Mr Guidi's separate submission that an assignation of an all-sums due standard security must, as a matter of law, specify a precise sum as being due by the assignor to the debtor at the date of the assignation. In my judgment, the failure of the Promontoria's redacted assignation to specify such a sum (that is, the omission of the words "to the extent of £… being the amount now due thereunder", which appear in Forms A & B of schedule 4 to the 1970 Act) does not itself render the supposed assignation disconform to the prescribed statutory wording. That is because, on a proper interpretation of the 1970 Act, having regard to the legislative purpose of the Forms, those words are not a material or essential element of such an assignation. I explain my reasoning more fully below.

[11] Thirdly, in contrast with the position in relation to the charge and standard security (anent craves 1 & 3, respectively), in my judgment the defender has averred a relevant right and title to the personal guarantee (anent crave 2). The form of an assignation of a personal guarantee is not prescribed by the 1970 Act. The terms of the redacted assignation founded upon by Promontoria are sufficient, as a matter of relevancy, to assign to Promontoria the Bank's moveable rights under the personal guarantee following intimation as averred.

[12] However, fourthly, the failure of Promontoria, without leave of the court, to lodge the complete and unredacted assignation (or an authenticated copy thereof) on which it

founds, means that, although a relevant defence is averred *quoad* the assignation of the personal guarantee (anent crave 2), the pursuer remains entitled to put Promontoria to proof of its disputed title thereto. Accordingly, Promontoria is not entitled to decree of dismissal at debate.

[13] Fifthly, in my judgment Promontoria is in default of its obligation under rule 21.1(1) of the ordinary cause rules 1993 ("OCR 1993") by failing, without leave of the court, to lodge in process the complete and unredacted assignation (or an authenticated copy thereof) on which it founds. I have made a finding to that effect in exercise of my powers under rule 40 of the 1993 Rules. The unsanctioned lodging of a redacted document has been the *de quo* of this action for several years now. Promontoria has no *right* unilaterally to lodge an incomplete (redacted) version of a document upon which it founds in averment. On the contrary, it is under an *obligation* to lodge such a document (or a certified copy thereof), complete and unredacted, *unless* it seeks and obtains leave of the court to lodge an incomplete version in lieu thereof. No such leave has ever been sought or granted in this case. In order to secure the expeditious progress of the case, I have afforded Promontoria the opportunity to purge its default within a defined timescale, under sanction that *inter alia* decree by default may be granted against it if it fails to do so.

[14] Lastly, I observe that if Promontoria were to seek judicial sanction to lodge a redacted document in satisfaction of its obligation under rule 21.1(1) of the 1993 Rules, it seems to me that, in any event, as a matter of basic procedural fairness, a complete and unredacted version of the document founded upon would require to be exhibited (at the very least) to the pursuer's counsel (perhaps with the protection of a confidentiality undertaking in terms to be discussed) and to the court, in order that any redactions could properly be understood, verified, challenged, and adjudicated upon. By this practical

mechanism, devised by analogy with well-established procedures followed in the roughly comparable context of evidence recovery, Promontoria's interest in protecting the supposed "commercial sensitivity" of the document founded upon by it is satisfied, while also satisfying the interests of open and equal justice (*Iomega Corp v Myrica (UK) Ltd (No.1)* 1999 SLT 793; *Ted Jacob Engineering Group Incorporated v Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579).

Factual summary

[15] In summary, for several decades Clydesdale Bank plc ("the Bank") loaned money under successive facility agreements to a corporate customer, Fieldoak Ltd ("Fieldoak"), and two related companies, Lightfoot Ltd and Ryseip Ltd. The debt was secured by numerous commercial securities, fixed and floating, and by cross-guarantees between the companies.

[16] In due course, Mr Guidi, a Fieldoak director and shareholder, granted a personal guarantee to the Bank in respect of Fieldoak's debt to the Bank (whether due or to become due), capped at a maximum sum of £450,000. He also granted a standard security to the Bank over his family home at 7 Sweethope Gardens, Bothwell ("the Standard Security") in respect of his personal indebtedness to the Bank (whether due or to become due).

[17] In 2015, the Bank then purportedly assigned to Promontoria its right and title to the loan agreements and commercial securities, as well as to the personal guarantee and the Standard Security. So began a chain of events leading to this litigation.

[18] Promontoria called up the loans to Fieldoak. The company did not pay. Promontoria appointed a receiver to Fieldoak.

[19] Promontoria then demanded payment from Mr Guidi of the capped sum under the personal guarantee. It served a charge for payment upon him (by virtue of a warrant for

summary diligence obtained on the back of the Standard Security) ("the Charge"). He did not pay. He was sequestrated at the instance of Promontoria. Mr Guidi subsequently petitioned for recall of his sequestration. The recall proceedings (in a different sheriff court) are sisted pending the outcome of this action.

[20] In this action, Mr Guidi seeks four remedies: (i) production and reduction of the Charge (crave 1), (ii) declarator that Promontoria has no right or title to the personal guarantee (crave 2), (iii) declarator that Promontoria has no right or title to the Standard Security, and no title to sue upon, enforce or otherwise take action against the pursuer on the footing thereof (crave 3); and (iv) declarator that the title sheet for the pursuer's registered interest in his home is "manifestly inaccurate" (Land Registration etc., (Scotland) Act 2012, sections 65 & 80) insofar as it purports to show that the Standard Security over it was validly assigned to Promontoria (crave 4).

[21] Mr Guidi claims that Promontoria has no right or title to the Fieldoak loan agreement (article 13), the personal guarantee, or the Standard Security (articles 17 & 25). He calls upon the defender to prove its title to these instruments. He claims that a "heavily redacted" document lodged and founded upon by Promontoria as the purported assignation is not sufficient in its terms to constitute a relevant assignation of title to the debt, the personal guarantee or the Standard Security. With specific reference to the Standard Security, he avers that the assignation founded upon by Promontoria is invalid because it is disconform to the statutory wording prescribed by the 1970 Act, sections 14 & 53, schedule 4, Form A (read with note 2 therein), with the result that the defender was not entitled to execute summary diligence thereon by serving the Charge upon him (article 29).

The pleadings

[22] The pleadings are convoluted. In fairness to those now involved, this may be due to the difficult procedural history of the action. It started in 2018 in Hamilton Sheriff Court, initially against two defenders, Clydesdale Bank plc ("the Bank") and Promontoria; in 2019 it was transferred to Glasgow Sheriff Court; it proceeded for a period as an ordinary action; it was then remitted to the commercial roll; its progress was diverted by a series of hefty procedural skirmishes, including an opposed motion for caution; for much of the time, the pursuer had no legal representation; in early 2020, on the morning of a debate, a significant amendment was initiated, substantially re-writing the grounds of action; later still, the action was abandoned so far as directed against the Bank, and it now proceeds only against Promontoria.

[23] In his pleadings, Mr Guidi begins by narrating a long history of successive loan agreements with, and securities granted to, the Bank, involving Fieldoak, Lightfoot and Ryesip. In late 2015, Promontoria entered the scene. The related averments appear in articles 13, 17, and 25 to 29 of condescendence, and the related Answers.

[24] In article 13, Mr Guidi avers that he was notified of a "supposed assignation" to Promontoria of the Fieldoak loan agreement and securities, but avers that its terms "cannot be known as substantial parts" have been "redacted or obscured". He places a call upon the defender:

> "… to produce an unredacted copy of the supposed assignation and all other documents necessary for it to be understood and properly construed…"

In response, in Answer 13, Promontoria avers:

> "A certified true copy of the Assignation is produced, adopted and incorporated herein *brevitatis causa*. Due to commercial sensitivity, the schedule to the Assignation (which contains information relating to a large number of borrower connections and

> related securities) has been redacted. It has been redacted so that it includes only the information expressed to relate to the borrower connections and related securities identified therein, referencing the names "Fieldoak Limited", "Lightfoot Limited" and "Giovanni Guidi". The schedule to the Assignation has been redacted to exclude all other information expressed to relate to other borrower connections and securities. It is further averred that the same assignation has been relied upon in other litigation in the courts of Scotland. In none of those litigations has it been found that the assignation was anything other than effective…."

I pause to observe that the only "certified" copy assignation that is lodged in process by the defender, and that bears to be so redacted, and indeed that has been relied upon "in other litigation" in the Scottish courts, is a document comprising item 1 in the first inventory of productions for Promontoria (marked as item 6/2(a)-1 of process). This appears to be the document that is referred to by both parties throughout their pleadings as "the Assignation".

[25] In article 17, the pursuer avers that the defender has "no title" to the personal guarantee or Standard Security. In response, in Answer 17, Promontoria avers that Bank's rights to the personal guarantee were "transferred" to it "by way of the assignation as condescended upon above". (Again, I observe that the only assignation "condescended upon above" is the redacted certified copy assignation referred to by the defender in Answer 13.)

[26] In article 25, the pursuer avers that Promontoria has "failed to produce documents necessary to establish" its title to the personal guarantee and Standard Security; that, insofar as Promontoria founds upon the Assignation (cross-referring to article 13), the document as produced by Promontoria is "heavily redacted" with "essential parts" obscured and indecipherable; that full disclosure of the Assignation ("in unredacted form") is said to be necessary to determine whether Promontoria has any such title; and that the redacted documents produced by the defender fail to establish its entitlement to payment under the

personal guarantee or the Standard Security. In reply, in Answer 25, Promontoria cross-refers to its preceding averments in Answer 13; it reiterates that it has lodged in process a copy of "the Assignation" redacting "only the information of other borrowers…"; that the redacted information is "irrelevant" to the proceedings; and that Mr Guidi has been "provided with all of the documentation necessary to satisfy himself of the transfer by assignation to [Promontoria]".

[27] In article 26, the pursuer avers that the Assignation "incorporates another document" which is said to be "necessary for [the] proper construction" of the Assignation, namely a Sale and Purchase Agreement ("the SPA"). The SPA is said to be referred to in clauses 1.1 to 1.3 of the Assignation. The pursuer avers that the defender has failed to produce an unredacted copy of the SPA. In response, in Answer 26, Promontoria avers that the pursuer has been provided with a "redacted version" of the SPA; that the redacted version is "sufficient" to permit the pursuer to construe the Assignation; and that Promontoria is under no obligation to provide the pursuer with "irrelevant commercially sensitive information".

[28] Article 27 introduces a slightly different argument. Mr Guidi avers that, in terms of clause 2.1 of the Assignation, each specific "loan asset" was only to be transferred to Promontoria with effect from the "Effective Time"; the "Effective Time" is defined as meaning the "Settlement Date" immediately following receipt of the "Purchase Price" paid for the specific loan asset; and the "Settlement Date" is defined as 4 September 2015. The pursuer claims that Promontoria has failed to aver or disclose the amount of the Purchase Price, or when it was paid, with the result (so the argument runs) that Promontoria has failed to establish a relevant title under the Assignation. In its averments-in-answer,

Promontoria admits that it has neither specified nor disclosed the amount of the Purchase Price, or when it was paid, under explanation that there is said to be no obligation to do so.

[29] In article 28, Mr Guidi avers that, since the defender can establish no entitlement to payment under the personal guarantee or Standard Security, it therefore had no entitlement to serve the Charge. In reply, again, Promontoria relies upon the Assignation and cross-refers to its earlier averments in Answer 25.

[30] In article 29, a discrete challenge emerges. Mr Guidi avers that the Assignation, insofar as it purported to assign the Standard Security, was incapable of vesting title thereto in Promontoria because it is disconform to the form of assignation prescribed by the 1970 Act, sections 14 & 53, and schedule 4 thereto (specifically, Form A read with note 2 therein). The disconformity is said to comprise the failure of the Assignation to specify "any extent" to which the Standard Security was purportedly assigned, specifically by failing to specify the amount due by Mr Guidi to the Bank at the date of the purported assignation. The disconformity is said to render the Assignation invalid with the consequence that Promontoria was not entitled to execute summary diligence against Mr Guidi, in particular by serving the Charge upon him. In Answer 29, the defender admits that the Assignation did not specify the amount due and secured by the Standard Security at the date of the Assignation, but avers that the omission "does not represent a serious breach of the legislation"; that it caused no prejudice to Mr Guidi (or any other party); that the "failure to follow a statutory procedure does not automatically result in invalidity"; and that this ground of challenge to the validity of the Assignation is "wholly technical in nature" and "irrelevant".

[31] In Article 30, the pursuer avers that the title sheet for his registered interest in the property at 7 Sweethope Gardens, Bothwell is "manifestly inaccurate", in terms of sections

65 & 80 of the Land Registration etc. (Scotland) Act 2012, insofar as it shows or tends to show that the Standard Security was assigned to Promontoria.

[32] Lastly, the pursuer's all-encompassing first plea-in-law reads as follows:

> "The [defender] having had no entitlement to sue the pursuer for payment under the Personal Guarantee or the Standard Security *et separatim* it being unable to establish any such entitlement *et separatim* it having no title [to] the Standard Security, decree for production and reduction *et separatim* declarator thereof should be granted as craved".

[33] For completeness, I record that the pursuer advances multiple alternative, cascading arguments to challenge Promontoria's title. I need not rehearse them in any detail. They were not the subject of discussion at debate. They can be summarised as follows: (i) that, on a proper construction, the purported assignation is, in law, properly characterised as a novation, in respect that it purported to "transfer obligations" from the Bank to Promontoria (article 19) (and that certain "conduct and representations" (article 20) by and on behalf of the Bank and Promontoria were "consistent with the purported novation" of the Fieldoak facility agreement, rather than its mere assignation); such a novation required the consent of Fieldoak as the borrower, both at common law and by virtue of express provision in the Fieldoak facility agreement; that no such consent was ever obtained; that, absent such consent, the purported novation was ineffective; in any event, that a novation was only competent to a restricted category of bank or financial institution, to which Promontoria does not belong; all with the result that the purported calling-up of the Fieldoak facility agreement, and subsequent calling-up of the personal guarantee and enforcement of the Standard Security were ineffective (articles 19 & 21); (ii) that the purported transfer (by way of novation) of the Fieldoak facility agreement was "illegal" and "unenforceable" in terms of the Financial Services & Markets Act 2000, because the activity thereby carried on by the Promontoria was a "regulated activity" for which it had no permission from the Prudential

Regulatory Authority (articles 21 & 22); (iii) that, if the Fieldoak facility agreement were indeed novated, Fieldoak's obligations thereunder would, in law, have thereby been extinguished, and the pursuer's accessory cautionary obligation would "simultaneously" have been extinguished (article 23); and (iv) that, if the Fieldoak facility agreement were transferred by novation to Promontoria, such a transfer would have resulted in the conduct of unlawful activity by the defender, in breach of the Payment Services Regulations 2009, with the result that the demand for repayment from Fieldoak would itself have been "unlawful and unenforceable" (article 24). In its written submissions, Promontoria states that these multiple alternative lines of attack are no longer insisted upon by the pursuer, and I was invited to exclude them from probation. However, no express concession to that effect was made for Mr Guidi at the debate. Therefore, for the time being, I have made no order in respect of those particular averments, pending clarification of the pursuer's position in due course.

The scope of the debate

[34] The action called before me at a debate on the parties' general preliminary pleas to relevancy and specification (pleas-in-law 3 & 4 for the pursuer; pleas-in-law 2 & 3 for the defender). (The defender's fifth plea-in-law, though framed as a specific relevancy plea, was not referred to in the defender's note of arguments (number 25 of process) or oral submissions, and did not appear to be insisted upon.) The defender sought dismissal of the action. The pursuer sought decree as craved, which failing, the allowance of a proof.

[35] Both parties had lodged substantial written submissions, together with a joint list of authorities containing 57 items. The supplementary oral submissions were equally extensive. The debate lasted two days.

[36] Though other issues were addressed in submission, the parties were agreed that the relevancy issues fell into two broad categories: (i) the import of the defender's failure to produce a complete (unredacted) copy of the assignation founded upon, including the Sale & Purchase Agreement referred to therein; and (ii) whether the assignation of the Standard Security was in conformity with the form specified by sections 14(1) & 53 of, and Form A (read with note 2(1) thereto) in schedule 4 to, the 1970 Act; and, if not, the consequence thereof, if any.

The defender's submissions

[37] Senior counsel for the defender adopted the written note of arguments (no. 25 of process).

[38] In supplementary oral submission, she noted that the pursuer did not dispute that he had executed the personal guarantee and the Standard Security (items 5/1 & 5/2 of process); he did not dispute that he had the benefit of independent legal advice in doing so (article 9); he did not dispute that the defender had demanded payment from Fieldoak (as principal debtor) and from the pursuer (as guarantor); he did not dispute that the sums so demanded were due; he did not dispute that, following service of the Charge upon him, he had unsuccessfully sought to suspend the Charge and to interdict his sequestration. In light of this, counsel submitted that the purpose of the present action was simply to "get behind the award of sequestration" by making "a technical submission" that was wholly without merit. The defender was said to be the assignee of the Bank's whole right, title and interest under the Fieldoak facility agreement, the personal guarantee and the Standard Security by virtue of an assignation "dated 4 September 2015". The pursuer's argument, it was said, was

merely that the defender had not *proved* that the guarantee and security were assigned to the defender.

[39] First, it was submitted that crave 1 was incompetent. The charge for payment having been served on 15 November 2016, and the days of charge having long since expired, it was now too late (and incompetent) to seek the remedy of reduction. Reference was made to *Aitken* v *Aitken* [2005] CSOH 105, paras. 5 & 6; *Wright* v *Tennent Caledonian Breweries* 1991 SLT 823; *Promontoria (Henrico) Ltd* v *Peart* [2018] CSIH 35.

[40] Second, it was submitted that the pursuer's averments challenging the defender's title to the personal guarantee and Standard Security were irrelevant. The defender's title to the Fieldoak facility agreement, personal guarantee and Standard Security derived from the Assignation; a certified copy of the Assignation had been produced; the schedule to that document had been redacted "due to commercial sensitivity"; a relevant "extract" of the Sale & Purchase Agreement dated 27 July 2014 ("SPA") (referred to in the Assignation) had also been produced; and, by a conventional process of construction, the court could readily conclude that the Bank's right, title and interest in and to those three instruments had been assigned to Promontoria. Detailed reference was made to specific clauses in the body and schedule of the Assignation. The SPA was said to be relevant only to the limited extent that words and expressions were not expressly defined in the Assignation itself, but that all the material words and expressions required to construe the Assignation were indeed defined within the Assignation, including "Seller", "Clydesdale", "Buyer", "Relevant Document" and "Relevant Pool B Loan Asset".

[41] Third, the pursuer's averments concerning the failure to lodge an unredacted copy of the Assignation and SPA were said to be irrelevant. Counsel observed that the pursuer was not asserting that any redacted clauses had any material effect on the Assignation or its

meaning. All that was asserted by the pursuer was that there *might* be something more that *might* be relevant. The pursuer was inviting the court to indulge in supposition. This argument, it was said, had been advanced and failed on numerous occasions. All salient parts of the Assignation and SPA had already been produced. The defender was not obliged to lodge the whole of a document founded upon by it (or every other document that might be referred to in a document founded upon); instead, it was only obliged to lodge such documents (or parts of a document) as were necessary to prove its case (*Promontoria (Henrico)* v *Friel* 2020 SLT 230 (IH); 2019 SLT 153 (OH)). The pursuer had all the information he needed in order to construe the Assignation. The pursuer was at liberty to seek to recover unredacted copies by commission and diligence. That remedy had been pursued at one stage, but was abandoned. Besides, the pursuer's only real interest in the Assignation (to which he is a stranger) was in knowing the identity of his creditor. There was no doubt about that. The original creditor (the Bank), when it had been a party to this litigation, had expressly averred that it had assigned all three instruments to Promontoria and retained no interest in any of them.

[42] Fourth, the defender submitted that the pursuer's averments anent the invalidity of the assignation of the Standard Security (by reason of its disconformity with prescribed statutory wording) were irrelevant. This argument had succeeded only once (in *OneSavings Bank plc* v *Burns* 2017 SLT (Sh Ct) 129), but had been rejected in multiple subsequent decisions (*Shear* v *Clipper Holdings II SARL*, Outer House (Lord Bannatyne), 26 May 2017; *Promontoria (Henrico) Ltd* v *The Firm of Portico Holdings (Scotland) & Another* [2018] SC GRE 5; *Clipper Holdings II SARL* v *SF & SFX*, Edinburgh Sheriff Court (Sheriff W. Holligan), 18 January 2018). I was invited to treat *OneSavings Bank* as "entirely outlying" and to dismiss the pursuer's argument as no more than "a technicality". The wording in Form A (read with

note 2 thereto) was said to be indicative or permissive in nature, not mandatory or prescriptive. In any event, the document need only conform with the statutory wording "as closely as may be" (s. 53, 1970 Act). That phrase meant "as closely as may be appropriate in the circumstances of the case" (*Sanderson's Trustees* v *Ambion Scotland Ltd* 1994 SLT 645). In the context of a bulk transfer of a vast number of bank book debts and securities, the wording of the Assignation was said to be "appropriate".

[43] Fifth, in any event, according to the modern approach, non-compliance with a form of statutory wording, even if prescribed, did not necessarily render the document invalid (*Osman* v *Natt* 2015 1 WLR 1536; *R* v *Soneji* [2006] 1 AC 340 at 21, 39 & 40; *London & Clydeside Estates Ltd* v *Aberdeen District Council* 1980 SC (HL) 1). Instead, the proper approach was to ascertain the intention of Parliament as to the consequences of a failure to comply with a prescribed form of wording. Non-compliance may give rise to a "spectrum of possibilities" (*London & Clydeside Estates Ltd, supra,* p.30), depending upon the purpose of the legislative provision. In this case, it was relevant to consider that the context in which the Assignation was executed, that it did not create a security right but merely transferred an existing security right, and that the alleged non-conformity caused no prejudice to the debtor. In any event, section 53 of the 1970 Act embodied the modern notion of "substantial compliance" as discussed in recent English cases.

The pursuer's submissions

[44] For the pursuer, junior counsel adopted his written submissions (number 24 of process).

[45] First, the pursuer's counsel sought to satisfy me of the pursuer's interest to challenge the defender's title to the personal guarantee and the Standard Security. (This related to averments in Answer 28, but was only faintly advanced in submissions for the defender.)

[46] Second, it was submitted that the defender was incapable of relevantly averring or proving title to the Fieldoak facility agreement, the personal guarantee or the Standard Security. Whether the defender had title to any of these instruments depended upon a proper construction of the Assignation founded upon (item 6/2(a)-1 of process). That exercise could not be performed when the court did not have before it the entirety of the document. The schedule was indecipherable. Besides, the Assignation referred to other documents. They too had not been produced. They were relevant to the interpretation of words and expressions in the Assignation. A "clear explanation" should have been provided by the defender *in averment* as to the nature and extent of, and justification for, the redaction (*Hancock* v *Promontoria (Chestnut) Ltd* [2020] 4 WLR 100). The failure to do so rendered the defender's pleadings irrelevant.

[47] Third, it was submitted that the defender's averments *quoad* title to the guarantee and Standard Security were irrelevant because the defender had failed to aver circumstances amounting to the purification of an *ex facie* suspensive condition in the Assignation, namely payment of the "Purchase Price". According to this argument, clause 2.1 of the Assignation provides that each specific loan asset (including the personal guarantee and Standard Security) would only be transferred with effect from the "Effective Time"; the "Effective Time" was defined as the "Settlement Date" immediately following receipt of the "Purchase Price" paid for the specific loan asset; the "Purchase Price" had been redacted in the copy document lodged by the defender; it had not averred – and the defender was not offering to

prove – that the Purchase Price had been paid (or when); accordingly, the defender had not relevantly averred the purification of suspensive conditions attached to the Assignation.

[48] Fourth, it was said that the defender had failed to aver a relevant title to the standard security because the Assignation on which it founded did not conform to the statutory wording prescribed by the 1970 Act, sections 14 & 53, schedule 4, Form A and note 2 thereto. In the context of this all-sums due security, the Assignation required to specify that it was assigned "to the extent of £… being the amount now due thereunder" (consistent with the wording in the statutory Forms). The Assignation failed to specify the precise amount due by Mr Guidi to the Bank at the date of the assignation. Nor did it specify any meaningful extent to which the security was assigned. The statutory wording also reflected the general understanding of the law and conveyancing practice prior to enactment of the 1970 Act as to the legal effect of assigning a security for a fluctuating or uncertain sum (Burns, *Conveyancing Practice* (4th ed.), p. 576; Halliday, *Conveyancing & Feudal Reform (Scotland) Act 1970* (1st ed.), 9-03; *Alexander* v *Kirkpatrick* (1874) 1 R (HL) 37, 42).

[49] Fifth, the consequence of the non-conformity was a question of statutory interpretation. Parliament's intention was to be ascertained from a consideration of the statutory scheme as a whole. In the context of public or administrative law, the courts will tolerate "substantial compliance", even if strict compliance has not been adhered to. In the context of private law rights, the notion of "substantial compliance" is inapplicable. The consequence is not dependent on the subjective circumstances of the parties, such as the existence of any actual prejudice (*Osman; Elim Court RTM Co Ltd, supra.)* The Scottish courts had so far failed to analyse such cases properly. The disconformity rendered the Assignation invalid. Similar provision in Forms in schedule 2 to the 1970 Act had been

regarded as mandatory (*Bennett* v *Beneficial Bank* p*lc* 1995 SLT 1105; *Beneficial Bank plc* v *McConnachie* 1996 SC 1190).

The defender's supplementary submissions

[50] In supplementary submissions, counsel for the defender emphasised that the burden lay on the pursuer to make relevant averments to challenge the validity of the Assignation. There was no onus on the defender to prove its title. Even if there were such an onus on the defender, the unredacted parts of the lodged Assignation were sufficient to disclose that title had indeed been assigned to the defender (per *Hancock, supra,* paras 77 & 78).

[51] The defender had not refused to aver that the Purchase Price was paid. It was merely refusing to aver what the Purchase Price was. The only reasonable inference from the averments was that the Purchase Price had been paid, thereby purifying any supposed suspensive condition attaching to the Assignation.

[52] The defender's counsel advised the court that, for what it may be worth, she had seen the SPA and unredacted documents, and could confirm, on her professional responsibility, that there was nothing in those documents to alter the identity of the Buyer or the interpretation advanced by the defender.

[53] The issue of non-conformity required to be interpreted through the lens of section 53 of the 1970 Act, which was a "statutory recognition of a form of substantial compliance". In any event, there was no basis to suggest that the prescribed statutory wording was intended to provide any sort of protection to the debtor. Lastly, the Halliday Report could not properly be used to construe the 1970 Act (*Keith* v *Texaco Ltd* 1977 SLT (Lands Tribunal) 16). It could only be looked at as an aid to identify the mischief that was sought to be addressed by Parliament.

The key documents

[54] It may be convenient at this point to say something of the key documents that are founded upon in the pleadings.

The Fieldoak facility agreement

[55] The Fieldoak facility agreement is the contract by which the Bank agreed to provide loan facilities to Fieldoak. It is said to be comprise an agreement dated 10 December 2012 as amended by letters dated 1 February 2013, 28 March 2013, 28 August 2013 and 3 February 2014.

[56] The parties appear to agree that the Bank's rights under the Fieldoak facility agreement were assignable. However, there is a factual dispute between the parties as to the precise terms of the facility agreement; and there is a legal dispute as to whether, in law, the Assignation purported to effect an assignation or a novation. Neither of these disputes (factual or legal) was canvassed at the debate.

[57] Copies of letters comprising the Fieldoak facility agreement bear to be produced by the pursuer (in his first inventory) and incorporated into his pleadings. The defender also founds upon the facility agreement, refers to specific excerpts in its answers, but does not lodge a copy.

The personal guarantee

[58] In terms of a personal guarantee dated 12 August 2010, Mr Guidi guaranteed payment to the Bank of Fieldoak's liabilities to the Bank (present or future), up to a maximum sum of £450,000. In the guarantee, the word "Bank" is defined as meaning

Clydesdale Bank plc "and any person to whom all or any of the rights of the Bank under this Guarantee are transferred and any successor in business to the bank" (clause 1.1).

[59] A copy of the personal guarantee bears to be produced by the pursuer (item 5/1 of process) and its terms incorporated into his pleadings.

The Standard Security

[60] The Standard Security is dated 11 July 2011. It is granted by Mr Guidi in favour of Clydesdale Bank plc, which is expressly defined as "the Bank" in the opening clause setting out the personal obligation. It reads:

> "Personal Obligation
>
> I Giovanni Giuseppe Guidi…undertake to Clydesdale Bank Public Limited Company incorporated under the Companies Acts and having their registered office at 30 St Vincent Place, Glasgow ('the Bank') as follows:-…"

The definition of "the Bank" does not change throughout the subsequent operative clauses defining the debt or the scope of the security.

[61] In clauses 1(a) & (b), under the heading "Personal Obligation", Mr Guidi undertakes to pay to the Bank all sums which are now, or in the future may be, "owed *to the Bank by me*" (my emphasis), whether solely or jointly, and whether as principal debtor or guarantor.

[62] Thereafter, under the heading "Grant of Security", Mr Guidi grants a standard security to the Bank over the property at 7 Sweethope Gardens, Bothwell:

> "… [i]n security for the sum or sums…due or to become due *to the Bank in terms of this deed*..." [my emphasis].

[63] The Standard Security purports to be in Form A of schedule 2 to the 1970 Act, in the sense that it bears to include both the personal obligation and the standard security in a single deed. That view is reinforced by the presence of a clause of consent to registration for

execution. (Such a clause appears only in a Form A security; no such clause appears in a Form B security, because a Form B security does not contain the personal obligation.) However, arguably, the deed is not a true Form A security at all because it does not, of itself, "constitute" the personal obligation (*Albatown Ltd v Credential Group Ltd*, 24 August 2001, Outer House (Lord Macfadyen), unreported, para. 16). In clause 1, Mr Guidi merely undertakes to pay all sums that may now or in the future be owed by him to the Bank. That is circular and unilluminating. How do the sums come to be owed? Arguably, this security merely refers to and describes a personal obligation (being an obligation which is constituted elsewhere by some other instrument, such as the personal guarantee) for the purpose of defining the debt to which the real right in security attaches. That said, nothing material appears to turn on this issue. In *Liquidator of Letham Grange Development Company Ltd v Foxworth Investments Ltd & Anor* [2011] CSOH 66, Lord Glennie was content to accept (at paras 97-101) that wording of a similar nature, being in effect a sort of "hybrid" of Forms A & B, would be competent and that it was common-place in practice, though one suspects it was not envisaged by 1970 Act when it prescribed the separate forms of security.

[64] However, before leaving this document, I pause to reiterate that the real right in security was granted to secure payment of debts (present or future) that are "*due to the Bank* in terms of this deed"; and that, earlier, the deed defines those debts as being all debts (present or future) "*owed to the Bank by [Mr Guidi]*" (clause 1(a) & (b)). This defines exhaustively the scope of the secured debt or obligation. A standard security cannot support a real right against the security subjects of wider import than the personal obligation to which it relates (*Albatown Ltd, supra*, para. 16). I shall consider the significance of this wording later.

[65] A copy of the Standard Security bears to be produced by the pursuer (item 5/2 of process) and its terms incorporated into his pleadings.

The Assignation

[66] The Assignation bears to be granted by the Bank (defined as "Clydesdale") in favour of Promontoria (defined as "the Novated Buyer" or the "Buyer") with the consent of National Australia Bank Ltd (defined as "the Seller"). It is executed by the Bank and National Australia Bank Ltd on 1 September 2015 and by Promontoria on 2 September 2015. Clause 6 permits the Assignation to be executed in any number of counterparts; where it is so executed, it is agreed that the Assignation "will not take effect until each of the counterparts has been delivered"; each counterpart will be "held as undelivered" until the parties agree a date on which the counterparts are to be treated as delivered; the "date of delivery" may be inserted in the testing clause in a blank provided for "the effective date" of the Assignation; and the testing clause records that the document was indeed executed in counterpart and was delivered on 4 September 2015.

[67] The Assignation has seven clauses in the main body of the document with a single appended Schedule. The Schedule is divided into two parts (Part I and Part II) with the second part being sub-divided into Parts A, B & C.

[68] The main body of the document, comprising eight pages, including details of the signatories, is complete and unredacted. The Schedule is partially redacted.

[69] Part I of the Schedule (entitled "Relevant Pool A Loan Assets"), commencing on the ninth page, is wholly redacted. It seems to extend to 5 pages. None are visible.

[70] Part A of Part II of the Schedule commences on page 16 (entitled "Relevant Pool B Loan Assets"). It is unredacted. It extends over seven pages. It lists a series of facility

agreements, commercial and personal guarantees, floating charges and standard securities.

Included in the list of guarantees is the following:

> "Scots Law Personal Guarantee by Giovanni Guidi ('GG') in favour of the [Bank] for the liabilities of Fieldoak up to £450,000 plus costs and interest dated 12 August 2010".

Included in the list of securities is the following:

> "Scots law standard security by GG in favour of [the Bank] (Title Number LAN100490) registered on 15 July 2011".

[71] Part B of Part II of the Schedule is wholly redacted. It seems to extend to three pages (pages 24 to 26), all of which are missing.

[72] Part C of Part II of the Schedule contains an unpaginated document or documents (comprising 5 sheets) which are partially redacted and partially illegible. In the body of the document, clause 1.3 refers specifically to Part C of Part II of the Schedule. It states that Part C of Part II of the Schedule:

> "… is included in this Assignation solely for the purposes of identifying the Relevant Pool B Loan Assets and that such information is included in this Deed without prejudice to, and that all time subject to, the terms of the Sale and Purchase Agreement and any limitations contained therein".

[73] Returning to the body of the document, clause 2.1 (headed "Assignation") reads:

> "Subject to the terms of this Assignation and in consideration for the payment by [Promontoria] to the Seller [National Australia Bank Ltd] 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) [the Bank] with the consent of the Seller, hereby assigns absolutely to [Promontoria] 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, (including, without limitation, with respect to each Relevant Pool A Asset those documents listed in Part I of the Schedule (Relevant Loan Assets) to this Assignation and with respect to certain of the Relevant Pool B Loan Assets those document listed in Part A and Part B of Part II of the Schedule (Relevant Loan Assets) to this Assignation);

(ii) [the Bank's] rights in its capacity as Lender (if any) under, to or in connection with the Relevant Documents, to demand, sue for, recover 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 Bank] in its capacity as Lender under, to and in connection with the Relevant Documents, (including, without limitation, with respect to each Relevant Pool A Loan Asset, those documents listed in Part I of the Schedule (Relevant Loan Assets) to this Assignation and with respect to certain of the Relevant Pool B Loan Assets those documents listed in Part A and Part B of Part II of the Schedule (Relevant Loan Assets) to this Assignation) and, in such capacity, to enforce its rights under the Relevant Documents, (including, without limitation, with respect to each Relevant Pool A Loan Asset, those documents listed in Part I of the Schedule (Relevant Loan Assets) to this Assignation and with respect to certain of the Relevant Pool B Loan Assets those documents listed in Part A and Part B of Part II of the Schedule (Relevant Loan Assets) to this Assignation), including (without limitation) any such rights arising under or in connection with any Related Security within or evidenced by the Relevant Documents (including, without limitation, with respect to each Relevant Pool A Loan Asset, those documents listed in Part I of the Schedule (Relevant Loan Assets) to this Assignation and with respect to certain of the Relevant Pool B Loan Assets those documents listed in Part A and Part B of Part II of the Schedule (Relevant Loan Assets) to this Assignation); and

(iv) all Ancillary Rights and Claims in respect of the Relevant Documents, (including, without limitation, with respect to each Relevant Pool A Loan Asset, those documents listed in Part I of the Schedule (Relevant Loan Assets) to this Assignation and with respect to certain of the Relevant Pool B Loan Asset those documents listed in Part A and Part B of Part II of the Schedule (Relevant Loan Assets) to this Assignation), and the Relevant Loan Assets,

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

(b) [The Bank], with the consent of the Seller:

(i) is released of all its 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) [Promontoria] becomes a party to each relevant document in the capacity of the Lender and is bound by obligations equivalent to those

> from which [the Bank] is 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".

Clause 2.2 (headed "Acceptance") reads:

> "[Promontoria] agrees that with effect on and from the Effective Time:
>
> (a) it accepts the assignation of the rights, title, benefits, interests, powers and ancillary rights referred to in clause 2.1(a) (Assignation) above; and
> (b) it shall assume, perform and comply with the terms of and obligations of the Lender under the Relevant Documents as if originally named as a party in the Relevant Documents in place of [the Bank] but, in each case, for the avoidance of doubt, other than in respect of, and excluding, the Excluded Liabilities."

[74] The following further clauses are worth noting.

[75] Clause 3 (headed "Notification") states that on the "Settlement Date" the Seller (National Australia Bank Ltd) shall notify Promontoria in writing promptly upon receipt by it of the "Purchase Price" for each Relevant Borrower Asset Group and shall confirm to Promontoria in such notice that the "Effective Time" has occurred.

[76] Clause 4 (headed "Sale and Purchase Agreement") states that the Seller, the Bank and Promontoria agree that the Assignation is a "Transaction Document" for the purposes of the Sale and Purchase Agreement, and each agrees and acknowledges that their entry into the Assignation is:

> "...without prejudice to the rights and obligations granted and assumed by them, as appropriate, by virtue of the entry into their Sale and Purchase Agreement".

[77] Clause 5 (headed "Further Assurance") states that the Seller and Promontoria shall (and the Seller shall procure that the Bank shall) promptly upon request do all acts and/or execute all documents for the purpose of completing "the Transfer" to Promontoria of any Relevant Loan Asset and "otherwise giving each Party the full benefit of this Assignation". Any such request must be given within three months of the Settlement Date.

[78] In order to make sense of the Assignation, it is necessary to consider the definitions in the interpretation clause (clause 1.1). Interestingly, the interpretation clause opens with the following statement:

> "Words and expressions used in this Assignation shall (unless otherwise expressly defined) have the meaning given to them in the Sale and Purchase Agreement…".

The Sale and Purchase Agreement features again in clause 1.2. It states (under the heading "Construction"):

> "Clause 1.2 (Construction) of the Sale and Purchase Agreement shall be incorporated in this Assignation as if set out in full herein".

[79] The interpretation clause (clause 1.1) goes on to provide various definitions, of which the following appear to be most relevant:

(i) "Effective Time" means "the Settlement Date immediately following the receipt by the Seller [National Australia Bank Ltd] of the Purchase Price for the Specified Loan Assets";

(ii) "Novation Agreement" means "the novation agreement dated 29 September 2014 between the Seller, [the Bank], Promontoria Holding 97 BV and the Novated Buyer [Promontoria] whereby the rights and obligations of Promontoria Holding 97 BV under the Sale and Purchase Agreement were novated to the Novated Buyer";

(iii) "Relevant Documents" means "in respect of a Specified Loan Asset, each facility, loan or credit letter or agreement…, security document, guarantee, contingent funding or indemnity agreement, subordination agreement, inter-creditor agreement, ranking agreement…, duty of care agreement, collateral warranty and/or any other document evidencing any Related Security in each case governed by Scots law and relating to that Specified Loan Asset…";

(iv) "Relevant Borrower Asset Group" means "in relation to any Specified Loan Asset, the Borrower Asset Group to which that Specified Loan Asset relates";

(v) "Relevant Loan Asset" means "a Relevant Pool A Loan Asset or a Relevant Pool B Loan Asset";

(vi) "Relevant Pool A Loan Asset" means "a loan asset or debt claim described in Part I of the Schedule (Relevant Loan Asset) to [the Assignation]";

(vii) "Relevant Pool B Loan Asset" means "a loan asset or debt claimed described in Part II of the Schedule (Relevant Loan Asset) to [the Assignation]";

(viii) "Sale and Purchase Agreement" means "the Sale and Purchase Agreement dated 27 July 2014 between the Seller, [the Bank] and Promontoria Holding 97 BV as the Initial Buyer, as amended by the Novation Agreement and amendment letters dated 27 November 2014 and 5 June 2015";

(ix) "Settlement Date" means "4 September 2015 (or such other date as may be agreed by the parties to [the Assignation] in writing";

(x) "Specified Loan Asset" means "(a) a Relevant Loan Asset; and (b) a Relevant Loan Asset as defined in the English Assignment and Assumption Deed";

[80] A certified redacted copy of the Assignation bears to be produced by the defender (item 6/2(a)-1 of process: item 1, defender's first inventory of productions). Its terms are incorporated into its pleadings. The certification docquet reads as follows:

> "Certified as a true copy of the original document, although due to commercial sensitivity the schedule to the document (which contains information relating to a large number of borrower connections and related securities) has been redacted so that it includes only all of the information expressed to relate to borrower connections and related securities identified therein referencing the names "Fieldoak Ltd", "Reysip [sic] Properties Ltd", "Lightfoot Ltd" and "Giovanni Guidi" and to exclude all other information expressed to relate to other borrower connections and securities".

The Sale and Purchase Agreement

[81] The Sale and Purchase Agreement ("SPA") is referred to in the Assignation. We know little else about it.

[82] However, the SPA appears to be relevant for two reasons. Firstly, one of its clauses (clause 1.2, headed "Construction") is expressly incorporated into, and thereby forms part of, the Assignation. Secondly, the Assignation incorporates a general cross-reference to the SPA for the purpose of providing a sort of default dictionary to define words and expressions in the Assignation, unless those words and expressions are expressly defined in the Assignation.

[83] In short, the SPA provides a lexicon of definitions for words and expressions in the Assignation, so far as not expressly defined therein. For example, the words "the Transfer" appear in clause 5 of the Assignation. There is no express definition of that term in the Assignation but, given its capitalisation, it might reasonably be supposed to be a defined term in the SPA (as, indeed, it is).

[84] A document bearing to show redacted extracts of clauses 1.1 & 1.2 of, and Schedule 1 to, the SPA is lodged by the defender (as item 2, defender's second inventory of productions: number 6/2(a)-2 of process) and referred to in its pleadings.

The Novation Agreement

[85] Like the SPA, the precise purpose and terms of the Novation Agreement are something of a mystery. The Novation Agreement features only because it is one of the documents referred to in the Assignation. Unlike the SPA, no part of the Novation Agreement is expressly incorporated into the Assignation. To that extent, it may be of less

relevance to the matters before me. In a sense, therefore, it exists only in a non-speaking part within this drama.

[86] No part of the Novation Agreement is produced or incorporated in the defender's pleadings.

[87] As an aside, I am aware that the decision of the Court of Appeal in *Hancock* v *Promontoria (Chestnut) Ltd* [2020] 4 WLR 100 offers an insight into the function of the SPA and the Novation Agreement, and the framework within which they and the Assignation operated. This insight, however intriguing, is not relevant to the present debate, where there are no averments explaining the wider commercial or contractual context, and no extraneous evidence can be considered. I simply require to adjudicate on the relevance or otherwise of these documents having regard to the pleadings as they stand, and applying first principles.

The Charge

[88] A copy of the charge for payment dated 15 November 2016 ("the Charge") is lodged (item 5/8 of process) and its terms incorporated in the pursuer's pleadings. It bears to have been executed by virtue of a warrant granted on 8 November 2016 under section 88 of the Debtors (Scotland) Act 1987 following registration of the Standard Security in the Books of Council & Session on 18 February 2016. The principal sum sought in the Charge was £450,000.

Discussion

[89] Having considered parties' submissions, I have concluded that Promontoria has failed to aver a relevant title to the Standard Security and, by extension, a relevant

entitlement to serve the Charge upon Mr Guidi. Accordingly, I have granted decree for production of the Charge (crave 1), as a precursor to reduction, and for declarator that Promontoria has no title to enforce the Standard Security (crave 3).

[90] In contrast, in my judgment Promontoria has averred a relevant title to the personal guarantee (crave 2). However, due to its failure, without leave of the court, to lodge in process, complete and unredacted, the assignation on which it founds (or an authenticated copy thereof), the pursuer remains entitled to put Promontoria to proof of its disputed title thereto. For that reason, the defender is not entitled to decree of dismissal at debate, and a proof has been allowed.

[91] Lastly, in my judgment Promontoria is in default of its obligation under rule 21.1(1), OCR 1993 by failing, without leave of the court, to lodge in process, complete and unredacted, the Assignation and SPA on which it founds (or copies thereof certified in terms of the 1988 Act). Accordingly, in exercise of my powers under rule 40 of the 1993 Rules, I have made a finding to that effect together with an ancillary order for the lodging of the same within a defined time-scale. I explain my reasoning below.

Which assignation is founded upon by Promontoria?

[92] Before proceeding further, it is necessary to address an important preliminary question.

[93] In this action, Mr Guidi disputes the defender's entitlement to serve the Charge upon him, and challenges the defender's title to the personal guarantee and the Standard Security. In defence, Promontoria founds its title upon an assignation from the Bank. But which assignation is the defender actually founding upon?

[94] The question arises because, to complicate matters slightly, the defender has in fact lodged three different documents in process, each bearing to be a copy "assignation" of sorts, each bearing to be subscribed by the same parties, each bearing the same dates of execution.

[95] The first document is item 1 in the defender's first inventory of productions (number 6/2(a)-1 of process). It is described in the inventory as "Certified Copy Assignation by [the Bank] in favour of [Promontoria] with the consent of National Australia Bank Limited". It was subscribed on 1 & 2 September 2015 (but, interestingly, it records in the testing clause that the date of delivery of the deed was 4 September 2015). It was lodged in process on 27 April 2020. This is the document that was referred to in detail by the defender throughout its written and oral submissions.

[96] The second document is item 8 in the defender's third inventory of productions (number 6/2(a)-8 of process). It is described in the third inventory as "Assignation of Standard Securities by [the Bank] in favour of [Promontoria] with the consent of National Australia Bank Limited". It was subscribed on 1 & 2 September 2015. It was lodged in process on 20 October 2020. This document was never referred to by the defender in its written or oral submissions.

[97] The third document is item 9 in the defender's third inventory of productions (number 6/2(a)-9 of process). It is also described in the third inventory as "Assignation of Standard Securities by [the Bank] in favour of [Promontoria] with the consent of National Australia Bank Limited". It was subscribed on 1 & 2 September 2015. It too was lodged in process on 20 October 2020. It too was never referred to by the defender in its written or oral submissions.

[98] Which of these three assignations is the document founded upon by the defender and incorporated into its pleadings?

[99] In my judgment, the answer is clear. On a plain reading of Promontoria's averments, it founds its right and title to the Fieldoak loan agreement, the personal guarantee and the Standard Security upon the first document (namely, item 1 in the defender's first inventory of productions: number 6/2(a)-1 of process).

[100] To explain, on a plain reading of the averments, the defender is founding upon one document only, not multiple documents. That single document is repeatedly referred to in its averments (and pleas-in-law) as "the Assignation". The first reference to "the Assignation" appears in Answer 13. It avers (in Answer 13):

> "A certified true copy of the Assignation is produced, adopted and incorporated herein *brevitatis causa*."

It avers that this "certified" copy of "the Assignation" is produced with "the schedule" redacted "[d]ue to commercial sensitivity" to exclude reference to "other borrower connections and securities". It also avers that "the same assignation" has been successfully relied upon in "other litigation in the courts of Scotland".

[101] Incontrovertibly, there is only one document lodged in process which bears to be (i) "certified" as a true copy assignation and (ii) "redacted" (in its schedule) due to commercial sensitivity. That document is item 1 in the defender's first inventory of productions (number 6/2(a)-1 of process). The other two copy documents are neither certified nor do they bear to have any redacted schedules, so they are plainly not the document that is being referred to in the defender's pleadings and incorporated therein *brevitatis causa*. (As an aside, I do not understand it to be disputed that only the first document has been referred to in "other litigation in the courts of Scotland".)

[102] To be clear, I am not saying that a "certified copy" of a document must be lodged in process in order for it to be treated, at debate, as founded upon by a party or incorporated into pleadings. That is not the rule. The issue here is a simple one of identification of the document that is being founded upon.

[103] Further, although, on a strict reading, Answer 13 deals specifically with the disputed assignation of the Fieldoak loan agreement, this Answer is significant because it is the first to identify the document upon which Promontoria founds as "the Assignation", and it provides further identification of that document by stating that the copy of it which is lodged in process is both "certified" and redacted (in the schedule). The defender's subsequent Answers then repeatedly cross-refer to Answer 13 when seeking to identify "the Assignation" on which it founds.

[104] Thus, in Answer 17 (which explicitly challenges the defender's title to the personal guarantee and the Standard Security), Promontoria avers that it is the person to whom the Banks's rights were transferred "by way of the assignation as condescended upon above". The only assignation "condescended upon above" is "the Assignation" previously referred to in Answer 13.

[105] Similarly, in Answer 25 (which also challenges the defender's title to the personal guarantee and Standard Security), Promontoria again founds upon "the Assignation"; it expressly cross-refers to Answer 13; and the copy of "the Assignation" lodged in process is further described as having been redacted to exclude "the information of other borrowers". Again, this can only be understood as referring to item 1 in the defender's first inventory of productions, because neither of the other two copy documents (items 8 or 9 of the defender's third inventory of productions) bears to redact "the information of other borrowers".

[106] Other Answers refer in detail to particular clauses in "the Assignation". These averments reinforce the conclusion that "the Assignation" to which Promontoria is referring, and upon which it founds, is the document forming item 1 in its first inventory of productions (number 6/2(a)-1 of process), being the "certified" and "redacted" document, not the other documents lodged in its third inventory. Thus, in Answers 19 & 22, Promontoria quotes from clauses 2.1(a) & 1.1 of "the Assignation". These clauses feature only in the first document. No such clauses appear in either of the other two documents.

[107] This conclusion from the pleadings is entirely consistent with the defender's written and oral submissions.

[108] Neither in its note of basis of preliminary pleas (number 21 of process) nor in its written note of arguments (number 25 of process) does Promontoria ever refer to the second or third documents (that is, items 8 & 9 in the defender's third inventory: numbers 6/2(a)-8 & 9 of process).

[109] Likewise, in oral submissions over two days of debate, Promontoria's senior counsel founded only upon the first document (that is, the certified copy, redacted document, forming item 1 in its first inventory: number 6/2(a)-1 of process). Indeed, at the outset of her submissions, she stated that the personal guarantee and Standard Security were assigned to Promontoria in terms of "an assignation dated 4 September 2015". Only the first document bears the date of 4 September 2015 (being the date of delivery stated in the testing clause); neither of the other two documents bears that date. Throughout the debate, Promontoria's counsel referred at length and in detail to that first document. She made no reference whatsoever to either of the other two copy assignations that happen to be lodged in process (items 8 & 9, defender's third inventory: numbers 6/2(a)-8 & 9 of process).

[110] In short, in my judgment it is clear that, both in averment and submission, the defender has founded its right and title squarely upon the first document (no. 6/2(a)-1 of process), which it refers to in its pleadings as "the Assignation". Indeed, in her oral submissions, the defender's senior counsel observed that one could "start and end the discussion on title" by looking at clause 2.1 of that document and the definition of "Buyer" therein. The same proposition can be seen in section 5 of Promontoria's note of arguments (number 25 of process). Under the heading "The overarching effect of the assignation", it states:

> "5.3 Clause 2.1(a) of the deed of assignation could not be clearer on the matter. The [Bank] assigned absolutely to [Promontoria] all of its right, title and interest under, in or to each Relevant Document….
> 5.4 Relevant Document means, in respect *inter alia* of a "Relevant Pool B Asset" each facility, loan or credit letter or agreement…. security document [and] guarantee".
> 5.5 Page 16 is headed "Relevant Pool B Loan Assets". Page 17 lists the 2012 Facility Letter as well as the personal guarantee… Page 23 shows the standard security….
> 5.6 On that basis alone, it is indisputable that the documents which form the basis of this action were included in the assignation by [the Bank] to [Promontoria]… On a plain reading and by the admission of the parties to the deed, *a transfer of the loans and their ancillary security documents including the personal guarantee and the standard security was effected by the deed of assignation.*" [my emphasis in italics]

[111] I dwell on this preliminary point because it has significant adverse repercussions for Promontoria.

[112] At debate, the court is constrained to adjudicate upon issues of relevancy by reference only to the pleadings and documents incorporated therein. It cannot adjudicate at debate on the basis of extraneous material not forming part of the pleadings (*Macphail*, Sheriff Court Practice (3rd ed.), 9.67).

[113] For the reasons explained more fully below, I conclude that by founding only upon the Assignation Promontoria has failed to aver a relevant title to the Standard Security (and,

by extension, a relevant entitlement to serve the Charge which proceeded upon that security). Whether Promontoria might more prudently have founded its title to the Standard Security upon some other document (a copy of which might happen to be reproduced in an inventory of productions somewhere in process) is not a matter for determination at debate. Nor is appropriate to defer adjudication on the preliminary pleas following debate, merely to afford a party the chance to amend its pleadings to make a relevant case, when no such motion has been made (*Lord Advocate v Johnston* 1983 SLT 290; *Jackson v Hughes Dowdall* 2008 SC 637 at 646). The court's duty is to determine issues of relevancy on the basis of the pleadings as they stand.

[114] My impression is that Promontoria appears to have lost sight of the fact that the Assignation on which it founds, whatever else it may achieve, is not in law effective to vest the Standard Security in Promontoria at all. A different form of assignation is needed to transfer such a heritable security. As the pleadings presently stand, Promontoria fails to found upon any such appropriate assignation.

Does the pursuer have title and interest to sue?

[115] In my judgment, the pursuer has title and interest to seek reduction of the Charge, and to challenge the defender's title to the Standard Security and personal guarantee.

[116] He has title to sue because the defender asserts that the pursuer is party to a number of legal relationships with the defender (under the personal guarantee and Standard Security), which the pursuer denies. He has interest to sue because some (non-trivial) benefit is capable of being derived by the pursuer from pursuing the remedies with which this action is concerned. In this case, the benefit may be both patrimonial and reputational in nature.

[117] To explain, the Charge, and the sequestration that followed upon it, are forms of diligence executed against Mr Guidi. The Charge was executed by virtue of a warrant for summary diligence granted (to the defender) under section 88 of the Debtors (Scotland) Act 1987, following registration (by the defender) of the Standard Security in the Books of Council & Session pursuant to a clause therein consenting to registration for execution (item 5/8 of process). The sum demanded in the Charge is the capped sum of £450,000 allegedly due to the defender under the personal guarantee, as secured by the Standard Security allegedly held by the defender.

[118] These circumstances confer upon Mr Guidi a substantial interest to pursue the remedies craved in this action. If he succeeds, the reduction of the Charge may support his pending proceedings for recall of his sequestration, presently sisted in Hamilton Sheriff Court. Indeed, it is unlikely that a debtor whose apparent insolvency has been constituted by a charge for payment of a debt which proceeds upon an extract decree for payment (or, as here, a warrant for summary diligence granted pursuant to an extract registered deed) could ever hope to obtain a recall of sequestration without first taking steps either to have the decree set aside or the charge reduced (*Murdoch v Newman Industrial Control Ltd* 1980 SLT 13; *Wright v Tennent Caledonian Breweries Ltd* 1991 SLT 823). Sequestration procedure affords limited scope for a debtor to challenge the validity of an *ex facie* valid charge for payment founded upon by a creditor. This action is an appropriate mechanism to do so, as well as to challenge the defender's alleged entitlement to the underlying Standard Security to which the executed diligence directly pertained.

Is reduction of the Charge competent?

[119] The defender submitted that, once the days of charge have expired, it is too late for a debtor to seek to reduce the charge. Accordingly, the pursuer's first crave was said to be incompetent.

[120] In my judgment, this argument is misconceived. In *Aitken, supra,* the pursuer was seeking the remedies of interim suspension of a charge and interim interdict to prevent a creditor seeking an award of sequestration (albeit in the context of an action of reduction). Lord Hodge concluded that interim suspension of the charge was not competent because the days of charge had expired and the pursuer's apparent insolvency had already been constituted. The charge had therefore served its purpose. In contrast, he granted interim interdict. He said nothing about the competency of reduction.

[121] Suspension, interdict and reduction are different remedies, with different effects, deployed for different purposes. The purpose of the suspension is to resist, stay or arrest some ongoing act or omission, usually diligence. Interdict prevents future conduct. Reduction sets aside a document, decree or decision, and deprives it of legal effect.

[122] In the present case, the pursuer does not seek suspension. He seeks reduction. So *Aitken* is not in point. Even after expiry of the days of charge, other remedies may be available to a debtor to prevent a sequestration taking place (*James Finlay Corporation* v *McCormack* 1986 SLT 106; *Aitken, supra,* para. 5), though the policy of the law in the context of a summary process such as sequestration is to limit the grounds for opposition to an award once the debtor is apparently insolvent other than in "exceptional circumstances" (*Scottish Milk Marketing Board* v *A & J Wood* 1936 SC 604). Following an award of sequestration, it is also well established that other remedies may be available to the

aggrieved debtor, including the remedy of reduction (*Murdoch* v *Newman Industrial Control Ltd; Wright* v *Tennent Caledonian Breweries Ltd, supra).*

How are rights assigned?

[123] At the heart of this case is a deceptively simple question: has Promontoria acquired, by assignation, the Bank's rights under the personal guarantee and the Standard Security? Therefore, it may be useful if I take a brief diversion to consider the basic legal principles affecting the transfer of rights by assignation. This summary is drawn heavily from Professor K. Reid's superlative analysis in the *Stair Memorial Encyclopaedia ("SME")*, Vol. 18.

[124] The law of property is concerned with rights in things (otherwise known as real rights). Rights in things are to be contrasted with rights against persons (or personal rights), which fall properly within the realm of the law of obligations. The distinction between real rights and personal rights is of the first importance in legal systems such as Scots law, which are based upon Roman law (*SME, supra*, 3 & 11).

[125] A real right, or a right *in re,* is a right held directly in a thing. Real rights include ownership, lease and security. An obvious example of a security right in corporeal moveable property would be pledge; an example of a security right in heritable property would be a standard security.

[126] In Scots law (as in Roman law), things are classified in two different ways. In the first place, all things are either corporeal or incorporeal; and in the second place, all things are either heritable or moveable. The effect of classifying things in two different ways is to create four separate classes of property, namely corporeal heritable, corporeal moveable, incorporeal heritable and incorporeal moveable. However, in the case of incorporeal property, the sub-division into heritable property and moveable property has been said to

be "largely artificial" and that the more fruitful sub-division of incorporeal property is simply into real rights and personal rights. That said, the distinction between incorporeal heritable and incorporeal moveable property remains relevant and should not be overlooked in relation to, for example, the choice of the proper form of assignation or in relation to the law of succession (*SME*, *supra*, 11).

[127] So, even from this basic analysis, it can be seen that a right in security over land is a real right, it is heritable in nature, and that this classification is relevant, among other things, to the *form* of assignation of that right. In contrast, a right to payment of a debt is a personal right and moveable in nature. (Though mercifully not relevant in this case, confusingly perhaps, rights in security over land are declared moveable in the succession of the creditor, except for the purposes of legal rights: Titles to Land Consolidation (Scotland) Act 1868, s.117, as amended by the Succession (Scotland) Act 1964, s.34, sch.2, as applied to standard securities by the 1970 Act, s.32. This peculiarity merely illustrates the continuing significance of the differing classification of rights in Scots law.)

[128] The difficulty which emerges in the context of standard securities is that a standard security involves an amalgam of real and personal rights, and a resulting interface between the law of property and the law of obligations. A standard security is a form of "heritable security" (1970 Act, s.9(1)), being a security constituted over land, or a real right in land, in security of any "debt" (s.9(8)). When a standard security is registered it operates to vest in the grantee "a real right in security" for the "performance of the contract to which the security relates". The unfortunate consequence of this amalgam, at times awkward, between property law and contract law, between real and personal rights, between things heritable and moveable, is that difficulties can emerge in the process of transferring a standard security. The difficulty emerges because although, in principle, all of these rights

are transferable, the form by which that transfer is effected varies depending upon whether one is concerned with a real right or a personal right. The assignation of a standard security brings to the boil the simmering tension between the real and personal rights which are forced to cohabit under the roof of a statutory construct, particularly in the context of a Form A standard security where the personal and real rights are embodied in a single deed. This case concerns such just a security.

[129] Lastly, over centuries, the assignation of incorporeal rights has tended to follow a recognised three-stage process, namely: (i) the conclusion of an agreement to transfer the right; (ii) the delivery of a document to give effect to the transfer; and (iii) intimation of the transfer to the debtor (though, in the case of heritable rights, intimation takes the form of registration). The first two stages reflect the clear distinction in Scots law, in common with other civilian systems, between, on the one hand, the actual conveyance or transfer of ownership of property and, on the other hand, the contract which in many cases precedes that conveyance. Only in the sale of goods, where the law has been anglicised by statute, is the distinction not fully observed (*SME, supra*, 606). The rule is *traditionibus non nudis pactis dominia rerum transferuntur:* ownership is transferred by delivery (or other conveyance) and not by bare contract (*Stair, Institutions* III, ii, 5; *Erskine*, Institute II, i, 18). At the first stage, on conclusion of a contract, each party has merely a personal contractual right against the other. It is only on delivery and intimation of the conveyance (at the third stage) that the transfer itself occurs, whereby the transferor is divested of the property and the transferee is vested in the real right (*SME, supra*, 606). Unless or until that stage is reached, the transfer is incomplete (*SME*, *supra*, 652 to 653). These rules of transfer apply to most but not all kinds of incorporeal property.

[130] In practice, the first and second stages of assignation (i.e. the agreement to assign, and the execution and delivery of the conveyance itself) are sometimes combined in one document. That can complicate matters. A decision may then be required as to whether the words used constitute merely an agreement to transfer or whether they are to be construed as effecting an immediate transfer. To illustrate, a document in which the cedent "agrees to assign" a right might be distinguishable from a document in which the cedent "hereby assigns" that right: the former is more likely to be construed as an obligation to perform a juridical act in the future; the latter is a more likely to be construed as a *de praesenti* conveyance (*Bell,* Commentaries (7th ed.), II 16). The answer may also depend upon the classification of the right that is sought to be transferred. As to form, the law does not insist on the use of the word "assign" or indeed any other specific words of transfer, provided there are "…words which may be construed as effecting an immediate transfer" (*Gallemos Ltd* v *Barratt Falkirk Ltd* 1990 SLT 98 at 100). Stair (*Institutions,* III, i, 4) observes that:

> "…assignation doth necessarily require the clear expressing of the cedent, assignee, and thing assigned",

coupled with:

> "… terms that may express the transmission of the right assigned from cedent to the assignee".

[131] However, in some cases, for the purposes of the second stage of the process (i.e. the document effecting the transfer), a statutory form of assignation may exist. Sometimes the statutory form of wording is mandatory, sometimes it is permissive, sometimes the wording may be partly mandatory, partly permissive. Statutory forms exist for the assignation of life assurance policies (Policies of Assurance Act 1867, s.5), registered leases (Registration of Leases (Scotland) Act 1857, s.3), and standard securities (Conveyancing & Feudal Reform (Scotland) Act 1970, s.14, schedule 4, Forms A & B). Importantly, even if statutory wording

is mandatory, the consequence of derogating from the prescribed form is a separate issue, to be considered not as a matter of judicial discretion but as a pure question of statutory interpretation (discussed later below). In other cases, where no statutory form exists, parties are free to use whatever wording they choose.

[132] Intimation is the final and obligatory stage in the transfer of incorporeal personal rights. Until intimation occurs, there is no divestiture of the cedent. Intimation also performs the additional practical function of notifying the debtor that performance is due to the assignee, not to the cedent. These two functions of intimation (transfer of the property right and notification) are quite distinct (*Stair Institutions* III, i, 6; *Erskine Institute* III, vi, 3; *SME, supra,* 656). In the case of assignation of real rights, the final stage of transfer is different: "intimation" takes the form of some public act in relation to the thing in which the right is held, usually by taking possession of the thing or by registration of the assignation. The choice depends on the method by which the right being assigned was originally made real. So, if a right requires possession for its constitution (for example, a pledge of goods or a short lease of land) it equally requires possession to complete its assignation. Until the assignee takes possession of the goods (or, as the case may be, the leased land) there is no transfer, and the cedent is undivested. In the case of a right requiring registration for its constitution (such as a long lease or a standard security), transfer of that right by assignation is completed only by registration of the assignation in the Land Register (or, formerly, the Register of Sasines) (*SME, supra*, 657).

[133] It is worth reiterating that it is only upon intimation (or, in the case of real rights, registration of the assignation) that ownership of the right passes from the cedent to the assignee. So intimation (or its equivalent) is not merely to ensure that the debtor pays the

correct creditor (*SME, supra*, 658). The law has been expressed thus (*Bankton*, Institute, III, i, 6):

> "The assignation is not completed by executing and delivering it to the assignee, but it must likewise be intimated to the debtor, until which is done, the cedent is not understood in our law to be denuded".

A modern statement of the same principle was given by the Inner House in *Gallemos Ltd, supra*, 101 (per Lord Dunpark):

> "Intimation of an assignation to debtor is the equivalent of delivery of a corporeal moveable and is necessary to complete the title of the assignee"

Therefore, an assignee holding on a delivered, but unintimated, assignation of a personal right (or an assignation of a real right that has not yet been registered) is in much the same position as a disponee of land holding on a delivered, but unregistered, disposition (*Burnett's Trustee* v *Grainger* 2004 SC (HL) 19). In both cases, ownership remains with the transferor, although the transferee has it within its power to become owner. In both cases, the deed of transfer operates at contractual level, binding the transferor not to derogate from his grant, and guaranteeing title, and so forth. However, the absence of effective intimation (or its equivalent, depending upon the nature of the right) may be significant in a question with competing rights in security, or competing creditors executing diligence, or in the event of the insolvency of the assignor or debtor.

[134] Lastly, an assignation of a real right in security constituted by a Form A standard security (that is, a security that constitutes within it the personal obligation(s) or "debt" to which the security relates: 1970 Act, sch. 2) will generally be sufficient to "carry with it" the personal rights to that debt. In contrast, the assignation of a real right in security constituted by a Form B standard security (that is, a security that does not constitute within in it the personal obligation(s) or debt to which the security relates: 1970 Act, sch.2) will not

generally be sufficient to "carry with it" the "separate bundle" of personal rights to the underlying debt (*Watson v Bogue (No. 1)* 2000 SLT (Sh Ct) 125). In that latter scenario (where the real right in security is constituted by a Form B standard security), the creditor's personal rights would require to be assigned by a separate deed. This illustrates that the creditor (and holder of the real right) in the standard security need not be the same as the creditor (and holder of the personal rights) in the "debt" or personal obligation to which the security relates: *3D Garages Ltd v Prolatis Company Ltd* 2017 SLT (Sh Ct) 9). In the scenario where both the real and personal rights are intended to be assigned, in recognition of the separate classes of right involved, the practical consequence is that in the assignation of, say, a standard security or a registered lease there must be both registration and also intimation of the assignation(s) in order fully to denude the cedent of both classes of right, real and personal, and to vest both in the assignee (*SME*, *supra*, 657; Halliday, *Conveyancing Law and Practice*, Vol. III, p.457, n.36).

How is a standard security assigned?

[135] A standard security may be transferred, in whole or in part, by the creditor by an assignation in conformity with either Form A or B of schedule 4 to the 1970 Act. Upon such an assignation being duly registered, the security (or, as the case may be, part thereof) shall be vested in the assignee "as effectually as if the security or the part had been granted in his favour" (1970 Act, s.14(1)).

[136] Section 53(1) of the 1970 Act makes it clear that a degree of latitude is permitted. Precise adherence to the statutory wording (in Forms A & B) is not essential, so long as the assignation conforms "as closely as may be" to those forms, and it is permissible to include any additional matter which may be relevant. Section 53 states:

> "It shall be sufficient compliance with any provisions in this Act which require any detail, notice, certificate or procedure to be in conformity with a Form or Note, or other required to this Act, that that deed, notice or certificate or procedure so conforms as closely as may be, and nothing in this Act shall preclude the inclusion of any additional matter which the person granting the deed or giving or serving the notice or giving the certificate or adopting the procedure may consider relevant".

Of course, this begs rather than answers the critical question: how far can the wording of an assignation stray from the statutory form?

[137] Schedule 4 sets out the "forms of deeds of assignation" as follows:

> "Form A
>
> Assignation of Standard Security
>
> I, AB (designation), in consideration of £….. hereby assign to CD (designation) a standard security for £….. (*or* a maximum sum of £….., to the extent of £…. being the amount now due thereunder; in other cases described as indicated in Note 2 to this Schedule) by EF in my favour (or in favour of GH) [registered in the Land Register of Scotland on ….. over Title Number ….. (or recorded in the Register for …. on ….)] *(adding if necessary,* but only to the extent of £…. of principal); with interest from ….
>
> Form B
>
> [To be endorsed on the standard security]
>
> As above save that instead of the words "a standard security for £…." or otherwise, as the case may be, insert 'the foregoing standard security'. Where the security is for a fluctuating amount whether subject to a maximum or not, add 'to the extent of £….. being the amount now due thereunder".

Seven notes are appended to schedule 4. Note 2 reads as follows:

> "In an assignation, discharge or deed of restriction, (i) a standard security in respect of an uncertain amount may be described by specifying shortly the nature of the debt or obligation (e.g. all sums due or to become due) for which the security was granted, adding in the case of an assignation, *to the extent of £….. being the amount now due thereunder*, and (ii) a standard security in respect of a personal obligation constituted in an instrument or instruments other than the standard security itself may be described by specifying shortly the nature of the debt or obligation and referring to the other instrument or instruments by which it is constituted in such manner as will be sufficient identification thereof"

[138] It will be recalled that a standard security can itself take two different forms (that is, either Form A or B of schedule 2 to the 1970 Act). The result is that four possibilities arise, as noted by the Scottish Law Commission in its Discussion Paper on Heritable Securities (No. 168) dated June 2019. The first possibility is that a Form A security is assigned by a Form A assignation. The assignation should be executed in duplicate, with one copy being intimated to the debtor and the second being registered in the Land Register. This is because the assignation is, in effect, assigning two bundles of rights: the right in security to the land (which can only be completed by registration) and the bundle of personal rights within the contract to which the security relates (which assignation can only be completed by intimation to the debtor). The second possibility is that a Form A security is assigned by a Form B assignation. In this scenario, the security document with its endorsement will require to be registered again. A separate intimation document would need to be intimated to the debtor. The third possibility is that a Form B security is assigned by a Form A assignation. The assignation document will have to be registered. But such an assignation has no effect on the creditor's separate personal rights under the personal obligation. If the intention is that the assignee of the security is also to acquire the personal rights under the contract to which the security relates, then those rights in the debt will require to be separately assigned (*Watson, supra)*. This could be done on a separate document or by adapting the wording in the Form A assignation. Again, intimation to the debtor will be required because the assignation of the personal rights under the contract to which the security relates is governed by different forms and procedure to the assignation of the real right and security. The fourth possibility is that a Form B security is assigned by a Form B assignation. Following endorsement, the security will require to be re-registered. Again, there will need to be a separate assignation of the debt (if that is the intention) which would

then require to be intimated to the debtor. These possibilities underline that the assignation of a standard security involves the transfer of different types of legal right (real and personal, heritable and moveable), with the result that different forms and procedures may have to be followed.

[139] The trap for the unwary is to assume that all rights, whatever their nature, can effectually be transferred in the same way, by the same form, and by the same procedure.

[140] Unfortunately, as I seek to explain later, it is a trap into which Promontoria has fallen in the present case, at least on the face of its pleadings and submissions.

Non-conformity with statutory wording

[141] Where a statute lays down a form or process for the exercise or acquisition of some right conferred by statute, and the statue does not expressly state what is the consequence of a failure to comply with that form or process, the traditional approach, in both English law and Scottish law, was that the consequence depended upon whether the statutory requirement was characterised as "mandatory" or "directory". If the form or process was held to be mandatory, a failure to comply with it was said to invalidate everything which followed; if the form or process was held to be merely directory, the failure to comply would not necessarily be fatal.

The English approach to non-conformity

[142] In England, that approach is now explicitly regarded as unsatisfactory because the characterisation of the statutory wording as either mandatory or directory really does no more than state a conclusion as to the consequence of non-compliance. It fails to address two logically-prior questions: (i) *why* is the wording to be regarded as mandatory or

directory, and (ii) *what* did the legislature intend should be the consequence of non-conformity?

[143] The modern English approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation. This involves an assessment of the purpose and importance of the requirement, viewed in the context of the statutory scheme as a whole. The elegant judgment of the Australian High Court in *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 is often referred to as a source of the new approach. It stated (at para 93):

> "In our opinion, the Court of Appeal in New South Wales was correct in *Tasker* v *Fullwood* [1978] 1 NSWLR 20, 23-24 in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have out-lived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court determining the validity of an act done in breach of statutory provision may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provisions should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute."

That passage was commended by the House of Lords in *R* v *Soneji* [2006] 1 AC 340 as encapsulating an improved analytical framework for examining the question of non-conformity and its consequences. In *Soneji,* Lord Steyn stated (at para 21):

> "…I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead…the emphasis ought to be on the consequences of non-compliance, and posing the question whether

> Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction".

Lord Carswell observed that the distinction between mandatory and directory provisions "has gone out of fashion" (*Soneji*, para 61) to be:

> "replaced… by a different analysis, directed to ascertaining what the legislature intended should happen if the provision in question were not fully observed"

According to the Law Lords, the essence of the search is the ascertainment of the intention of the legislature about the consequences of failure to observe the statutory wording, form or process (*Soneji,* para 62).

[144] A trio of Court of Appeal decisions continued the trend. In *Osman* v *Natt* [2015] 1 WLR 1536, Sir Terence Etherton C. observed (para. [25]):

> "The characterisation of the statutory provisions as either mandatory or directory really does no more than state a conclusion as to the consequence of non-compliance rather than assist in determining what consequence the legislature intended."

He distinguished two broad categories of cases involving non-conformity with statutory wording:

> "(1) Those cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, of which concerned procedural requirements for challenging a decision whether by litigation or some other process, and (2) those cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance of the statutory requirement precludes that person from acquiring the right in question" (para. [28]).

In the first category (involving public law issues), "substantial compliance" could be good enough. But in the second category (involving private law rights), the concept of substantial compliance did not arise. Instead, in this second category, the judicial task was to determine whether, on a proper interpretation of the statute, the discrepancy in wording was of "critical importance" in the context of the legislative scheme (*Osman*, para. [33]) or whether

it was "of secondary importance or merely ancillary" (para. [34])). Importantly, the Court rejected the suggestion that the subjective circumstances of the parties could be relevant to the issue of non-conformity. Etherton C. stated:

> "On that approach, the outcome does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case… This is consistent with the policy of providing certainty in relation to the existence, acquisition of transfer of property interests…"

So, in *Osman*, a statutory notice served by tenants for the purpose of claiming a right to acquire the freehold of a property was held to be invalid because it did not state the full name of one of the qualifying tenants, the address of her flat, or the particulars of her lease, being particulars prescribed in the statutory form. It did not matter that everyone was fully aware of the missing details. No one was in any doubt as to who the omitted tenant was, or her address, or her lease particulars. No confusion had been caused to anyone. But, on a proper interpretation of the statute, these omitted particulars went "to the very heart" of the statutory objective which was to disclose, on the face of the notice, *inter alia* the number of qualifying tenants, their addresses and lease particulars. On a proper interpretation of the statute, those missing particulars were critical (whether or not their omission had caused any actual confusion to the particular parties). Further, the fact that a second (corrected) notice could readily be served tended to support the conclusion that Parliament intended that non-conformity should render the first (defective) notice wholly invalid.

[145] In *Elim Court RTM Co Ltd* v *Avon Freeholds Ltd* [2017] 3 WLR 876, Lewison LJ expounded further on the proper approach to non-conformity in cases falling within the second category (i.e. private law cases). Following *Osman*, he stated (para. [52]):

> "The outcome of such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient

> or the actual prejudice caused by non-compliance on the particular facts of the case (see *Osman*, paragraph [32]). The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole [*Osman,* paragraph [33]). Where the notice or the information which is missing from it is of critical importance in the context of the scheme, the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand, the information missing from the statutory notices of secondary importance or merely ancillary, the notice may be held to have been valid [*Osman*, paragraph [34]). One useful point is….whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity".

In cases falling within the second category (private law cases), Lewison LJ stated that it did not follow that every defect in a notice or procedure "however trivial" invalidates the notice (para. 56). Certain discrepancies were not "an essential feature of the statutory scheme" (para 71), others were "ancillary to the primary objective of the legislation" (para 73). On the facts in *Elim,* the notice was not invalidated despite its inconsistencies with the statutory wording.

[146] The third Court of Appeal decision is *Cheerupmate2 Ltd* v *Franco De Luca Calce* [2019] 1 WLR 1813. Likewise, the wording of an impugned notice diverged from the prescribed statutory form, but in a minor respect only, when viewed in the context of the statutory scheme as a whole. By process of statutory interpretation, the Court of Appeal concluded (para 20):

> "Parliament is unlikely to have intended that the minor discrepancy between the notice in fact served and the prescribed form was of sufficient importance to invalidate the notice."

The Scottish approach to non-conformity

[147] In Scots law, the approach to the issue of non-conformity has tended to reflect the traditional dichotomy between mandatory and directory provisions, but often with no

deeper analysis of the underlying methodology. Many first instance decisions turn upon a fairly unsophisticated labelling of deviations from statutory wording as being either, on the one hand, "essential" and "material" or, on the other hand, "trivial" or "ancillary" or the like, but with no evident application of a uniform analytical framework. The older sheriff court decisions illustrate the approach, such as *Forbes* v *Pollock* (1900) 16 Sh Ct Rep 329; *Hay* v *McCrone* 1928 SLT (Sh Ct) 25; *Standard Property Co Ltd* v *McGregor* (1930) 46 Sh Ct 294; *McLachlan* v *McKinnon's Trs* (1937) 53 Sh Ct Rep 69; *Christie's Trs* v *Reid* 1952 SLT (Sh Ct) 50 and *Strathclyde Securities Co Ltd* v *Park* 1955 SLT (Sh Ct) 79. The same may be said of recent cases like *Shear v Clipper Holdings II SARL* and *Promontoria (Henrico) Ltd* v *The Firm of Portico Holdings (Scotland)*, *supra* (in both of which a discrepancy was dismissed as a "technicality") and, to the opposite effect, *OneSavings Bank plc v Burns, supra* (in which the statutory wording was labelled as mandatory). All that might be drawn from them, perhaps, is that "technical" or "trivial" discrepancies or "errors of calculation" may be overlooked, whereas "substantial" discrepancies or "errors of magnitude" are not excusable. These decisions are otherwise unilluminating.

[148] However, for the reasons set out below, I conclude that the correct Scottish approach to the issue of non-conformity is broadly similar, if not identical, to the modern English approach (at least in the context of private law rights).

[149] The traditional dichotomy between mandatory and directory provisions is unobjectionable, provided it is understood as being no more than "a convenient shorthand" (*Soneji*, *supra*, 63). Fundamentally, what is required of the court in such cases is that it undertake an exercise in statutory interpretation to ascertain (i) the *purpose* of the prescribed statutory wording, viewed in the context of the statutory scheme as a whole, and (ii) what the legislature intended to be the *consequence* of any particular deviation from it. It is only

once the purpose of the statutory wording has been ascertained that an informed decision can be reached as to whether the impugned discrepancy is properly characterised as material or immaterial, essential or inessential, substantive or ancillary, important or trivial, all viewed through the lens of that statutory purpose or objective.

[150] I reach this conclusion for the following reasons. Firstly, three Inner House cases provide the most insightful and authoritative Scottish precedent in support of the conclusion that the exercise involved here is indeed one of pure statutory interpretation. The three cases are *Johnston* v *Pettigrew & Ors* (1865) 3 M 954, *Department of Agriculture for Scotland v Goodfellow* 1931 SC 556 and *Rae* v *Davidson* 1954 SC 361. In *Johnston,* the question was whether a departure from a prescribed statutory form was fatal to the registration of a conveyance by which a real right was sought to be constituted. The Second Division's reasoning explicitly discloses that it approached the question as one of statutory interpretation. Lord Cowan sought to identify "the object of the legislature prescribing the form". Having done so, he concluded that certain elements of the prescribed wording were "essential" to achieve that statutory objective, with the result that their omission was "fatal to the validity of the registration of the deed". The Lord Justice-Clerk, by process of statutory interpretation concluded that the statutory wording prescribed matters that were "not mere matters of form; they enter into the substance of the procedure". The purpose of the statute was, he said, to confer "a boon" to citizens by providing "a cheaper, easier and speedier way" of acquiring a real right to land but a failure to follow that statutory wording "in substance" was intended to deny the defaulting party the benefit conferred by the statute. The emphasis throughout is on distinguishing, by process of statutory interpretation, the "essential" (per Lord Cowan) or "substantive" (per Lord Neaves) from the inessential or merely ancillary. *Johnston* was followed in *Goodfellow*, *supra*, where, by an

oversight apparently, a removal notice was sent to a tenant by unregistered post rather than by one of three other ways prescribed by statute. The Lord Justice-Clerk (Alness) had "very little sympathy" for either party. Interestingly (in contrast with the approach taken in *Shear* and *Promontoria Henrico Ltd, supra*), it was acknowledged that the tenant had suffered "no real prejudice" and was "seeking to take advantage of a technicality" (at 558). Nevertheless, proceeding upon a "true construction" of the statute (at 559), the prescribed manner of service was mandatory. I concede the analysis is not as full as it might have been. Only a hint is made at the inferred statutory purpose. It was said that the prescribed manner of transmission of such notices could not be "thrown loose", allowing such notices to be served "by a taxi-driver or an office boy" (page 559). In *Rae*, the issue was whether a notice to quit complied with the statutory form. The prescribed wording required that the notice specify the lease under which the land was occupied. This detail was omitted in the landlord's notice. The issue was approached explicitly "on the construction" of the statute. Again, in contrast with the approach in *Shear* and *Promontoria (Henrico) Ltd, supra*, it did not matter that the tenant's challenge to the conformity of the notice was "extremely technical", or that the tenant might succeed on what was "the merest technicality", or that no actual confusion was caused to the tenant (who was clearly well aware of the lease under which he occupied the farm), because:

> "….the policy of the [statute] is that the prescribed form must be observed and, as this has not been done, the notice is bad".

In other words, the analysis was entirely objective. He explained (p.366):

> "The consistent policy of the legislature as to notices has been to say what must be in them. The theory is that, if the form is properly defined, then, so long as the statutory instructions are obeyed, there can be no room for doubt. There may, of course, be occasions where disputes arise as to whether the instructions are obeyed, but the theory is that the troubles so arising are fewer

> and simpler than those which might be expected to arise if the thing were left at large to the discretion of the author."

[151] Secondly, more recently, in *Legal & Equitable Nominees Ltd* v *Scotia Investments Ltd Partnership* 2019 SLT (Sh Ct) 193, the Sheriff Appeal Court grappled with the issue of the alleged disconformity of a calling-up notice with prescribed statutory wording (this time, in the 1970 Act, s.19, sch. 6.2, Form A). By majority, the Court concluded that the discrepancies in the notice did not render the notice invalid. The Court agreed that the correct approach was to determine the validity of the notice by a process of "statutory interpretation" (para [24]). On that approach, two of the appeal sheriffs concluded that the discrepancies were "trivial" in nature, "obvious and minor", and caused "no room for doubt" on the part of the recipient (paras [25] & [26]) but no fuller explanation is given of the majority reasoning. *Soneji, Osman* and *Elim* were not cited.

[152] However, one appeal sheriff (Sheriff W. Holligan), in a partly dissenting judgment, did seek to analyse the issue more deeply. He did so (correctly in my respectful view, and consistently with the three Inner House authorities referred to above) by seeking to ascertain "the purpose of the requirement". The dissenting judgment does not fully explain the methodology, but it comes closest to applying it.

[153] Thirdly, although *Soneji* and *Osman* are non-binding English decisions, they explicitly trace the source of the modern English approach to non-conformity to dicta in a Scottish House of Lords decision in *London & Clydeside Estates Ltd* v *Aberdeen District Council* 1980 SC 1. This case is viewed as the first to advocate a fresh approach by challenging the binary dichotomy of mandatory and directory provisions. In *London & Clydeside Estates Ltd*, the Lord Chancellor acknowledged that in the reported decisions up to that date (including some of his own) there was much language pre-supposing the existence of "stark categories"

such as "mandatory" and "directory", "void" and "voidable", "nullity" and "purely regulatory" provisions. While he conceded that such language may be useful, he opined that it may be misleading. The Lord Chancellor stated:

> "Parliament lays down a statutory requirement for the exercise of legal authority and it expects this authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another".

[154] Fourthly, while the English decisions are not binding upon me, they are of significant persuasive value, given the eminence of the judges involved, the consistency of the line (supported by Commonwealth authority) and the attractiveness of the logic. It is difficult to conceive that a materially different approach is likely to be taken in Scotland to what ought to be a straight-forward exercise in statutory interpretation.

De minimis clauses

[155] Often the statute makes express provision for a degree of leeway. The terminology varies. Sometimes it states that a deed or process should conform to the statutory wording "as nearly as may be", or "as closely as may be", or "substantially to the same effect", or the like. Such clauses featured in *Johnston* and *Rae, supra.*

[156] In my judgment, such clauses merely make explicit the legislature's intention that strict adherence to the prescribed wording is not necessary. They do nothing more than articulate a form of *de minimis* provision. Beyond that, they do not assist in defining the precise extent to which deviation from the prescribed wording is permitted. In order to

distinguish the fundamental from the frippery, the material from the *de minimis*, the substantive from the ancillary, one must first ascertain the purpose of the wording.

[157] The critical questions remain: (i) on a proper construction of the statute, what is the *purpose* or objective of the prescribed wording; (ii) is the impugned wording (or omitted wording) material or immaterial, essential or inessential, substantive or ancillary, to that statutory objective; and (iii) what did the legislature intend to be the *consequence* of the impugned discrepancy? Viewed through the lens of the ascertained purpose, if a discrepancy can be characterised as immaterial, inessential or ancillary, it will fall within the statutory *de minimis* clause and the wording will be deemed to conform.

[158] This case involves just such a clause. Section 53 of the 1970 Act states that it shall be sufficient compliance with a prescribed form of wording if the deed or notice conforms "as closely as may be" with the prescribed wording. In *Sanderson's Trs* v *Ambion Scotland Ltd* 1994 SLT 645 (a case decided in 1977 but not reported till many years later), Lord Dunpark interpreted these words as meaning "as closely as may be appropriate to the circumstances of the case". With respect, I am not persuaded that that interpretation is useful or correct. First, it involves a gloss on the statutory wording, adding words that are not there. Second, it is itself inherently vague and sheds no real light on the extent of the latitude intended by Parliament. Third, it diverts the focus of the exercise from one of statutory interpretation (that is, ascertaining the purpose of the statutory wording) to an examination of the individual circumstances of the parties and the transaction in question. To say that a deed may conform as closely as may be "appropriate to the circumstances of the case" is at risk of introducing an infinite degree of subjective fluctuation, inconsistency and unpredictability that panders to the whims and preferences of the parties and their transaction, rather than giving precedence to the wider policy objective and strictures of the statutory framework.

The effectual vesting of a real right in security (with all its consequences for the rights of the debtor and third party creditors) should not turn upon issues as subjective and unpredictable as the peculiar circumstances affecting parties to a particular transaction. The task involved is an objective one. Individuality and subjectivity are sacrificed in the wider interests of the statutory objective, whatever that may be. It will be recalled that both the Inner House and the Court of Appeal have rejected as irrelevant reliance upon subjective consequences to the parties, such as the absence of any actual prejudice or confusion caused by a derogation from prescribed wording (*Goodfellow*; *Rae*; *Osman; Elim*, *supra)*.

What is the purpose of the wording in Forms A & B of the 1970 Act?

[159] In my judgment, on a proper interpretation of the 1970 Act, the purpose of the statutory wording in Forms A & B of schedule 4 is to provide a simple mechanism for the effectual transfer of a real right in security over land from an assignor to an assignee.

[160] The objective of simplicity is discernible from the relatively lean wording and structure of the Forms themselves. It is also consistent with the recommendations in the Report of the Halliday Committee (Cmnd. 3118), presented to Parliament in December 1966, which preceded the enactment of the 1970 Act. One of the Committee's declared principal objectives in recommending legal reform to introduce the new standard security was (at para 125):

> "… in order to achieve so far as possible uniformity and simplicity in conveyancing practice…";

and the Committee observed that one of the consequential "benefits" of the new form of security would be that it would be practicable to effect "by very simple supplementary documents" (to be prescribed by statutory styles) the variation, postponement, discharge

and assignation of the security (para 126). Simplicity carries with it the notion of certainty. The cedent and assignee are not the only persons with an interest in the deed of assignation. There is a wider public interest at stake. The Keeper has a duty to maintain the accuracy of the Register; the debtor is entitled to know the identity of his secured creditor and the true extent of that creditor's right over his land; competing third party creditors, prior or postponed, present and future, are entitled to look to the Register to understand the extent to which land is secured before advancing or distributing funds; singular and universal successors to the land (purchasers, trustees in sequestration, executors, and the like) are entitled to know, by easy reference to and reliance upon the Register, what exactly has been assigned, to whom, when, and how. It is not satisfactory to say that ambiguities, complexities or errors in the deed might be sorted out by process of contractual construction, with reference to a factual matrix known only to the cedent and assignee. A satisfactory framework of law within which legally enforceable security can be given for the payment of debt "is of importance to the whole of the business community, both borrowers and lenders" *(Bank of Credit & Commerce International SA* v *Simjee & Anr* [1997] CLC 135, 136); and, in this context:

> "…. certainty is the single most important feature of the law: uncertain security is not good security" (per Hobhouse LJ).

[161] The statutory objective of effectual vesting of a real right is discernible from the immediate and wider legal context. First, the Forms derive from section 14(1) of the 1970 Act. This envisages that the deeds will be registered in the Land Register, in order to vest the security in the assignee:

> "…as effectually as if the security…had been granted in [the assignee's] favour".

This harks back to section 11 of the 1970 Act which explains that the effect of registration of a standard security is to vest in the grantee "a real right in security" for the performance of the contract to which the security relates. Indeed, the only mechanism by which a real right in security over land can be created is by registration. Therefore, the two legal regimes (one regulating the content of a deed that purports to transfer a real right in heritable property, the other regulating the registration of such a deed in the Land Register) are inextricably connected. The content of such deeds must be compatible with the legal regime governing their registration formerly in the Sasines Register and now in Land Register of Scotland, under the Land Registration etc., (Scotland) Act 2012) ("the 2012 Act"). It would be absurd if the 1970 Act were to dictate a mandatory form of wording for an assignation that was repugnant to the 2012 Act regime for the registration of deeds, because the deed would thereby be incapable of registration and the real right in security would not be capable of vesting "effectually" in the assignee. Second, both legal regimes sit in the wider context of centuries of conveyancing practice recognising a broad three-stage procedure for the transfer of real rights in lands, namely: (i) the conclusion of an agreement to convey or transfer the right; (ii) the execution and delivery of a deed of conveyance or transfer; and (iii) the registration of that deed, whereby the real right is transferred; as well as a plethora of precedent and principles regarding the proper of content of deeds that purport to convey rights in heritable property. There is no reason to suppose that those principles have ceased to apply. Third, the 2012 Act makes both express and implied provision regarding the content of deeds presented for registration. The Keeper can only register a "registrable deed" (s.49), being one that is capable of being registered in the Land Register by virtue of specified enactments (including the 1970 Act). Deeds that are not so authorised by statute cannot be registered. In respect of registered plots, the deed must narrate the title number of

the title sheet to which the application relates and it must be "valid" (2021 Act, s.26(1)). The necessity for the deed to be "valid" introduces a host of common law and statutory principles concerning the drafting of deeds that seek *inter alia* to transfer real rights in land. For example, it can reasonably be inferred from this statutory condition that such a deed must be properly subscribed; that any annexations or plans are properly incorporated (Requirements of Writing (Scotland) Act 1995); that the granter and grantee are identifiable; that the thing being assigned is identifiable; and that the deed contains operative words indicating a *de praesenti* intention to effect the transfer; all of which are basic principles regulating the content of deeds of conveyance that date back, in some instances, as far as Stair. If any of these features is missing, the deed will not be "valid", the application for registration would fall to be rejected, and the statutory objective of vesting the real right "effectually" in the assignee is defeated.

[162] Therefore, by process of statutory interpretation, I conclude that the purpose of the prescribed wording in Forms A & B (of schedule 4 to the 1970 Act) is to provide a simple mechanism for the effectual transfer of a real right in security over land from an assignor to an assignee. Simplicity connotes certainty; and the "effectual" vesting of rights implies both efficacy and efficiency.

[163] Derogations from the statutory wording that are material, essential or substantive to the attainment of that statutory purpose will render the deed disconform to the prescribed wording; whereas, by virtue of section 53, deviations that are immaterial, inessential or ancillary to that statutory purpose will not render the deed disconform.

[164] Further, even if a deed is disconform in some respect, the task of the court is also to determine, by process of statutory interpretation, what consequence, if any, the legislature intended to follow from that disconformity.

[165] The statutory *de minimis* clause in section 53 of the 1970 Act merely indicates that strict adherence to the prescribed wording is not required. Beyond that, it does no more than permit derogations that are immaterial or inessential, insubstantial or ancillary, to the statutory objective, by deeming such deviations to constitute "sufficient compliance", and thereby to conform.

What is material to the legislative purpose, & what is immaterial?

[166] Viewed through the lens of that statutory purpose, it is possible to identify those elements of the wording in Forms A & B that are material or immaterial, essential or inessential, substantive or ancillary, to the attainment of that legislative objective.

[167] In my judgment, the material elements of the statutory Forms are as follows:

(i) the structural form of the document (that is, a unilateral deed, transferring a standard security);

(ii) the identity of the parties (that is, the names and designations of the assignor and assignee);

(iii) the description of the standard security that is being assigned;

(iv) the operative clause (that is, wording that defines the extent of the assignation and effects a *de praesenti* transfer thereof);

(v) in the case of a registered plot, the date of registration and the title number on the title sheet; and

(vi) in the case of an unregistered plot, the date of registration in the Register of Sasines and the relevant county.

If any one of these elements is omitted or defective, the deed is rendered disconform to the prescribed statutory wording. The rest is immaterial, inessential or ancillary.

Is the "form" of the deed material to the statutory purpose?

[168] To explain, in respect of element (i) (the form of the deed), Professor Halliday classified "deeds" into three categories (*Halliday,* Conveyancing Law & Practice (2nd ed.) 1997), paragraph 1-02):

> "(a) In relation to function, as (i) deeds of constitution which create rights or obligations; (ii) deeds of transfer whereby an existing right is transferred to another person; or (iii) deeds of discharge whereby an existing right or obligation is extinguished.
>
> (b) In relation to the time when they take effect, as (i) inter vivos which become operative either immediately or at some specified date or time which is not dependent on any life of any person, or (ii) mortis causa deeds which take effect only upon the death of a person, usually the granter.
>
> (c) *In relation to their form*, as (i) unilateral deeds granted by one person or by several persons having the same or related interests or (ii) bilateral or multilateral deeds granted by two or more persons having different interests." (*my emphasis*)

The documents in schedule 4 to the 1970 Act are all identified as "forms of deeds". The most immediate and striking feature of these "deeds" (including the two deeds of assignation) is that they are, in form, *unilateral* deeds. They are not bilateral or multilateral deeds or contracts between parties having different interests. In my judgment, that specified *form* or structure is important to the attainment of the statutory objective for the following reasons.

[169] First, a unilateral deed is likely to be simpler than a bilateral or multilateral deed. It is more likely to comprise a clear unconditional conveyance, uncluttered by content irrelevant to the transfer of the real right in security. If the Keeper, on receipt of an application for registration of a supposed "deed" of assignation of a security (in the form of a multilateral contract), has to trawl through pages of obscure legal drafting (perhaps having to refer to other documents, not produced for registration, but incorporated for definitional

purposes) to try to work out what the contract means, the statutory objective of simplicity (with its connotation of certainty) is obstructed.

[170] Second, a unilateral deed is more likely to disclose the essential operative clause, disclosing the granter's unconditional intention to effect a *de praesenti* transfer of the real right in security. In contrast, a bilateral or multilateral deed is more likely to be subject to and encumbered by reciprocal rights, mutual obligations, qualifications, suspensive conditions and so forth, purification of which may not be capable of being determined by reference to the deed itself but only by reference to extraneous evidence, all of which is inconsistent with the recognised necessity for clear *de praesenti* operative words of conveyance. That is why form is important. This is not "mere fuss-pottery" (to use the conveyancing professors' splendidly invented word: *Conveyancing 2017: "Assigning standard securities: A question of style"* 118, 126).

[171] Third, the use of a unilateral deed is consistent with centuries of conveyancing practice whereby real rights in land (including real rights in security) are transferred by a unilateral deed, not by a multilateral or bilateral deed or contract. The use of a bilateral or multilateral deed (*a fortiori* one that purports to transfer a miscellany of rights, both real and personal, heritable and moveable, under the umbrella of a multilateral contract containing mutual obligations and suspensive conditions) is more consistent with the first stage in the recognised three-stage process for the creation and transfer of real rights in land, whereby parties merely record their agreement to assign rights on a future date or event; the use of a unilateral deed is consistent with the second stage in that recognised process, whereby the cedent executes and delivers a conveyance of the real right to the assignee (subject to completion by registration or intimation or both, as the case may be). So the statutory form

(prescribing the use of a unilateral deed) can be seen to correspond to, and reflect, that second stage of a familiar, centuries-old process for the transfer of real rights in land.

[172] Fourth, all of the unilateral deeds (Forms A to F) in schedule 4 relate to one thing only - that is, a standard security. None of them is concerned with the transfer, variation, restriction, or discharge, of any other kind of security or right. This can be inferred to be a material element of the deed because the Keeper can only accept "registrable deeds", being deeds that Parliament has authorised for registration in the Land Register (s.49. 2012 Act). Parliament has expressly authorised the registration in the Land Register of (unilateral) deeds of assignation, variation, restriction, etc. of standard securities; it has not authorised the registration of (unilateral, bilateral or multilateral) deeds of assignation, etc., of floating charges, personal guarantees, or any mixed bag of personal rights, claims or securities. The registration of such a deed on the Land Register would be anomalous. Any application to do so would be rejected. So, again, the *form* or structure of the deed as a unilateral deed transferring only a standard security (or standard securities: per *OneSavings Bank, supra*, para [22]) can be seen to be material to the attainment of the statutory purpose, because, without it, the objective of effectual vesting of the real right in security is defeated.

Other material elements

[173] Turning to elements (ii) and (iv), their materiality to the statutory objective is largely self-explanatory. The name and designation of the assignor are material elements of the statutory wording because the Keeper, in order to register the deed (and thereby achieve effectual vesting in the assignee), must be able to identify whether the assignor has the right to assign (either as the original creditor or by deduction of title through the original creditor). Equally, the name and designation of the assignee must be essential to the

statutory objective because the Keeper, must be able to identify the person in whom the security right is intended to be vested. Others too have a legitimate interest to know the identity of the assignee. The operative clause (that is, wording that effects a *de praesenti* transfer of the thing to be assigned) is also plainly critical to the statutory objective. Without it, no effectual vesting of the security in the assignee can take place, not least because the Keeper would be duty-bound to reject as "invalid" a deed that did not contain such wording.

Is the description of the security a material element?

[174] I would categorise each of the elements (iii), (v) & (vi) as aspects of the "description" of the security that is to be assigned. The "description" can readily be inferred to be an essential element of the statutory wording because it pertains to the identification of the security that is being assigned. Unless the security is clearly identified in the deed, the statutory objectives of simplicity and efficacy are frustrated.

[175] However, the "description" of a standard security may have multiple component features. Form A appears to have five discrete elements to the "description" of a standard security: (i) the type of standard security (namely, whether it is a security for a fixed sum, or for a fluctuating amount subject to a maximum, or an all sums due standard security); (ii) in case of a fixed sum and maximum sum security, the amounts of those fixed and maximum sums, respectively; (iii) the names of the original granter and grantee of the security; (vi), the date of registration of the security and the title number (in the case of a registered plot); and (v) the date of registration of the security and the relevant county (in the case of a Sasines title).

[176] Are all five of these component features essential elements of the "description" of a standard security, and material to the statutory purpose? In my judgment, the answer is yes.

[177] The ready identification of the relevant security is of the utmost importance to the Keeper, the debtor, and a plethora of third parties, each of whom is required or entitled to know, in simple terms and with certainty, which security has purportedly been assigned. The form is designed to cater for a variety of factual circumstances. At one extreme, a debtor may have granted only one security over his property. It might easily be identified by reference only to the plot's title number. At the other extreme, it is quite conceivable that a debtor has granted multiple securities over the same plot, being securities of the same or different types, for the same or different amounts (fixed or fluctuating), in favour of the same or different parties, registered on the same or different days or, indeed, unregistered at the date of assignation. In such varied scenarios, confusion and uncertainty may well arise if the assignation were to fail to describe the security by reference to many or all of the component features appearing in the statutory description. It can be inferred that, Parliament, in its wisdom, has envisaged just such a variety of scenarios, and that, by prescribing all these multiple component elements in the simple forms of assignation, its intention is to eliminate the risk of any such confusion and uncertainty ever arising. It does not matter that, in the context of any particular transaction, no actual confusion may be caused by the omission of one or more of the component elements of the description. The exercise is objective, not subjective. The prescribed wording may happen to be immaterial or irrelevant to the particular parties to a particular transaction, but, by process of statutory interpretation, it can be seen to be material to the underlying legislative purpose of achieving simplicity and certainty, efficiency and efficacy, in the majority of transactions across a multiplicity of factual scenarios.

[178] Accordingly, I conclude that a failure to include any of these component elements in the description of the standard security will render the assignation disconform to the statutory wording.

What is immaterial to the statutory purpose?

[179] In my judgment, it follows from the foregoing that the immaterial, inessential or ancillary elements of the statutory wording in Forms A & B of schedule 4 include:

(i) the consideration for which the assignation was granted;

(ii) the currency of the debt;

(iii) the interest clause; and

(iv) specification of the precise amount then due under the security at the date of the assignation (in the case of a fluctuating security up to a maximum sum, or an all sums due security).

The omission of any of these elements from the assignation is of no consequence to the question of its conformity.

[180] To illustrate, Forms A & B contain the words "in consideration of £….". In my judgment, they have no relevance to the statutory purpose. There is nothing in the statute to indicate that the legislature's objective was to restrict the currency in which securities were to be traded. The reference to sterling in the prescribed wording cannot mean that Parliament intended to invalidate assignations granted for a consideration in euros or dollars. Indeed, the inclusion or omission of any consideration whatsoever is of no significance to the disclosed statutory objective of the wording (though, of course, it may be relevant to other issues). Likewise, the inclusion or omission of an interest clause has no bearing upon the attainment of the statutory purpose. It is a matter for private negotiation

between the parties. Lastly, in respect of securities for debt of an uncertain amount, the inclusion or omission of a precise sum then said to be due at the date of the assignation is also of no relevance to the attainment of the disclosed statutory purpose. However, as this issue formed a central plank of the pursuer's submissions, I shall address it in more detail below.

Is it essential to specify "the amount due" by the debtor at the date of assignation?

[181] For standard securities for an uncertain amount (whether for a fluctuating debt subject to a maximum, or for all sums due), Forms A & B prescribe that the assignation should include the words "to the extent of £… being the amount now due thereunder" (schedule 4, Forms A & B, note 2).

[182] Is it a material element of the statutory wording in such cases that the assignation should specify the amount of the indebtedness at the date of the assignation? In my judgment, the answer is no.

[183] To explain, as a preliminary observation, these words ("to the extent of £… being the amount now due thereunder") do not form part of the *description* of the standard security at all. They do not identify the security that is being assigned. Rather, they describe the *extent* to which an identified security is being assigned. They form part of the operative clause of the assignation. The words beginning "to the extent of…" might equally well have been placed immediately after the standard operative words "hereby assign" where they appear in the prescribed forms, because they define (and usually limit) the extent of the transfer. An assignation that states "I assign the security…", without other limitation, will be read as assigning the whole of the security. The transfer of the whole security follows naturally from the absence of any words of limitation suggesting an assignation in part. In contrast,

the use of the words "to the extent of" tends to indicate that something less than the whole is being assigned, in which event it will be necessary to define that extent more precisely in order to give meaning to the operative clause of the assignation. Why then would Parliament wish to regulate the drafting of the operative clause of an assignation to the extent of compelling the disclosure, on the face of the deed, of a precise sum owed by the debtor at the date of the assignation?

[184] In my judgment, this particular statutory wording is immaterial and inessential, because it has nothing to do with the legislative purpose of the Forms at all. It neither contributes to the simplicity of the transfer process (indeed, it probably complicates it), nor does it have any effect on the ability to register the document to effectually vest the real right in the assignee. In many cases it will be far from simple, if not utterly impracticable, to calculate precisely the sum due by a debtor at the date of an assignation, given that a standard security can competently secure payment of an unascertained contingent or future indebtedness, or even performance of an obligation *ad factum praestandum*. Ironically, though, the compulsory insertion of a specific sum to define the extent of the assignation is also likely to expose the cedent to the risk of liability for breach of warrandice if the calculation proves to be inaccurate (*Halliday,* Commentary, para 9.07; Halliday, *Conveyancing Law and Practice*, Vol 2, para 55-19; Cusine & Rennie, *Standard Securities* (2nd ed.), 6.06). When first registering a standard security, it makes no odds whether the debtor's indebtedness to the creditor is quantified or unquantified at the date of creation of the security; securities for fixed or uncertain amounts are equally capable of registration and effectual vesting. By logical extension, it should equally makes no odds to the registration of an assignation of any such security that the debtor's liability is unquantified on the face of the assignation. In

contrast, I accept that quantification of the alleged indebtedness would be relevant at the later stage of enforcement of the security.

[185] What then is the point of this statutory wording? In *Sanderson's Trustee*, *supra*, Lord Dunpark conceded that it was "not obvious" (p.649L) why this wording appeared in the Forms at all. Mr Guidi's counsel suggested that it was intended to "protect" the debtor by crystallising, and publicising on the register, the extent of his indebtedness at the date of assignation. I disagree. It is striking that the wording applies only to standard securities for an uncertain amount. No similar wording applies to assignations of fixed sum securities, notwithstanding that, on the pursuer's logic, the debtor and others might be equally keen to know the precise amount of the balance due at the date of assignation. If crystallisation and publication of the indebtedness were the objective, the differential treatment would be illogical. Separately, it may be surmised that the prescribed inclusion of a specific sum in the assignation is a vestige of the historic antipathy of the law towards the creation of heritable security for uncertain or fluctuating amounts. That might explain why the statutory wording only applies to these types of security. However, that explanation is also unconvincing because all of the old rules limiting such heritable security were repealed by section 9(6) of the 1970 Act, and expressly do not apply to a standard security (or, by logical extension, any assignation thereof).

[186] In my judgment, this particular statutory wording in Forms A & B (which bears to compel the insertion of a precise sum quantifying the debtor's indebtedness at the date of the assignation) is not designed to achieve any wider legislative objective at all. Instead, it merely reflects a commonly accepted conveyancing practice – and, indeed, the correct contractual outcome - when assigning a *conventionally-worded* standard security for an uncertain amount. Critically though (and this appears to have been the basis of much

misunderstanding), it does not reflect the contractual outcome in every case, specifically in the context of a standard security that might be said to be *unconventional* in its drafting (as explained further below).

[187] The wording finds its way into Forms A & B because, prior to the enactment of the 1970 Act, it was the "commonly accepted view" (*Burns,* Conveyancing Practice, 576) and "existing law and practice" (Halliday, *Conveyancing & Feudal Reform (Scotland) Act 1970*, para 9-03) that where a heritable security had been granted for a fluctuating amount subject to a maximum, such a security (i) could competently be assigned only to the extent of the sum outstanding at the date of the assignation and (ii) could not be assigned to the extent of securing further (post-assignation) advances to the debtor by the assignee. This "commonly accepted view" has led to the conclusion that the same outcome would apply to the assignation of the new standard security for an uncertain amount (Halliday, *supra*; G. Gretton, "Assignations of All Sums Standard Securities" 1984 SLT (News) 207). To be clear, I do not doubt the correctness of that conclusion. However, in my judgment, it is important to emphasise that it is predicated upon the assignation of a *conventionally-worded* security, that is, a security which followed the usual style of heritable securities over land prior to, and for many decades after, the enactment of the 1970 Act. Professor Halliday sought to explain why the assignation of a standard security of an uncertain amount would, in effect, freeze the debtor's indebtedness as at the date of the assignation. He stated (*supra*, para 9-07) (with my italicised emphasis):

> "The personal obligation of the debtor will have been created *in favour of the original creditor* and will have covered sums becoming due *to him* by the debtor: after assignation of the standard security there will *normally* [*my emphasis*] be no further course of dealing between these parties. So, if any future advances are to be made by the assignee and are to be covered by the security, then (a) if the personal obligation was contained in the original standard security either a recorded variation or a new standard security will

> be necessary to secure the further advances or (b) if the personal obligation was contained in a separate instrument and a recorded instrument will be necessary to constitute the new personal obligations for the further advances or a new standard security may be granted in respect of them. In practice it will probably be simpler and clearer to discharge the existing standard security and have a new comprehensive standard security".

Professor Halliday was addressing what would "normally" happen. His analysis is predicated upon a standard security in which the personal obligation is created only "in favour of the original creditor", no doubt because this would have been the conventional drafting style prior to the enactment of the 1970 Act and, I would wager, for decades thereafter, right up to the present day.

[188] To explain, in the normal case, an all sums standard security (and its nearest predecessor, the bond of cash credit and disposition in security) would be granted by A to B to secure payment to B of debt due (or become due) by A to B. The first underlined words identify the secured creditor; the second underlined words identify the personal creditor; the third underlined words define the *scope* of the secured obligation. I shall refer to this as a conventionally-worded security.

[189] Assume that B assigns to C the right to the security. The effect of the assignation is to change the *identity* of the secured creditor (i.e. the holder of the security). The identity of the personal creditor (to whom the debt is payable) is unchanged by such an assignation; and the *scope* of the secured obligation is also unaffected. C, as assignee of the security, is entitled to enforce the security, but only to compel payment to the same personal creditor (B) of the same "debt" (that is, the debt owed by A to B). So far, so good.

[190] Assume then that B assigns to C both the right to the security and the right under the personal obligation. The effect of the assignation is to change both the *identity* of the secured creditor (i.e. the holder of the security) and the *identity* of the personal creditor (to whom the

debt is payable). However, again, the *scope* of the secured obligation (or "debt") remains the same. C (as assignee of the security) is now entitled to enforce the security to compel payment or performance to C (as assignee of the rights under the personal obligation) of the secured "debt" (that is, the debt owed by A to B, albeit now payable to C). An assignation does not re-write the definition of the secured "debt; it merely changes the identity of the creditor who is entitled to receive payment of that "debt" (or who can enforce the security to compel such payment).

[191] This explains why the assignation of a conventionally-worded security has a "freezing" or crystallising effect (in the sense that, in the hands of the assignee (C), it can secure only the indebtedness of A to B as it was outstanding at the date of the assignation). This is a consequence of the definition of the secured obligation under the security. It is a purely contractual outcome. In its conventionally-drafted terms, the deed gives security only for payment of debt owed by A to B. Debt owed by A to C (pre-assignation or post-assignation) does not fall within the narrow scope of the secured obligation as so conventionally worded (unless, of course, it was *at some stage* owed by A to B, and has subsequently been assigned by B to C).

[192] The issue therefore boils down to one of contractual drafting and construction.

[193] Prior to 1970, it would have been unorthodox, if not heretical, to draft a heritable security for a capped fluctuating amount to cover any indebtedness due or to become due not only to the original creditor, but also to the creditor's assignee. It is unlikely that such a wide-ranging security would have been tolerated since the bond of cash credit and disposition in security was itself a tightly-constrained statutory anomaly, introduced for the convenience of commerce by the Debts Securities (Scotland) Act 1856 to overcome the double impediments of the feudal law rule that a real burden on land must be definite and

the Bankruptcy Act 1696 prohibition on the obtaining of heritable security in respect of debt contracted after the recording of the security deed. Even after 1970, it would, in practice, have been most unconventional for a standard security to be drafted in such a way as to secure debt incurred both pre-assignation and post-assignation to the original creditor *and* to any assignee of the original creditor. For the reasons explained above, this is subtly but significantly different from a clause that allows merely for the assignability of the security (or the personal obligation to which it relates). The issue we are concerned with here is a discrete one, namely the scope of the security (in other words, the definition of the "debt" that is to be secured).

[194] The important point, which has not received previous Scottish judicial consideration, is whether the scope of the standard security must always be worded in that conventional way. In my judgment, it need not be so worded. The standard security is a different and more flexible creature than its predecessors, both in the nature of the "debt" which it may secure and in the assignability of its component elements. It will be recalled that the secured creditor in a standard security need not be the same as the creditor in the personal obligation (*Watson v Bogue (No. 1)* 2000 SLT (Sh Ct) 125; *3D Garages Ltd v Prolatis Co Ltd* 2017 SLT (Sh Ct) 9). In a system that values freedom of contract, in my judgment it would be perfectly competent for a standard security to be drafted in such a way as to extend its conventional scope to cover not only debt owed by A to B (the original creditor), but also debt owed by A to C, D, E, or any other third party (such as B's assignees) whether or not such debts are incurred before or after the assignation of the security. All that is required is careful, creative drafting of the secured obligation. Such an extended security would be very valuable to the original creditor (B) due to its marketability; and it would be equally coveted by third party creditors of A, who, by obtaining it, would at a stroke transform their

unsecured debt into secured debt, like the alchemist's dream of turning metal into gold. Such extended wording may be unconventional, but it is not prohibited by any rule of law. Parties to a security are allowed to define the scope of the secured "debt" as they wish.

[195] Interestingly, the Scottish Law Commission ("SLC") is currently deliberating on this very issue. In its first Discussion Paper on Heritable Securities (No. 168) (18 June 2019) it observed that English security documentation is now increasingly drafted in such extended terms. This is achieved by the simple device of extending the definition of "secured liabilities" to cover debt owed by the debtor, now or in the future, to the original creditor and to any assignee of the creditor.

[196] If an all sums standard security were to be drafted in that unconventional manner, it seems to me that Professor Halliday's rationale for the "freezing" effect of an assignation of such a security disappears. On the face of such a security, even after assignation, a "further course of dealing" (to use his terminology) would be contemplated between the debtor and this wider range of creditors by virtue of the extended definition of the secured "debt".

[197] That said, I would have thought that any such development in commercial practice is one which the Scottish Parliament may wish to monitor with a wary eye because the potential repercussions are so surprising. The effect of such extended drafting may be to create a constantly-recyclable, constantly-regenerating, potentially never-ending security over a debtor's land, as it passes from one creditor of the debtor to the next. In its Discussion Paper, the SLC referred to the Australian judgement in *Re Clark's Refrigerated Transport Pty Ltd (In Liquidation)* [1982] VR 989 at 995, which beautifully encapsulates one's instinctive disquiet at the proposition. In that case, Brooking J stated:

> "When a person gives an 'all obligations' mortgage or debenture he does not ordinarily contemplate that the property the subject of the security will secure not only his present and future obligations to the mortgagee or debenture

> holder but also any debt or liability of his which may be assigned by a third person to the secure creditor. It does seem strange that a man may lock up his counting house and go home for the night, in the uncomfortable knowledge that his only secured creditor is his banker, to whom he owes a trifling sum secured by the usual boundless bank instrument, and unlock the door in the morning to find that, by virtue of assignment of the large but unsecured debts owed by him to his fellow merchants, and indeed to the butcher, the baker and the candlestick maker, all his unsecured debts have gone to feed his bankers insatiable security, so that everyone of his debts is now secured."

The common law *contra proferentem* principle of construction may provide some protection to the naïve debtor in entering into such an unconventional, all-grasping security, by requiring clear wording to create it. Beyond that, the desirability of seeking to curtail parties' freedom of contract in this respect is a matter for the SLC to consider and the Scottish Parliament to determine.

[198] But I digress. The purpose of this discussion has been twofold. First, it is intended to illustrate that this particular statutory wording in Forms A & B (beginning with the words "to the extent of…." and prescribing the insertion of the precise indebtedness of the debtor at the date of assignation of certain securities) has no bearing on the legislative purpose of the statutory Forms, as explained above. It is therefore immaterial to the issue of conformity. Instead, the wording has a peculiar genealogy linked to a common understanding of the effect of assigning a conventionally-worded heritable security for an uncertain amount. It reflects that historical baggage; it is pertinent only to that conventional style of security; and there is nothing in the wider legal context to suggest that this particular statutory wording was intended to introduce a uniform rule of law to constrain parties' freedom of contract in the drafting of either (i) the scope of a standard security or (ii) the extent of its assignation.

[199] Second, once one understands the origin of this statutory wording, it becomes evident that the omission of those words from an assignation is also immaterial to the legal effect of the assignation. To explain, in the case of a conventionally-worded all sums security, if these statutory words were omitted, the assignation (by bearing no *prima facie* words of limitation) would simply operate as an assignation of the "whole" standard security for what it was worth; and, by the usual process of contractual construction, the benefit of that security, as so transferred, could not extend beyond securing the "debt" as originally defined, namely the debt of A to B (irrespective of the identity of the personal creditor, from time to time, who may be entitled to receive payment of that "debt"). The outcome would be as described by the learned professors, Halliday & Gretton: the assignee would acquire the security to the extent only of its original scope, namely to the extent of the "debt" due by the debtor (A) to the original creditor (B) but, in practical effect, frozen or crystallised as at the date of the assignation because, in such conventional cases, there will "normally be no further course of dealing" (Halliday, *supra*, para 9-07) between A and B after the date of the assignation. That outcome (specifically, the "freezing" effect of the assignation) does not arise by virtue of some obscure general rule of law limiting the extent to which such securities can competently be assigned. Rather, it arises by simple process of contractual construction of a conventionally-worded security, and by the application of basic logic. The assignee cannot acquire more, by way of security, than the secured "debt", as that term appears and is defined in the security. Likewise, in the case of an unconventional all sums security, if the prescribed statutory words (beginning "to the extent of…") were omitted, the effect would also be immaterial to the legal effect of the assignation. The assignation (again bearing no *prima facie* words of limitation) would operate as an assignation of the "whole" security for what it was worth; and, by ordinary process of

contractual construction of the standard security, the benefit of that security, as so transferred, would extend to securing the "debt" as originally defined (albeit now in its extended terms). The outcome would be that the assignee would acquire the security to the extent of its original (extended) scope. There is no obvious purpose in requiring a fixed sum to appear on the face of the assignation itself. Quantification of any accrued indebtedness could readily be left to the later stage of enforcement of the security. It is certainly immaterial to the statutory purpose of achieving simple, effectual vesting of the security.

[200] I shall conclude this chapter by observing that the Standard Security granted by Mr Guidi in favour of the Bank is drafted in the *conventional* manner.

[201] On a plain reading, it secures payment merely of debt incurred by Mr Guidi (A) to the Bank (B); it does not secure payment of debt incurred by Mr Guidi to third parties (such as the Bank's assignees). I shall comment on the significance of this later.

A quintet of Scottish cases

[202] At debate, I was referred to five decisions, all at first instance, involving the assignation of "all sums" standard securities. In each, the validity of the assignation was challenged due to the failure of the deed to state the precise amount of the indebtedness due by the debtor at the date of assignation. In four of the cases, the omission was said to be inconsequential; in one, the omission was held to invalidate the deed.

[203] Regrettably, and extending due respect to the learned judges and sheriffs in each case, I did not derive much assistance from any of these decisions because none of them involved a clear application of the modern analytical two-stage approach whereby, by process of statutory interpretation, (i) one seeks to identify the purpose or rationale of the statutory wording, in order to determine whether or not there is a disconformity in the

essentials, and (ii) if there is such a disconformity, by like process of statutory interpretation, one seeks to ascertain what Parliament intended to be the consequence(s) of the particular disconformity. In none of the cases was the court referred to *Osman*, *Elim*, *Johnstone* or *Rae*, *supra*. In one case, *Soneji* was cited, but it does not appear to have been followed. I shall address each case briefly.

Sanderson's Trustees

[204] The first reported case challenging the assignation of an all sums standard security was *Sanderson's Trs* v *Ambion Scotland Ltd* 1994 SLT 645. It was decided by Lord Dunpark in 1977, but was not reported until 1994. The facts are unusual. The defender was a building company. The pursuers agreed to provide it with loan finance. The loan was not made directly to the defender. Instead, it was made to the defender's holding company, which then passed the money on to the defender. The defender granted an all sums standard security to its holding company and the security was then assigned to the pursuers. The defender became insolvent, giving rise to a competition between the defender's receiver and the pursuers (as assignee) regarding the validity of the assigned security, with each claiming entitlement to the real right in security.

[205] The receiver argued that the assignation was disconform to the 1970 Act wording, and invalid, because it omitted a statement of the precise indebtedness due by the debtor at the date of assignation. Lord Dunpark rejected this argument.

[206] The peculiarity of the case is that the loan contract (the underlying "personal obligation" to which the security related) was a "tripartite agreement" (p.649L), signed by all three parties: debtor, cedent and assignee. (Generally, of course, as in the present case, the assignee will have no involvement in the underlying personal obligation, and the debtor

will have no involvement in the subsequent assignation until it is intimated upon him.) In these circumstances, Lord Dunpark held that the omission of the statutory wording (that is, a quantification of the debt as the date of assignation) did not invalidate the deed because the loan contract, to which the security related, was signed by all three parties and, therefore, the assignee was not "a stranger to the debtor" (p.650). Interpreting the underlying contract, Lord Dunpark concluded that all three parties had agreed (p.650F):

> "…that the subjects should be transferred by the original creditor to the third party in security of such future advances as the third party may make for the benefit of the debtor…".

In other words (p.651K):

> "…it was intended by all parties to give to the pursuers security for any subsequent advances which they might agree to make in terms of…the minute of agreement".

[207] Though slightly different in approach, this resonates with the point I was seeking to make earlier (paras [191] & [192] *et seq*). It illustrates (albeit by the rather unusual mechanism of a tripartite agreement) that the assignation of an all sums security does not necessarily have effect to freeze the indebtedness at the date of assignation. If, by astute drafting, the scope of an all sums security is defined in such a way as to cover not only debt due by the debtor to the original creditor but also debt owed by the debtor (now or in the future) to assignees of the original creditor, then the "commonly accepted view" that an assignation of such a security "freezes" the indebtedness at the date of assignation is inapplicable.

[208] *Sanderson's Trustees* was decided on the basis of the factual peculiarity that it involved a tripartite agreement between debtor, cedent and assignee, which plainly envisaged future secured advances to the debtor, post-assignation. For that reason, the omission of the prescribed statutory wording (requiring a precise quantification of the

indebtedness at the date of assignation) was held to be inconsequential because it was not "appropriate" in the circumstances of the case. In obiter dicta, Lord Dunpark goes on to observe that, but for the tripartite agreement (in other words, if the assignee had been a "stranger to the debtor"), in his view the assignation would indeed have required to state a specific sum, being "the value of the security to the assignor" (p.650).

[209] While, in my respectful opinion, the outcome in *Sanderson's Trustees* was correct, its reasoning (and obiter dicta) should be approached with caution. Firstly, the learned Lord Ordinary's analysis is influenced by the traditional dichotomy between mandatory or permissive statutory wording, with no further detailed inquiry as to the legislative purpose or objective behind the statutory wording, as now advocated by the modern analytical approach. (Interestingly, insofar as an analysis was undertaken of the legislative purpose of the wording, Lord Dunpark opined that it was "not obvious" to him why schedule 4 required the insertion of the words "to the extent of £… being the amount now due thereunder" in assignations of all securities of an uncertain amount: p.649L). Secondly, the analysis was heavily influenced by a consideration of the subjective circumstances of the parties and their transaction, and whether the statutory wording happened to suit those subjective circumstances. That subjective approach is inconsistent with the modern analytical framework. In any event, the present case involves no tripartite agreement, so it is distinguishable on that ground alone.

OneSavings Bank plc

[210] In *OneSavings Bank plc* v *Burns* 2017 SLT 129, an assignee of an all sums standard security sought to call up and enforce the security against the debtor. The debtor challenged the assignee's title to sue, arguing that the assignation did not conform to the prescribed

form, in that it failed to specify the specific amount due by the debtor at the date of the assignation.

[211] Again, the reasoning in *OneSavings Bank* is heavily influenced by the traditional dichotomy between mandatory and permissive statutory wording. There is no deeper analysis of the legislative rationale behind the prescribed wording (or any assessment as to whether the omitted wording may be material to that purpose). Instead, the statutory wording was, for the most part, labelled as mandatory, and the consequence of disconformity was assumed to be invalidity, because (para [21]):

> "…[o]therwise, there would be no point in prescribing anything and parties might as well just do as they please with all the confusion and uncertainty that would bring".

For that reason, with respect to the learned sheriff, I approach this particular aspect of *OneSavings Bank plc* with hesitation, and decline to follow it.

Shear

[212] In *Shear v Clipper Holdings II SARL,* Outer House (Lord Bannatyne), 26 May 2017, unreported, an assignee sought to enforce an all sums security against the debtor. The debtor sought to interdict enforcement, arguing that the assignation was invalid because, again, it omitted a precise quantification of the indebtedness due to the cedent at the date of assignation.

[213] Lord Bannatyne gave the debtor's argument short shrift. However, the unreported Note gives little insight into the reasoning. The learned Lord Ordinary concluded that "a more flexible approach" had been adopted to issues of this nature in recent times (para [2]) but he does not clarify what that "flexible approach" is said to have been. Reference was made to *Newbold v The Coal Authority [2014] WLR 1288* (a case which does feature in *Osman,*

supra, paras [31] & [34]), but the Note in *Shear* does not expressly disclose an analysis, adoption or application of the "modern approach" advocated in *Osman*. Indeed, the reasoning appears to be inconsistent with the *Osman* analysis. Lord Bannatyne states that "first and perhaps most importantly" the "seriousness of the breach" required to be considered. He concluded that the omission of the prescribed wording was a "technicality", that it was designed to do "nothing more than …to delay payment", and that the breach was not "serious" because the pursuer had not been "affected in any way, far less materially" (para [3]) by the omission. This discloses the application of purely subjective criteria to what should be an objective assessment of the statutory purpose of the wording. It will be recalled that there was likewise no subjective prejudice in *Osman, Goodfellow* and *Rae*. But that was not the point. The exercise is an objective one, to ascertain the legislative purpose of the wording. The learned Lord Ordinary concluded (para [4]) that the debtor's approach would "frustrate the purposes of the legislation", but he does not say what those purposes are, only that Parliament must have intended "a sensible result", whatever that means.

[214] While I take no issue with the outcome, it has been suggested that *Shear* involves "perhaps too much…rhetoric" (Reid & Gretton, *Conveyancing 2017: Assigning standard securities: a question of style*, 118, 124).

[215] Pausing here, the basic criticism that may be levelled at the reasoning in both *OneSavings Bank* and *Shear* is broadly similar, albeit they reach opposite conclusions on the same fundamental issue. In *OneSavings Bank*, the court may be said to have jumped too quickly to the conclusion that the wording is mandatory, and that any non-conformity must result in invalidity; whereas, at the opposite extreme, in *Shear,* the court has jumped rather too quickly to the conclusion (adopting an unspecified "more flexible approach") that the disconformity was entirely "technical" and immaterial because the debtor had not been

prejudiced. In my respectful judgment, both approaches are erroneous in that they fail to analyse the statutory purpose of the prescribed wording, with a view to ascertaining whether any disconformity is material or immaterial to that purpose; and, if there is such a material disconformity, the legislature's intended consequence, if any, arising therefrom.

Promontoria (Henrico) Ltd

[216] In *Promontoria (Henrico) Ltd* v *The Firm of Portico Holdings (Scotland)* [2018] SC GRE 5; 2018 GWD 6-87, the pursuer, as assignee of a standard security, sought to recover possession of the property in summary application proceedings. The debtor resisted the application on the same basis as above. In this case, the learned Sheriff had the benefit of express citation of *Soneji, supra* (paragraph [16]), as well as two earlier English authorities that touch upon the same issue. Further, in submissions for the assignee, the sheriff was explicitly invited to consider the purpose of the legislation and whether any breach was intended to render the document invalid for the purposes of enforcement (para [16]).

[217] However, the learned sheriff appears again to have adopted an entirely subjective approach to the issue of conformity. He said that there had been "an ongoing dispute" as to the extent of the outstanding borrowings due by the defender, that the dispute had been "running for a number of years" (paragraph [26]), so that the omission of the prescribed wording (i.e. a precise quantification of the indebtedness) was "in the circumstances of these loans wholly understandable and reasonable". In other words, the sheriff founded upon entirely subjective circumstances, peculiar to the particular parties and their transaction. That approach continued as follows, in explicit terms (para. [24]):

> "Section 53 is sufficiently imprecise that an assignation which follows the style of Form A, *with adaptations to suit the individual characteristics of the*

> *securities and of the bargain between the parties to the assignation*, may well be considered to be as 'close as may be' to Form A" (my emphasis).

Even if there had been a disconformity with the statutory wording, the sheriff concluded, following the approach of Lord Bannatyne in *Shear,* that the discrepancy "would not have been fatal" to the vesting of the security in the assignee (para [35]). There is no fuller explanation as to why that conclusion was reached, other than by reference to further subjective criteria such as that the debtor could have been "in no doubt" as to its obligations, that it had suffered "no prejudice whatsoever", and that the argument was "clearly only a technical challenge" designed to delay repayment of a due debt (paras [35] & [36]).

[218] Again, while I agree with the outcome in *Promontoria (Henrico) Ltd,* I respectfully consider that the methodology is incorrect because it is not consistent with the analytical approach set out *Johnstone*, *Goodfellow* and *Rae*, and more recently expounded by the House of Lords in *Soneji* and the compelling trio of recent English Court of Appeal decisions.

Clipper Holdings

[219] The final case in the Scottish quintet is *Clipper Holdings II SARL* v *SF and SFX,* Edinburgh Sheriff Court (Sheriff W. Holligan), 18 January 2018, unreported. It too was a summary application by the assignee of a heritable creditor to enforce an all sums standard security. The assignation was said to be disconform to the statutory wording in two respects. First, it was said that the assignation made no mention of the consideration allegedly paid by the assignee to the assignor. Second, the assignation failed to include specification of "the amount due thereunder" (1970 Act, sch. 4, Form A, note 2). In the event, the argument focused upon the latter alleged defect.

[220] It seems to me that the *Clipper* case comes closest to grasping the nettle. Having heard initial submissions, Sheriff Holligan properly identified that the issue in dispute concerned the interpretation of schedule 4 to the 1970 Act and he invited the agents to consider "at greater length the purpose of these provisions" at a later hearing (paragraph [21]). The parties' supplementary submissions then did so, addressing more directly the purpose underlying the statutory wording in Forms A & B and the legislature's intention as to the consequence(s) of any disconformity (paras [23]-[27]). While reference was made in submissions to *Central Tenders Board* v *White* 2015 UKPC 39 (in which the modern approach is discussed), no reference was made to the clearer or more persuasive dicta in *Soneji* or *Osman, supra*.

[221] Regrettably, the result is that the learned sheriff did not have the benefit of full citation of relevant authority. While he correctly observes that it is "important to look at the mischief intended by the insertion of a sum" in the statutory Forms (para. [35]), he does not go on to elucidate what that perceived "mischief" actually was. The statutory purpose of the prescribed wording is not explained, with the result that the materiality or immateriality of any divergence therefrom has not been evaluated.

[222] The learned sheriff concludes that the omission of the prescribed wording in the assignation (that is, the absence of a precise sum quantifying the outstanding indebtedness at the date of assignation) did not render the deed invalid, but there is no clear elucidation of the reason for that conclusion. Instead, there is a suggestion that the learned sheriff may have been influenced to some degree by irrelevant subjective considerations, notably the fact that "the transaction was a large scale transaction" and the absence of "any present prejudice to the debtor" by reason of the omitted wording (para [35]).

[223] For the foregoing reasons, I have attached little weight to the reasoning in these five cases. Instead, I conclude that the correct approach is illustrated in the older Inner House decisions in *Johnstone, Goodfellow* and *Rae*, and persuasively expounded more recently by the Supreme Court in *Soneji* and the impressive trio of English Court of Appeal decisions.

Is the Assignation disconform to the prescribed wording in the 1970 Act?

[224] Having identified the statutory purpose of the prescribed wording, and the elements of the wording that are material to that legislative objective, I conclude that, in the present case, the Assignation founded upon by the defender is materially disconform to the prescribed statutory wording in three essential respects.

[225] First of all, and most fundamentally, the Assignation is not in the form of a unilateral deed, granted by one or several persons with the same interest. Instead, the Assignation is a multilateral deed between several persons with different interests, containing mutual obligations and suspensive conditions. That disconformity is material to the attainment of the legislative purpose for the reasons more fully explained in paragraphs [168] to [172], above. In short, a unilateral deed is the recognised format in which to effect registration of a deed of conveyance (such as an assignation) in the Land Register and thereby effectually to vest in an assignee a real right in security over land, consistent with simplicity, consistent with certainty and efficiency, consistent with conveyancing practice before and after enactment of the 1970 Act, and consistent with a centuries-old, tripartite structure in Scots law for the conveyance of real rights in land. It is inconceivable that the Assignation, being in form a multilateral deed bearing to be subject to multiple reciprocal rights, obligations and suspensive conditions, could ever properly be accepted for registration by the Keeper. In form, it prevents the attainment of the statutory objective, because it defeats or least

imperils efficient registration of the document in the Land Register. Interestingly, I observe that the defender does not actually aver that the Assignation, on which it founds, was ever registered in the Land Register (which of course, if it were the deed by which Promontoria acquired title, would be the only competent way in which the Standard Security could be vested in the defender).

[226] Secondly, though linked to the first disconformity in structure, the Assignation does not contain clear operative wording of *de praesenti* conveyance, in the sense that it fails to disclose the granter's unconditional intention to effect an immediate transfer of the real right in security. That disconformity is material to the attainment of the legislative purpose for the reasons explained in paragraphs [170] & [173], above. True, there are words in the Assignation which purport to effect such an immediate transfer of rights, but that transfer is subject to and encumbered by multiple reciprocal rights, mutual obligations, qualifications, suspensive conditions and so forth, all of which are inconsistent with clear operative words of *de praesenti* conveyance, as prescribed in the legislature's Forms. To explain, clause 2.1 states that the Bank "hereby assigns absolutely" to Promontoria certain assets thereafter defined. This terminology is generally consistent with a *de praesenti* conveyance, but the clause must be read as a whole. It begins with the words "subject to the terms of this assignation…" which necessarily qualifies and dilutes the later purported immediate transfer; the clause then states that it is only to take effect "on and from the Effective Time"; the "Effective Time" is defined elsewhere as meaning the "Settlement Date" following the receipt by the consentor (National Australia Bank) of the "Purchase Price"; the "Settlement Date" is defined as meaning 4 September 2015 or, rather vaguely, as "such other date as may be agreed by the parties to the assignation in writing"; clause 3 requires the Bank to notify Promontoria in writing "promptly" upon receipt by it of the Purchase Price and to

"confirm" to Promontoria in that notice "that the Effective Time has occurred" (clause 3); and the defender's pleadings make no reference to the purification of any of these conditions. This labyrinthine conditionality exists because the document is not a unilateral deed at all, but rather a multilateral deed between parties with different interests, subject to reciprocal obligations and innumerable conditions, purification of which cannot be determined within the four corners of the deed itself but only by reference to extraneous evidence. This illustrates why "form" is important. Simplicity, certainty, efficacy and efficiency are not facilitated by a purported conveyance in the form of a multilateral deed.

[227] Thirdly, the Assignation bears to assign to Promontoria rights other than the right to a standard security (or standard securities). Specifically, as well as the rights to standard securities, the Assignation bears to assign rights to a mixed bag of multiple floating charges, corporate cross-guarantees, a personal guarantee, and negligence claims against auditors, to name but a few. Schedule 4 of the 1970 Act prescribes a form of wording that bears to assign only a standard security. That element of the prescribed wording is material to the statutory purpose for the reasons more fully discussed at paragraph [172], above. No statute authorises the Keeper to register in the Land Register an assignation of a floating charge, or a personal guarantee, or a negligence claim against auditors. An assignation of such a right is not a "registrable deed" (2012 Act, s.49). For that reason, the Keeper would be duty-bound to reject an application to register the Assignation. It may confer certain personal rights upon Promontoria against the Bank in relation to the Standard Security, but it cannot "effectually vest" the heritable security in Promontoria because it is not, in form and structure, capable of being registered in the Land Register.

[228] What consequence did the legislature intend should follow from these material disconformities? The answer is simple. Reflecting the wording in section 14 of the 1970 Act,

the deed, being materially disconform, cannot "effectually vest" the security in Promontoria as the purported assignee. The consequence is not wholesale invalidity of the Assignation; the deed is perfectly valid for certain purposes; but it is ineffectual to convey to Promontoria the heritable real right in the Standard Security. Some other deed is require to achieve that end.

[229] These conclusions are significant because, in the pleadings and at the debate, Promontoria founds its title to the Standard Security solely upon the Assignation. That is doubly significant because the defender's entitlement to serve the Charge derives directly and exclusively from the Standard Security. It is the Standard Security, not the personal guarantee, that contains the clause of consent for registration for execution; by virtue of that clause (in the Standard Security), a warrant for summary diligence was obtained by Promontoria following its registration of the deed in the Books of Council & Session on 18 February 2018; by virtue of that warrant for summary diligence, the Charge was served on Mr Guidi on 15 November 2016 (Answer 14); and by virtue of expiry of that Charge, Promontoria sequestrated Mr Guidi on 3 February 2017. Merely acquiring title to the personal guarantee would not have entitled Promontoria to execute summary diligence by service of the Charge. Of course, the defender might eventually have proceeded to sequestration via a different route, but it could not have done so by means of this contested diligence (the Charge). The defender's entitlement to serve the Charge is wholly dependent upon its averred title to the Standard Security.

[230] In the event, by founding solely upon the Assignation (a deed that is materially disconform to mandatory statutory wording and, as a consequence, ineffective to vest the Standard Security in the defender), Promontoria has failed relevantly to aver right or title to the Standard Security and, by extension, any entitlement to serve the Charge, which derives

directly from that security. Accordingly, the pursuer's general preliminary plea (plea-in-law number 3) is sustained in part only, to the extent of the defender's averments anent its title to the Standard Security and entitlement to serve the Charge; and decree falls to be granted in terms of craves 1 & 3.

[231] It will be recalled that the pursuer's challenge to conformity (under the 1970 Act) was founded principally upon the absence of a precise sum quantifying Mr Guidi's indebtedness to the Bank at the date of assignation. For the avoidance of doubt, in my judgment, that argument fails. However, it is the pursuer's secondary argument which forms the basis of my decision. Though not articulated in quite such explicit terms, I understood it as encapsulating, in substance, a challenge to the form of the Assignation as a *de praesenti* conveyance due to its multiple suspensive conditions, which were examined in detail at debate.

The personal guarantee

[232] In contrast, by founding upon the Assignation (which is also expressly averred to have been intimated to Mr Guidi), Promontoria has relevantly averred the completed transfer to it of the Bank's whole right and title to the creditor's rights under the personal guarantee. The creditor's rights under the personal guarantee are moveable in nature, not heritable. No mandatory statutory wording applies to the assignation of such moveable rights. The Assignation, as incorporated in the defender's pleadings, and its averred intimation, provides a relevant basis in averment for the completed transfer to, and vesting in, the defender of the Bank's moveable rights under the personal guarantee.

[233] Accordingly, *quoad ultra* the pursuer's general preliminary plea (plea-in-law number 3) falls to be repelled anent the defender's remaining averments concerning title to

guarantee; and the pursuer's related motion at debate for decree in terms of crave 2 falls to be refused. Subject to my separate conclusions below (regarding the consequences of Promontoria's default in lodging an incomplete (redacted) version of the Assignation), I have allowed parties a proof of their respective remaining averments.

What about the other assignations in process?

[234] As I explained earlier (paragraphs [92] to [114]), Promontoria happens to have lodged three separate documents in process, each bearing to be an assignation of sorts. However, fatally as it turns out, in its pleadings and submissions, it founds solely upon one of those documents (referred to as "the Assignation"). The irony is that one of the other documents lodged in process might, perhaps, have given the defender a less precarious footing on which to assert title to the Standard Security and the entitlement to serve the Charge. It is item 6/2(a)-8 of process. It is a copy document that bears to be an assignation of a standard security over Mr Guidi's home at 7 Sweethope Gardens, Bothwell. (For ease of reference, I shall refer to that document as "the Other Document".)

[235] However, as previously explained (see paragraphs [112] & [113], above), I am constrained to adjudicate upon issues of relevancy by reference only to the pleadings and documents incorporated therein. That may seem pedantic, but it is a predicament into which the defender has boxed both itself and the court.

[236] None of this should come as a surprise to Promontoria. The pursuer's counsel kindly drew the matter to the defender's attention in his written submissions (para [74] under the heading "Which Assignation"), and repeated it in his oral submissions. He noted (correctly) that, strictly speaking, the relevancy of the defender's pleadings had to be tested by reference to the Assignation, because that is the only assignation founded upon by the

defender. Nevertheless, the pursuer's counsel indicated that he was content to advance certain submissions on the Other Document. In the event, strikingly, Promontoria chose not to engage with the issue at all and made no submissions on it.

[237] What am I to make of this situation? If I engage with the pursuer's submissions on the Other Document, an argument which was entirely ignored by the defender, I allow myself to be drawn into the rather absurd situation where I am adjudicating upon the relevancy of the defender's averments based on a document that is not founded upon in the defender's averments, and forms no part of its written or oral submissions.

[238] In my judgment, I must play matters with the proverbial straight bat. The pursuer's counsel may well, magnanimously perhaps, have pointed out a material deficiency in the defender's pleadings; he may well, equally magnanimously, have offered the defender a way out of that predicament, obviating the need for amendment, by indicating a willingness to debate the relevancy of the Other Document (though not strictly founded upon); but this was an offer that was not taken up by the defender. The defender simply did not engage with it. Promontoria continued to plough the same furrow, namely that its entitlement to the personal guarantee, the Standard Security, and to serve the Charge, was founded upon the Assignation. On that basis, I am compelled to determine the issue on the basis of the defender's pleadings and submissions alone, not on the basis of the other party's offer to extend the scope of the debate to some extraneous document not referred to in the defender's pleadings, when that offer was never taken up by the defender.

[239] Having done so, I have nevertheless decided, for the sake of completeness, to set out below my obiter observations on the relevancy of the defender's averments, if it were to be assumed that Promontoria was founding its title to the Standard Security upon the Other Document.

The Other Document

[240] In form, the Other Document bears to be a unilateral deed granted by the Bank, with the consent of National Australia Bank, whereby the Bank assigns to Promontoria:

> "… the standard securities (the "Standard Securities") granted by the respective parties whose names are specified in Column 2 of the Schedule annexed and executed as relative hereto (the "Chargors") in favour of the party specified in the relative entry in Column 1 of the said Schedule for all sums due or to become due, *to the extent of all obligations and liabilities due or to become due by the relevant Chargor to [Promontoria]*, the said Standard Securities being over the property described in the relative entry in Column 3 of the said Schedule and registered in the Land Register of Scotland under Title Number specified in the relative entry in Column 4 of the said Schedule…" [my emphasis]

The annexed Schedule is a six page list of standard securities, each page comprising five columns naming the Bank as the original creditor (Column 1), the names of the "Grantor" of the standard security (Column 2), the address of the secured property (Column 3), the title number of the secured property (Column 4) and "date of registration" (Column 5). (Oddly, the content of Column 5 ("date of registration") is not expressly incorporated into the body of the deed. It might have been said that this results in an essential statutory element of the description – the date of registration of the security – being omitted from the deed, but no such point was taken.) The final entry on the sixth page of the Schedule identifies a standard security granted by Mr Guidi over the property at 7 Sweethope Gardens, Bothwell.

[241] Put shortly, the pursuer's counsel argued *inter alia* that the Other Document was also disconform to the statutory wording because, in its operative clause, it sought to achieve the "impossible", by purportedly assigning the security "to the extent of" the debts owed by Mr Guidi *to Promontoria*. He submitted that this was "impossible" because the assignation could only competently transfer the security to the extent of Mr Guidi's indebtedness *to the Bank* as at the date of the assignation (see also paragraph [85], pursuer's written submission).

Accordingly, insofar as Promontoria may be founding upon the Other Document, it was submitted that the defender had still failed to aver a relevant title to the Standard Security.

[242] In my judgment, the pursuer's submission is essentially correct, though the reasoning requires clarification.

[243] The issue here harks back to the matters discussed in paragraphs [190] to [191], above. On an ordinary reading of the Standard Security (set out in paragraphs [60] to [65], above), it is worded in a *conventional* form, in the sense that the secured debt is defined as comprising all debt owed by Mr Guidi, now or in the future, *to the Bank* (the original creditor). This defines and limits the scope of the security. Of course, the right to demand and receive payment of that debt (owed by Mr Guidi to the Bank), and to enforce the security in respect of that debt, are readily capable of being assigned from time to time to any third party, but the definition or scope of the secured debt (as opposed to the identity of the person who may enforce it) is not affected by any such assignation. This is a consequence of the ordinary construction of the assignation and the security, as so conventionally worded.

[244] True, the Standard Security is assignable. The deed makes express provision to that effect, though that much would have been implied anyway. But mere assignability does not alter or extend the defined scope of the secured obligation.

[245] Only one other clause bears upon the issue. After the clause granting the security, the deed contains an unnumbered clause which bears to make variations to the statutory standard conditions. It reads:

> "CONDITIONS
>
> The standard conditions (specified in schedule 3 to the 1970 Act) and any lawful variation of them operative of the time being shall apply; and I agree that those standard conditions shall be varied as follows:

(1) Definitions
In the *following* clauses:…(*my emphasis*)
(d) 'The Bank includes persons deriving right from the Bank'."

Here, then, we find a clause which might form the basis of an argument that "the Bank" is to be taken as including the Bank's assignees. However, from a plain reading of this clause, it can be seen to have no effect whatsoever on the definition of the *scope* of the secured debt. First of all, it applies to a series of clauses that relate only to the standard conditions. Those conditions are irrelevant to the definition of the secured debt or the personal obligation to which the security relates. Secondly, this wider definition of "the Bank" is explicitly stated to apply only in "the *following* clauses" (my emphasis). The "following clauses" must mean the various clauses (numbered (2) to (8)) which follow this expanded definition. They deal only with variations to the standard conditions. The wider definition of "the Bank" (to include persons deriving right from the Bank) does not apply to the *preceding* clauses (in which one finds the key operative clauses defining the scope of the personal obligation and the secured debt.

[246] Accordingly, as previously explained, an assignation of a conventionally-worded security (of which the Assignation is one example) cannot extend the definition of the secured "debt". It merely changes the identity of the person entitled to enforce the security or the personal obligation. Moreover, by ordinary process of contractual construction, the effect of assigning such a conventionally-worded security is, in practical terms, to "freeze" the indebtedness due by the debtor (in this case, Mr Guidi) to the cedent (the Bank) at the date of assignation, because no further dealing is contemplated with the Bank post-assignation and, likewise, no post-assignation dealings with Promontoria can competently fall within the narrow scope of the conventionally-defined secured debt (Halliday,

Annotations to the Conveyancing and Feudal Reform (Scotland) Act 1970 (2nd ed.), paras 9-03 *et seq*; Halliday, *Conveyancing Law & Practice*, Vol III, paras 40-15, 40-19 and 40-23; Gretton, "Assignation of All Sums Standard Securities" 1994 SLT (News) 207; Cusine & Rennie, *Standard Securities* (2nd ed.), para 6.06).

[247] However, in my judgment, as previously explained, the precise amount of the indebtedness need not be specified in the assignation to achieve conformity with the prescribed statutory wording. It is not material to the attainment of the statutory purpose. Indeed, it may be well-nigh impossible to do so. Besides, the mandatory insertion of a specific sum would bring with it an unwelcome risk to the cedent of liability for breach of warrandice, if the true indebtedness turns out to be less than the stated sum. Instead, provided no words of limitation on the extent of an assignation are included, the assignation will naturally operate as an assignation of the "whole" security; and, by process of ordinary contractual construction of the security, the legal effect will be to convey to the assignee security for no more, and no less, than the whole defined secured obligation (being the debt due by the debtor to the original creditor, frozen, in practical terms, at the date of assignation, since no further dealing with that original creditor or assignee is contemplated in the deed). An alternative approach may be to draft the security in the style that appears in *OneSavings Bank plc.* There, the all sums standard security (in Form A) was assigned:

> "…. to the extent of all sums now due or at any time or times hereafter to become due under the respective standard securities, the creditors' interest in which is currently vested in the transferor…".

[248] Unfortunately, what the Bank and Promontoria purport to have done in the Other Document is to assign the Standard Security to the extent of all debt owed by Mr Guidi (now or in the future) *to Promontoria*. That wording is inept (in the context of a conventionally-

worded all sums security). It seeks to achieve the impossible. It seeks to widen the scope of the Standard Security from one which secures only debt owed by Mr Guidi to the Bank, to one which secures debt owed by Mr Guidi to Promontoria, thereby, on its face, purportedly securing (i) post-assignation lending by Promontoria to Mr Guidi, (ii) debt formerly owed by Mr Guidi to third parties (not being the Bank) which happens to be assigned to Promontoria, post-assignation, and (iii) pre-assignation indebtedness to Promontoria (not otherwise derived from the Bank). In fact, the best that Promontoria (as assignee) could hope to have obtained from the assignation of the Standard Security was security for the debt owed by Mr Guidi *to the Bank* (frozen, in practical terms, at the date of assignation since no further dealing with the Bank was contemplated).

[249] For this reason, in my judgment, the Other Document is *ex facie* materially disconform to the statutory wording because it fails to contain a valid operative clause, when read in its contractual context alongside the Standard Security. By using wording in the operative clause which *ex facie* purports to alter and enlarge the defined scope of the Standard Security, the assignation is inept, "invalid", and susceptible to rejection by by the Keeper. The position would have been different if the Standard Security had been *unconventionally* worded, that is, if the scope of the security had been worded to extend to debt owed to the Bank's assignees. In that hypothetical scenario, the operative clause in the Other Document (the assignation) would have been valid, because it would not have exceeded the defined scope of the debt in the Standard Security. In the event, the Other Document bears to assign something different from (and wider than) what the Standard Security can actually give.

[250] Is this *prima facie* non-conformity capable of being remedied by process of contractual construction? My preliminary view is no. Whether a document conforms to mandatory

statutory wording is a question of statutory interpretation (to which the principles in *Johnstone, Rae, Soneji, Osman* etc., apply); the true meaning of the document is a separate question of contractual construction (to which the principles in *Mannai Investment Co Ltd* v *Eagle Star Life Insurance Co Ltd* [1997] AC 749, *Arnold* v *Britton, etc.,* apply). Conformity precedes construction. It is only once a document has been found to conform to a prescribed statutory wording that one enters upon the separate exercise of seeking to interpret the document to ascertain its true meaning (*Legal & Equitable Nominees Ltd*, *supra* paras [14] (concession by counsel), [22] & [24]).

[251] Is this *prima facie* non-conformity capable of being remedied by rectification of the deed? I express no view on this matter. I observe only that if an order for rectification of the deed were to be granted by the court, it is conceivable, I suppose, that a question might arise as to whether a rectification order should have retrospective effect (Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, sects. 8, 8A & 9). The issue of retrospectivity may arise particularly sharply in circumstances where diligence has been executed on a defective deed (as by the service of a charge, or by sequestration), since regularity of procedure tends to be of heightened significance in that context.

[252] In the event, at debate, no motion was made by the defender for leave to amend its pleadings in order to found upon the Other Document (as the alleged basis of its title to the Standard Security and entitlement to serve the Charge).

Lodging redacted documents

[253] It has become quite the fashion for parties to lodge redacted documents in process, without obtaining the prior leave of the court to do so. Redactions regularly appear in the

body of the document, sometimes entire schedules are deleted, on occasion subscriptions and witness attestations are obscured.

[254] More often than not, no objection is taken, and nothing turns upon it. Justifications for the practice vary: environmental protection, data protection, commercial sensitivity. In commercial actions, with voluminous productions, it has been said to be a sensible way of getting to the crux of a disputed issue by clearing the field of irrelevant material.

[255] But therein lies the nub of the problem. Who decides what is "commercially sensitive", or irrelevant, or the like?

[256] In this case, Promontoria considers that it should decide. It asserts that it is *entitled* to lodge redacted versions of documents to exclude material that it considers to be irrelevant or "commercially sensitive" (whatever that means). Apparently, the pursuer and the Court is simply expected to take Promontoria's word for it. The various redacted versions of the Assignation that have grudgingly been exhibited to the pursuer by Promontoria (and the Bank) at different stages in this litigation have gone through numerous iterations, with ever-diminishing tranches of supposedly "irrelevant" or "sensitive" material being excised on each occasion. The defender's dogged refusal to exhibit the unredacted document of title on which it founds its defence has been the *de quo* of the parties' dispute for years, culminating in a two day debate.

[257] Frankly it is a preposterous state of affairs.

[258] In my respectful judgment, this unsatisfactory situation arises due to a misunderstanding of three key issues: (i) first, the crucial distinction between a document that is founded upon, and a document that comprises a mere adminicle of evidence; (ii) second, the nature of the long-standing duty incumbent upon a party who founds upon a document (or incorporates its terms) in its pleadings; and (iii) third, the consequences

(which vary depending upon the procedural context) that may arise if a party chooses to lodge an incomplete (i.e. redacted) document without seeking and obtaining leave of the court to do so.

[259] In my judgment, the correct legal position regarding the lodging of redacted documents (specifically, where such documents are founded upon or incorporated in a party's pleadings) can be explained as follows.

The general rule

[260] In ordinary civil procedure, the general rule is that a party who founds upon a document in his pleadings (or adopts it as incorporated therein) must, so far as it is in his possession or within his control, lodge that document in process as a production (Ordinary Cause Rules 1993, rule 21.1; Rules of the Court of Session, rule 27.1).

[261] According to the general rule, the original document should be lodged, complete and unredacted *(Murray's Trustees* v *Wilson's Executors* 1945 SC 51; *Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75, 106; *Macphail, Sheriff Court Practice*, para 9.67.)

[262] Nor is there any dubiety as to when such a document must be lodged. When the document is founded on or adopted in an initial writ, it must be lodged as a production at the time of returning the initial writ following expiry of the period of notice; when the document is founded on or adopted in defences, a counterclaim, answers or a minute, the document must be lodged at the time of lodging that part of process; or when the document is founded on or adopted in any adjustment to any pleadings, the document must be lodged at the time when such adjustment is intimated to any other party (OCR 21.1(1)(a)-(c); RCS 27.1(1)(a)-(c)).

[263] In contrast, documents that are not founded upon in pleadings (or adopted as incorporated therein), but which are instead merely adminicles of evidence, need not be lodged until shortly prior to the assigned diet of proof (OCR, rule 29.11; RCS, rule 36.3).

[264] The general rule (in relation to documents founded upon) has existed in the Court of Session for nearly two centuries. It originates from the Court of Session Act 1825, section 3. The sheriff court rule is of similar vintage. Its direct lineage can be traced back to rule 51 of the Act of Sederunt for Regulating the Form of Process in Sheriff Courts, promulgated on 10 July 1839, which required parties to produce with their condescendence or answers:

> "All writings in their custody, or within their power, not already produced, on which they mean to found…."

The Sheriff Courts Act 1876, section 22 was similarly peremptory. A slight relaxation emerged in rules 47 & 48 of the Schedule to the Sheriff Courts Act 1907 whereby each party was required along with his pleadings, or at latest before the closing of the record, to lodge any documents founded upon, so far as these were within his custody or power; but production was stated to be necessary only "if required by any other party in the action or by the sheriff". Nevertheless, the obligatory nature of the rule continued to be acknowledged, judicially and in leading textbooks (*Wright* v *Valentine* (1910) 26 Sheriff Court Reports 26, affirmed on appeal at 151; Dobie, *Sheriff Court Practice* (1952) 155; Lewis, *Sheriff Court Practice* (8th Ed) (1939) 118-119). Sheriff Dobie stated (*supra*, 115):

> "Production of documents founded on before the closing of the record can, it is thought, be insisted on as a matter of right. The mere fact that production may disclose more than parties in the case are at that stage entitled to know, is not apparently pleadable as an excuse for non-production. The statutory rule gives an unqualified right to each party in a cause to see the documents founded on in the pleadings of all the other parties, and to see them before the record is closed… The court has apparently has no discretion on the matter but must, it is thought, if required by the other party, order production".

Ordinary procedure in the sheriff court was substantially re-written by the ordinary cause rules 1993, but the general rule remained largely intact. Indeed, it was tightened and extended. The previous latitude afforded by the old rule 47 (whereby the obligation did not arise until the court or a party requested production) was removed, to be replaced with the current unqualified obligation to lodge the document founded upon at specified stages in procedure. The rule was also expressly extended to cover any document "adopted as incorporated" in his pleadings.

[265] The merit of the general rule seems never to have been judicially doubted. It has been enforced by the Inner House, repeatedly and decisively (*Independent West Middlesex Fire & Life Assurance Co* v *Cleugh* (1840) 2 D 1053; *The Western Bank of Scotland* v *Baird* (1863) 2 M 127; *Reavis* v *Clan Line Steamers Ltd* 1926 SC 215).

The rationale of the general rule

[266] The general rule is an adjunct to the three key principles underlying the civil judicial process: candour, fair notice, and open justice. A document that is "founded on" has a higher status than a mere adminicle of evidence at proof. It forms the basis of the claim or defence. Rightly, if it is being so relied upon by a party for the purpose of invoking judicial relief, it must be produced to the court (as an aspect of open justice) and to the opponent (in compliance with its duties of candour and the giving of fair notice). To fail to do so is inimical to those key principles.

[267] On a more practical level, two further justifications for the general rule are discernable.

[268] Firstly, the lodging of a document founded upon, at an early stage in litigation, is likely to be more productive of extra-judicial settlement in appropriate cases. Showing one's

hand, by disclosure of the essential document(s) on which the claim or defence is founded, is not only consistent with candour and the giving of fair notice, but it is also more likely to promote early dialogue and extra-judicial settlement between the parties in appropriate cases. In *Western Bank of Scotland, supra*, the Lord Justice-Clerk stated:

> "The policy of the Act of Parliament [the Court of Session Act 1825, section 3] is to compel parties, as far as possible, to disclose to one another, *at the earliest stage* what their case is…" [my emphasis]

Lord Neaves stated (at page 136)

> "…I think it is quite plain that [the Lord Justice-Clerk] has correctly stated the object of the Act of Parliament, which was to make parties reveal to each other *in the outset* insofar as it depended upon special writings, the cause of action and the ground of defence. I humbly think that was a good object, *intended to make parties understand their position, and come either to a regular fair trial of the question, or to a settlement of it, when they saw what could be respectively made against each other,* insofar as the documents were concerned. But whether it was a good object or not, which I think it was, that was the object, and it would be to defeat that object if we were not to enforce the judicial production of the documents. Extra-judicial exhibition is not the thing required. What is required is the judicial production of the documents on which the parties found in their pleadings, and which they think it is necessary to found upon." [my emphasis]

[269] Secondly, in many cases, the document founded upon will be a contract or document of title, and, more often than not, the issue in dispute will be the proper construction of that document. Self-evidently, in those circumstances the document has to be produced in order that it can be construed; and the task of construction cannot be performed unless the document is produced, whole and unredacted. I shall return to this point shortly.

Copy documents

[270] I pause to note that an important difference has developed in the treatment of copy documents and redacted documents. A copy document is a complete reproduction of the original document. A redacted document is an incomplete version (or, more usually, an incomplete copy version) of the document, part of it having been removed, deleted, or obscured.

[271] For many years, the courts have permitted the lodging of copy documents (that is, complete reproductions of the originals) in lieu of lodging the principal document (see e.g. *MacLean* v *MacLean Trs* (1861) 23 D 1262). Nowadays, the Civil Evidence (Scotland) Act 1988, section 6(1) regulates the position in most cases. It states that a copy of a document, purporting to be authenticated by a person responsible for making the copy, is, *unless the court otherwise directs,* deemed to be a true copy and is treated as if it were the document itself. In effect, this modifies the duty under the general rule (OCR 21.1) by deeming a certified copy of the document founded upon to be the equivalent of the original, unless the court directs otherwise. No special leave requires to be sought by a party for the lodging of a certified copy in lieu of the original. In that sense, though somewhat inaccurately, a party may loosely be said to be "entitled" to lodge a certified copy instead of the original. The onus then shifts to the other party to make its position clear by timeously challenging the lodging of the certified copy and by taking active steps to seek a direction from the court, giving reasons for doing so (*Promontoria (Henrico) Ltd* v *Friel* 2020 SC 242, at [48]).

Redacted documents

[272] In contrast, no such pragmatic statutory intervention has been made to permit the lodging of incomplete (that is, redacted) documents, in lieu of complete documents founded

upon. A redacted document is not deemed by any statute to be the equivalent of the complete document. A party is not "entitled" in any sense to lodge an incomplete document in lieu of the complete document founded upon by it.

[273] Instead, if a party wishes to lodge a redacted version of a document that is founded upon by it (or incorporated in its pleadings), it should seek leave of the court to do so, and justify that request.

[274] There are good reasons for the difference in treatment. In most cases, it will not matter whether the original document or a true copy is lodged, except in cases where the authenticity of the document (or copy) is genuinely a live issue (Scottish Law Commission Report (Number 100), paragraph 3.71). In contrast, the lodging of an incomplete (redacted) version of a document that forms the very basis of claim or defence is liable materially to impede the attainment of the three key principles discussed above. For that reason the lodging of a redacted document, in lieu of the complete document, is a privilege, not a right; it is permitted "under the control of the court" *(Alliance Trust Savings Ltd* v *Currie* 2017 SCLR 685, paras [46] per Lord Tyre); and a party who wishes to lodge an incomplete document in discharge of the duty under the general rule (OCR 21.1) to lodge the complete document should seek leave of the court to do so.

[275] Redaction is particularly problematic where the document founded upon is a contract or document of title or the like, and the court's task is to adjudicate upon the disputed meaning of it. In such cases, there is a compelling reason why the document (or certified copy), complete and unredacted, should be lodged. It is elementary that such a document has to be construed "as a whole" (*Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, para [10]). If the entire document is lodged, the court is impeded in performing its task of construction. In *Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75, the

House of Lords required to determine the true meaning of a formula within a contract, but only an excerpt of the relevant formula was produced to the court. Lord Fraser of Tullybelton (at 106) deprecated the practice:

> "The memoranda containing the formula which has to be construed are not before this House. They were not produced in process and I assume that they were not before the Court of Session. Nor do we even have the full formula before us. All we have is an excerpt from the formula quoted on record in Condescendence 2 and founded on by Unigate as the only portion which is relevant for the present action. Neither the Board nor the auditors have suggested the contrary, and I think therefore that we must proceed on the material that is before us. Nevertheless, I regard it as unsatisfactory that this House and the Court should have been asked to construe part of the formula without having before them the whole formula showing the context in which the disputed portion occurs. No doubt the draftsmen of the pleadings on both sides were very properly concerned to avoid producing unnecessary documents, although in these days of photocopying the expense is much less than when documents had to be printed. I hope that nothing I say will discourage such concern and I have in mind the Court's criticism of unnecessary duplication of documents, in *Murray's Trustees* v *Wilson's Executors* 1945 SC 51. But even in that case, which was concerned with the construction of a will, Lord President Normand said: "In most cases the whole will to be construed should be before the Court." In the present case the whole formula should, in my opinion, have been before the Court."

The same sentiment was expressed by the Court of Appeal in *Hancock* v *Promontoria (Chestnut) Ltd* [2020] 4 WLR 100. In that case, as here, Promontoria had produced only a substantially redacted version of the Assignation on which it founded. Henderson LJ, delivering the unanimous judgment, stated:

> "Redactions to the body of the Deed….are more problematical. I have much sympathy with the general thrust of the [claimant's] 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 not doubt there are others too) which can be relied upon to justify the redaction".

Redactions purportedly on the ground of confidentiality were also criticised. Henderson LJ stated:

> "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 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."

[276] Therefore, in my judgment, the starting point must be that the entire document founded upon (*a fortiori* in cases where construction is in issue) should be produced to the court. Leave of the court requires to be sought to lodge a redacted document in discharge of the duty under rule 21.1, OCR 1993. In general, irrelevance alone is not a proper ground for redaction of a document which a court is being asked to construe, because it is the task of the court to construe the document as a whole. It is not normally appropriate for a party, or solicitor or counsel, however experienced, to pre-judge which parts of the document the court may find useful in performing its task of construction. Relevance is a matter for the court to decide (*Hancock, supra*, [89]). Likewise, confidentiality alone can never be a good reason for obscuring or editing an otherwise relevant provision in a contract, document of title, or the like, on which a party founds. Confidentiality can and should be addressed by other flexible means, usually involving the imposition of conditions, such as a confidentiality ring (as in *Iomega Corporation v Myrica (UK) Ltd (No. 1)* 1999 SLT 793,

whereby the whole document is exhibited, complete and unredacted, to a limited number of designated persons only, such as counsel, agents and experts. So, generally, redaction on grounds of irrelevance or confidentiality should either be forbidden or, if permitted at all on the application of the lodging party, "convincingly justified and kept to an absolute minimum" (*Hancock, supra*, para [89]). What cannot be tolerated is a free-for-all, whereby parties, left to their own devices, unilaterally decide what is irrelevant or immaterial, confidential or "commercially-sensitive", and lodge whatever edited or abridged version of the key documents they happen to be comfortable with.

[277] Of course, a rigid rule that admits of no exceptions would smother common sense and pragmatism. There can be no reasonable objection to the redaction, on the ground of irrelevance, of details of third party loan assets and title numbers in a schedule to a global assignation of the kind with which this case is concerned. Such personal details probably have no bearing on the construction of the operative clauses of the deed and could not conceivably be of concern to Mr Guidi (nor, in fairness, does he argue otherwise). However, the proper procedure to be followed remains the same: the party seeking to redact such information should seek leave of the court to do so; the redaction has to be justified; and, to adjudicate fairly on the point, the unredacted document would, at a minimum, require to be exhibited to the court and to the opposing party's counsel or solicitor in order that the nature and extent of the redaction could properly be verified, consistent with open justice. Likewise, redaction of personal details of signatories or attesting witnesses might plainly be irrelevant to the issue of the construction of a deed, but that does not mean that such details should routinely be obscured in a document lodged pursuant to rule 21.1, OCR 1993, because the due execution of the deed may, perfectly legitimately, be an issue in dispute, on

which the lodging party is being put to proof (*Hancock, supra*, [73]). Leave to lodge such a redacted document should be sought, and convincingly justified.

[278] Therefore, contrary to Promontoria's submission, in my judgment it is the court, not the lodging party, which is the final arbiter when issues of relevancy, admissibility or confidentiality arise; and to perform that role, the court (at the very least) needs to see the unredacted document.

[279] Interestingly, a similar affirmation of the court's role (in regulating the lodging of redacted documents) has been enunciated in the separate context of the common law procedure for recovery of evidence by commission & diligence. In *XY Council* v *S* 2020 S.L.T. (Sh Ct) 311, the sheriff (Cubie) held:

> "Fundamentally the specification procedure exists so that the court can monitor and if necessary, decide upon the relevance or admissibility or confidentiality of material which is subject to the motion for recovery, either refusing the motion or allowing excerpts to be taken from material, or allowing the material to be redacted. The court maintains control of the procedure and is the final arbiter when issues of relevance, admissibility or confidentiality arise."

The matter was also addressed, albeit *obiter*, in *Cherry & Ors v The Advocate General for Scotland* 2020 SC 37. The respondent had lodged redacted documents, purportedly on the basis of irrelevance, legal privilege and the law officers' advice convention. The petitioners complained that they did not know whether these redactions had been properly made. They sought production of the unredacted versions. The court observed (at p.48) that specification procedure normally required:

> "….scrutiny of the documents by the Lord Ordinary to determine whether the redactions are justified on the bases proffered".

In a similar vein, in *Sommerville v The Scottish Ministers* 2008 SC (HL) 453, Lord Rodger observed (p.90):

> "… The correct starting point, as I have said, is that the redacted passages are indeed relevant to one or more issues in the petitioners' cases, since otherwise there could be no question of them being produced under the specification. In these circumstances there was no onus on counsel for the petitioners to show why they should recover the full version of the documents, including the redacted passages. The decision on whether they should do so was one for the Lord Ordinary after balancing the competing interests of the petitioners in having relevant material and of the public in maintaining the confidentiality of that material. I can see no way in which the Lord Ordinary could carry out that vital balancing exercise in this case without actually looking at the documents in question. …"

[280] In light of the foregoing, I struggle to understand why Promontoria considers that it is "entitled", in the face of long-standing challenge from the pursuer, to lodge only a redacted version of the critical document of title on which it founds and which it also expressly incorporates into its pleadings. The high-water mark of the defender's submission is the dicta in *Friel, supra* (at [49]) that:

> "[i]n the interests of clarity and efficiency in a commercial case, a party is *entitled* to produce only such parts of a document as are necessary to prove the case averred." [my emphasis]

In my judgment, in this context the Inner House was going no further than to state that a party was "entitled" to prepare for and proceed to proof on the basis of a redacted document, absent timeous, fair notice from its opponent that the absence of the complete document was an issue. The Inner House was not sanctioning a blanket "entitlement" unilaterally to lodge redacted versions of a documents founded upon. That would have represented an unprecedented change in court procedure. Rather, the "entitlement" was merely to proceed to proof on the assumption that no objection was being taken to the lodging of an incomplete version of the document of title, since the other party had taken no issue with the *prima facie* default. In *Friel,* no consequence flowed from the failure to lodge the unredacted document because there had been:

> "… no real indication that [the production of the complete document] might have a bearing on the central issue of whether the assignation covered the [company] debt and the defender's guarantee." (para [49])

Mr Friel had given no fair notice prior to, or even during, the proof that he took issue with the absence of the complete document. Somewhat opportunistically, the argument "was focused only in submissions during the reclaiming motion" (*Ballantyne Property Services, supra*, 65).

[281] In contrast, the absence of the complete, unredacted document of title on which Promontoria founds has been the *de quo* of these proceedings for almost two years prior to the debate.

What is the consequence of breaching the general rule?

[282] What is the consequence of a party failing to comply with its duty under rule 21.1, OCR 1993, by lodging a redacted version of a document in place of a complete document (or certified copy thereof), without obtaining leave of the court to do so?

[283] The answer (unsatisfactory though it may be) is that the consequence will vary depending upon the particular circumstances of the case, including the "procedural context" in which the default arises (*Hancock, supra*, [77]). In *Promontoria (Henrico) Ltd* v *Friel* 2020 SLT 321, the Inner House stated (at [49]):

> "If only part [of a document] is produced, there may be a risk that the other party can present certain arguments based on the absence of the whole document. Whether such arguments will succeed must depend on the particular circumstances of the case."

In my judgement, depending on the circumstances, the following non-exhaustive, specific consequences may arise from such a default.

[284] First, the defaulting party may ordered to produce the document and may be found liable in the expenses of an order for production or recovery of the document (rule 21.2, OCR 1993; RCS, rule 27.2).

[285] Second, the defaulting party may, quite legitimately, be put to proof of the whole terms of the document founded upon by it, provided the other party has given fair notice that it challenges the lodging of the incomplete (redacted) version. In *Promontoria (Chestnut) Ltd* v *The Firm of Ballantyne Property Services & Ors* [2020] CSOH 56, fair notice of the challenge having been timeously raised in the defences, the defender was "entitled" to insist on "…putting [Promontoria] to proof as to the material terms of the Assignation" (para 66).

[286] Third (linked to the preceding consequence), the defaulting party may fail to obtain summary decree, because its failure (to lodge the complete document founded upon) gives rise to a triable issue of fact, entitling the opponent to proof. This is precisely what happened in *Ballantyne Property Services, supra* (paras 66 & 68).

[287] Fourth (also linked to the preceding consequence), the defaulting party may fail to obtain decree at debate, again because its failure to lodge the complete document founded upon may justify the conclusion that there is a *prima facie* disputed issue of fact, entitling the opponent to proof.

[288] Fifth, the defaulting party may simply be prevented from proceeding further with its claim (as in *The Western Bank of Scotland* v *Baird, supra*) or its defence until it lodges the document founded upon; or it may be prevented from proceeding to proof or from leading evidence at proof until the document is lodged (as in *Reavis* v *Clan Line Steamers Ltd, supra*).

[289] Sixth, provided fair notice has been given by the opponent that the absence of the unredacted document is an issue in dispute, the defaulting party may find that it ultimately fails to prove its case at proof. This is what happened in *Dowling* v *Promontoria (Arrow) Ltd*

[2017] BBIR 1477 and in *Promontoria (Pine) Designated Activity Co* v *Hancock* (2021) EWHC 259 (Ch), where:

> "[f]aced with the straightforward task of proving its title to the assigned debt, [Promontoria] inexplicably chose to redact more of the Deed of Assignment than could possibly have been legitimate on account of the reasons of confidentiality or security that it gave." (para 103)

The defaulting Promontoria entity was said to be "the author of its own difficulties" (*supra*, para 103), having chosen to proceed to proof on the basis of an incomplete document of title.

[290] Sixth, decree by default may be granted against the defaulting party, pursuant to rule 16.2, OCR 1993.

What is the consequence of Promontoria's default?

[291] In the present case, incontrovertibly, Promontoria "founds" upon the Assignation. It is the crux of its defence. Accordingly, it is under a duty to lodge the document as a production, in terms of rule 21.1, OCR 1993. That duty arose as far back as December 2018, when it first lodged Defences asserting that the Bank had "assigned" its rights to Promontoria and that it had "acquired rights" in respect of the personal guarantee and Standard Security (answer 13; plea-in-law number 4). Promontoria has no entitlement, under statute or at common law, to lodge an incomplete version of the document on which it founds. It must lodge the whole document, complete and unredacted, or a certified copy thereof, unless it obtains leave of the court to lodge an incomplete (redacted) version. To date, Promontoria has neither sought nor obtained any such leave.

[292] Having chosen, without leave of the court, to lodge only an incomplete version of the document on which it founds, Promontoria is in default of its obligation under rule 21.1, OCR 1993.

[293] The precise consequences, if any, that flow from Promontoria's failure to lodge the unredacted document on which it founds, in breach of rule 21.1, OCR 1993, will vary depending upon "the particular circumstances of the case" and the "procedural context" (*Friel; Hancock, supra*). These potential consequences are the "risk" faced by such a defaulting party, as described by the Inner House in *Friel, supra* (at [49]). Of course, in many cases, there may be no consequences, if no objection is taken by the other party.

[294] However, in the present case, the first significant circumstance is that the pursuer has given fair notice in its pleadings (and in other parts of process, as well as in its written submissions lodged in advance of the debate) that it challenges the defender's title to the debt, and that it objects to the lodging of an incomplete document of title. The absence of the whole document of title is evidently a very real issue in contention. For that reason, the present case is immediately distinguishable from *Friel*.

[295] The second important circumstance is that, on a plain reading of the pleadings, the issues in contention include both the existence and the true meaning of the purported assignation. For those reasons, the failure to produce the complete document attains an enhanced significance. Without the whole document before it, the court is hindered (at debate) in its task of construing the Assignation "as a whole" (*Wood; Unigate Foods Ltd, supra*).

[296] The third material circumstance is that the Assignation itself refers to, and expressly incorporates definitions from, another document, namely the SPA, but the SPA has also not been produced. To explain, clause 1.1 of the Assignation states that words and expressions therein shall (unless otherwise expressly defined) have the meaning given to them in the SPA. Clause 1.2 is even more specific, in that it explicitly incorporates into the Assignation clause 1.2 of the SPA "as if set out in full herein". Following Lord Doherty's conclusion in

Ballantyne Property Services, *supra,* the effect of these provisions is to make the SPA a "lexicon of defined terms" and "access to that lexicon is necessary in order to construe the Assignation" (para 62). However, Promontoria has not produced the SPA. Instead, it has lodged only a copy "extract" of the SPA (item 6/2(a)-2 of process). That extract might possibly include the complete terms of clause 1.2 of the SPA which is expressly incorporated into the Assignation, but other parts of the SPA are certainly redacted. In my judgment, given the wholesale reference to the SPA for default definitional purposes (per clause 1.1 of the Assignation), the whole SPA is properly characterised as a document founded upon in the defender's pleadings because it forms, by reference, an intrinsic part of the Assignation on which the defence is explicitly founded. Accordingly, the complete SPA should have been produced, in compliance with rule 21.1, OCR 1993.

[297] The fourth relevant circumstance is that the default, and the controversy surrounding it, has persisted now for many years, culminating in a two day debate involving counsel. The effect on the progress of the action has been significant.

[298] Taking account of the foregoing circumstances, and the procedural context, I conclude that the appropriate consequences that should flow from Promontoria's default in this case are as follows. Firstly, Promontoria's motion for decree of dismissal at debate should be refused, because its failure to lodge the crucial document founded upon by it justifies the conclusion that there is a *prima facie* disputed issue of fact, entitling the pursuer to proof. On the basis of his pleadings, Mr Guidi is entitled to put Promontoria to proof of the whole terms of the document founded upon by it, having given ample notice in his pleadings (and other parts of process) that the absence of the Assignation (and SPA), complete and unredacted, is a material issue in dispute (*Ballantyne Property Services*, *supra*, 66; *Friel*, *supra,* 49). Secondly, Promontoria, as the defaulting party, should be ordered to

produce the Assignation (and SPA), whole and unredacted, within a defined time-scale (or to seek and obtain leave to produce a redacted version in lieu thereof). The order leaves open the possibility that Promontoria might yet, albeit belatedly, seek and obtain leave to lodge redacted documents in discharge of its obligation under rule 21.1, OCR 1993, if the same can be "convincingly justified" (*Hancock, supra*, 89). My order expressly reserves the power of the court to pronounce further on this issue such as, for example (i) to allow the lodging of a redacted document in satisfaction of the obligation under rule 21.1, OCR 1993 or (ii) to prevent or restrict Promontoria leading evidence at proof (as in *Reavis, supra,* per Lord Sands) or (iii) to grant decree by default (rule 16.2, OCR 1993). Thirdly, Promontoria should be found liable in the expenses of the diet of debate which has been caused, for the most part, by Promontoria's persistent default and has resulted in an order being pronounced against it for production of the documents founded upon (rule 21.2, OCR 1993).

The pursuer's motion for decree in terms of crave 2

[299] In an interesting argument, the pursuer's counsel submitted that, having failed to lodge the (unredacted) Assignation, Promontoria was obliged to set out, in averment, a proper justification for its redactions. He argued that Promontoria's failure to do so rendered its pleadings irrelevant (pursuer's written submissions, paras (59) – (66): item 24 of process). The pursuer's counsel candidly accepted that he was inviting me to adopt into Scottish procedure the English procedure devised by the Court of Appeal in *Hancock*, *supra* (paras 74 & 75).

[300] In my judgment, the bespoke development in English practice illustrated in *Hancock* is not apt for importation to Scottish procedure. Pleadings in Scottish civil procedure serve a distinct purpose. They should be reserved for averments of fact and pleas-in-law in support

of the substantive claim and defence. The pleadings are not the appropriate place for detailed arguments on ancillary issues such as alleged procedural default. Such matters are best reserved for written or oral submissions. Besides, as explained above, Scottish procedure can readily accommodate a mechanism by which an asserted justification for the lodging of a redacted document of title or the like can be debated. That mechanism is by way of submissions initiated, most simply, by way of a motion lodged either by the party seeking leave to lodge the redacted document (setting out its justification therefor) or by opposing party challenging the unilateral lodging of a redacted document and seeking such consequential order as may be appropriate depending upon the procedural context (such as for production of the unredacted document, limitation of proof, decree by default etc.).

[301] In my judgment, while the defender's failure, without leave of the court, to lodge the complete Assignation founded upon by it constitutes a default, it does not follow that the defaulting party's averments (anent the assignation of the personal guarantee) are thereby rendered irrelevant. To this extent, the pursuer's preliminary pleas fall to be repelled.

Conclusion

[302] In conclusion, for the foregoing reasons, I shall repel the defender's preliminary pleas (pleas-in-law 1, 2 & 3); I shall sustain the pursuer's preliminary pleas (pleas-in-law 3 & 4) in respect of the defender's averments anent its alleged title to the Standard Security and its alleged entitlement to serve the Charge; and *quoad ultra* I shall repel the pursuer's preliminary pleas. It follows that decree falls to be granted in terms of craves 1 & 3 (for production of the Charge and for declarator that Promontoria has no title to the Standard Security). *Quoad ultra* I shall allow parties a proof of their respective remaining averments.

[303] Further, in exercise of my powers under rule 40 of the 1993 Rules, I have ordained the defender, within 21 days of today's date, either (i) to lodge in process, complete and unredacted, the Assignation and SPA founded upon and adopted by it in its pleadings (or a true copy thereof certified in terms of section 6 of the Civil Evidence (Scotland) Act 1988) or (ii) to seek and obtain leave of the court to lodge redacted certified copies thereof in discharge of the obligation incumbent upon it in terms of rule 21.1(1), OCR 1993.

[304] Lastly, as the pursuer has been substantially successful at debate, and having regard to the wider procedural context, I have decided to award the taxed expenses of the debate, and preparation therefor, against the defender. In *Nicoll v Promontoria (Ram 2) Ltd* [2019] BPIR 1519, Mann J criticised, in trenchant terms, what appeared to him to be a "common practice by the Promontoria companies" of "inappropriate redaction". He sounded a clear warning (at para 65) about the risks that such litigants were taking. He stated:

> "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."

In *Promontoria (Pine) Designated Activity Co, supra* (para 104 & 105), Snowden J agreed with these comments. I concur. In the present case, Promontoria chose to proceed to debate on the basis of a redacted document of title, in full knowledge that the absence of the complete deed was a material issue in dispute. It is "the author of its own difficulties" (*supra*, para 103). In this case, for Promontoria, the chickens have come home to roost.