Neutral Citation Number: [2021] EWCA Civ 1682

Case No: A3/2020/0683

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN BRISTOL**
**APPEALS (ChD)**
**Mr Justice Marcus Smith**
**[2020] EWHC 104 (Ch) and [2020] EWHC 563 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2021

**Before :**

**LORD JUSTICE HENDERSON**
**LORD JUSTICE PHILLIPS**
and
**LORD JUSTICE NUGEE**

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**Between :**

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| **PROMONTORIA (OAK) LTD** | **Claimant/ Respondent** |
| **- and -** | |
| **(1) NICHOLAS MICHAEL EMANUEL**<br>**(2) NICOLA JANE EMANUEL** | **Defendants/ Appellants** |

Case No: A3/2020/0684

**And between :**

| | |
|---|---|
| **PROMONTORIA (OAK) LTD** | **Claimant/ Appellant** |
| **- and -** | |
| **(1) NICHOLAS MICHAEL EMANUEL**<br>**(2) NICOLA JANE EMANUEL** | **Defendants/ Respondents** |

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**Hugh Sims QC** and **Oliver Mitchell** (instructed by **Brains Solicitors**) for
**Mr and Mrs Emanuel**
**Jamie Riley QC** and **James McWilliams** (instructed by **Addleshaw Goddard LLP**) for
**Promontoria (Oak) Ltd**

Case No: A3/2019/2606

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN BIRMINGHAM**
**BUSINESS LIST (ChD)**
**His Honour Judge David Cooke (sitting as a Judge of the High Court)**
**[2019] EWHC 2327 (Ch)**

**Between :**

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| **PROMONTORIA (HENRICO) LTD** | **Claimant/ Respondent** |
| **- and -** | |
| **GURCHARN SAMRA** | **Defendant/ Appellant** |

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

Case No: A4/2020/1509

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**
**CIRCUIT COMMERCIAL COURT (QBD)**
**His Honour Judge Stephen Davies (sitting as a Judge of the High Court)**
**[2020] EWHC 2136 (Comm) and [2020] EWHC 2137 (Comm)**

**Between :**

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| **PROMONTORIA (CHESTNUT) LTD** | **Claimant/ Respondent** |
| **- and –** | |
| **(1) SCOTT SIMPSON**<br>**(2) TRACY SIMPSON** | **Defendants/ Appellants** |

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**Trevor Berriman, Katie Wilkinson** and **Thomas Wheeler** (instructed by **Trinity Law Solicitors**) for **the Appellants**
**Jamie Riley QC** and **James McWilliams** (instructed by **Addleshaw Goddard LLP**) for **the Respondent**

Case No: A3/2020/1596

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN NEWCASTLE**
**APPEALS (ChD)**
**His Honour Judge Kramer (sitting as a Judge of the High Court)**

**Between :**

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| **BIBBY INVOICE DISCOUNTING LTD** | **Claimant/ Respondent** |
| **- and -** | |
| **(1) THOMPSON FACILITIES AND PROJECT MANAGEMENT SERVICES LTD**<br>**(2) THOMPSON POWER TOOL SERVICES UK LTD** | **Defendants/ Appellants** |

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**Antoine Tinnion** (instructed by **Mr Luckhurst-Matthews, General Counsel, the Thompson Group**) for **the Appellants**
**Kelly Pennifer** (instructed by **Addleshaw Goddard** LLP) for **the Respondent**

Hearing dates: 18, 19 and 20 May 2021
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# Approved Judgment

**Lord Justice Henderson, Lord Justice Phillips and Lord Justice Nugee:**

*Introduction*

1. This is the judgment of the Court to which all members have contributed.

2. There are a number of appeals before the Court. The first three cases, *Promontoria (Oak) Ltd v Emanuel* (**"the *Emanuel* case"**), *Promontoria (Henrico) Ltd v Samra* (**"the *Samra* case"**), and *Promontoria (Chestnut) Ltd v Simpson* (**"the *Simpson* case"**) all arise out of the acquisition by companies in the Promontoria group of portfolios of loans from Clydesdale Bank plc (**"Clydesdale"**); in each case the relevant Promontoria company brought a claim against the debtor(s) to enforce payment of a loan as assignee of Clydesdale's rights. The terms on which the Promontoria group acquired the portfolios are regarded as commercially sensitive and that has led the Promontoria companies to cover up or redact, to a greater or lesser extent, certain documents on which they rely. As these cases illustrate, this practice has given rise to a number of questions which have troubled judges up and down the country.

3. In the fourth case, *Bibby Invoice Discounting Ltd v Thompson Facilities and Project Management Services Ltd* (**"the *Bibby* case"**), the claim has a rather different background, being a claim brought by an invoice discounter on invoices due. But it shares the same features with the Promontoria cases that the claim is brought by the claimant as assignee of a debt, that the terms on which the claimant acquired title to the debt are regarded by it as commercially sensitive, and that it has therefore relied on documents in a redacted form.

4. Nugee LJ granted permission to appeal in each case and directed that they be heard together on the basis that they raised a common issue, namely how a trial judge should deal with a document which (a) is a document on which the claimant needs to rely to prove its title to sue but (b) is presented to the Court in a redacted form on (claimed) grounds of relevance and confidentiality.

5. In the event the argument on this general point of principle was fairly limited, all parties accepting that the starting point was the guidance given by Henderson LJ in *Hancock v Promontoria (Chestnut) Limited* [2020] EWCA Civ 907 (***"Hancock"***). We refer to this in detail below, but we can reaffirm that the approach to be taken in cases such as this is to be found in that judgment.

6. Most of the argument was therefore taken up with points of detail specific to the particular appeals, which raise no points of general principle.

7. In this judgment we will therefore address the point of general principle first, and then deal with the points raised by the particular appeals.

*Background – the Promontoria cases*

8. Having had the advantage of seeing the documentation and evidence in three Promontoria cases, the structure of the transactions which form the background to these claims is now reasonably clear to us; it does not of course follow that all the judges in the individual cases were in the same position.

9. We can take as an example the facts in the *Simpson* case where a detailed explanation

was given in the evidence of Mr Cooper of Addleshaw Goddard LLP, the solicitors acting for the Promontoria companies. This was to the following effect. The Promontoria companies are part of the wider structure of Cerberus Capital Management LP group (**"Cerberus"**), a private investment firm headquartered in New York. Part of Cerberus's investment strategy is to acquire portfolios of non-performing loans. One such portfolio, referred to as the Chestnut portfolio, was acquired from Clydesdale and National Australia Bank Ltd (**"NAB"**), NAB being the group company which owned and controlled Clydesdale. (The facilities granted to Mr and Mrs Simpson were in fact granted by "Yorkshire Bank"; this originally referred to a bank called Yorkshire Bank plc (**"Yorkshire"**), but it appears from the loan documentation that at some date in 2004 Yorkshire's business and assets were transferred to Clydesdale pursuant to a private Act called the National Australia Group Europe Act 2001, Clydesdale retaining Yorkshire Bank as a trading name, and that after that date "Yorkshire Bank" therefore referred to Clydesdale, trading as Yorkshire Bank.[1])

10. By a Sale and Purchase Agreement (**"the Chestnut SPA"**) dated 27 July 2014 and made between NAB, Clydesdale and a Promontoria company called Promontoria Holding 97 BV (**"Holding 97"**), Holding 97 agreed to buy the Chestnut portfolio of non-performing loans, Holding 97 being a Dutch company that is, as its name suggests, a holding company. The Chestnut SPA merely effected the sale and not the transfer of title, and it is apparent from its terms that it was always contemplated that another Promontoria company would be substituted as the final purchaser in whose favour the purchase would be completed. Thus Holding 97 was referred to as "the Initial Buyer"; references to "the Buyer" referred to the Initial Buyer up to the Novation Date and thereafter to "the Novated Buyer"; and "the Novated Buyer" referred to a wholly owned subsidiary of Holding 97 to be incorporated in Ireland.

11. In due course this is what happened. Promontoria (Chestnut) Ltd (**"Promontoria Chestnut"**) was incorporated in Ireland; by a Deed of Novation and Amendment (**"the Chestnut Novation"**) dated 29 September 2014, the Chestnut SPA was novated from Holding 97 to Promontoria Chestnut; and by an Assignment and Assumption Deed (**"the Chestnut Assignment"**) of 5 June 2015, the Chestnut SPA was completed, insofar as it concerned the pool of assets which included the claims against Mr and Mrs Simpson,[2] in favour of Promontoria Chestnut.

12. As explained in more detail below, Mr and Mrs Simpson had given guarantees to Clydesdale and Promontoria Chestnut sued them on the guarantees as assignee of Clydesdale's rights, relying on the Chestnut Assignment to prove their title.

13. The other Promontoria transactions would appear to have followed a similar pattern. In the *Samra* case, the claim was brought by Promontoria (Henrico) Ltd (**"Promontoria Henrico"**) against Mr Samra to enforce two mortgages which he had granted to Yorkshire and Clydesdale respectively. Here there were: (i) a Sale and Purchase Agreement (**"the Henrico SPA"**) dated 15 December 2014 and made between NAB, Clydesdale and a Promontoria company called Promontoria Holding 93 BV (**"Holding**

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1 This is consistent with the explanation given to Nugee LJ in *Clydesdale Bank plc v Stoke Place Hotels Ltd* [2017] EWHC 181 (Ch): see at [13].

2 It appears from *Hancock*, which also concerned a claim by Promontoria Chestnut, that the transfer of assets sold by the Chestnut SPA was effected by a number of deeds of assignment dealing with different pools of assets: see at [27(4)]. In that case the assignment relied on was dated 28 November 2014.

**93"**), under which the Henrico portfolio was sold to Holding 93 as Initial Buyer; (ii) a Deed of Novation and Amendment (**"the Henrico Novation"**) dated 21 April 2015 under which the Henrico SPA was novated to Promontoria Henrico as Novated Buyer; and (iii) an Assignment and Assumption Deed (**"the Henrico Assignment"**) dated 5 June 2015 which completed the Henrico SPA by effecting an assignment of the portfolio to Promontoria Henrico. Promontoria Henrico relied on the Henrico Assignment to prove its title.

14. In the *Emanuel* case, the claim was brought by Promontoria (Oak) Ltd (**"Promontoria Oak"**) against Mr and Mrs Emanuel to enforce a mortgage that they had given to Clydesdale. Promontoria Oak relied on an Assignment and Assumption Deed (**"the Oak Assignment"**) dated 16 September 2016 and made between NAB, Clydesdale and itself. That referred to a Sale and Purchase Agreement (**"the Oak SPA"**). As explained below no copy of the Oak SPA was in evidence, but there was in evidence a letter dated 24 June 2016 from NAB and Clydesdale to Mr and Mrs Emanuel informing them that they had sold the Emanuels' facilities to Promontoria Holding 170 BV (**"Holding 170"**), and that they expected to transfer their rights to Holding 170 in due course; and a further letter dated 16 September 2016 informing the Emanuels that they had completed the sale of all amounts owing to Promontoria Oak, which was described as a successor in title to Holding 170.

15. In each of these cases therefore the relevant Promontoria company brought the claim as assignee from Clydesdale, and relied on the relevant Assignment to prove their title as assignee. But in none of the cases did they provide the defendants with full and unredacted copies of the documents I have referred to. Mr Cooper's evidence in the *Simpson* case is that the terms of the acquisition of the relevant portfolio were heavily negotiated and highly commercially sensitive; this was because the market for investment in portfolios of non-performing loans is very competitive, and any revelation of the detailed provisions in the documents, many of which are price sensitive, could divulge confidential information to Cerberus's competitors, potential vendor counterparties and debtors.

16. That has led the Promontoria companies to adopt a restrictive approach to what they have disclosed to prove their title. In the *Emanuel* case, Promontoria Oak relied on a redacted version of the Oak Assignment, but did not disclose either the Oak SPA or any Deed of Novation. In the *Samra* case Promontoria Henrico relied on a redacted version of the Henrico Assignment (although the redactions were not in all respects the same). It did not rely on either the Henrico SPA or Henrico Novation, although Mr Samra had obtained redacted copies of them and sought to put them before the Court. In the *Simpson* case, Promontoria Chestnut initially also relied on a redacted version of the Chestnut Assignment, but after the decision of this Court in *Hancock* produced a version which was almost fully unredacted, only the execution page and details relating to other borrowers being omitted. It also produced a copy of the Chestnut SPA but this was only because the Chestnut Assignment incorporated definitions from the Chestnut SPA, and it was heavily redacted so as to disclose only the relevant definitions.

17. The practice of redacting documents has encouraged defendants to put in issue the title of the relevant Promontoria company to sue them. It is perhaps understandable that those who are sued for large amounts of money should seize on any possible argument that might be thought to give them a defence, although in most cases the end result has only been to add complexity and expense to the litigation without any ultimate benefit

to the defendants.

18. We give the details of the cases before us below, but in summary in the *Emanuel* case, the claim was tried in the County Court before Mr Recorder Willetts in Exeter. He admitted the redacted form of the Oak Assignment into evidence and gave judgment in favour of Promontoria Oak. On appeal, Marcus Smith J, sitting in the High Court in Bristol, held that he should not have relied on the redacted Oak Assignment as proving title, and that it should either have been excluded or held to have been insufficient to prove title. But after hearing further argument, he held that Promontoria Oak could rely instead on their registration as registered proprietor of the charge to prove their title and hence that Mr Recorder Willetts' order should not be disturbed. He nevertheless awarded the Emanuels 50% of the costs of the appeal, on the basis that although their victory was a pyrrhic one, they had been very much the winners in their appeal. Both parties appeal to this Court. In appeal A3/2020/0683 the Emanuels appeal on the basis that Marcus Smith J erred in allowing Promontoria Oak to rely on their registration as proprietor as an alternative route to proving their title; in appeal A3/2020/0684 Promontoria Oak appeals on the basis that Marcus Smith J erred in holding that the redacted Oak Assignment should not have been admitted, and in awarding the Emanuels 50% of their costs when they could not be regarded as the successful party since the order below stood unchanged.

19. In the *Samra* case two claims were tried together by HHJ David Cooke sitting as a Judge of the High Court in Birmingham. He held that Promontoria Henrico had made out its title by virtue of the redacted Henrico Assignment and gave judgment in its favour. Mr Samra appeals on the basis that the Judge should not have held that its title was established. A number of points are relied on in support, including the extensive redactions to the Henrico Assignment.

20. In the *Simpson* case the claim was tried by HHJ Stephen Davies sitting as a Judge of the High Court in Manchester. He held that Promontoria Chestnut had made out its title to the claim and gave judgment in its favour. Mr and Mrs Simpson appeal on a number of grounds, relying among other things on the extent of the redactions to the Chestnut SPA.

*Background – the Bibby case*

21. Bibby Invoice Discounting Ltd (**"Bibby"**) provides invoice factoring services. In this action it sued the two defendant companies (**"the Thompson companies"**) on invoices said to have been raised by We Recruit (SW) Ltd (**"WER"**) for the supply of temporary workers to them. Bibby's case was that WER had assigned the invoices to it pursuant to an Invoice Finance Agreement.

22. Among other defences the Thompson companies put Bibby to proof that the debts had been validly assigned to it. Bibby relied on a redacted copy of the Invoice Finance Agreement and sought summary judgment. DJ Phillips held that the Thompson companies had no real prospect of success in disputing the validity of the assignment and granted Bibby summary judgment on that issue. HHJ Kramer, sitting as a Judge of the High Court in Newcastle, dismissed an appeal. The Thompson companies appeal to this Court on the ground that Bibby was obliged to disclose an unredacted copy of the document and in its absence was not entitled to summary judgment on the issue.

*Hancock*

23. *Hancock* was another case involving the Chestnut portfolio. Mr Hancock had received various loans from Clydesdale, secured against residential properties. Promontoria Chestnut claimed to have acquired title to the loans and the charges by virtue of a deed of assignment dated 27 November 2014.[3] The value of the charges was estimated by Promontoria Chestnut at some £6m, as against sums outstanding from Mr Hancock of some £10m, leaving an unsecured balance of over £4m. Promontoria Chestnut served a statutory demand on Mr Hancock. He applied to set it aside on a number of grounds, but did not at that stage take any point on the validity of the assignment. His grounds were all rejected by DJ White, but on appeal Barling J gave him permission to rely on a new ground, namely that Promontoria Chestnut, which had relied on a heavily redacted copy of the assignment, had failed to prove title to the loans. That issue was heard by HHJ Hodge QC sitting as a Judge of the High Court in Liverpool. He dismissed the appeal on the basis that the debt was not genuinely disputed on substantial grounds, there being no genuine triable issue as to Promontoria Chestnut's entitlement to sue on the loans.

24. A further appeal to this Court was dismissed for the reasons given in the judgment of Henderson LJ, with whom Flaux and Floyd LJJ agreed. What follows is of course no substitute for reading the judgment in full, but, in summary, after setting out the factual background, the details of the redactions to the deed of assignment, and Mr Cooper's evidence in relation to them, Henderson LJ at [46ff] considered whether there was a substantial dispute about the title of Promontoria Chestnut to Mr Hancock's debts. At [49] he said that although the drafting of the deed was rather convoluted and not easy to follow, it left no room for any reasonable doubt that the loans to Mr Hancock, and Clydesdale's rights in relation to them and the charges securing them, were prima facie included in the assignment. At [50ff] he considered and rejected three arguments put forward on behalf of Mr Hancock which were relied on as showing a substantial dispute about the title, concluding at [57] that none of them had any substance and that there was nothing to displace the natural conclusion from the unredacted parts of the deed that Mr Hancock's loans and Clydesdale's rights were thereby transferred from Clydesdale to Promontoria Chestnut. After dealing with an application by Mr Hancock to adduce fresh evidence, at [66] Henderson LJ referred to s. 136 of the Law of Property Act 1925 (**"LPA 1925"**), pointing out (at [67]) that if the deed of assignment constituted an absolute assignment by Clydesdale to Promontoria Chestnut of Mr Hancock's debts then by s. 136(1) LPA 1925 the giving of notice in writing to Mr Hancock of the assignment had the effect of transferring the legal title to the debts to Promontoria Chestnut and enabling the latter to give a good discharge to him for them without the concurrence of Clydesdale. Furthermore, the proviso to s. 136(1) provides protection for the debtor if he has notice that the assignment is disputed by the assignor by enabling the debtor to either pay the money into court or commence a stakeholder claim; but (at [68]) there was not a shred of evidence that Clydesdale had ever disputed the validity of the assignment, or that Mr Hancock had ever asked Clydesdale to confirm that it no longer had any claims against him, or any evidence of any other conflicting claims to the debts.

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[3] As referred to above (fn 2) this was a different deed of assignment from that relied on in the *Simpson* case, different pools of assets in the Chestnut portfolio being assigned by different deeds.

25. At [69ff] Henderson LJ then considered whether there was any overriding principle preventing Promontoria Chestnut from relying on a redacted version of the deed of assignment. The argument of Mr Hugh Sims QC, counsel for Mr Hancock, started with the elementary proposition that a written contract had to be construed as a whole (at [70]). On that basis his primary submission was that the Court should simply refuse to engage with the construction of a document if the whole document were not before the Court (at [72]). That was rejected by Henderson LJ as unrealistic if taken as a rigid rule which admitted of no exceptions: for example, Mr Sims accepted that there could be no reasonable objection to the redaction on grounds of irrelevance of details of third party loan assets and title numbers in the schedule to the deed; it would be fanciful to suppose they could affect the construction. The same applied to personal details of signatories and witnesses (where the issue was one of construction; they could be highly relevant to an issue of execution) (at [73]).

26. Henderson LJ continued:

> "74. Redactions to the body of the Deed, however, are more problematical. I have much sympathy with the general thrust of the submission, which I take to be that where the court is called upon to resolve a question of construction of a contractual document, the document must in all normal circumstances be placed before the court as a whole, and it is not for the parties or their solicitors to make a pre-emptive judgment about what parts of the document are irrelevant. Sometimes, as with the details of third party transactions contained in the Schedule to the Deed of Assignment, it may be obvious that they can properly be omitted or blanked out; but even then a clear explanation must in my view be provided of the nature and extent of the omissions, and the reasons for making them. In general, irrelevance alone cannot be a proper ground for redaction of part of a document which the court is asked to construe, and there must be some additional feature (such as protection of privacy or confidentiality, but no doubt there are others too) which can be relied upon to justify the redaction.
>
> 75. Considerations of confidentiality, by contrast, give rise to very different considerations. Seldom, if ever, can it be appropriate for one party unilaterally to redact provisions in a contractual document which the court is being asked to construe, merely on grounds of confidentiality. If it is obvious that the provisions in question would on any reasonable view be completely irrelevant to the issue of construction, and if the reasons for taking that view can be clearly and fully articulated by the solicitor acting for the party seeking the redaction, I am inclined to accept that the redaction may be defensible. But the reason why it would be defensible is that the provisions are clearly irrelevant, not that they are confidential. Confidentiality alone cannot be a good reason for redacting an otherwise relevant provision in a contractual document which the court has to construe, and there are other ways in which problems of that nature can be addressed. I have already given the example of a confidentiality ring. Another solution, if the parties all agree, could be for the judge alone to see the document in its unredacted form."

27. Henderson LJ then reverted to the case before him, identifying certain specific

redactions which gave rise to concern (at [76]), but then reiterating (at [77]) that the procedural context in which the question arose was that of an application by Mr Hancock to set aside a statutory demand where the burden lay on him to show the existence of a substantial dispute and he had not provided any credible evidence casting doubt on Promontoria Chestnut's title. Henderson LJ continued:

> "77. …This is not a case where Promontoria Chestnut has to prove its title to sue Mr Hancock, and even if it were, Promontoria Chestnut would only need to rely on the Deed of Assignment in order to establish the absolute assignment of the relevant debts to it by the Bank. It is only in that limited sense that a question of construction of the Deed of Assignment arises. Furthermore, since Mr Hancock was not himself a party to the Deed, or to the SPA which preceded it, the question relates to a transaction between third parties rather than to an agreement under which Mr Hancock assumed rights and obligations of his own.
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> 78. Viewed in that context, the redactions to the Deed of Assignment seem to me to fade into relative insignificance. For the reasons which I have already given, the unredacted parts of the Deed are in my judgment sufficient to show that title to Mr Hancock's debts was indeed assigned by the Bank to Promontoria Chestnut. In a case of the present type, it would therefore be wrong to lay down any overriding principle based on the redactions to the Deed. I have little doubt that the redactions were far more extensive than they needed to be, and Mr Cooper's evidence would have been of greater assistance to the court if he had condescended to greater detail about the specific reasons for particular redactions. He could, for example, have explained, without revealing any confidential information, why the second limb of the definition of "Specified Loan Asset" was redacted, and why it had no impact on the generality of the first limb of the definition. Similarly, he could, and in my view should, have provided a general explanation of the contents of clauses 3 to 6 of the Deed, explaining why they were considered confidential, and why they were on any view irrelevant to the question of title to Mr Hancock's loans. Furthermore, Mr Cooper should clearly in my view have disclosed the relevant parts of the SPA which were incorporated by reference. In a different context, these criticisms, and others of a similar nature, might arguably have precluded Promontoria Chestnut from placing reliance on the Deed of Assignment in the redacted form which we have seen. In the present context, however, I am satisfied that the redactions have not caused any injustice to Mr Hancock, and the doubts which he has sought to raise about Promontoria Chestnut's title to demand payment from him are unfounded."

28. That was sufficient to dispose of the appeal, but Henderson LJ went on to refer to two other matters. One (at [80ff]) was the *Emanuel* case, but Henderson LJ purposefully did not say anything which might influence what were then pending applications by both parties for permission to appeal. He did however make the point (at [83]) that in the *Emanuel* case Promontoria Oak had to establish its title to sue, whereas Mr Hancock by contrast was seeking to set aside a statutory demand.

29. The other matter he referred to (at [85ff]) was the question whether there was any useful

analogy with the practice of redacting documents for irrelevance on disclosure, where the certificate of the disclosing party's solicitor that the redacted parts are irrelevant will in all normal circumstances be treated as conclusive. Henderson LJ rejected the submission that similar principles were applicable where the Court was being asked to construe a redacted document, as follows:

> "89. These submissions have a superficial attraction, but as I have already indicated I can only accept them to a very limited extent. There is in my judgment a clear distinction between the rules which apply when a party is giving disclosure of documents, in the ordinary course of litigation, and the process of construction which a court has to embark upon when considering the meaning or legal effect of a document. Since the process of construction requires the document as a whole to be considered, the starting point must always be that the entire document should be made available to the court, and any redactions to it on grounds of irrelevance should either be forbidden or, if permitted at all, convincingly justified and kept to an absolute minimum. Except in the clearest of cases, the question of relevance to the process of construction is one that the court should be left to decide for itself. Certification by a solicitor provides an important safeguard, but where the question is one of the correct interpretation of a written document, it is not normally appropriate for a solicitor, however experienced, to pre-judge which parts of the document the court may find useful in performing its task, except perhaps in relation to material that on no reasonable view could have any bearing on the exercise. In all normal cases, the entire document should be placed before the court; and if, exceptionally, any redactions are made, they should be fully explained and justified by the party making the redaction, with sufficient particularity for the court to be able to rule on the need for the redaction if it is challenged.
>
> 90. I have so far spoken only of redaction for irrelevance. Redaction on the grounds of confidentiality alone is a very different matter, and as at present advised I find it hard to see how it could ever be justified where the confidential material forms a relevant part of the document which the court is asked to construe. As I have already said, there are other ways of dealing with problems of confidentiality, such as the use of confidentiality rings which have become a familiar feature of competition and intellectual property cases.
>
> 91. In many contexts, application of the criteria which I have outlined above might well (I say no more) lead to the conclusion that redactions similar to those in the present case were so extensive, and of such a nature, that the court could not safely resolve an issue of construction of the document in question, even if the redactions were accompanied by explanatory evidence and assurances of the kind given by Mr Cooper. In the particular context of the present case, however, I have concluded, for the reasons already given, that the redactions cannot, without more, enable Mr Hancock to make good his challenge to the Statutory Demand. As so often, context is everything, and sweeping generalisations are to be avoided. I will therefore content myself with saying that, in most

> circumstances, it is unlikely to be helpful to draw an analogy between the established principles which apply in this jurisdiction to the redaction of documents on disclosure in civil proceedings, on the one hand, and the particular problems posed by redaction of a document which the court is being asked to construe, on the other hand."

*The point of general principle*

30. It can be seen from these citations from *Hancock* that Henderson LJ was very alive to the fact that the procedural context in which that appeal arose was that of Mr Hancock seeking to set aside a statutory demand where the onus lies on the applicant to show that the debt is genuinely disputed on substantial grounds. It was not a case where the claimant had to establish its title to sue. The present appeals by contrast all concern claims by a claimant claiming as assignee where its title to sue has been put in issue and where the onus falls on the claimant to make good its title. That raises the point of general principle identified by Nugee LJ when granting permission to appeal, namely how a trial judge should deal with a document on which the claimant needs to rely to prove its title to sue but which is presented in a redacted form.

*Defendants' submissions*

31. The argument for the defendants was primarily advanced by Mr Sims, who appeared with Mr Oliver Mitchell for the Emanuels. His overall submission identified two propositions as follows. First, if a claimant relies on a document to prove its title and has redacted it on claimed grounds of relevance and confidentiality, the defendant should be permitted to see the whole of it, on confidentiality ring terms if necessary, and, if the defendant so wishes, to place the whole of it before the Court (subject to the Court, if satisfied that the document contained confidential information and publicity would damage that confidentiality, directing that the relevant parts of the hearing be heard in private pursuant to CPR r 39.2(3)(c)). Second, if the claimant can readily produce the unredacted copy but fails to produce it then, absent some special circumstances (which for present purposes cannot include mere confidentiality since that is addressed to the extent necessary in the first proposition), the Court will decline to admit the redacted copy and the claimant will fail to establish their title.

32. Mr Sims supported this submission with a number of points. So far as his first proposition was concerned, they were as follows:

    (1) Where the Court is asked to consider the meaning and effect of an instrument, it must consider the whole of it: see *Hancock* at [70], referring to *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 (**"*Wood v Capita*"**) at [8] to [15] per Lord Hodge JSC, where he said that the Court's task when construing a contract requires it to consider the contract as a whole.

    (2) Where a document is relevant to an issue before the Court, both parties should have equal access to it so that they can make submissions on it as they think fit. This is required by the principle of "equality of arms" (see *Al Rawi v Security Service* [2011] UKSC 34) and the right to a fair trial in the determination of a person's civil rights and obligations conferred by Article 6 of the European Convention on Human Rights.

(3) If the Court permits one party to prejudge the question of relevance, the Court is then obliged to consider the document after it has been redacted. This is wrongly permitting one side to act as a filter.

(4) In *Hancock* the issue before the Court concerned a statutory demand where the burden is on the applicant, and where the issue is not finally determinative in any event, the statutory demand being a precursor to a bankruptcy petition. The present cases, where the Court is finally deciding the question of title, are very different.

(5) There is usually no difficulty in making the whole of the document available in unredacted form, if necessary on terms that preserve its confidentiality. If there is no difficulty, the Court should require the party seeking to rely on the document to produce the whole.

33. As to his second proposition, Mr Sims submitted that if a party could readily produce an unredacted copy and failed to do so, then the Court should (absent special circumstances) decline to admit it, or place no weight on it: see *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563 (***"Springsteen"***) at [85] per Jonathan Parker LJ. For these purposes confidentiality is not a good reason for non-production: *Hancock* at [75].

34. Mr Sims also made submissions as to why s.136 LPA 1925 was not an adequate protection for the debtor; these were supplemented by some further submissions on s. 136 both from Mr Samra, who appeared in person, and from Mr Antoine Tinnion, who appeared for the Thompson companies in the *Bibby* case. We will deal with those separately when considering the question of s. 136 below. Other than that neither they, nor Mr Trevor Berriman, who appeared with Ms Katie Wilkinson and Mr Thomas Wheeler for the Simpsons, wished to add anything on the general principle.

*Claimants' submissions*

35. The argument for the claimants was primarily advanced by Mr Jamie Riley QC, who appeared with Mr James McWilliams for the Promontoria companies.

36. His submission was that the answer to the question was to be found in *Hancock* and was ultimately a very simple one. The Court should approach the question in the same way as it approached any other question of evidence: was it persuaded that the claimant had, on the totality of the evidence before the Court, discharged the burden of proof that lay upon it? There was no reason why there should be any special rule for documents proving title. Nor was there any absolute rule that the whole of such documents should be placed before the Court.

37. Mr Riley accepted that the starting point where the Court was asked to construe a document was that it must in all normal circumstances be placed before the Court as a whole, it not being for the parties or their solicitors to make a pre-emptive judgment as to which parts might be relevant to the process of construction: *Hancock* at [79], [85]. But there is no absolute rule, and there could easily be parts of a document which could clearly have no bearing on the question at issue, for example details of rights against third parties that were also the subject of the same assignment: *Hancock* at [73]. Where redactions are to be made to the operative parts, *Hancock* gives clear guidance as to the

appropriate way to proceed: a clear explanation must be given of the nature and extent of the redactions and the reasons for them; and the material that is redacted must not only be irrelevant but have some other additional feature such as privacy or confidentiality to justify the redaction: *Hancock* at [74], [89].

38. But it does not automatically follow from a failure strictly to comply with this guidance that the party is unable to rely on the document or the Court unable to construe it. The Court has to grapple with the evidence before it, and if it can safely conclude that it can be satisfied that the instrument does what the party claims it does (here effect an assignment of the relevant assets), then the Court can proceed to so find. By redacting a document a litigant in fact makes life difficult for itself as it runs the risk that the Court will come to the conclusion that it cannot safely construe the document at all: *Hancock* at [91]. But if, despite the redactions, the Court concludes that it can answer the relevant question safely, then it should do so, and there is no rule of law preventing the Court from admitting the redacted document into evidence and reaching a decision as to its effect.

39. Mr Riley also made submissions on s. 136, as did Ms Kelly Pennifer, who appeared for Bibby, and again we will pick these up later.

40. On the main issue, Ms Pennifer added some submissions as follows. She said that Mr Sims' position, that the Court should adopt an absolute rule that if a document of title was produced with redactions the Court should refuse to admit it, was likely to be unfair. The requirements of a fair trial, whether viewed through the prism of Article 6, or as a matter of common law principles, or as an aspect of the overriding objective, applied to both parties, and were inimical to absolute rules which did not admit of exceptions. The jurisprudence of the European Court of Human Rights for example was to the effect that Article 6 required that each party be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent, but that what this means in any particular case depends on the context and the particular facts and circumstances: see eg *Regner v The Czech Republic* (Application no. 35289/11) at [146]-[148].

41. That was the approach, she submitted, that was correctly adopted in *Hancock*, and if it was safe for the Court to construe the document when the question was whether there was a serious issue to be tried for the purposes of setting aside a statutory demand, then it could also be done at trial. The debtor's interest in the question of title to the debt was: who do I need to pay, and am I at risk of being sued twice? See *Walker v The Bradford Old Bank Ltd* (1884) 12 QBD 511 at 515-6. She did not go so far as to say that it was not open to the debtor to challenge the validity of an assignment, but where the assignor and assignee were agreed, that was a matter of great factual importance: *Ennis Property Finance Ltd v Thompson* [2018] EWHC 1929 (Ch) at [60], [66], *Nicoll v Promontoria (Ram 2) Ltd* [2019] EWHC 2410 (Ch) at [41].

42. The interests of the assignee may vary. If the assignment only assigned a single debt, one would expect the whole document to be produced. But in the case of factoring or invoice discounting, it was common for there to be a single contract which not only effected the assignment of debts, but also dealt with the arrangements for financing. It was easy to see that that was likely to contain clauses that were genuinely irrelevant to the question of title to the debt, such as those dealing with the accounting between the parties. The debts which a factor pursued by litigation might be very small, and the

damage to the factor in disclosing confidential material might be significant. Nor was a confidentiality ring necessarily an answer: such arrangements not only build complexity and hence cost into litigation that should otherwise be straightforward, but can also have practical problems, particularly with litigants in person (who are common in factoring claims); there is also the question whether confidentiality will be able to be maintained at trial given the principle that trials should *prima facie* be heard in open court.

*The general principle – discussion*

43. As can be seen all parties took *Hancock* as their starting point. We do not therefore have to consider which parts of the judgment are strictly part of the *ratio* of the decision by which we are bound, and which are to be regarded as *obiter*, as we received no argument inviting us to depart from anything Henderson LJ there said.

44. For our part we consider that *Hancock* provides sufficiently clear guidance for future cases. Without attempting to re-write that guidance, it can in our view be summarised as follows:

(1) 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: [74]. The starting point must always be that the entire document should be made available to the Court: [89].

(2) But it may be obvious that some parts, such as the details of third party transactions, can be omitted or blanked out. In such a case a clear explanation must be given of the nature and extent of the omissions and the reasons for making them: [74]. In general, irrelevance alone is not enough to justify redaction; there must be some additional feature such as privacy or confidentiality: [74].

(3) Mere confidentiality can seldom, if ever, justify redaction, but provisions can be redacted if it is obvious that on any reasonable view the provisions in question would be completely irrelevant to the question of construction, and the reasons for taking that view are clearly and fully articulated by the solicitor for the party seeking that redaction: [75].

(4) But redactions on the ground of relevance should either be forbidden or if permitted at all convincingly justified and kept to an absolute minimum: [89]. Except in the clearest of cases, the question of relevance to the process of construction is one that the Court should be left to decide for itself: [89].

(5) In a sentence, in all normal cases, the entire document should be placed before the Court and if, exceptionally, any redactions are made, they should be fully explained and justified by the party making the redaction, with sufficient particularity for the Court to be able to rule on the need for redaction if it is challenged: [89].

45. We add a few comments on points that emerged in the course of oral argument. First, the *Hancock* guidelines are directed at a case where the Court is required to construe a document. But quite what is required in any particular case must be heavily dependent

on the context: as Henderson LJ observed in argument, context is all-important. If for example there is a classic difficulty of construction that needs to be resolved – a provision that on its face is open to more than one competing interpretation – then we suspect that it would be difficult to justify withholding other parts of the same instrument as experience shows that arguments on construction are often wide ranging, and not infrequently draw on comparisons with other parts of the same instrument, even if dealing with a different aspect of the parties' agreement. That is the context of Lord Hodge's statement in *Wood v Capita* at [10] that in ascertaining the objective meaning of the parties' language, the Court must consider the contract as a whole.

46. But the present cases are not like that. The Court is not being asked to resolve the meaning of an ambiguous provision, or choose between competing interpretations. Instead the question is a very limited one: does the document before the Court effect an assignment of the relevant debt or not? That undoubtedly requires the Court to consider the meaning and effect of the provisions relied on, but that does not usually present great difficulty, and it is far more likely that a clear and convincing justification can be made out that other parts of the same document are entirely irrelevant to that question. We accept, for example, Ms Pennifer's submission that in a typical invoice factoring agreement, provisions dealing with the obligations of the original creditor and the factor to account to each other are unlikely to have any relevance to the question whether the document effects an assignment of the relevant debts. We therefore accept the submissions of Mr Riley and Ms Pennifer that there is no absolute rule that the whole document should always be disclosed in unredacted form if asked for, as indeed *Hancock* itself makes clear. The ultimate question is always whether it is possible for the Court to reach a safe conclusion on the effect of the document: if it cannot, it would be unfair to the other party for the Court to proceed on the basis that the document had a particular effect, but if it can, there is no reason why it should not do so, and it would be unfair on the party relying on the document to refuse to do so.

47. Second, it is in general unsatisfactory for questions as to the extent of redactions to be first raised at trial. The general position under the CPR is that cases should be managed in such a way that by the time the parties get to trial they should know what the evidence is on which they will each be relying, and procedural matters should have all been resolved. This is of course a counsel of perfection which cannot always be attained in practice, but in cases like the present where it is clear from an early stage that the claimant claims as assignee, the claimant's title is put in issue, and the claimant intends to rely on a redacted document to prove the assignment, the defendant should in our view raise the issue well before trial if he seeks to object to that being done, either at a case management conference or by way of interlocutory application. It will usually be obvious from disclosure that the claimant does not intend to provide an unredacted copy of the document; and that is the opportunity for the defendant to object to the claimant seeking to rely on a redacted document to prove its title.

48. We hope that this is sufficient to provide practical guidance to parties and judges for the future. It does not however directly answer the questions raised in these appeals where (save for the *Simpson* case) the hearings below took place before the *Hancock* guidance was available. We will look at the individual appeals in due course, but in summary we think the resolution of these appeals must turn on the question identified in *Hancock* at [91]: can the Court in the circumstances safely resolve the question of construction (or in the present cases the question whether the instrument is effective as

an assignment) on the material before it? If it concludes that it cannot, then the claimant will not have proved its title, and its claim will fail. But if it can, we see no reason why it should not do so.

*Assignment and s. 136 LPA 1925*

49. We consider here the points raised in argument on the effect of s. 136 LPA 1925, sub-section (1) of which reads as follows:

> "**136. Legal assignments of things in action.**
>
> (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—
>
> (a) the legal right to such debt or thing in action;
>
> (b) all legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor:
>
> Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—
>
> (a) that the assignment is disputed by the assignor or any person claiming under him; or
>
> (b) of any other opposing or conflicting claims to such debt or thing in action;
>
> he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act, 1925."

50. As pointed out by Henderson LJ in *Hancock* at [67] the significance of this provision in the present context is that if the assignment relied on is an absolute assignment of which notice is given, then the assignee can give a good discharge to the debtor without joining the assignor. In *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607, this Court held that no formal requirements were required for such a notice, and that it is sufficient that it makes plain that there has been an assignment so that the debtor knows to whom he has to pay the debt: see per Lord Denning MR at 613B. Lord Denning continued:

> "After receiving the notice, the debtor will be entitled, of course, to require a sight of the assignment so as to be satisfied that it is valid, and that the assignee can give him a good discharge."

Davies and Widgery LJJ gave concurring judgments but did not say anything about this point.

51. Mr Riley submitted that this *obiter* statement was erroneous, and that the debtor has no right to see the assignment as such and that his remedy, if in any doubt as to who his creditor is, is to invoke the proviso to s. 136(1) and pay the money into court or call upon the disputing creditors to interplead.

52. We do not think this is a complete answer to the point. The proviso only applies if the debtor is on notice that the assignment is disputed or that there are conflicting claims. The debtor may not be on notice of any such dispute but is still entitled to be assured that he will obtain a good discharge. Since Mr Riley accepted that the section only applies if there has in fact been a valid absolute assignment under hand, we agree with Lord Denning that he is entitled to satisfy himself that there has been such an assignment.

53. However we doubt that this particular point is of much if any relevance to the resolution of the questions raised by these appeals. In practical terms the obvious recourse for the debtor to avoid the risk of having to pay the assignor as well as the assignee is to ask the assignor to confirm that the debt has been assigned to the assignee and that it has no further claims against him: see *Hancock* at [68]. Indeed where the assignor has joined in giving notice of the assignment to the debtor even that may be unnecessary. If the assignor gives the requisite confirmation, we would have thought that the debtor could safely pay the assignee without more, as the assignor would be estopped from thereafter asserting a claim; whereas if the assignor does dispute the validity of the assignment and claims to still have an interest in the debt, then the debtor will be able to invoke the proviso. It is therefore only likely to be necessary for the debtor to go further and satisfy himself of the validity of the assignment if the assignor fails to respond at all, or does so in equivocal terms. But even then, although we agree with Lord Denning that the debtor can ask to see the assignment to satisfy himself that it does assign the debt in question, we do not think this entitles the debtor to see any more of the document than sufficient to demonstrate that there has indeed been a valid absolute assignment under hand of the debt. Lord Denning said nothing about the question whether irrelevant and confidential parts of the same document can be withheld.

54. Mr Samra submitted that sometimes there had been a chain of assignments so that a confirmation from the original creditor that it no longer had any interest in the debt would not suffice. We see the point but do not think it affects the principle: if the original creditor confirms that it has assigned the debt to A, and B claims now to be entitled to it, the debtor can ask A what the position is, and so on.

55. Mr Tinnion said that the debtor often disputed any liability for the debt, and in such a case the remedy of interpleader or paying into court was not available. But in such a case, as Phillips LJ pointed out, the remedy of the debtor if he is sued by the assignee and is uncertain to whom the liability, if any, is owed, is to call on the assignor to state if he has any interest in the claim, and if he asserts that he does, to join the assignor into the action so that both assignor and assignee are bound.

56. In the event we do not think the various submissions we received on s. 136 have any direct bearing on the general question of principle. We did not understand either

Mr Riley or Ms Pennifer to dispute that a debtor who is sued by an assignee is entitled to put the title of the assignee in issue, or that the assignee in such a case is obliged to make good his title. That brings into play the considerations we have already discussed above. What can be said however is that a debtor who has made no attempt to clarify the position with the assignor, and can point to nothing suggesting that the assignor disputes the assignment, will usually not find it easy to suggest that there is a real doubt as to the assignee's title such that the Court should find that the assignee has failed to prove it.

57. We now consider the individual appeals before us.

*The Emanuel case*

58. We have already summarised the salient features of the *Emanuel* case at [14] and [18] above. The claim brought against the Emanuels by Promontoria Oak was for possession of a residential property owned by them, and occupied by them or members of their family, at Trevowan Farm, Crantock, near Newquay in Cornwall (**"the Property"**). The Property was registered in their joint names with title absolute under title number CL95258. In support of the possession claim, and an associated claim for a money judgment, Promontoria Oak relied on an "all monies" legal charge which the Emanuels had given to Clydesdale in October 2008 (**"the Clydesdale Charge"**). Copies of the registered title and the Clydesdale Charge were annexed to the particulars of claim, which recited the facilities which the bank had granted to the Emanuels and a demand for repayment made on 23 November 2016 in the sum of £110,753.71.

59. The particulars of claim also pleaded the Oak Assignment, averring that by it "all the rights and obligations under the facilities and security referred to herein were assigned to" Promontoria Oak. No copy of the Oak Assignment was annexed to the particulars of claim, but in due course a redacted version of it was disclosed to the Emanuels. The redactions were in all material respects very similar to those in *Hancock*, so it was apparent from the unredacted text that:

    (a) the assignment had been preceded by a document referred to as a "Sale and Purchase Agreement", which it is reasonable to infer was thus defined in a redacted part of clause 1.1 where a definition of that term would fit alphabetically; and

    (b) Promontoria Oak itself was defined as "the Novated Buyer" or "the Buyer".

60. This incomplete documentary evidence was supplemented by the two letters referred to in [14] above, dated respectively 24 June 2016 and 16 September 2016.

61. By the first letter, NAB and Clydesdale informed the Emanuels that:

> "… we have sold your facility/facilities (together with all related rights and benefits, including, without limitation, guarantees and security) to Promontoria Holding 170 B. V. an affiliate of Cerberus Global Investors and we will be transferring our rights to Promontoria Holding 170 B. V. in due course. We are expecting the transfer to take place on 16/09/2016 and we will write to you again at the point of transfer to confirm this."

Enclosed with the letter was a list of frequently asked questions, which made clear, among other things, that the sale of the Emanuels' loan had already been agreed, and was permitted under the terms of their agreement with Clydesdale. That was indeed correct. As one would expect, clause 19 of the Clydesdale Charge enabled the bank to "assign all or any of its rights" thereunder, and stated that any assignee of the bank "shall be entitled to the full benefits of this legal charge."

62. The second letter, headed "Important information on your facilities", informed the Emanuels that NAB and Clydesdale had "completed the sale of all amounts owing to another legal entity", namely Promontoria Oak, which was described as "successor in title" to Holding 170, the entity referred to in the first letter. Accordingly, the relevant "Loan Assets", which were broadly defined, had been transferred to Promontoria Oak with effect from 16 September 2016, defined as the "Transfer Date". The letter then said:

> "This letter constitutes notice to you of the Transfer and that, from the Transfer Date, all payments, amounts and obligations owing by you or that may become due or owing in respect of the Loan Assets will be owed to Promontoria. Please note that, in respect of the Loan Assets, the balance transferred to Promontoria will include the rights to all outstanding amounts…
>
> …
>
> A letter will be sent to you shortly from Engage Commercial, which is a trading name of Pepper UK Limited. Engage Commercial will be servicing the Loan Assets on behalf of Promontoria and will confirm to you how to make loan payments."

The contact details of Engage Commercial were then set out.

63. The second letter was then followed up, on 20 September 2016, by a letter to the Emanuels from Engage Commercial, which confirmed their appointment to provide portfolio and asset management services in respect of the Emanuels' loan facilities and their responsibility for managing the direct relationship with the Emanuels on behalf of Promontoria Oak.

64. The claim was tried over three days in May 2018 by Mr Recorder Willetts. The Emanuels were represented at trial, as they have been since, by Mr Sims QC, instructed by Brains Solicitors. One of the main issues which the judge had to determine was whether Promontoria Oak had title to sue. The judge had the benefit of "some five binders" of written evidence, and he also heard live evidence from Mr Ronan Breen, who was a senior manager of Engage Commercial, on behalf of Promontoria Oak, as well as from Mr Nicholas Emanuel, the first defendant.

65. In his reserved judgment, handed down on 16 July 2018, Mr Recorder Willetts began his consideration of the issue of title to sue by describing the redacted version of the Oak Assignment. He was satisfied from what he could see of the document that it was "a formal and properly worded deed of assignment", which had been duly executed, and that the parties to the Oak Assignment considered it to be a binding agreement as evidenced by the contemporary correspondence: see paragraph 17 of the judgment. He then considered Promontoria Oak's refusal to disclose the original document for

reasons of commercial sensitivity and confidentiality, as pleaded in paragraph 4 of the reply and defence to counterclaim settled by counsel then appearing for Promontoria Oak, Mr Ashley Cukier. Paragraph 4.1 included the following passage:

> "The sections of the Deed of Assignment that have been redacted contain commercially sensitive material that have no bearing upon the existence or effectiveness of the Deed of Assignment and/or any rights or obligations arising thereunder and the Claimant has a legitimate expectation that the confidentiality of such parts of the Deed of Assignment shall be protected in these – and other – proceedings where such information is irrelevant to [*the*] claim and where such material in no way prevents the just disposal of proceedings."

66. With regard to Mr Breen's evidence, the judge recorded at paragraph 21 his explanation in his oral evidence in chief "that the purchase cost and structure of the deal with the Bank would have to be redacted for commercial reasons." Mr Breen, had, however, also accepted that he had not been personally involved in the redaction, and he agreed in cross examination that he would not know if the redactions went further than was necessary for that purpose.

67. With regard to the law, the judge directed himself by reference to the judgment of Jonathan Parker LJ in the *Springsteen* case, and said at paragraph 24 that the admissibility of the Oak Assignment must depend on "whether there is a reasonable explanation or otherwise special circumstances to justify withholding the original deed". He then stated his conclusion, at paragraph 25:

> "In this case an explanation has been provided, at first instance in the pleadings and then in Mr Breen's evidence before me… Whilst I think it likely that the Claimant has given little thought to this issue before Counsel became involved at trial, it could (and in my view should) have served a statement from its solicitor dedicated to this topic to avoid any potential evidential pitfalls. Nonetheless I am satisfied that on the available evidence a satisfactory explanation of commercial confidentiality for the redactions has been provided. I will therefore permit the Claimant to rely on the copy redacted Assignment Deed which in my judgment is both a valid and enforceable agreement between the Bank and the Claimant."

68. The judge then said, at paragraph 26, that he found support for this conclusion in two recent decisions involving sister Promontoria companies. The first was the decision of Her Honour Judge Moulder, sitting as a judge of the High Court, in *Promontoria (Chestnut) Limited v Iliad Group Limited* [2017] EWHC 2332 (QB) where she granted the claimant's application for summary judgment and rejected a submission that the claimant could not rely upon a deed of assignment with redactions similar to those in the present case. She did, however, have the benefit of a witness statement of Mr Cooper, a partner of Addleshaw Goddard, which was evidently similar to the evidence which he gave in *Hancock*.

69. The second case was a decision of the Irish High Court, *English v Promontoria (Aran) Limited (No.2)* [2017] IEHC 322, where Ms Justice Murphy rejected a challenge to various redacted deeds saying:

> "All of these issues raised by counsel for the plaintiff would be properly and validly raised if the plaintiff were a party to the deeds with an entitlement to challenge their efficacy, but he is not a party to the deeds. He is a third party whose only entitlement is to be shown that the stranger knocking on his door claiming possession has in fact acquired the interests of [the bank]…"

70. In the next section of his judgment, running from paragraphs 28 to 31, Mr Recorder Willetts explained why he was satisfied that there were no further relevant documents required to prove Promontoria Oak's title to commence the proceedings. He considered that the Oak Assignment "provides the full picture as to the sale and purchase of the relevant facilities."

*The appeal to Marcus Smith J*

71. The Emanuels' appeal to the High Court from the order of Mr Recorder Willetts was heard by Marcus Smith J on 3 December 2019. The Emanuels were again represented by Mr Sims, now leading Mr Oliver Mitchell. Promontoria Oak were represented by Mr Jamie Riley QC, who has also appeared before us, but was then leading Mr Cukier. The judge handed down his reserved judgment on 30 January 2020: see [2020] EWHC 104 (Ch).

72. By the date of the hearing, the Property had been sold under protest by the Emanuels and their outstanding indebtedness under the Clydesdale Charge was paid to Promontoria Oak from the proceeds. It was agreed, however, that this would not prejudice the arguments which the Emanuels wished to advance on the appeal. There were three grounds of appeal which they had permission to advance. The first was that the Recorder had been wrong to admit the redacted version of the Oak Assignment into evidence. In the alternative, the second ground was that he had been wrong to conclude that the redacted deed proved title, while the third ground was that Promontoria Oak had adduced insufficient evidence to prove its chain of title.

73. The conclusion reached by the judge, as Henderson LJ recorded in *Hancock* at [82], was that grounds 2 and 3 failed, but ground 1 succeeded. As Henderson LJ said (ibid):

> "In a careful and thoughtful judgment, the judge set out the reasoning which led him to that conclusion… I would, however, draw attention to a striking feature of the judge's process of reasoning. He began by considering grounds 2 and 3 together, and rejected them on the basis that the judge had clearly been entitled, on the evidence adduced before him, to reach the conclusion which he did: see the judgment at [33] to [36]. That, one might have thought, would have been the end of the matter, but the judge nevertheless concluded that the appeal should succeed on ground 1, having regard to the evidence that could have been, but was not, adduced at the trial by Promontoria Oak, including in particular the unredacted [*Oak*] Assignment. In this connection, the judge considered that the recorder's decision to permit Promontoria Oak to rely on the redacted deed "was so flawed that it must be set aside": see [52], and the reasons for that conclusion set out at [54] to [75]."

74. There is in our view an obvious difficulty about this result, which may be shortly stated. In general, it is the duty of a court to decide a case on the basis of the admissible evidence adduced before it. In dismissing the second and third grounds of appeal,

Marcus Smith J held, in effect, that this was what the Recorder had done, and that he had been entitled to do so because there was sufficient evidence before him to prove Promontoria Oak's title. Yet in upholding the first ground of appeal, the judge appeared to contradict his former conclusion by holding that the Recorder had been wrong to admit the redacted version of the Oak Assignment into evidence, thereby apparently resurrecting the "best evidence" rule, which as he rightly recognised at [44] had been given its quietus by the decision of this court in the *Springsteen* case. Furthermore, the judge expressly recognised, at [45], that the so-called rule "is not a rule at all, but essentially guidance". The question whether or not to admit the redacted Oak Assignment had been "a question of judicial discretion" for the Recorder, whose decision must stand unless it was one that no judge in his position could reasonably have taken: see [51]. In his consideration of ground 1, the judge concluded that this high burden was satisfied, but that conclusion is in our judgment impossible to reconcile with his earlier conclusion that the Recorder had been entitled to find that Promontoria Oak's title was adequately established by the evidence adduced at trial, including the redacted version of the deed.

75. The apparently paradoxical nature of the judge's conclusion was then reinforced when, following further argument after his judgment had been handed down, he decided that the Emanuels' appeal should after all not result in a change to the outcome below on the basis that Promontoria Oak could rely instead on their registration as registered proprietor of the Clydesdale Charge to prove their title. The judge gave his reasons for so concluding in a second reserved judgment which he handed down on 19 March 2020: see [2020] EWHC 563 (Ch). For convenience, we will refer to the judge's two judgments as **"the January Judgment"** and **"the March Judgment"** respectively. The effect of the two judgments was recorded in an order dated 19 March 2020, which as we have already noted at [18] above awarded the Emanuels 50% of their costs of the appeal.

*Discussion*

76. Since the Emanuels do not challenge the judge's dismissal of their second and third grounds of appeal, it is convenient to begin with the reasons which led him to that conclusion. The judge began his discussion of those grounds by saying, at [24] of the January Judgment:

> "It is the function of a judge to decide the facts of a case on the basis of the admissible evidence before him or her. A judge cannot abdicate that responsibility by declining to decide an issue of fact because, for example, the evidence is incomplete or less than perfect. Most trials are conducted and determined on the basis of less than perfect – often substantially incomplete – evidence."

As will already be apparent, we respectfully agree.

77. The judge then said, at [27]:

> "The substance of Grounds 2 and 3 involves the question whether, in light of the evidence that was adduced before him, and ignoring the fact that further evidence might have been adduced, the Judge was entitled to conclude, as he did, that the Bank's rights against the Emanuels had been assigned to

> Promontoria Oak. That was a question to be decided on the balance of probabilities, the burden resting on Promontoria Oak as the party asserting the right." (Original emphasis).

This statement is in our view more problematical, because of its emphasis on further evidence that "might have been adduced". Although it is often appropriate for a judge, in assessing the evidence adduced before him, to consider what further evidence might have been adduced on a relevant topic, and the reasons why it has not been, there is a danger of such consideration deflecting the judge from the task in hand, which is to come to a decision on the basis of the admissible evidence which has been adduced. The fact is, as the judge rightly recognised when dealing with ground 1, that the Recorder had exercised his discretion to admit the redacted Oak Assignment into evidence. Once he had done so, the question of the weight to be attached to it in its redacted form was one for the Recorder to assess, and on well-established principles an appellate court should be very slow to interfere with such an assessment.

78. This reluctance on the part of an appellate court was, again rightly, recognised by the judge at [33], after he had set out the Recorder's key findings in relation to the redacted deed. The judge then stated his conclusion in relation to grounds 2 and 3 at [34]:

> "In this case, although I have three criticisms of the [*Recorder's*] approach (which, for completeness I describe in paragraph 35 below), they are altogether insufficient for me to conclude that [*he*] erred in his conclusion that – on the basis of the evidence before him – Promontoria Oak had shown good title. It seems to me that the [*Recorder*] having regard to the evidence before him, and disregarding the evidence that might have been before him (which I consider to be the substance of Ground 1), was quite entitled to reach the conclusion that he did. He had regard to the evidence of the Bank, Promontoria and (indeed) the Emanuels themselves that the assignment appeared to be accepted by all to be binding and effective. He carefully considered the terms of the assignment, and he considered the documentary context in which the assignment occurred. In my judgment, [*he*] was entitled to reach the conclusion he did, on the evidence that was before him." (emphasis in the original)

79. One of the three criticisms which the judge proceeded to make in [35] was that the involvement of Holding 170 in the assignment "required further analysis". We accept that there is some force in that criticism, but we also agree with the judge that it did not affect the Recorder's entitlement to conclude as he did.

80. We now turn to the reasons which led the judge, when considering ground 1, to conclude that the Recorder had after all been wrong to admit the redacted Oak Assignment. The judge began by considering the "best evidence" rule at [40] to [45], and rightly observed (as we have already seen) that it is now defunct. He then set out, at [46], some of the factors which a judge needs to bear in mind when deciding whether or not to admit secondary evidence of the contents of a document, including the nature of the point at issue, the reason for a party's inability or unwillingness to produce the original, and the procedural history. He then said:

> "Generally speaking, the issue of a party's failure to produce an original ought to be raised and resolved well before trial".

On this last point, see the guidance we have already given at [47] above.

81. The judge next set out the reasons which had led the Recorder to admit the redacted deed, on the basis that the redactions were justified by commercial confidentiality. At [50(4)], the judge said the Recorder had been "entitled to rely on the fact that the redactions to the assignment had been made by Promontoria's legal team." He noted that the redactions were not supported by a witness statement of Promontoria Oak's solicitors, but referred to an earlier ruling which he had given when refusing the Emanuels permission to introduce a further ground of appeal alleging that the redactions had been deliberately misleading. In the course of that ruling, the judge had made clear that he "would not permit either the introduction of evidence or argument that the redactions were improperly made by Promontoria Oak's legal team". The Recorder had therefore been "entitled to accept, at face value, what Promontoria Oak's legal team were saying regarding confidentiality and relevance".

82. The reasons which the judge proceeded to give for setting aside the Recorder's decision to admit the redacted deed were, in summary, as follows:

(1) he failed to have regard to the implications of the evidence that was *not* before him;

(2) he failed properly to consider the adequacy of Promontoria Oak's reason for not producing the original of the Oak Assignment, or an unredacted copy of it, and he failed properly to apply the law relating to redactions made on grounds of confidentiality;

(3) he was, in particular, wrong to accept without fuller explanation that the redacted passages were irrelevant, and he failed to consider at all the failure to produce the Oak SPA;

(4) he failed to attach proper weight to the fact that the chain of title was in issue between the parties; and

(5) he failed properly to consider the procedural history.

83. With regard to the procedural history, the judge, while criticising Promontoria Oak's disclosure as "seriously defective", nevertheless accepted that the Emanuels had been well aware of the deficiencies from an early stage, but had made no application for specific disclosure or made any attempt to remedy the deficiencies until trial, when the point was clearly raised by Mr Sims on their behalf. The judge said at [72]:

> "Whilst I accept, of course, that the rules on disclosure are there to be followed, and that Promontoria Oak can be criticised for not following these rules, I do not accept that the Emanuels are not to be criticised also. They had, at their disposal, tools for resolving the issue of Promontoria Oak's defective disclosure and they (culpably) failed to avail themselves of those tools."

The judge then added, at [73], that if Promontoria Oak had contended at trial that it was too late for the Emanuels to raise the point, the Recorder might well "have been entitled to refuse what would have been a very late application for disclosure" and "[h]e could then have proceeded, as he did, to determine the issues on the material before him."

84. Having set aside the Recorder's decision to admit the redacted deed, the judge then had to remake the decision himself. In his view, as he explained at [79], the appropriate course was either to exclude the redacted deed from the evidence or to hold that it was insufficient to prove Promontoria Oak's title to sue.

85. The main focus of Promontoria Oak's appeal to this court is that Marcus Smith J erred in holding that the redacted Oak Assignment should not have been admitted. Counsel for Promontoria Oak submit that the Recorder's decision to admit and give weight to the redacted deed was an exercise of judicial discretion, having regard to all the circumstances of the case in accordance with the guidance given in *Springsteen*. In the absence of any material error of law, the Recorder's decision fell comfortably within the generous ambit of reasonable disagreement about the exercise of a judicial discretion. As to the reasons given by Promontoria Oak for the redactions, they were clearly based on irrelevance as well as confidentiality, and the judge was wrong to reject that explanation in the context of ground 1 when he had already accepted it in the context of grounds 2 and 3. Indeed, by his ruling on the Emanuels' application to extend their grounds of appeal the judge had positively disallowed any argument that the redactions were improperly made. The judge also held, as we have seen, that if the Emanuels had sought specific disclosure of the unredacted deed at trial, the Recorder would have been entitled to reject the application as being made too late and to proceed on the basis of the available evidence, as he then did.

86. In our view, these submissions are well-founded, and they expose the basic contradiction in the judge's treatment of the grounds of appeal before him. With all respect to the judge, we think that he was over-influenced by the possible implications of evidence that was not before the trial judge, and that this led him, in the context of ground 1, to reject Promontoria Oak's case that the redacted passages were not only confidential but also irrelevant. Promontoria Oak's case on this point would have been stronger had it been bolstered, as it was in *Hancock*, by a witness statement from a solicitor who could speak to the redactions and justify them one by one. But the absence of such evidence was not necessarily fatal, particularly at a time before this court had given its guidance in *Hancock*; and as the judge himself recognised in the context of grounds 2 and 3, the Recorder had been entitled to accept Promontoria Oak's case that the redactions were indeed justifiable.

87. The ultimate question, as we have said in our discussion of the general point of principle arising on these appeals, is whether the trial judge could safely resolve the issue of Promontoria Oak's title to sue on the material in evidence before him. In the present case, the answer to that question is clearly "yes" unless the Recorder's exercise of discretion to admit the redacted Oak Assignment can be impugned. For the reasons which we have given, we consider that Marcus Smith J was wrong to set aside the Recorder's decision on this point, and that Promontoria Oak's appeal to this court must therefore be allowed.

88. In those circumstances, it is unnecessary for us to consider Promontoria Oak's separate ground of appeal against the costs order made by the judge. Since Promontoria Oak has succeeded on its main ground of appeal, the costs of the proceedings to date will be dealt with by us in the usual way after this judgment has been handed down, and will include the costs in the courts below. The separate appeal on costs would only have been a live issue for us to determine if we had dismissed Promontoria Oak's appeal on the main issue. We will therefore content ourselves with saying, at this stage, that we

provisionally see much force in the argument that the judge was wrong to regard the Emanuels as in any sense the successful party when the ultimate outcome of their appeal, after the March judgment, was to leave the order below unchanged.

89. For similar reasons, it is also unnecessary for us to deal with the Emanuels' cross-appeal on the question whether Marcus Smith J erred in allowing Promontoria Oak to rely on their registration as proprietor of the Clydesdale Charge as an alternative route to proving their title. That issue would only be a live one for us to determine in the event that we had rejected Promontoria Oak's appeal and held that they could not rely on the redacted Oak Assignment. Since we have allowed Promontoria Oak's appeal, anything we said on the merits of the cross-appeal would be obiter, and we therefore consider it preferable to leave the issue for determination in a case where it needs to be decided.

*The Samra case*

90. Mr Samra is a businessman. He was a longstanding customer of Yorkshire and then Clydesdale. In 1998 he granted Yorkshire an all monies legal charge over a leasehold property in Coventry called Jesson House. In 2006 he granted Clydesdale an all monies legal charge over another leasehold property in Coventry on Torrington Avenue. In 2007 he signed a facility letter with Clydesdale under which he drew down certain monies secured by the existing charges over Jesson House and Torrington Avenue. There followed other facilities granted by Clydesdale, the last of which was an overdraft facility in the sum of £610,000 which expired in June 2013.

91. Promontoria Henrico made a formal demand of Mr Samra for payment of sums due under the facility in June 2017, and then brought two claims against him, the first in October 2017 in relation to Torrington Avenue, and the second in November 2017 in relation to Jesson House, seeking possession and payment. The claims were heard together by HHJ David Cooke, sitting as a Judge of the High Court, in Birmingham in July and August 2019. By a reserved judgment handed down on 30 September 2019 at [2019] EWHC 2327 (Ch), HHJ Cooke held in favour of Promontoria Henrico and by his Order dated 14 October 2019 he gave judgment for possession of both properties and payment of the sums claimed (some £630,000 and interest). He refused permission to appeal. Permission to appeal was granted by Nugee LJ on 15 December 2020.

92. Most of HHJ Cooke's judgment (at [36]-[98]) is taken up with the question whether the relationship between Mr Samra and Clydesdale (or Promontoria Henrico) was unfair to Mr Samra within the meaning of s. 140A of the Consumer Credit Act 1974, Mr Samra's principal contention being that Clydesdale had unfairly resiled from a common intention or understanding that facilities would be made available to him for 15 years. After careful consideration of the evidence HHJ Cooke rejected that contention on the facts, finding that there was no such common intention or understanding; and, after considering a number of other matters relied on, held that the relationship was not unfair. No appeal is brought against that conclusion.

93. Mr Samra had however in his pleadings put Promontoria Henrico to proof that the facilities and charges had been effectively assigned to it, and HHJ Cooke dealt with this comparatively briefly in his judgment at [32]-[35]. In summary he held that the Henrico Assignment dated 5 June 2015, which was put before him in a redacted form, was sufficient to effect an assignment to Promontoria Henrico of Clydesdale's claims against Mr Samra.

94. Mr Samra appeared in person at the hearing of the appeal, but relied on a skeleton argument prepared by counsel, Mr John Pugh, who was formerly acting for him but who unfortunately died before the hearing. In that skeleton Mr Pugh confined the Grounds of Appeal to the following:

(1) Ground 1 disputes the validity of the assignment to Promontoria Henrico. Two points are relied on: Ground 1(1) is based on the date of the assignment; Ground 1(2) on the extensive redactions, and failure to put related documents before the Court.

(2) Ground 2 puts in issue Promontoria Henrico's title to sue on the basis that it had assigned away its interest to U.S. Bank Trustees Ltd (**"USBT"**) before commencement of the proceedings.

*Ground 1(1) – date of assignment*

95. The facts relevant to this ground are as follows:

(1) On 1 May 2015 Clydesdale wrote to Mr Samra to notify him that his debt and all related rights had been sold to Promontoria Henrico and that a formal transfer would be made in due course.

(2) The Henrico Assignment relied on by Promontoria Henrico is dated 5 June 2015. This provides in cl 2.1 that "with effect on and from the Effective Time" each of the Seller (NAB) and Clydesdale assigns absolutely to the Buyer (Promontoria Henrico) its rights in relation to each Specified Loan Asset. By cl 1.1 "Effective Time" is defined as meaning the Settlement Date immediately following the receipt by NAB of the Purchase Price for the Specified Loan Assets; and "Settlement Date" is defined as 4 June 2015 "or such other date as may be agreed in writing by the Parties".

(3) By a letter also dated 5 June 2015 Clydesdale gave Mr Samra notice of assignment, and said that Promontoria Henrico would be appointing an agent trading as Engage Commercial (**"Engage"**) to manage the account.

(4) On 8 June 2015 Engage wrote to Mr Samra to introduce itself. It referred to correspondence from NAB and Clydesdale which "highlighted the sale of the above loan … to [Promontoria Henrico] on 4 June 2015".

(5) On 29 June 2015 Promontoria Henrico itself wrote to Mr Samra to the effect that the overdraft facility expired in June 2013 and that it was considering its options and reserved all its rights. The letter was headed (after reference to the overdraft agreement) as follows:

> "**Assignation agreement dated 5 June 2015 between National Australia Bank Limited and Clydesdale Bank Plc (the "Assignors") and Promontoria (Henrico) Limited (the "Assignee") (the "Assignment Agreement")**"

It continued, under the heading "Background and Interpretation", as follows::

> "1.1 In accordance with the terms of the Overdraft Agreement and pursuant to the terms of the Assignment Agreement, the Assignor transferred all its rights under the Overdraft Agreement and certain additional finance documents (including associated guarantee and security documentation) to the Assignee."

96. On these facts, Promontoria Henrico's case is that a legal assignment was effected under s. 136(1) LPA 1925 by a combination of (i) the Henrico Assignment dated 5 June 2015 and (ii) either the letter from Clydesdale dated 5 June 2015 or the letter from Promontoria Henrico dated 29 June 2015.

97. We will say straightaway that in our judgment that is right, for the reasons given in more detail below. The argument to the contrary articulated by Mr Pugh in his skeleton argument (and relied on by Mr Samra) is that the terms of the Henrico Assignment show that it was agreed between the parties to it that the assignment should be effective on 4 June 2015 not 5 June 2015, but that it was not possible as a matter of law for the Henrico Assignment executed on 5 June 2015 to effect a legal assignment on 4 June 2015. Mr Pugh referred to *Harrison v Burke* [1956] 1 WLR 419 at 421 per Morris LJ for the proposition that it was not possible for a notice given on 6 December of a purported assignment on that day to operate as an effective notice under s. 136 LPA 1925 of an assignment which did not then exist and which only came into existence on 7 December. That establishes that one cannot give notice of an assignment before the assignment takes place, but that does not seem to us directly in point as no reliance is here placed on a premature notice.

98. There does not seem to us to be the difficulty which Mr Pugh suggested. It is true that the documents indicate some vacillation as to whether the assignment took effect on 4 June 2015 or 5 June 2015: not only does the Henrico Assignment itself refer to the assignment as taking effect on the Effective Date, namely the Settlement Date of 4 June 2015 (and there was no evidence that any other date had been agreed in writing), but Engage's letter of 8 June 2015 also referred to the sale as having taken place on 4 June 2015, and a note in Promontoria Henrico's accounts referred to the first tranche of connections being transferred to it on 4 June 2015, with the second tranche not being until 4 September 2015.

99. But none of this seems to us to be relevant. By s. 136(1) LPA 1925 two things are needed to effect a legal assignment. The first is an absolute assignment by writing under the hand of the assignor. There is no suggestion in any of the material before us, or that was before HHJ Cooke, that there was any assignment in writing under the hand of Clydesdale on 4 June 2015. We agree therefore with Mr Pugh that there cannot have been a legal assignment on 4 June 2015 for the simple reason that the first requirement of s. 136(1) had not then been met. It follows that the earliest date on which a legal assignment can have taken place was on 5 June 2015 when the Henrico Assignment was executed.

100. The remaining question is whether the second requirement of s. 136(1) has been met. This is that notice of the assignment is given to the debtor. Two notices are relied on. The first is that dated 5 June 2015 by Clydesdale. Unfortunately we have not seen that document, but it was before HHJ Cooke, and he referred to it twice in his judgment. First at [19], having referred to the deed of assignment being dated 5 June 2015, he said that "notice of assignment was given by [Clydesdale] in a letter of the same date"; and

then at [34(ii)] he said that "it was not disputed that both the assignor and the assignee gave notice to Mr Samra that an assignment of his debt had taken place with effect from 5 June 2015." There has been no appeal against that factual finding, and neither Mr Pugh in his written submissions nor Mr Samra in his oral submissions has suggested it was wrong. In those circumstances we see no reason not to accept what HHJ Cooke said at face value, namely that Clydesdale's letter of 5 June 2015 did give notice that the assignment had taken place that day. That seems to us to be sufficient to satisfy the requirements of s. 136(1) LPA 1925.

101. In those circumstances it does not seem to us to matter that in the Henrico Assignment the parties agreed that the assignment should take effect as from 4 June 2015. HHJ Cooke, who dealt with this point briefly in his judgment at [34(ii)], was prepared to assume that the parties had in fact agreed that the assignment should be effective on 5 June 2015. Mr Pugh criticised this on the basis that under the Henrico Assignment the Settlement Date was 4 June 2015 or such other date as might be agreed "in writing", but there was no evidence of any such writing. So far as it goes that may well be a valid point. But HHJ Cooke went on to say that even if they had agreed a date which preceded the deed:

> "it does not seem to me that this would create any particular difficulty; no doubt the assignment would only operate in law on the date it was executed, but the "with effect from" provisions would mean that the parties to the assignment would be obliged to treat it as between themselves as having taken effect on the earlier date, and account to each other for payments and receipts accordingly."

We agree. There is no reason why the parties should not agree as between themselves to treat the assignment as having been effective on 4 June 2015, but as we have explained there is no evidence that any assignment in writing under hand actually took place until 5 June 2015, and on the basis that Clydesdale's letter gave notice of an assignment on that date it seems to us to have been both accurate, and effective to operate as a legal assignment.

102. The second notice relied on is the letter from Promontoria Henrico dated 29 June 2015. Mr Pugh submitted in his skeleton argument that that was not a good notice because it erroneously referred to an "Assignation Agreement". Assignation is not an English law term, but it is a Scots law term, and Mr Samra had obtained a copy of an Assignation by NAB and Clydesdale to Promontoria Henrico bearing the name of a well-known firm of solicitors in Edinburgh and providing for the Scottish courts to have exclusive jurisdiction.[4] This is in very similar form to the Henrico Assignment, and also refers to the Settlement Date being 4 June 2015, and we accept that it can be inferred that it was the Scottish counterpart of the English Assignment. Mr Pugh's submission was that Promontoria Henrico's letter was erroneously referring to this Scottish Assignation and not to the English Assignment, and hence that it could not operate as notice of the latter for the purposes of s. 136 LPA 1925. Mr Riley's submission was that it should be read as a reference to the English Assignment, albeit slightly misdescribed.

103. In the light of our conclusion on the letter from Clydesdale we do not in fact need to

[4] It no doubt also provided that it was governed by Scots law, but the page with the relevant clause is in fact missing from the copy we have.

reach any concluded view, but we prefer Mr Riley's submission. Mr Samra's properties were both in England and there is nothing to suggest that he had any connection with Scotland at all. It would be bizarre therefore for Promontoria Henrico's letter to be understood as referring to the Scottish Assignation rather than the English Assignment. In those circumstances we consider that Mr Riley's submission that the letter is to be interpreted as referring to the English Assignment is to be preferred.

104. We therefore conclude that Ground 1(1) is not made out. Mr Pugh's written submissions also referred under this head to what he said was the true chain of title, but it is more convenient to deal with this under Ground 1(2).

*Ground 1(2) – redactions*

105. Ground 1(2), as articulated by Mr Pugh, is that other documents not before the Court were necessary to show the true chain of title, which was much more complex than suggested, and that it was unfair for the Court to admit the Henrico Assignment in its redacted form when the whole document, and the other documents referred to in it, were relevant to the issue whether Promontoria Henrico had proved its title. In support reliance was placed on the decision of Marcus Smith J in the *Emanuel* case.

106. The Henrico Assignment was put before the Court in redacted form, so as to obscure what was said to be commercially sensitive information, but without any detailed explanation of what was covered up and why. In the light of the guidance given by this Court in *Hancock* and repeated by us above, it can now be seen that that was less than ideal, and it seems likely that the redactions went beyond what could properly be justified. By comparison with other examples of assignments that are before us, it seems very probable, for example, that a clause dealing with further assurance, which it is difficult to believe contains anything truly sensitive, was among those covered up.

107. Nevertheless it was not suggested that HHJ Cooke should not admit the document into evidence, and he found that it did establish that there had been an effective assignment, making the general point that any exercise of construction of the document was to be approached on the basis of what the parties intended it to achieve and not on the basis of a hostile assessment by a third party. We do not think that either his decision to rely on the document (it not being suggested, as we have said, that he should refuse to admit it) or his conclusion that the parts before him did effect an assignment, are open to criticism. As we have said, the ultimate question is whether the trial judge can reach a safe conclusion on the basis of the material before him; and HHJ Cooke took into account not only the terms of the assignment that were in evidence (which were not in themselves ambiguous or of doubtful effect) but also the surrounding material, all of which pointed to the parties being agreed that the document had indeed effected an assignment.

108. Nor do we think that there is any reason to suppose that fuller disclosure of the document would have cast any doubt on this conclusion. Indeed Mr Samra had in fact obtained, and produced at trial, both an unredacted copy of the Scottish Assignation, and another English assignment from another case, differently redacted, and HHJ Cooke said that none of the additional wording that could be read in those documents, assuming that the same wording was in the Henrico Assignment, would add anything to the points made on Mr Samra's behalf. We agree.

109. Mr Pugh submitted that the redactions were significant because they covered up the true chain of title, namely the Henrico SPA dated 15 December 2014 and the Henrico Novation dated 21 April 2015 (see [13] above). He said that under cl 3.2 of the Henrico SPA NAB and Clydesdale transferred their title to Holding 93, and this was then novated to Promontoria Henrico. That this was the true chain of title was, he said, demonstrated by the TR4 lodged by Promontoria Henrico at HM Land Registry which contained a receipt clause as follows:

> "The Transferors have received from the Transferee for the property the consideration more particularly set out in the sale and purchase agreement dated 15 December 2014 between National Australia Bank Limited (1), Clydesdale Bank PLC (2) and Promontoria Holding 93 B.V. (3) relating to a portfolio of loans referred to as the "Project Henrico" portfolio (which has been novated to the Transferee under a Deed of Novation dated 21 April 2015 between National Australia Bank Limited (1), Clydesdale Bank PLC (2), Promontoria Holding 93 B.V. (3) and Promontoria (Henrico) Limited (4).)"

110. We did not have the advantage of hearing from Mr Pugh orally, and Mr Samra's oral submissions did not materially add anything to this argument, but we think it rests on a simple misunderstanding. It is incorrect to say that title was transferred under the SPA. Rather, cl 2.3 of the SPA provided that:

> "Subject to and in accordance with the Transfer Procedures, this Agreement and any other applicable Transaction Documents, each of [NAB] and Clydesdale shall transfer to [Holding 93] all of its rights, title, interests, benefits, duties and obligations in, under and to the Relevant Documents…"

"Transfer Procedures" is defined as including an English GAAD, and that in turn is defined as an English Law governed global assignment and assumption deed.

111. In other words the SPA did not itself effect any transfer of title; it was an agreement to the effect that NAB and Clydesdale would in due course transfer title by a deed of assignment. To regard it as itself effecting a transfer of title is to blur the well established distinction between contract and conveyance, or in this case between an agreement to assign, and the assignment itself. Equally, the Henrico Novation did not transfer title: it transferred the rights under the SPA. The receipt clause in the TR4 was no doubt entirely accurate, but does not show that the chain of title was anything other than what Promontoria Henrico claimed it to be, namely that title was transferred directly from NAB and Clydesdale to Promontoria Henrico by the Henrico Assignment.

112. In those circumstances we are not persuaded that there is anything in Ground 1(2).

*Ground 2 – assignment on to USBT*

113. Ground 2 is that even if Promontoria Henrico did acquire title under the Henrico Assignment it had no title to sue at the time that it brought proceedings because it had assigned on its entire interest in the Henrico portfolio to USBT.

114. This argument was based on the registration at the Irish Companies Registration Office of a charge against Promontoria Henrico in favour of USBT. The short particulars of the property charged indicated that the chargor "assigned absolutely and (if such

assignment was ineffective) charged" the relevant contracts. Mr Pugh's argument was that that showed that the assignment was an absolute one and he submitted that the case was indistinguishable from *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 (***"Bexhill"***) where this Court held that an assignment of receivables, although clearly intended to be by way of security, was an "absolute" assignment, and as such the assignor could not maintain the action without joining the assignee.

115. We can deal with this point (which was not raised before HHJ Cooke) very shortly. It is accepted by Promontoria Henrico that by deed dated 5 June 2015 it provided security to USBT over the Henrico portfolio as part of its funding arrangements to acquire the portfolio. But the evidence of Mr Cooper for this appeal (which we grant permission for) is that by deed dated 16 July 2018 USBT released the security.

116. It is not suggested that any notice was ever given to Mr Samra of the deed of 5 June 2015. That means that, irrespective of whether it effected an absolute assignment or an assignment by way of charge only, it did not take effect as a legal assignment under s. 136 LPA 1925. At most it could only have taken effect as an equitable assignment. As such it did not deprive Promontoria Henrico of its legal title to sue Mr Samra.

117. It is true that if there has been an absolute equitable assignment of a debt, both assignor (as legal owner of the debt) and assignee (as equitable owner) should be joined to the proceedings so that all parties are effectively bound: see *Snell's Equity* (34th edn, 2020) at §3-023. But this requirement is only procedural and failure to join the assignee does not make the proceedings a nullity, and the assignee can be joined at a later stage: *ibid*. Hence in *Bexhill* the proceedings were not struck out, but remitted to enable an application to join the assignee to be made: see at [68].

118. It follows on the facts of the present case that we do not need to decide whether the deed of 5 June 2015 effected an absolute equitable assignment or not (something that is strenuously disputed by Mr Riley). Even assuming that it did, the most it would mean is that USBT should have been joined in the proceedings when they were brought in October and November 2017, and no doubt if the point had then arisen, it might have been possible for Mr Samra to obtain a stay until an application to join USBT had been made. But once the security had been released in July 2018, USBT no longer had any interest in the debt and it seems to us that there was no longer any basis for suggesting that it was a necessary party or that the action was not maintainable without it being joined. That was long before the trial which took place in July and August 2019, so even if the point had been a live one at trial, it would have made no difference.

119. In those circumstances we dismiss Ground 2, and Mr Samra's appeal. It is therefore (again) unnecessary to consider the argument, raised in a Respondent's notice, that Promontoria Henrico can in the alternative establish title by registration as proprietor of the charges granted by Mr Samra.

120. We add one point which, although it does not arise on the Grounds of Appeal before us, may be worth noting. Mr Riley was inclined to accept that in a case such as Mr Samra's where the claimant sought both payment of a debt and possession of charged property, it could rely on the deed of assignment and notice under s. 136 LPA 1925 to make good its legal title to the debt; but to establish legal title to the charge it would need to show that it was registered as proprietor of the charge by production of office copy entries of the register. We did not hear argument on the point but that seems

to us to be right, on the basis that any disposition of a registered charge needs to be completed by registration to confer legal title. In the present case we were told that office copy entries were before the Court at trial, which no doubt explains why no point was taken on the need for Promontoria Henrico's title to the charges to be completed by registration. We heard no argument on what the position would have been had its title not been duly registered, although no doubt it would then have had the usual rights and remedies of an equitable mortgagee.

*The Simpson case*

121. Mr and Mrs Simpson are husband and wife, and were director and secretary respectively of a company called Property For Sale or Let Ltd (**"PFSOL"**). PFSOL banked with Yorkshire and then Clydesdale. It went into administration in February 2016. It had a series of banking facilities, the last one being an overdraft facility in the sum of £2.365m dating from March 2013.

122. Mr and Mrs Simpson gave two joint and several guarantees in respect of PFSOL's liabilities to the bank, the first in September 2004 limited to £100,000 and the second in February 2007 limited to £200,000.

123. Promontoria Chestnut claimed to have acquired title to the debt owed by PFSOL, and to the benefit of the guarantees given by Mr and Mrs Simpson, by the Chestnut Assignment dated 5 June 2015. In February 2016 it demanded payment from PFSOL of the amounts owing under the overdraft facility, being over £2.7m. PFSOL did not pay and on 1 March 2016 it demanded payment from Mr and Mrs Simpson under the guarantees of £300,000. It brought proceedings against them in September 2017.

124. The case was heard by HHJ Stephen Davies, sitting as a Judge of the High Court, in the Circuit Commercial Court in Manchester in July 2020. On Day 3 of the trial, 22 July 2020, he gave an unreserved judgment (at [2020] EWHC 2136 (Comm)) refusing an application by the Simpsons to re-amend their Defence on the basis that the proposed amendments had no real prospect of success. On the next day he gave a second judgment (at [2020] EWHC 2137 (Comm)) which dealt with the only remaining issue for trial, which was whether the Chestnut Assignment in fact covered the relevant overdraft facility and the Simpsons' guarantees. He held in favour of Promontoria Chestnut on that point and gave judgment against the Simpsons for the sums claimed.

125. Six Grounds of Appeal were settled by Mr Pugh who was then acting for the Simpsons. But Mr Berriman did not in the result rely on them all. He accepted that Grounds 1 and 2 (which concerned the approach of HHJ Davies to the application to amend) could not be sustained; and equally did not pursue Grounds 5 and 6 (which concerned the question whether the overdraft facility was included in the Chestnut Assignment), accepting that if that deed did effect a valid assignment at all, it covered the overdraft facility, and that the monies drawn down under the facility were covered by the guarantees.

126. The remaining grounds, and the only ones argued, are similar to those that we have already considered in relation to the *Samra* case. Ground 3 is that the redactions made by Promontoria Chestnut to its documents meant that it had not established its title to sue. This was one of the points that the Simpsons sought to introduce by their proposed amendment but which HHJ Davies refused to allow them to plead. We do not think there is anything in this point. Initially Promontoria Chestnut, as had been done in other

cases, sought to rely on a redacted form of the Chestnut Assignment. But shortly before the trial (and immediately after the decision in *Hancock* was handed down by this Court on 14 July 2020), Mr Cooper made a further witness statement disclosing an almost entirely unredacted copy of the Chestnut Assignment, the only parts withheld being the signatures on the execution page and the details of other borrowers transferred. That fully answers any suggestion that the Court could not assess the effect of the Chestnut Assignment.

127. Mr Berriman's argument was rather that the Simpsons should have seen an unredacted copy of the Chestnut SPA. A redacted version of the SPA was before the Court, but only because it contained certain definitions which were cross-referred to in the Chestnut Assignment. Mr Cooper's witness statement did however contain, as we have already referred to (see [9]-[11] above), a detailed explanation of the structure of the transaction which included confirmation that the SPA was a contract to buy, that he had read it, that it did not affect the transfer of title from Clydesdale to Promontoria Chestnut, and that the redacted parts were of no relevance. As he explained, the transaction was not effected by a transfer to Holding 97 followed by a transfer from Holding 97 to Promontoria Chestnut, but by a contract to sell to Holding 97 which was novated to Promontoria Chestnut, and a transfer direct from Clydesdale and NAB to Promontoria Chestnut. In those circumstances the terms of the SPA were not relevant to the question of Promontoria Chestnut's title.

128. HHJ Davies dealt with this point in his first judgment at [40]-[41]. It had been submitted to him that the SPA, being described as a sale and purchase agreement, might be thought to amount to a contract of sale under which title passed. But he rejected that submission as mere surmise, and said that there was no solid basis for the submission that the SPA might well, or reasonably arguably, contain material that would indicate that it was intended to and did effect any immediate assignment; he also referred to other material which was all consistent with the assignment not having been effected until the Chestnut Assignment.

129. We agree, and see no error in this approach. Promontoria Chestnut having been put to proof of its title was obliged to disclose any documents which affected its title. But it was not obliged to disclose a document which did not affect its title; and we see no reason to think that Mr Cooper was wrong to say that the SPA did not have any effect on its title, and that the only parts that were arguably relevant (and were disclosed) were those which shed light on definitions incorporated by reference into the Chestnut Assignment.

130. Another point taken before HHJ Davies and referred to by Mr Berriman was that Promontoria Chestnut had entered into a security agreement with Nomura International plc. HHJ Davies held that it created a charge and not an absolute assignment and so did not affect the position (in his first judgment at [68]), but in any event went on to hold that a deed of release in October 2019, which included the relevant obligations, meant that whatever the position beforehand Promontoria Chestnut was thereafter the only party with any rights and title to sue (at [69]). That, as in the *Samra* case, seems to us to be right and a complete answer to any argument based on the security agreement.

131. Ground 4 raises a different point which is the effectiveness of the notices given in connection with the assignment. The point here is a very short one. The Particulars of

Claim rely on notice having been given to PFSOL by letter dated 8 June 2015. That is a letter from Engage which referred to the sale having taken place on 4 June 2015. For reasons given above in relation to the *Samra* case, that was strictly inaccurate if it was intended to refer to the date of the assignment under hand, which was not until 5 June 2015. It is said that that means the notice was bad.

132. There is an equally short answer to it. Whatever the merits of that point, HHJ Davies referred to a number of other notices to PFSOL, one by Clydesdale on 5 June 2015 which informed PFSOL that the bank's rights had been transferred to Promontoria Chestnut on 5 June 2015, and another on 29 June 2015; there is also before us a further notice from Promontoria Chestnut to PFSOL dated 5 February 2016. It has not been suggested that any of these suffer from the same supposed defect. HHJ Davies held that the letter to Engage of 8 June 2015 was a good notice, but if he was wrong, there can be no real doubt that notice was in fact duly given to PFSOL so as to effect a legal assignment. Technically those other notices were not pleaded, but if HHJ Davies had allowed the Simpsons to re-amend to plead the defect in the Engage letter, Promontoria Chestnut would undoubtedly have relied in the alternative on one or more of the other notices. In those circumstances we do not think there is anything in this ground of appeal.

133. We therefore dismiss the appeal in the *Simpson* case.

*The Bibby case*

134. Bibby's claim against the Thompson companies is in respect of 24 unpaid invoices raised by WER during 2018, totalling £67,880.14 in the case of the first defendant and £221,739 in the case of the second defendant.

135. As referred to above, Bibby claims title to those debts pursuant to an Invoice Finance Agreement dated 11 January 2017 and executed as a deed by both Bibby and WER. A substantial proportion of the copy disclosed by Bibby has been redacted (about 60%, including the headings of redacted sections), but section A (Introduction) and B (Transfer of Debts) were disclosed in their entirety, revealing straightforward assignment provisions typical of an agreement of its type as follows:

    i) An introductory explanation that Bibby would support WER's cash flow by buying its "Debts" and making payments against their purchase;

    ii) A reference to the arrangement being subject to Bibby's General Conditions in effect from time to time, with a link to those conditions on the internet;

    iii) A reference to the fact that certain words (such as "Debts") were defined in the General Conditions;

    iv) Agreement by WER that it would on 11 January 2017 "assign to [Bibby] with full title guarantee ownership of all Debts". Those Debts not existing on the Start Date were to "transfer automatically when created".

136. On 8 August 2018 Addleshaw Goddard LLP, Bibby's solicitors, wrote to each of the Thompson companies informing them that WER had assigned any debts arising under invoices raised by WER, but naming the assignees as Bibby Factors Northwest Ltd and

Bibby Financial Services Limited rather than Bibby. The letters also demanded payment of the invoices plus interest.

137. Just over three weeks later, on 31 August 2018, Addleshaw Goddard sent further letters to the Thompson companies giving notice of assignment under the Invoice Finance Agreement, this time naming Bibby as the assignee, and again seeking recovery of the sums due and payable. The letters enclosed a copy of the Invoice Finance Agreement, explaining that "we have redacted all commercially sensitive and confidential information where such information is also irrelevant to Bibby's claim against you".

138. As no payments were made, on 29 November 2018 Bibby commenced proceedings against the Thompson companies in the Business List in the Business and Property Courts in Manchester, claiming payment of the invoices and interest thereon as assignee. The Particulars of Claim referred to the Invoice Finance Agreement (recording that a copy had been supplied, redacted as to commercially sensitive information where this was also irrelevant to the claim) and the notices of assignment of 31 August 2018.

139. The Thompson companies served their Defence on 31 December 2018, denying liability to pay the invoices raised by WER. As regards Bibby's claim to title to the debts as assignee, the Thompson companies made no admission in respect of the validity of, and the nature, content and effect of the Invoice Finance Agreement and no admission as to the validity and effect of the notices of assignment.

140. On 15 April 2019 in-house counsel at the Thompson companies wrote to Addleshaw Goddard asserting that "only the purported signature page" of the Invoice Finance Agreement had been disclosed. Addleshaw Goddard replied, pointing out that a complete copy had been provided and that the General Conditions were freely available online. As for redaction, the disclosed provisions clearly showed the assignment. Addleshaw Goddard asked "Please confirm what exactly you infer has been redacted from the Agreement that ought to be disclosable and/or is relevant to the issues in dispute? i.e. what do you believe to be missing?"

141. On 10 July 2019 Bibby issued an application to strike out the Defence and/or for summary judgment on the claim. The evidence served by Bibby in support of its application included:

    i) the witness statement of Ashlee Simms, a solicitor at Addleshaw Goddard, confirming at [6] that, by the Invoice Finance Agreement Bibby had purchased all present and future debts due to WER (including those owed by the Thompson companies). She further confirmed at [9] that the Invoice Finance Agreement had been redacted as to commercially sensitive and irrelevant information;

    ii) the witness statement of Anthony Roche, Head of Operations of the Bibby group, who confirmed the accuracy of paragraphs [6]-[9] of Ms Simms' statement;

    iii) the witness statement of Stuart Smith, the Operations Director of WER, confirming at [4] that the invoices in issue in the case were assigned to Bibby pursuant to the Invoice Finance Agreement.

142. On 18 October 2019 the Thompson companies wrote to Addleshaw Goddard requesting a copy of the invoice finance agreement referred to in the letter dated 8 August 2018, that is to say, an agreement between WER and Bibby Factors Northwest Ltd and Bibby Financial Services Ltd. Addleshaw Goddard wrote back on 23 October 2019 confirming that the latter two companies had been named in error in the 8 August letter and that, once Addleshaw Goddard had received a copy of the Invoice Finance Agreement, they had set out the correct position in the letters of 31 August 2018, enclosing a copy of that agreement.

143. Bibby's application was listed for hearing on 5 November 2019 before DJ Phillips. On 28 October 2018, however, the Thompson companies served a substantial volume of evidence in response, including a lengthy statement of Adam Thompson, a director of the first defendant, and five other unsigned statements, together with over 730 pages of exhibits sent under cover of 22 emails.

144. As regards Bibby's title to the debts, Mr Thompson stated at [157-158]:

> "I ask the Court to note that [Bibby] has failed to produce an unredacted copy of the factoring agreement on which it relies purportedly assigning WER's debt to [Bibby]…
>
> In the absence of transparency on what is plainly a critical issue – especially in circumstances where there is a "*competing*" factoring agreement between WER (assignor) and Bibby Factors Northwest Ltd. and Bibby Financial Services Ltd. (assignees) – neither the [Thompson companies] nor the Court can be confident that (i) the Court is being given the full picture (ii) the terms [Bibby] has redacted are not relevant to the unredacted terms in the factoring agreement on which [Bibby] relies."

145. Mr Tinnion appeared for the Thompson companies at the hearing on 5 November 2019. In his skeleton argument he contended that the application should be dismissed because there was uncertainty as to the identity of the true assignee (and therefore whether Bibby was the proper claimant) given the contents of the 8 August 2018 letters, but did not argue that the redacted Invoice Finance Agreement disclosed in the proceedings was in any event insufficient evidence of an assignment to Bibby. In the event, the 5 November 2019 hearing was adjourned to 11 December 2019 and directions given for the service of evidence in reply by Bibby.

146. Mr Tinnion again appeared for the Thompson companies on 11 December 2019, his skeleton argument revised to take the point that Bibby could not prove title to the debts as it had failed to disclose the full term of the Invoice Finance Agreement. During oral argument, after Ms Pennifer (appearing for Bibby) had pointed out that this was a new point, being taken for the first time, Mr Tinnion accepted that the argument had not been in his previous skeleton, stating "That's because I was hoping to take her by surprise and deal with it in oral submissions…"

147. In a reserved judgment dated 31 January 2020, DJ Phillips dealt with the question of Bibby's title to sue as an assignee as a preliminary issue. After noting the letters dated 8 August 2018 had contained an error by naming associated companies of Bibby as assignee, he held that nothing turned on that as the notices dated 31 August were valid and effective. DJ Phillips went on to say that if there were any doubt about the correct

assignee, the provisions of the redacted Invoice Finance Agreement ought to have resolved any doubt on the part of the Thompson companies, stating at [33]:

> "The redactions to the Factoring Agreement…are entirely appropriate in my judgment. This is a case in which [Bibby] and WER are in agreement as to the purpose and effect of the Factoring Agreement and the Court requires no further document to find that a valid assignment of the debts has taken place and that notice of assignment dated 31 August 2018 has been provided…in appropriate form."

148. After consequential hearings in January and March 2020, DJ Phillips made an order on 22 April 2020 giving judgment for Bibby against both of the Thompson companies on the assignment issue and one other preliminary issue. He further made an order that the first defendant pay Bibby £64,819.29 (the total of the invoices addressed to the first defendant, less the VAT element, plus interest) but did not award a money judgment against the second defendant. Directions were given for trial of the remaining issues.

149. The Thompson companies' first appeal, brought with the permission of Snowden J, the Vice-Chancellor of the County Palatine of Lancaster, came before HHJ Kramer on 20 August 2020, by which date the *Hancock* decision was available. HHJ Kramer, having noted at [34] that the instrument considered in *Hancock* was far more complicated than the Invoice Finance Agreement, proceeded to dismiss the appeal, his reasons in relation to the assignment issue being as follows:

> "41. In the present case, District Judge Phillips needed to decide whether, on the evidence, it had been proved that the debts which arose under the supplier's invoice had been assigned to [Bibby]. In the light of *Hancock*, the redacted agreement supported by the solicitor's confirmation that this document has the effect of assigning the claimed debts was sufficient proof that it did and he was accordingly, entitled to come to that conclusion.
>
> 42. In addition, he added the evidence of Mr Stuart Smith from the supplier who said that the right to claim under the invoices had been assigned to [Bibby]. Mr Tinnion suggests that the judge had delegated the task of construing the agreement to [Bibby] and WER. He did nothing of the sort. He merely pointed out that both assignor and assignee agreed that the assignment had taken place.
>
> 43. From the point of view of the debtor, the importance of knowing whether the assignment is valid is that it must not be at risk of facing claims from both supplier and [Bibby]. i.e. put at risk of paying one and then finding the other claimant has title to the debt. In referring to [Bibby] and WER being in agreement, all the judge was pointing out was that, as between the two of them, there was no dispute but that [Bibby] was entitled to the debt. In those circumstances, the validity of the assignment was not in dispute as between the parties thereto and the risk of the [Thompson companies] facing claims from both did not arise. In fact, evidence from the assignor that the debt was assigned to the assignee is further relevant extrinsic evidence that the Factoring Agreement has that effect.

> 44. There is some support for this proposition in *Hancock*. Henderson LJ considered, at paragraph 68, that the fact that the bank had never disputed the validity of the [assignment] and Mr Hancock had never asked the bank to confirm if it had any valid claims [against him] gave his assertion that the debt was disputed [on substantial grounds] a hollow ring to it[5].
>
> 45. As there was sufficient evidence upon which the district judge could conclude that the debt has been assigned, and as there is no principle that the debtor is entitled to a copy of the unredacted assignment on an application for summary judgment and the evidence does point to the assignment being valid, Ground 1 of the appeal must fail."

150. By way of second appeal to this Court, the Thompson companies advanced one ground of appeal, contending that the only conclusion HHJ Kramer could permissibly have reached was that Bibby was obliged to disclose the assignment instrument disclosing all its operative terms and, in its absence, was not entitled to summary judgment on the assignment issue.

151. Mr Tinnion made the following submissions in support of that ground of appeal:

i) The normal starting point was that the whole of a document to be construed should be put before the court, subject to exception in relation to third party details and information which was both irrelevant and confidential.

ii) There was nothing out of the norm about the present claims: Bibby had the burden to prove its title to the debts and was asserting that the Invoice Finance Agreement transferred that title. In contrast with the position in *Hancock*, the burden of proof in the present case was on the party adducing the redacted document.

iii) In further contrast with the position in *Hancock*, in the present case the debts were disputed on substantial grounds (at least in the case of the second defendant) and there was at least some uncertainty as to whether the debts had been assigned to Bibby because of the letters of 8 August 2018, sent many months after the assignment had taken place.

iv) The party relying on the document was not entitled to make a unilateral decision about what was irrelevant or confidential. In this case Bibby had done exactly that, whereas there was no reason why the redaction exercise could not have been carried out collaboratively (if necessary with the Thompson companies' in-house counsel included in a confidentiality ring, or even by confidential disclosure to the court).

v) Ms Simms' statement that the documents had been redacted as to commercially sensitive and irrelevant information was wholly inadequate. Ms Simms did not state that she had seen the unredacted document and did not give any explanation (even in the broadest terms) of the subject-matter of the redacted sections or why they were both confidential and irrelevant.

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[5] Words in square brackets have been changed or added to reflect more accurately what was said in paragraph 68 of *Hancock*.

vi) The result was that Bibby had redacted operative provisions of the central document on the issue of assignment without giving any proper reasons.

vii) Further, Bibby also failed to disclose the General Conditions referred to in the Invoice Finance Agreement, which meant that the definition of the key term "Debts" was not before the court, with the result that it was not possible to see precisely what had been assigned to Bibby.

viii) Whilst Bibby and WER were in agreement that the debts in question had been assigned to Bibby, they were also in agreement that the debts arose from the provision of temporary staff by WER to the second defendant. DJ Phillips, on the other hand, found that it was arguable that (as the Thompson companies contended) WER was providing payroll staff to the first defendant, for which the first defendant was liable. That gave rise to an issue as to whether the liability which thereby arose was properly within the undisclosed definition of "Debts" in clause 16 of the General Conditions.

*Discussion*

152. As Henderson LJ emphasised in paragraph [77] of *Hancock*, when considering the approach to redaction of a document the court is to construe, it is necessary to remember the procedural context in which the question of construction arises, as well as the nature of that question.

153. The procedural context of the present case was an application by Bibby for summary judgment and/or striking out of the Defence. The first important point is that Bibby was under no obligation to give disclosure[6], having complied with the requirements of paragraph 7.3(1) of the Practice Direction to CPR Part 16 by providing a copy of the written agreement on which it relied, claiming the right to redact in so doing[7]. The Thompson companies could have applied pursuant to CPR 31.14 for inspection of documents referred to in the Particulars of Claim and/or in Bibby's witness statements, including the Invoice Finance Agreement (the burden on any such application being on Bibby to justify the redactions), but did not do so during the period of almost one year which elapsed between the commencement of the proceedings and the hearing of Bibby's application for summary judgment.

154. Indeed, the Thompson companies did not even press Bibby for disclosure of the unredacted Invoice Finance Agreement following Addleshaw Goddard's explanation on 18 April 2019. Their focus, instead, was on the mistaken reference in the 8 August 2018 letter to a "competing" assignment to associated companies of Bibby, prefacing a technical argument that the wrong company was the claimant. Neither did the Thompson companies ask for copies of the General Conditions: it must be assumed (as the contrary has not been suggested) that their in-house counsel (and/or Mr Tinnion) accessed those conditions on the internet and would have deployed them, had any

6 The Disclosure Pilot in the Business and Property Courts, set out in PD51U, which requires a party to give Initial Disclosure of key documents they rely on, did not come into force until January 2019.

7 Bibby should, strictly, also have served the General Conditions to comply with paragraph 7.3(2), unless they were unexpectedly lengthy, but that technical omission can readily be excused given that the conditions were available online and a link was contained in the disclosed copy of the Invoice Finance Agreement.

arguable point been identified, in answer to the claim or the application.

155. A second important aspect of the procedural context is that, on an application for summary judgment, the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial, the essential ingredient being the applicant's belief in that regard: *White Book* 2021 vol 1 para 24.2.5, citing ***ED&F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472. If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial.

156. It follows that it is not necessary on an application for summary judgment for the applicant to prove its case with evidence in all respects (including on matters that have been the subject of a non-admission), as might be required at a trial. The applicant is entitled, at least in the first instance, to rely on facts asserted and supported by a statement of truth. For example, a simple claim by a bank for summary judgment for an amount outstanding on an account may be made on the basis of the claim form (or particulars of claim), perhaps attaching the letter of demand. It is not necessary, unless an issue is raised by the customer in response, for the bank to put in evidence the account opening documentation and the bank ledgers demonstrating how the final amount on the account has been reached. In the same way, applications for summary judgment for debt claims may be made, at least in the first instance, by reference to the pleaded case, evidenced only by invoices. It would not be necessary to adduce underlying documentation unless and until an issue is raised in response.

157. In the above context, it is clear that Bibby was not obliged to put the unredacted Invoice Finance Agreement before the court on its application, but was entitled to assert the fact of the assignment, evidenced by the redacted version and supported by evidence from its solicitors. Still less was it necessary for Bibby to put the General Conditions before the court. We therefore reject the first limb of the Thompson companies' ground of appeal, namely, that Bibby was obliged to disclose all the operative terms of the Invoice Finance Agreement as a condition of obtaining summary judgment.

158. The further question, correctly posed by both DJ Phillips and HHJ Kramer, was whether it was appropriate in this case, on the evidence before the court, to proceed to determine that there had been an assignment to Bibby without the Thompson companies having the opportunity to examine all the terms. This, in our judgment, is no more than an application of the well-known principle that on an application for summary judgment the court should also consider the evidence that could reasonably be expected to be available at trial (*Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550). It also engages the second aspect emphasised by Henderson LJ at [77] of *Hancock*, namely, the nature of the question of construction that was before the court.

159. In our judgment, nothing raised at the hearing before DJ Phillips required him to decline to determine that there had been an assignment to Bibby without sight of the unredacted Invoice Finance Agreement. Our reasons are as follows:

    i) The main issue as to the validity of the assignment to Bibby raised by the Thompson companies was the possible existence of another assignment

agreement with other companies in the Bibby group. However, if there had been such duplication, it could easily have been rectified by further documentation or by joining the other companies as claimants. Those steps were not necessary because Addleshaw Goddard had explained that its 8 August 2018 letters had named the associated companies in error, corrected by the 31 August 2018 letters. In the light of that explanation, and the comprehensive witness evidence, there was no remaining issue in this regard with any real prospect of success. Mr Tinnion rightly did not pursue the point before HHJ Kramer. But in any event, the issue turned on whether there was another assignment agreement, not the contents or construction of the Invoice Finance Agreement.

ii) Although Mr Tinnion argued that a defence may arise from the definition of Debts in clause 16 of the General Conditions, he did not raise that argument before DJ Phillips and he cannot attribute that failure to the redaction of the Invoice Finance Agreement for the reasons discussed above: those conditions were identified by Bibby and were readily accessible by the Thompson companies. It was for them to raise the defence if it existed.

iii) In more general terms, the Invoice Finance Agreement was an agreement of a type discussed at paragraph 46 above. Its nature, purpose and effect are straightforward and well-understood, transferring the title of all debts from the creditor to the factor. The disclosed sections of the Invoice Finance Agreement demonstrate clearly that this was achieved in the present case, further evidenced by the statements from officers of both parties (Bibby and WER) and yet further confirmed by Bibby's solicitors. It is evident (and not seriously open to doubt) that the redacted sections concern both irrelevant details and also the terms of the arrangement as between Bibby and WER as to the operation of the facility and their respective rights and obligations following the general assignment.

iv) It follows that there was no serious issue raised before DJ Phillips as to the construction of the Invoice Finance Agreement. In those circumstances the combination of the transfer provisions of that Agreement and the evidence of the parties to that agreement was entirely sufficient to justify the District Judge's finding.

160. In summary, once the factual issue of whether there had been another assignment had been resolved, the Thompson companies had no real basis for disputing that Bibby had acquired title to the relevant debts, and did not identify any issue of construction that required examination of the unredacted assignment agreement. Thereafter the issue of redaction was raised opportunistically and tactically, with a view to obstructing and delaying the claim, as best illustrated by Mr Tinnion's admitted intention to ambush Ms Pennifer with a new argument on redaction at the ineffective first hearing before DJ Phillips. The District Judge and HHJ Kramer were right to reject the defence so advanced for the reasons they gave.

161. We therefore dismiss the appeal in the *Bibby* case also.