Neutral citation number: [2019] EWHC 2646 (Ch)

Case No: C60LV727
Appeal Ref: 75/2017

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN LIVERPOOL

Liverpool Civil & Family Courts,
35 Vernon Street, Liverpool,
Merseyside L2 2BXT

Thursday 22 August 2019

Page Count: 16
Word Count: 4984
Number of Folios: 70

Before:

HIS HONOUR JUDGE HODGE QC
sitting as a Judge of the High Court

Between:

ANTHONY HANCOCK

Appellant

- and -

PROMONTORIA (CHESTNUT) LIMITED

Respondent

- -

MR GRAHAM SELLERS and **MISS VICTORIA ROBERTS** for the **Appellant**
MR JAMIE RILEY QC for the **Respondent**

- -

APPROVED JUDGMENT

(Approved in Manchester without reference to any papers)

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE HODGE QC:

1. This is my extemporary judgment on the substantive hearing of an appeal by Mr Anthony Hancock against an order made by District Judge Wright as long ago as 15 June 2017. The appellant is represented by Mr Graham Sellers, leading Miss Victoria Roberts (both of counsel). The respondent to the appeal is Promontoria (Chestnut) Limited, which is represented by Mr Jamie Riley QC. By her order, District Judge Wright refused to set aside a statutory demand dated 20 October 2016 served by the respondent on the appellant in respect of an alleged debt in excess of £4 million. The alleged debt related to secured loan facilities granted by Clydesdale Bank plc (then trading as Yorkshire Bank) to Mr Hancock and also to a company owned and controlled by him.

2. The respondent to the appeal claims to have taken an assignment of the secured lending from Clydesdale Bank and its parent company National Australia Bank Limited by a deed of assignment dated 28 November 2014. At the time of the hearing before the district judge, Mr Hancock was represented by other solicitors and counsel. An appellant's notice seeking permission to appeal the district judge's decision was filed out of time. After various case management directions, the hearing of the application for permission to appeal came on before Barling J, the Vice-Chancellor, sitting in Liverpool on 6 June 2018. The hearing was not concluded within the one day allotted to it and the hearing continued in London before Barling J on 31 July 2018. Barling J delivered an extemporary judgment on the permission application on the following day, 1 August 2018. A transcript of the approved judgment, which bears the neutral citation number [2018] EWHC 2934 (Ch), is before the court.

3. Before Barling J, a great many grounds of appeal were sought to be raised. In the event, Barling J gave permission to appeal only in relation to three points that had been taken in relation to the deed of assignment. At paragraph 44 the Vice-Chancellor acknowledged that these were a range of new arguments, the deed of assignment not having been previously challenged. He commented that in the lower court the deed of assignment had in fact been relied upon by the appellant in support of an unfair relationship argument which had been run before the district judge. At paragraphs 45 through to 54, the Vice-Chancellor referred to, and rejected, a number of points raised on behalf of Mr Hancock in relation to the validity of the deed of assignment. At paragraph 55, the Vice-Chancellor recorded that he then turned to the other questions Mr Hancock had raised in relation to proof of title, which were said to be essentially three in number. The first was that clause 2.1 of the deed of assignment only referred to "Relevant Asset Groups" and did not specify which debts or loans were within each such group, so that the appellant could not tell within which relevant borrower asset group (if any) his loans were comprised. The problem seemed to result from a combination of the somewhat circular and obscure drafting comprised in the deed and the complete illegibility of the schedules thereto.

4. The second of the related arguments was said to be that by virtue of clause 1.5 of the deed, the assignment appeared to be expressly conditional upon the terms of a sale and purchase agreement, whose contents were unknown. The Vice-Chancellor proceeded to set out the terms of clause 1.5.

5. The third issue was identified at paragraph 58. For the appellant it was argued that the reference to the sale and purchase agreement, combined with a description or

definition of the respondent in the deed of assignment as the "novated buyer" or "the buyer", implied that before the deed of assignment there had been an earlier novation to the respondent from an unknown and unidentified third party. For the appellant, it was submitted that, if that were so, there would have been nothing for the bank to assign, and also that the appellant was in no position to trace, and be satisfied as to, the respondent's title to sue him under the facilities.

6. The Vice-Chancellor noted that there was some parallel with an Irish case which he referred to. He noted also that one point of distinction was that in the Irish case there had been complete openness on the part of the assignee as to the nature and content of the instruments, which had led to the claimant there allegedly being a position to enforce the facilities in question. At paragraph 60, the Vice-Chancellor asked himself whether, if those three points concerning the assignment and proof of title were not, as they were, wholly new points, he would have given permission on this ground to appeal. With very considerable hesitation, the Vice-Chancellor recorded that he had concluded that the answer was "Yes". The position in relation to those three arguments, and only those three, was said to be sufficiently in doubt to render it appropriate for the appellant to have permission to pursue them on appeal, subject to the issue whether an extension of time to appeal should be granted, and whether the appellant should be permitted to raise this argument on appeal, which had not been argued below.

7. The Vice-Chancellor addressed those considerations at paragraph 61. He noted that the points were "within a relatively narrow compass and involve essentially questions of law, interpretation and construction… If the respondent is not in a position to establish a title to sue, then the statutory demand would obviously be liable to be set aside". At paragraph 62, the Vice-Chancellor emphasised that the proof of title point, for which (subject to an extension of time to appeal) he would give permission to appeal, did not include any of the other points on assignment which he had mentioned earlier. Those included the notice of assignment point, the *ejusdem generis* construction of clause 6.2, the argument that the deed of assignment was only between the Australian bank and the respondent, and any point relating to the redaction of signatures to the deed.

8. The Vice-Chancellor proceeded to give permission to appeal, out of time, limited to the three issues described as "the title issues", which he identified in paragraph 2 of his order as relating to the proof of the respondent's title to the debt originally owed by the appellant in respect of various facilities granted to him by Clydesdale Bank plc. Those three issues were as follows:

(a) Whether the rights and interests of the Bank pursuant to, and in relation to, the facilities which it had advanced to the appellant were included in the rights and interests assigned to the respondent in relation to the relevant documents in respect of the specified loan assets comprised within the relevant borrower asset groups pursuant to clause 2.1 of the deed of assignment between the Bank and the respondent dated 28 November 2014.

(b) Whether an assignment to the respondent of the Bank's rights under the said facilities was effected by the deed of assignment in light of its clause 1.5, which provides that Part 2 of Schedule 1 is included to identify the relevant Pool B loan

assets, and that such information is included without prejudice to, and subject to, the terms of the sale and purchase agreement.

(c) Whether in light of the references in the deed of assignment to a sale and purchase agreement and the definition of the respondent as the "novated buyer or the buyer", the Bank was unable to assign its rights under the facilities to the respondent because they had been novated to an unidentified third party.

9. The Vice-Chancellor gave procedural directions for the service of any evidence in relation to the title issue by the respondent, for the filing and service of any evidence in answer by the appellant, and for the filing and service of any evidence in reply from the respondent. He directed that the hearing of the appeal should be listed before me, or an alternative section 9 Specialist Business & Property Court Judge, with a time estimate of one day.

10. Pursuant to the Vice-Chancellor's directions, evidence in relation to the title issue was served by the respondent in the form of a witness statement dated 4 January 2019 from Mr Timothy Cooper, a solicitor, partner and member of Addleshaw Goddard LLP, the solicitors acting for the respondent, together with documents within exhibit TC1. Evidence in answer was served by the appellant in the form of a witness statement from Miss Joanne Connolly, the appellant's solicitor, dated 28 January 2019, together with documents exhibited as JC2. Evidence in reply took the form of a second witness statement from Mr Cooper dated 11 February 2019, exhibiting further documents as exhibit TC2.

11. It is a matter of some regret that on the hearing of what was described by the Vice-Chancellor as essentially "a relatively narrow issue of law, interpretation and construction", no less than four bundles of documents, inaccurately described as "core bundles", were put before me, comprising some 1,300-plus pages. In addition, no less than 24 authorities were put before me, although Mr Riley added to these during the course of his oral submissions. The court received written skeleton arguments from Mr Sellers and Miss Roberts for the appellant, and from Mr Riley for the respondent. Mr Sellers addressed me for about an hour and a half; Mr Riley responded either side of the short adjournment for a little under an hour and three-quarters. Then Mr Sellers replied for about 15 minutes.

12. The basis of the appeal is Mr Sellers's submission that if title to the debts the subject matter of the statutory demand cannot be shown by the respondent, then the statutory demand ought to be set aside. That submission was clearly accepted by the Vice-Chancellor at the end of paragraph 61 of his judgment, where he said that if the respondent was not in a position to establish a title to sue, then the statutory demand would obviously be liable to be set aside. It is clearly correct. Moreover, since this is an application to set aside a statutory demand, the question I have to consider is whether, within the meaning of the then applicable Insolvency Rule 6.5(4)(b), "the debt is disputed on grounds which appear to the court to be substantial". The issue is whether the dispute as to liability raised by the appellant is a substantial dispute giving rise to a genuine triable issue.

13. Mr Sellers took me through the redacted deed of assignment. He emphasised that the crucial definition is that of "specified loan asset". This is defined as meaning "(a) a relevant loan asset", and then something else which is not apparent from the redacted

document. Mr Sellers emphasised that the definition uses the conjunctive. Mr Sellers's argument proceeds, in my view correctly, on the premise that all of the appellant's loan facilities are relevant Pool B loan assets, described in Part 2 of Schedule 1 to the deed. Mr Sellers submitted that without seeing the entire suite of documents it is difficult to see precisely what was going on between the parties and how the documentation was structured. Mr Sellers accepted that the defined term "relevant document" was as wide as it could possibly be, extending to all financial loan documents; but he emphasised that they must all be in respect of a "specified loan asset". The inherent difficulty in proving the respondent's title to the loan facilities was with the meaning of the term "specified loan asset". Apart from the fact that one had not been allowed to see half of the definition because it had been redacted, it was said to be unclear whether the Pool B loan assets fell within the ambit of a "specified loan asset". That was said to be because the operative assignment clause 2.1(a)(i) purported to assign absolutely to the buyer "each of the seller and Clydesdale's rights, title, benefits and interests under in or to each relevant document (including without limitation with respect to each relevant Pool A loan asset those documents listed in Part 1 of Schedule 1 to this deed.)" As a result, it was said to be unclear whether the Pool B loan assets, including the appellant's liabilities, fell within the scope of the assignment. That difficulty was said to be compounded by the terms of clause 1.5, headed "Relevant Pool B loan assets". That provides: "The parties agree that Part 2 of Schedule 1 is included in this deed solely for the purpose of identifying the relevant Pool B loan assets, and that such information is included in this deed without prejudice to and at all times subject to the terms of the sale and purchase agreement and any limitations contained therein".

14. The difficulty, Mr Sellers says, is that the sale and purchase agreement is not before the court, even in redacted form. Mr Sellers submits that the Pool B loan assets are said to be included in the deed solely for the purposes of identification, and subject to the limitations contained in the sale and purchase agreement and its terms, but one does not know what those terms are. As a result, there is said to be a fundamental problem with the respondent's chain of title. He asks: "How is any debtor expected to be able to construe an assignment as badly drafted as the one before the court?" He says that a debtor ought not to be put into this corner when an alleged creditor is pursuing an insolvency route rather than a debt recovery action by way of a Part 7 claim. He submits that the onus is on the creditor to make out a good and effective chain of title entitling it to invoke the insolvency process.

15. A number of authorities had been relied upon in Mr Cooper's second witness statement, but none of them was said to be of any real assistance on the crucial issue of construction in the present case because the relevant wording in the instant deed of assignment was not the same. In particular, in the other cases there appears to have been no division between Relevant Pool A and Relevant Pool B loan assets. Mr Sellers submits that the deed of assignment operated beneath the dominant documents of the sale and purchase agreement and a novation agreement when these documents were not before the court. The thrust of Mr Sellers's argument is that because of the opaque language of the deed of assignment, the court could not be certain that the respondent had acquired title as assignee to the original lender's loan facilities and documentation.

16. Mr Riley's principal submission is that the key question for the court to determine is whether the deed of assignment, in the redacted form before the court, establishes a good title in the respondent to the loan assets. On the true construction of the deed of assignment, it is said that there was an absolute assignment of all of Clydesdale Bank's interests in relation to each relevant document, specifically including, but without limitation, Mr Hancock's loan facilities. Mr Riley submitted that, on its true construction, clause 1.5, and the operative clause 2.1(a)(i), did not limit the scope of the assignment to the Pool A loan assets. The expressions "relevant documents" and "specified loan asset" were widely drafted and extended to all categories of financial loan and security documents relating to the relevant Pool B loan assets, including the appellant's loan facilities, as well as to the relevant Pool A loan assets.

17. Mr Riley submitted that there was a clear path through the documentation and that it was not circular. He submitted that the deed of assignment "did what it said on the tin". The facilities granted to the appellant, and the Bank's rights, interests and remedies in relation to them, were specified loan assets. Pursuant to clause 2(1)(a) of the deed of assignment, the Bank had assigned all its rights, title, remedies and interests in, under, or pursuant to the appellant's facilities and the mortgages, which all fell within the definition of "relevant documents". The redacted deed of assignment was said to provide all the information needed to establish that the Bank's rights under the facilities and mortgages had been assigned to the respondent. That had been confirmed by copies of the relevant Land Registry office copies relating to the mortgaged properties. The transfer of the Bank's title to the mortgages had been formally executed by the requisite form TR4, which had been filed at the Land Registry.

18. Mr Sellers in his reply took the point that even the fuller version of the form TR4 before the court had not included the names of the executing parties and the witness details. These had been redacted, unlike the position with regard to the deed of assignment. However, I accept Mr Riley's point that the Land Registry would not have registered the respondent's title to the mortgages had it not been satisfied, by viewing the unredacted form TR4, that the Bank's title to the mortgages had in fact been transferred.

19. In the course of his submissions, Mr Riley submitted that a debtor whose liabilities had been the subject of an assignment was not entitled to look at all the transactional deeds between the assignor and the assignee. All he was entitled to see was the notice under section 136 of the Law of Property Act.

20. Mr Sellers relied upon an observation of Lord Denning MR, which Mr Sellers said was consistent with previous authority, in the case of *Van Lynn Developments Limited v Pelias Construction Co Limited* [1969] 1 QB 607 at 613C. There Lord Denning MR, delivering the leading judgment with the agreement of Lords Justices Davies and Widgery, had said:

> "After receiving the notice [under section 136], the debtor will be entitled, of course, to require sight of the assignment so as to be satisfied that it is valid, and that the assignee can give him a good discharge. But the notice itself is good, even though it gives no date."

Mr Riley submitted that that observation was both *obiter* and incorrect. In my judgment, Lord Denning's observation has now to be read subject to the principle that a party can withhold a document if it is irrelevant or confidential and can put forward a document in redacted form. Mr Riley took me to passages in the judgment of Lewison LJ in the case of *Shah v HSBC Bank* [2011] EWCA (Civ) 1154 at paras 24-29, 37 and 48-50. Those passages were said to be consistent with the approach of Judge Elizabeth Cook, sitting as a Judge of the High Court, in the case of *Ennis Property Finance v Thompson* [2017] EWHC 3263 (Ch) at paras 20-21.

21. I accept Mr Riley's submission that any surmise and speculation arising out of the redacted documents is answered by the compelling evidence contained within the two witness statements of Mr Cooper. I am satisfied that there is no material in the circumstances of this case which suggests that Mr Cooper's certification of the propriety of the redactions, in his capacity as a competent senior solicitor, must be wrong.

22. I would endorse the observations of Her Honour Judge Moulder (as she then was) in the case of *Promontoria (Chestnut) Limited v Iliad Group Limited* [2017] EWHC 2332 (QB) at para 51 to the effect that a witness statement from a partner of an established law firm, signed with a statement of truth, and exhibiting a deed of assignment and clearly stating that, pursuant to that deed, the bank's rights in respect of a loan document were assigned to the claimant, is sufficient evidence upon which the court is entitled to rely. I am satisfied that, just as in the case before Judge Moulder, there is no evidence before this court which calls into question the veracity of Mr Cooper's witness statement.

23. I am satisfied that there is no real prospect of the appellant establishing that title to the relevant loan facilities has not been effectively transferred by the redacted deed of assignment that is before the court to the respondent to this appeal. Whilst there may have been an overabundance of caution on the part of the respondent in redacting parts of the deed of assignment that are not truly commercially confidential (as with the redaction of certain of the definitions), it seems to me that one is able to see all of the relevant parts of the deed of assignment that it is necessary to see in order to conclude that the respondent has indeed established its title to the loan facilities which are the subject of the statutory demand. The operative part of the assignment is clause 2.1. Under its terms each of the seller, National Australia Bank Limited and Clydesdale Bank plc, assigned all of its right, title, benefits and interests under each relevant document in relation to each specified loan asset comprised within the relevant borrower asset group. "Specified loan asset" is defined as meaning "a relevant loan asset". "Relevant loan asset" is defined as meaning "a relevant Pool A loan asset or a relevant Pool B loan asset". Nothing in the provisions of the deed of assignment, on its true construction, has the effect, in my judgment, of cutting down the width of the reference to "relevant Pool B loan asset" as meaning a loan asset or debt claim described in Part 2 of Schedule 1. The reference in parenthesis to the documents listed in Part 1 of Schedule 1 is intended to make it clear that the relevant documents include, but without limitation in relation to relevant Pool A loan assets, those documents listed in Part 1 of Schedule 1. Those additional words in parenthesis do nothing, in my judgment, to exclude any loan asset or debt claim described in Part 2 of Schedule 1 from the scope of the assignment.

24. In my judgment, clause 2.1 is clear as a matter of construction. It extends to, and includes, all relevant Pool B loan assets, meaning those loan assets or debts or debt claims described in Part 2 of Schedule 1, including the appellant's loan facilities and documentation.

25. In my judgment, the question identified in paragraph 2(a) of Barling J's order should be answered in the affirmative. The rights and interests of the Bank pursuant to, and in relation to, the facilities which it advanced to the appellant were included in the rights and interests assigned to the respondent in relation to the relevant documents in respect of the specified loan assets comprised within the relevant borrower asset groups pursuant to clause 2.1 of the deed of assignment.

26. The other two issues identified by paragraph 2 of the Vice-Chancellor's order are, in my judgment, adequately addressed in the evidence of Mr Cooper. The issue identified in paragraph 2(b) is addressed at paragraphs 39-41 of Mr Cooper's first witness statement and in paragraphs 61 and 62 of Mr Riley's skeleton argument. In summary, clause 1.5 of the deed of assignment does not have the effect for which the appellant contends. The purpose of clause 1.5 is simple and straightforward, as Mr Riley submits. It identifies the relevant Pool B loan assets which were being transferred pursuant to clause 2.1. The reference to the information in Part 2 of Schedule 1 being subject to the terms of the sale and purchase agreement simply makes it clear that, although the title to the assets is being transferred by the deed, there remain obligations pursuant to the sale and purchase agreement with which the respondent must comply. The deed of assignment is the instrument transferring title from the Bank to the respondent to give effect to the sale of the portfolio of loans.

27. In my judgment, clause 1.5, on its true construction, merely underlines the fact that the deed of assignment is the relevant and distinct instrument of transfer of the loan assets. It transfers those loan assets to the respondent which have been sold pursuant to the sale and purchase agreement. What clause 1.5 does is to spell out that Part 2 of Schedule 1 is included in the deed of assignment solely for the purpose of identifying the relevant Pool B loan assets that are the subject of the assignment. Those assets however remain subject to the terms of the sale and purchase agreement and any limitations contained therein. Clause 1.5 does not, however, have the effect of in any way derogating from the assignment of those assets, and their transfer to the respondent, effected by clause 2 of the deed of assignment. I am therefore satisfied that an assignment to the respondent of the Bank's rights under the loan facilities to the appellant was effected by the deed of assignment, notwithstanding the terms of clause 1.5.

28. The third issue identified by the Vice-Chancellor for decision on this appeal, and referred to in paragraph 2(c) of his order, was whether, in light of the references in the deed of assignment to a sale and purchase agreement, and the definition of the respondent as "the novated buyer or the buyer", the Bank was unable to assign its rights under the facilities to the respondent because they had been novated to an unidentified third party. In my judgment, it is quite clear that the Bank was able to assign its rights under the facilities to the respondent. They had never been novated to any unidentified third party. That is clear from the terms of paragraphs 42-45 of Mr Cooper's first witness statement, reiterated at paragraphs 24 and 25 of his second witness statement. Mr Riley was right to comment in his oral submissions that this issue had not really been touched upon in Mr Sellers's oral submissions. In my

judgment, for the reasons set out at paragraphs 63 and 64 of Mr Riley's skeleton argument, there is simply nothing in this point. Whilst I endorse all that is said in those paragraphs of Mr Riley's skeleton, and accept them, the short point is that there was no novation of the loan facilities between the Bank and the appellant; rather, any novation was of the sale and purchase agreement between the original purchaser, the holding company, and the present respondent. I am satisfied that any argument of the appellant to the contrary is misconceived; and, in fairness to Mr Sellers, he did not pursue it in his oral submissions.

29. The upshot is that whilst I am satisfied that Mr Sellers and Miss Roberts have said everything they can in support of the appeal, the appeal is doomed to failure. Had the Vice-Chancellor had the evidence of Mr Cooper before him that is now before the court, and had he not had the distractions of the many other arguments advanced to him on which he refused permission to appeal, I very much doubt that he would have given permission to appeal on the points that he in the event did. But I am satisfied, in the light of the evidence which is now before the court, which was not before the Vice-Chancellor, and having had the benefit of the very full and able submissions on both sides, there is really nothing in the points that were sought to be advanced for the first time on the permission application

30. So, for all of those reasons I dismiss the appeal. I am satisfied that the debt the subject matter of the statutory demand is not genuinely disputed on grounds which appear to the court to be substantial. There is no genuine triable issue as to the respondent's entitlement to sue on the loan facilities that were granted by Clydesdale Bank to the appellant. So, for those reasons the appeal is dismissed.

This Judgment has been approved by the Judge.

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com