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Insolvency No. 880 of 2018
Appeal No. 69 of 2019
Case No: F01LV711
Appeal No. 78 of 2019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
CHANCERY APPEALS

On appeal from the decision of DDJ Williams dated 14 May 2019

And on appeal from the decision of HHJ Hodge QC dated 30 September 2019

Civil and Family Justice Centre
Liverpool
Thursday 11 February 2021

Before :

MR JUSTICE SNOWDEN

Vice-Chancellor of the County Palatine of Lancaster

IN THE MATTER OF THE INSOLVENCY ACT 1986
AND IN THE MATTER OF ANTHONY LESLIE HANCOCK

Between :

**PROMONTORIA (PINE) DESIGNATED
ACTIVITY COMPANY**

**Claimant/
Creditor**

- and -

ANTHONY LESLIE HANCOCK

**Defendant/
Debtor**

James McWilliams (instructed by **Walker Morris LLP**) for the **Claimant**
Graham Sellers (instructed by **Joanna Connolly Solicitors**) for the **Defendant**

Hearing dates: 28-29 October 2020

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on 11 February 2021

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

1. This judgment follows a remote hearing of two matters: (i) an appeal (“the Bankruptcy Appeal”) by Promontoria (Pine) Designated Activity Company (“Promontoria”), and (ii) an application for permission to appeal (the “PTA Application”) by Mr Anthony Leslie Hancock (“Mr. Hancock”).
2. Promontoria’s Bankruptcy Appeal is an appeal against the decision of Deputy District Judge Williams dated 14 May 2019, in which DDJ Williams ordered that a statutory demand in bankruptcy served by Promontoria on Mr. Hancock be set aside.
3. By the PTA Application, Mr. Hancock sought permission to appeal from an order of His Honour Judge Hodge QC dated 30 September 2019, in which it was ordered that Mr. Hancock provide vacant possession of certain properties, and pay sums due under certain finance facilities to Promontoria.
4. At the hearing, following submissions by counsel for both parties, I refused Mr. Hancock’s PTA Application but reserved judgment on Promontoria’s Bankruptcy Appeal. This judgment sets out my reasoning with regard to both matters.

Background and Procedural History

5. The Bankruptcy Appeal and the PTA Application share a common factual background.
6. Pursuant to the terms of a facility letter dated 12 November 2013, Mr. Hancock borrowed the sum of £1,591,882 from AIB Group (UK) Plc (“AIB” and the “Facility”). The Facility was intended to renew and re-finance various existing loans Mr. Hancock had taken out with AIB in order to finance his investment property portfolio. As required under the terms of the Facility, Mr. Hancock granted “all monies” legal charges (the “Charges”) in favour of AIB over three properties (together, the “Properties”), namely:
 - i) 60a Chapel Road, Garston, Liverpool L19 2LG;
 - ii) 2 Granville Road, Garston, Liverpool L19 1RS (also known as 60 Chapel Road); and
 - iii) 32 Island Road, Garston, Liverpool L19 6PA.

The Charges conferred on AIB the right to assign the whole or any part of the benefit of the Charges.

7. By its terms, Mr. Hancock was required to repay the Facility in full by 6 November 2014, by way of monthly repayments of capital of £5,340. Interest was agreed to accrue at 3% above AIB’s Managed LIBOR Base Rate, but would not be payable until the end of the term, sale of the Properties or “clearance” by other means.
8. Mr. Hancock did not repay the Facility in full by 6 November 2014. On 30 June 2016, AIB agreed to extend the deadline for repayment of the Facility until 31 December 2016.

9. On 16 February 2018, and as part of the transfer of a wider portfolio of various loans and securities, AIB transferred its rights and remedies under the Facility to Promontoria pursuant to a global deed of assignment (the “Deed of Assignment”).
10. On 19 February 2018, AIB wrote to Mr. Hancock giving him notice of the assignment, and informing him that Promontoria had retained Link ASI Limited (“Link”) as its portfolio and asset management agent. On 10 May 2018, Link wrote to Mr. Hancock referring to the transfer of the Facility to Promontoria and informed Mr. Hancock of the new loan account reference number which had been assigned to the Facility. Link wrote to Mr. Hancock again on 14 June 2018 referring to the outstanding balance owed by Mr. Hancock in respect of the Facility and sought confirmation of Mr. Hancock’s availability to meet with Promontoria to discuss proposals for the repayment of the liabilities.
11. On 12 July 2018, Link wrote to Mr. Hancock demanding repayment of the outstanding balance due under the Facility, which at that time was just over £1m. When Mr. Hancock did not meet the demand, on 10 August 2018, Promontoria appointed receivers over the Properties pursuant to the Charges granted by Mr. Hancock to secure the Facility.

DDJ Williams’ Decision

12. On 15 August 2018, Promontoria served a statutory demand in bankruptcy on Mr. Hancock in respect of the part of his debt owing under the Facility which was not secured by the Charges (the “Statutory Demand”). Mr. Hancock applied to set aside the Statutory Demand on 24 September 2018. That application was heard by DDJ Williams on 30 January 2019, who reserved judgment. At a subsequent hearing on 14 May 2019, DDJ Williams provided his order and a draft judgment to the parties. DDJ Williams handed down a revised judgment (the “Set Aside Judgment”) on 11 July 2019.
13. In the Set Aside Judgment, DDJ Williams found against Mr. Hancock on a large number of the issues that he had raised, but upheld his challenge to the Statutory Demand on a single ground. DDJ Williams found that Mr. Hancock had established a dispute on substantial grounds with respect to whether the Deed of Assignment had been validly executed and was thus effective to transfer the rights under the Facility to Promontoria.
14. That decision turned on the fact that Promontoria had redacted parts of the Deed of Assignment which it had exhibited to its evidence. In particular, as well as the redaction of some commercial terms, the name and signature of Promontoria’s signatory was redacted. The name of Promontoria’s witness was provided, although her signature and address were redacted. The signatures of AIB’s signatories and witness were redacted, but the names of the signatories and of the witness were visible. Promontoria asserted that the redactions were necessary in order to prevent other debtors copying the signatures with a view to seeking to escape liability under their own lending arrangements by forging the signature of the person acting on behalf of Promontoria.
15. In dealing with this contention, DDJ Williams referred to the approach of the then Vice Chancellor, Mr. Justice Barling, in Hancock v Promontoria (Chestnut) Ltd

[2018] EWHC 2934 (Ch). In that case, Mr. Hancock similarly sought to question the title of an assignee of the rights against him under a loan agreement. Barling J dealt with the point in the following way, at [49]-[51],

“49. The next issue in relation to the deed related to the redactions made. This is one strand of the new argument that the deed does not establish, and indeed the respondent has not established via the deed or otherwise, that it acquired title to the debts. The point is now sought to be raised for the first time on appeal.

50. The argument here relies on the fact that the signatures of the representative persons signing on behalf of the parties have been redacted. I have already referred to the reasons Mr. Parr gave in evidence for the signatures being redacted, i.e. for the purpose of security. It is the respondent’s case that those signatures, albeit redacted, belong to persons who are otherwise identified, in particular, the Bank’s and the respondent’s representatives. Thus, it is argued, the appellant is in a position, should he wish, to check the credentials and authorisations of those individuals to sign on behalf of the parties in question.

51. In my view this aspect of the appellant’s reliance on the redactions is a non-starter. Whether or not the caution on the part of the Bank and the respondent is justified, it is clear on the evidence, supported by a statement of truth, that the identified individuals signed the deed. In those circumstances the point cannot assist the appellant.”

16. At paragraphs [77]-[80] of the Set Aside Judgment, DDJ Williams purported to apply this reasoning to the instant case. He decided that, as both the signature and name of Promontoria’s signatory to the Deed of Assignment had been redacted, Mr. Hancock was not in a position to check the credentials and authority of the person who had signed the Deed of Assignment on behalf of Promontoria. This, DDJ Williams held, meant that Mr. Hancock had established a dispute on substantial grounds with respect to whether the Deed of Assignment had validly transferred AIB’s rights under the Facility to Promontoria.
17. DDJ Williams did, however indicate (at paragraph [78]) that a way in which Promontoria could address the issue would be either to provide a copy of the Deed of Assignment in which the signature and identity of the signatories was not redacted, or to provide other evidence sufficient to satisfy the court of the identity of the signatories.
18. DDJ Williams granted permission to Promontoria to appeal his decision. This is the Bankruptcy Appeal which I shall consider below.

HHJ Hodge QC's Decision

19. Separately, on 4 February 2019, Promontoria commenced CPR Part 55 proceedings for the debt due under the Facility and for possession of the Properties (the “Part 55 Proceedings”). On 12 March 2019, Mr. Hancock filed three defences in response to the Part 55 Proceedings, one in respect of each of the three Properties (the “Defences”). The Defences made materially identical arguments in relation to each of the Properties.
20. On 31 July 2019, following the handing down of the Set Aside Judgment of DDJ Williams, Promontoria applied for summary determination of the Part 55 Proceedings pursuant to CPR 55.8(1)(a) on the basis that the Defences did not disclose any genuine or substantial dispute to Promontoria’s claims; and/or an order striking out the Defences as an abuse of process.
21. In essence, Promontoria contended that the matters raised in the Defences were the same arguments raised by Mr. Hancock which DDJ Williams had found to be without substance. Promontoria sought to address the redaction point upon which DDJ Williams had found in favour of Mr. Hancock by adducing a second witness statement from its solicitor confirming that he had seen the executed Deed of Assignment in unredacted form and identifying the individual whom he indicated he had been informed had executed the document on behalf of Promontoria as a director of the company, a Mr. John Burke.
22. On 20 September 2019, shortly before the date set for the hearing, Mr. Hancock served an application for (i) permission to amend his Defences in the Part 55 Proceedings to advance new arguments (the “Amended Defences”), (ii) an order for specific inspection of an unredacted version of the Deed of Assignment and (iii) variation of case management directions that had been made by DJ Johnson on 4 June 2019.
23. There were essentially three sets of allegations sought to be raised by Mr. Hancock in his Amended Defences:
 - i) that the Deed of Assignment was invalid and ineffective by reason of various aspects of its drafting and execution to transfer AIB’s rights under the Facility to Promontoria (paragraphs 10 and 11);
 - ii) that AIB was negligent and/or that the facility provided to Mr. Hancock under an earlier facility letter agreement dated 28 November 2008 (“the November 2008 Facility”) had been mis-sold (paragraph 3); and
 - iii) that Mr. Hancock’s relationship with AIB was and continued to be unfair within the meaning of section 140A of the Consumer Credit Act 1974 (“Section 140A”) so as to entitle him to an order pursuant to section 140B of the same Act (“Section 140B”) (paragraphs 14 and 15).
24. The relevant paragraphs of the Amended Defences included the following,
 - “3. The facility which first requested a secured charge over the [Properties] was in respect of the overdraft facility

offered [in a] ... facility letter dated 10 April 2007 ... Thereafter, various other facilities were provided to [Mr. Hancock] by Allied Irish Bank plc for varying amounts and with varying terms. In particular, the [Properties] continued to be named as security in respect of the following loans:

...

(v) 28 November 2008. This loan was described as a 'LIBOR' term loan and the purpose of which was "[an] amalgamation of existing loans totalling £882,000 plus £30,000 to 'take out' portion of hardcore debt from portfolio". The interest rate was described as "three months LIBOR plus a margin of 2.5%". Pending disclosure, [Mr. Hancock], in his capacity as an individual who wished to increase his pension provision, will aver that the loan was mis-sold and unsuitable for [him] and Allied Irish Bank plc was negligent /mislead [him] in that it:

(a) failed to provide any information or advice as to the existence of other available products and their respective costs;

(b) No illustration as to how the interest rates would work in practice were provided to [Mr. Hancock];

.....

10. [Promontoria] purports to be a legal assignee of AIB's rights under the [Facility]. [Mr. Hancock] avers that the Deed of Assignment dated 16 February 2018 did not effect any assignment or transfer [any] of AIB's rights under the [Facility] to [Promontoria].

11. [Mr. Hancock] will aver,

...

b. The Deed of Assignment is heavily redacted. [Mr. Hancock] is entitled to require a sight of the unredacted assignment including the signatures, authorisations and credentials of all parties who have signed the deed...

....

e. It is denied that AIB gave [Mr. Hancock] notice of the Deed of Assignment by letter dated 19 February 2018. The purported notice does not give the date of the assignment but merely states that a 'transfer' was completed on 16 February 2018.

....

14. By way of indicative but non-exclusive indication of the areas of the said ongoing relationship which are unfair [Mr. Hancock], below, sets out the relevant history of the relationship and draws attention to the matters which made the relationship unfair [within the meaning of Section 140A of the Consumer Credit Act 1974].

i. Early on the relationship between AIB and [Mr. Hancock], AIB created an unfair term in the agreement in that whilst it created a fixed term loan agreement of 15 years in length, AIB made it 'subject to periodical reviews at the discretion of AIB. The 15-year term requirement was needed by [Mr. Hancock] in order for his property portfolio to remain viable. [Mr. Hancock] received verbal assurances from the AIB manager, Kevin Cassidy from 5 October 2005 onwards that "there would be no problem with renewing the facility". However on 29 May 2007, AIB changed the terms of borrowing with the Defendant by drastically reducing the term of the loans to as low as four-month terms to the extent that [Mr. Hancock] was unable to afford to repay the loan facilities in full without selling his portfolio. [Mr. Hancock] had spent considerable sums of refurbishing his properties making them suitable for long term rental.

ii. [Mr. Hancock] avers that he would not have signed the agreement if it had not been expressed as being for a term of 15 years, which he relied upon a collateral warranty, and had been told that it could be changed to a 4 month term as happened in May 2007 since AIB represented to him that 'there would be no problem with renewing the facility'. [Mr. Hancock] had relied upon the assurances from his then AIB manager. The conditional term of the contract does not give examples of what changes to the term may take place which is unfair and misleading.

...

iv. The facility letters also had varying interest rates attached to it under which meant that [Mr. Hancock] did not know what he was agreeing to in terms of what interest rate he would be paying which only seeks to reaffirm the unfair relationship.

v. The [facility agreement of] 22 November 2010 included a fee of £12,200 described as 'other fees'. Given the absence of any explanation as to what these fees comprise...[Mr. Hancock] avers that such fee is sufficient to create an unfair relationship...[under Section 140A].

vi. No illustration as to how the LIBOR interest linked rates would work in practice were provided to [Mr. Hancock].

vii. AIB were excessive in their recovery actions towards [Mr. Hancock] in that when he verbally told a manager at AIB ...in October 2017 that he had a willing buyer for [some properties] ... AIB did not respond ... and instead purported to assign the debt to [Promontoria] to recover...

viii. [Promontoria] has acted unfairly in the way it has chosen to enforce the debt ... by issuing multiple proceedings thereby increasing legal costs and court time.

....

15. [Mr. Hancock] requests that the court provide him with the relief [sic] by way of an order under [Section 140B].”

25. At a hearing on 30 September 2019, HHJ Hodge QC granted Promontoria’s application for summary determination, and dismissed Mr. Hancock’s applications. HHJ Hodge QC held that none of the allegations in the Amended Defences had any prospect of success. HHJ Hodge QC gave a monetary judgment in respect of the Facility and ordered that Mr. Hancock give up possession of the Properties (the “Possession Order”).

26. In his judgment, HHJ Hodge QC first addressed the potential relevance of the decision of DDJ Williams in the Set Aside Judgment. After a review of the authorities, he observed, at paragraph 32:

“Where, however, the court has considered and rejected arguments against the existence of a debt, it does seem to me that it would be a waste of the court’s time, and the parties’ money, to allow a party against whom an issue has already been determined to seek to re-litigate that issue unless, perhaps, the court can be satisfied that the previous court has in some way fallen into error. In the present case, I am entirely satisfied that the deputy district judge was entitled to reach the conclusions that he did on the evidence before him. I am satisfied that the deputy district judge was fully entitled to reject the various challenges to the statutory demand in the way and to the extent that he did.”

27. That said, HHJ Hodge QC then went on to consider the merits of the arguments raised in the Amended Defences:

“33. I am satisfied that there is no substance in the various arguments raised by the existing defence, or sought to be raised by the proposed amended defence. I am satisfied that none of the asserted grounds of defence give rise to any genuine substantial dispute as to the entitlement to possession. I accept

the various points advanced by Mr. McWilliams at paragraphs 34 to 47 of his written skeleton argument as to why there is no genuine or substantial dispute as to the validity of the assignment. The matter that concerned the deputy district judge, and which led him to set aside the statutory demand, has, in my judgment, adequately been addressed by the two witness statements of Mr. Clark.

34. So far as the arguments founded upon an unfair relationship under section 140B of the 1974 Act are concerned, there was no challenge by Mr. Sellers to the summary of the law set out at paragraphs 48 through to 53 of Mr. McWilliams' written skeleton argument. I am satisfied, for the reasons set out at paragraph 54 of Mr. McWilliam's skeleton, that none of the matters raised by the defendant in this case, or sought to be raised by him, discharge the evidential burden, which rests upon Mr. Hancock, of adducing sufficient evidence to raise an arguable case that he could invoke the jurisdiction under section 140B so as to throw upon [Promontoria] the ultimate burden of satisfying the court that the credit relationship was not unfair to Mr. Hancock.

35. I also accept the further point made at paragraph 55 of Mr. McWilliams' written skeleton that even if [Mr. Hancock] was arguably able to show that some aspect or other of his relationship with AIB might have been unfair, it does not follow that any order would be made under section 140B, still less that any order would operate to relieve Mr. Hancock of his liability under the facility letter and the legal charges, for the reasons set out at sub-paragraphs 55(i) and (ii).

[...]

37. So far as the allegations of negligence or mis-selling are concerned, there seems to me to be a complete lack of proper allegations of causation, loss and damage; but, in any event, I can see absolutely no answer to the proposition that any such complaints are long since statute-barred. I do not accept Mr. Sellers's submission that the court ought not to prevent the defendant from running those points where there is a complete answer to them. I would not accept Mr. Sellers's submission that it would not be right to shut Mr. Hancock out merely because the claimant can be compensated in costs if, as I find, the proposed amendments have no prospect of success.

[...]

42. I am satisfied, for the reasons given by Mr. McWilliams, that there is no arguable case for challenging the unfairness of the relationship, either between AIB and [Mr. Hancock] or [Promontoria] and [Mr. Hancock] under section

140B of the Consumer Credit Act 1974. The fairness of the relationship has to be assessed against the background that this was the renewal of substantial borrowing taken out to finance a considerable residential investment portfolio to provide for the defendant's pension. The documentation made it clear that it was subject to periodical reviews at the discretion of AIB, and no assurance given back in 2005 could qualify that in any way.

43. The allegation of a forced sale of [another property] at an unspecified date is wholly lacking in particularity. It is quite clear that the sale proceeds were properly credited against the loan. There can be no objection to providing that interest should be payable by reference to a certain percentage uplift on the specified LIBOR rate. The allegation that AIB failed to respond to a request to information that there was a willing buyer cannot give rise to any unfair relationship, and there is nothing to suggest that AIB's attitude prevented a disposal of the property by the defendant. The claimant was perfectly entitled to pursue each of the mortgaged properties in separate proceedings but, in any event, by consent the three proceedings were consolidated at a very early stage.

44. For all of those reasons, and for the reasons set out more fully in Mr. McWilliams's skeleton argument, I am entirely satisfied that this is a case where the claim is not genuinely disputed on grounds appearing to be substantial and that the court can therefore decide the claim. I would not allow permission to amend the defence because I am satisfied that the proposed amendments have no prospect of success.

45. Had it been necessary to do so, I would have refused the application to extend time for [Mr. Hancock] to make an application to call expert evidence....there is really no adequate justification for seeking an extension of time for making an application...[and] in any event, I accept Mr. McWilliams's submission that it is wholly unclear what the nature of the evidence would be..."

28. HHJ Hodge QC's reference in paragraph [34] of his judgment to paragraph [54] of Mr. McWilliams' Skeleton Argument in relation to the defence under Section 140A was to the following paragraph (I have renumbered the sub-paragraphs to correspond with the relevant sub-paragraphs of paragraph 14 of the Amended Defences above)

"None of the matters raised by Mr. Hancock in this case discharge Mr. Hancock's evidential burden to adduce sufficient evidence to raise the issue. Dealing with the matters pleaded ... in turn:

(ii) There is no sensible basis for the suggestion that a term loan of 15 years with a clause subjecting that term to periodical review at the discretion of the Bank is such as to

render the relationship unfair. Mr. Hancock was borrowing substantial sums for the purposes of a business – as he himself contractually acknowledged – and there are sound commercial reasons as to why the Bank would wish to review the term periodically. If Mr. Hancock did not wish to allow for the possibility that the term should be curtailed then, with respect, he should have sought finance on alternative terms.

(ii) Mr. Hancock’s assertion that he would not have signed the (unspecified) agreement had it not been expressed as being for a term of 15 years and that he relied on (unparticularised) assurances from the Bank is hopeless. No collateral warranty as alleged can have arisen in circumstances where it is contradicted by the terms of the facility, which provide for periodical reviews with a first review scheduled for June 2006. Similarly, it is not open to Mr. Hancock to rely on any assurance which was given in circumstances where again it contradicts the terms of the facility by which Mr. Hancock is bound: see Peekay Intermark Ltd v Australia & New Zealand Banking Group [2006] 2 Lloyd’s Rep. 511.

....

(iv) The assertion that the fact that the Facility Letters Mr. Hancock entered into with the Bank had varying rates of interest rendered the relationship unfair is, with respect, absurd. Variable rates of interest are entirely commonplace and it is rightly no part of Mr. Hancock’s case that the rates themselves charged were unfair. The idea that Mr. Hancock, an individual who borrowed substantial sums over a lengthy period did not understand the rate of interest he was paying does not warrant serious consideration.

(vii) Mr. Hancock’s case that the Bank were “excessive in their recovery actions towards” him is not borne out by the matters on which he himself relies or indeed the facts. No sensible criticism can be made of the Bank in failing to further indulge Mr. Hancock in November 2017, almost a year after the extended expiry period of the Facility under the Extension Letter (itself granted to allow Mr. Hancock time to restructure or refinance). The Bank gave Mr. Hancock ample time.

(vii) The suggestion that the Bank’s decision to assign its rights under the Facility Letter and the Legal Charges rendered the relationship unfair is without basis. The Bank was entitled to assign its rights under the relevant agreements, which right would have in any event subsisted had it not been excluded. The assignment necessarily has had no material impact on Mr. Hancock’s position, for all Promontoria can do is enforce the rights the Bank had against Mr. Hancock.”

29. The reference in paragraph 35 of HHJ Hodge QC's judgment to paragraphs 55(i) and (ii) of Mr. McWilliams' skeleton was to the following paragraphs,

“(i) Mr. Hancock's complaints about the term and periodical reviews in his facility letters with the Bank have no bearing whatsoever on the Facility Letter which forms the subject matter of these proceedings. It was only taken out in 2013 and in any event did not have a 15-year term. Mr. Hancock advances no grounds of challenge to the circumstances in which he took out the Facility Letter.

(ii) No proper basis has been pleaded for Mr. Hancock's complaints with respects to the circumstances in which he sold [another property] but, to the extent that property was sold at an undervalue he will have a remedy. That, rather than reopening the terms of a Facility Letter and Legal Charges about which he makes no complaint is the appropriate remedy.”

30. I shall first deal with the application for permission to appeal HHJ Hodge QC's decision.

The PTA Application

31. Although there were numerous grounds set out in Mr. Hancock's Notice of Appeal, these were whittled down by Mr. Sellers for the purposes of the application for permission. So, for example, Mr. Sellers indicated that Mr. Hancock was no longer pursuing any argument on appeal in relation to the question of whether the terms of the Deed of Assignment were effective to apply to Mr. Hancock's loans.
32. Although Mr. Sellers sought to appeal on the basis of HHJ Hodge QC's comments in paragraph 32 to the effect that it would be a waste of the court's time, and the parties' money, to allow a party against whom an issue has already been determined to seek to re-litigate that issue, I do not consider that this was in fact the basis upon which HHJ Hodge QC decided the case. HHJ Hodge QC did not simply rely upon the decision of DDJ Williams, but went on to deal with the substantive points on their merits in his judgment.
33. Mr. Sellers also criticised HHJ Hodge QC for failing to apply the decision in Patel v Patel [2009] EWHC 3264 (QB). Mr. Sellers contended that decision was to the effect that even though complaints in tort or under contract in relation to certain matters might be statute-barred by limitation, nonetheless such matters could be relevant when the court was considering whether a continuing relationship was unfair for the purposes of Section 140A. In that respect Mr. Sellers contended that HHJ Hodge QC's comments in paragraph [37] of his judgment were an erroneous dismissal of those points for the purposes of Section 140A.
34. I do not, however, consider that HHJ Hodge QC misunderstood or failed to apply Patel v Patel as Mr. Sellers suggests. HHJ Hodge QC's comments in paragraph [37] appear to me to be solely directed at the allegations of negligence and mis-selling in paragraph 3(v) of the Amended Defences, which appeared as free-standing defences.

HHJ Hodge QC was entirely correct to point out that such complaints in tort were obviously statute barred.

35. I also note that the allegation that the November 2008 Facility was mis-sold was not, in those terms, relied upon in the Amended Defences as a factor going to the allegedly unfair relationship. The only matter relied upon in paragraph 14 of the Amended Defences which related to the November 2008 Facility was the suggestion in paragraph 14(vi) that no illustration as to how the LIBOR interest linked rates would work in practice was provided to Mr. Hancock.
36. HHJ Hodge QC did not deal with that allegation in the specific terms in which it was made. He did, however, address the broader substance of the allegation as regards the change to a rate linked to LIBOR when he held in paragraph [43] of his judgment – by reference to Section 140A - that there could be no objection to providing that interest should be payable by reference to a certain percentage uplift on a specified LIBOR rate. I agree with HHJ Hodge QC’s approach, since I cannot see how a mere allegation of failure to provide a product illustration could possibly give rise to an unfair relationship unless the underlying product actually supplied was itself in some way unsuitable or unfair to the customer.
37. The key points taken by Mr. Sellers on appeal essentially boiled down to two topics – namely (i) whether HHJ Hodge QC was right to hold that there was no arguable case that there was an unfair relationship between Promontoria and Mr. Hancock within the meaning of Section 140A which might justify some relevant relief under Section 140B; and (ii) whether Mr. Hancock’s right to a fair trial under Article 6 of the Human Rights Act 1998 were violated by HHJ Hodge QC dealing with the case in a summary manner.

Unfair relationship

38. So far as relevant, Sections 140A and 140B provide as follows:

“140A Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following –

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

...

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

...

140B Powers of court in relation to unfair relationships

(1) An order under this section in connection with a credit agreement may do one or more of the following—

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.

...

(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.”

39. In short, the combined effect of the two sections is that the Court may make an order under Section 140B if, under Section 140A, it determines that a relationship as between a creditor and a debtor is unfair.
40. It is important to note that Section 140B(9), if applicable, places the burden of proving that a relationship is not unfair upon the creditor. But, as Swift J held in Axton v GE Money Mortgages Limited [2015] EWHC 1343 (QB) at [49], it cannot be the case that Section 140B(9) means that no summary disposal can take place. A debtor cannot simply make a bare allegation of unfairness and insist on the case going to trial. There must be some credible evidence to support such allegation, so as to give rise to some realistic prospect that the creditor will fail to satisfy the burden under Section 140B(9) at trial.
41. In his oral submissions, Mr. Sellers focussed on HHJ Hodge QC's treatment of two of the reasons pleaded in the Amended Defences, which he contended gave rise to an unfair relationship:
 - i) the switch from AIB's variable base rate to a LIBOR-based variable base rate under the November 2008 Facility (see paragraph 3(v) and of the Amended Defences) (the "LIBOR Argument"); and
 - ii) the reduction of the term length of Mr. Hancock's historic facilities with AIB from 15 years to terms as short as four months (see paragraphs 14(i) and (ii) of the Amended Defences) (the "Term Argument").
42. These arguments must be considered against the long history of Mr. Hancock's relationship with AIB, which was apparent from the pleadings and the evidence filed on the application.
43. Mr. Hancock first entered into a facility with AIB at some point prior to 11 August 2005. The earliest facility document exhibited to Mr. Hancock's application to amend the Defences was dated 11 August 2005, and stated that part of its purpose was the "Renewal of existing loan of £2,733,000". This agreement had a 15 year term, was subject to periodic reviews at AIB's discretion, and interest was linked to AIB's variable base rate. As well as renewing the existing loan, its purpose was also to assist the purchase and refurbishment of four distinct properties.
44. Further facilities on similar terms and with similar purposes were entered into on 5 October 2005 (this facility was also said to be partially to fund the balance of a divorce settlement) and 6 February 2006. On 21 February 2006, the term of the loan was increased to 20 years. On 14 March 2006, a facility with three separate loans was taken out, with terms of 20 years or 1 year, as was the case with the next facility taken out on 18 April 2006.
45. Notwithstanding the pleaded case, in fact, the last facility entered into between AIB and Mr. Hancock which had a term of 15 years appears to have been the facility dated 6 February 2006. Since 6 February 2006, on the evidence before HHJ Hodge QC, Mr. Hancock entered into a further 43 facilities (some letters included more than one facility) with AIB for terms generally much shorter than 15 years. Further, term loans as short as four months seem to have been agreed between AIB and Mr. Hancock

from as early as 18 January 2007, when an overdraft facility with a term of three and a half months was entered into.

46. The first time a facility in respect of the Properties which are the subject of the Possession Order was entered into by Mr. Hancock and AIB was on 12 March 2007. Two facilities were entered into on that date in respect of 60A Chapel Road and 2 Granville Road, which were said to be to “assist purchase” of the properties and to provide “Development Funding to convert/refurbish” the properties at those addresses. The loans were required to be cleared in full by 28 February 2009, meaning they had a term of just under two years. Interest in each was set at “7.25% per annum varying being 2% above the Bank’s Base Rate which is currently 5.25%”.
47. On 29 May 2007, Mr. Hancock entered into further facilities with AIB, in order to “assist purchase” of and provide “Development Funding” in relation to 32 Island Road, and to renew the existing loans in relation to the other two Properties. These facilities were required to be cleared by 31 May 2009, giving them a term of just over two years, and interest was set at “7.5% per annum varying being 2% above the Bank’s Base Rate which is currently 5.5%”.
48. The November 2008 Facility was for an amount of £912,000. The purpose was stated to be the “Amalgamation of existing loans totalling £882,000 plus £30,000 to ‘take out’ portion of hardcore debt from overdraft.” The term was one year from the date of first drawdown, and interest was set at “Three months LIBOR plus a margin of 2.5%”.
49. With that background in mind, I now turn to consider the LIBOR Argument and then the Term Argument.
50. With regard to the LIBOR Argument, Mr. Sellers accepted that up until the November 2008 Facility, the interest terms of the lending relationship between AIB and Mr. Hancock had been perfectly fair. His argument was that the November 2008 Facility was the first facility which Mr. Hancock had taken out with AIB which was linked to LIBOR as a base rate. Mr. Sellers’ argument was that LIBOR was an inherently unsuitable base rate for Mr. Hancock, because he was entering into the facilities “in his capacity as an individual who wished to increase his pension provision”; that AIB had not explained to Mr. Hancock how LIBOR linked interest rates would work in practice; and that AIB had not provided any information or advice as to the existence of other available products and their respective costs.
51. In oral argument, Mr. Sellers further sought to contend that the switch to a LIBOR variable base rate resulted in Mr. Hancock paying more interest than he would have done if he had remained on AIB’s variable base rate. He asserted that this was indicative of a widespread practice of banks at this time in the middle of the financial crisis in trying to move customers to LIBOR-related products. As will be apparent, that allegation was not set out in the pleaded case.
52. The essential difficulty for Mr. Hancock in these respects is that all of Mr. Hancock’s facilities were variable rate facilities, and there is no inherent or obvious reason why a variable rate facility linked to LIBOR should have been any more or less suitable in 2008 (or subsequently) for Mr. Hancock than a variable rate facility linked to some other benchmark or published bank rate. It is, for example, a fact that the average

three-month LIBOR rate in November 2008 was 2.22% (and continued to fall for years after that), so that even with a margin of 2.5%, the cost of borrowing to Mr. Hancock (a total of about 4.72%) was cheaper under the November 2008 Facility than had been the case under the earlier facilities where a total rate in excess of 7% had been charged.

53. As such, if an allegation of unfairness based upon the change to LIBOR was to have been made, some credible evidence needed to have been provided to HHJ Hodge QC to support such a proposition. All Mr. Sellers could point to in this respect was Mr. Hancock's signed statement of truth to his Amended Defences and a reiteration of some of the allegations in his witness statements. But that amounted only to a bare assertion of Mr. Hancock's belief in his own case and was not objective independent evidence. In paragraph [45] of his judgment, HHJ Hodge QC rightly drew attention to the fact that Mr. Hancock had been given the opportunity to apply to adduce expert evidence by the earlier order of DJ Johnson of 4 June 2019, but had failed to do so and had provided no proper explanation. Indeed, notwithstanding that observation by HHJ Hodge QC, Mr. Hancock had still not obtained any such evidence or made any application for its (very late) admission by the time of the appeal hearing before me.
54. The same point applies to Mr Sellers' submission in relation to the timing of the switch to LIBOR in the November 2008 Facility coinciding with the 2008 banking crisis, and his suggestion that AIB may somehow have deliberately mis-sold Mr. Hancock a LIBOR-linked product as part of a wider scheme to switch customers onto unsuitable LIBOR products. Again, no evidence whatever was put forward to support this allegation.
55. I therefore consider that there is nothing in the LIBOR Argument and HHJ Hodge QC was entirely correct to place no weight upon it in his consideration of the case under Section 140A.
56. HHJ Hodge QC dealt with the Term Argument shortly in paragraph [34] of his judgment, accepting the arguments in paragraph 54 of Mr. McWilliams' submissions. He also returned to the point in paragraph [42] of his judgment. I have set those paragraphs out above.
57. Mr. Sellers' submission that HHJ Hodge QC erred in rejecting the Term Argument was based upon an assertion that Mr. Hancock required a 15 year term loan to manage his property portfolio, that AIB introduced an unfair term into Mr. Hancock's agreement from the start by making this term loan subject to periodical reviews at AIB's discretion, and that Mr. Hancock relied upon an assurance given by manager in October 2005 "there would be no problem with renewing the facility". Mr. Hancock's case appears to be that AIB acted unfairly by reducing the term loans to as little as four months in and from May 2007, and that Promontoria acted unfairly by not renewing the facilities in 2018, leaving Mr. Hancock unable to repay the loan facilities in full without selling his portfolio of properties.
58. Mr. Sellers was unable to point to any independent evidence in support of Mr. Hancock's claims regarding his need for a minimum 15 year term or the assurances allegedly given by an officer of AIB. However, even if it were true that Mr. Hancock would not have entered an agreement for less than a 15 year term in 2005 without AIB's purported assurances, the facts set out above make it perfectly clear that from

2007 Mr. Hancock then went on to enter into subsequent agreements for new loans with far shorter terms and without any repetition of, or reference to, the supposed assurances. Indeed, as indicated above, the new facilities taken out to finance the purchase and development of the Properties (on 12 March 2007 and 29 May 2007) were only ever for terms of around two years. The Properties have therefore always been financed on the basis of what was, on its face, short-term lending.

59. In those circumstances, I can see no logical basis on which Mr. Hancock could argue that any preference that he might have had for a 15 year term, or any assurance that he might have been given in 2005 in relation to a 15 year term loan, could operate to render unfair his subsequent relationship with AIB in relation to new loans with a far shorter term of two years which he voluntarily and knowingly entered into with AIB to expand his property portfolio in 2007. There is, moreover, no evidence that Mr. Hancock ever sought to raise or reiterate to AIB his desire for longer term finance in order to purchase the Properties.
60. I therefore do not consider that HHJ Hodge QC erred in any respect in rejecting Mr. Hancock's contention that there was anything remotely unfair about the length of the facilities which he agreed with AIB.
61. As a more general and overriding point, I also consider that HHJ Hodge QC was right in paragraph [35] of his judgment to accept Mr. McWilliams' contention that it is inconceivable that any of the matters relied upon by Mr. Hancock as grounds of unfairness would lead a court to exercise its powers under Section 140B so as to relieve Mr. Hancock of any material part of his liabilities to Promontoria or to prevent enforcement of the security over the Properties leading to the Possession Order.
62. The authorities make it clear that there must be a causative link between the unfairness complained of and the relief to be sought and granted under Section 140B. In Patel v Patel [2009] EWHC 3264 (QB) at paragraph 79, George Leggatt QC (as he then was) observed in relation to Section 140B:
- “It is plain from the width of the provisions that the intention is to give the court a very wide discretion to make whatever order it thinks just. But in principle it seems to me that the order made should reflect and be proportionate to the nature and degree of the unfairness which the court has found.”
63. As I have indicated above, however, paragraph 15 of the Amended Defences simply contained an entirely non-specific request by Mr. Hancock that the court provide him with “relief” under Section 140B. No attempt was made to articulate the particular relief which Mr. Hancock asserted would remedy the alleged unfairness in his relationship with AIB or Promontoria.
64. In his submissions, Mr. Sellers realistically accepted that the court would not simply order that Mr. Hancock be entirely relieved of his liabilities under the Facility if some degree of unfairness had been found. Mr. Sellers contended, however, that, for example, if the court accepted the LIBOR Argument, it could compensate Mr. Hancock for the difference between the amount paid under the LIBOR rate and AIB's variable base rate. However, as I have pointed out above, it was by no means obvious that the rate connected to LIBOR rate was higher than the other rates which Mr.

Hancock had been paying or might have been charged by reference to AIB's base rate. Moreover, Mr. Hancock had entirely failed to provide any evidence to support the contention that he had suffered loss due to the alleged mis-selling of the facilities containing interest determined by reference to the LIBOR rate rather than any other benchmark or bank rate.

65. Mr. Sellers also submitted that, if the Term Argument had been accepted, the court could in effect rewrite the terms of the Facility to include a 15 year term. In my judgment, that would be a remarkable course for the court to take, which would require clear evidence to support it. It is fanciful given the circumstances in which, as indicated above, Mr. Hancock only ever entered into short term finance agreements from the time that he chose to buy the Properties using loans from AIB, and there is no evidence to suggest that he sought to raise such a desire at any time thereafter.
66. I therefore conclude that Mr. Hancock has no realistic prospect of persuading an appellate court that HHJ Hodge QC was wrong to reject his arguments with regard to the existence of an unfair relationship, and I see no realistic basis upon which an appellate court might think it appropriate to interfere with the judgment in relation to the judgment on the Facility or the Possession Order. On the contrary, I am entirely satisfied that the conclusions of HHJ Hodge QC in this respect were correct.

Summary Determination

67. Mr. Sellers contended that HHJ Hodge QC was wrong to determine Promontoria's claim summarily. In support of that contention in his grounds of appeal, in addition to reiterating that HHJ Hodge QC should not have relied upon the earlier decision of DDJ Williams, Mr. Sellers emphasised what he said was the highly fact-sensitive nature of the issue of unfair relationship under Section 140A which made it unsuitable for summary determination.
68. As I have indicated above, I do not consider that HHJ Hodge QC did decide the application on the basis that he was bound by the earlier decision of DDJ Williams. Moreover, I agree with Swift J in Axton v GE Money Mortgages Limited [2015] EWHC 1343 (QB) at [49], that there is nothing in Section 140A which prevents summary determination in an appropriate case.
69. Although I accept that the nature of a claim of unfair relationship and the reversal of the burden of proof in Section 140B(9) means that a court should be cautious before determining a case summarily, at the end the question for the court, as with all applications for summary determination, is whether there was anything of substance in Mr. Hancock's pleaded defences to justify the matter going to a full trial.
70. Having reviewed the evidence placed before the court by Mr. Hancock, HHJ Hodge QC concluded that this was not the case. In my judgment, he did not err in his approach, or in the evaluation of the undisputed facts and (very limited) evidence adduced by Mr. Hancock in this regard.

Conclusion

71. As indicated at the outset of this judgment, for the reasons that I have given, I was satisfied that there was no realistic prospect of Mr. Hancock persuading an appellate

Court that HHJ Hodge QC was in any way wrong in the decision he reached. There was also no other compelling reason to allow an appeal to be heard. Accordingly, I refused the PTA Application and Mr. Hancock's application for a stay of execution of the Possession Order.

The Bankruptcy Appeal

72. The parties agreed that if I refused Mr. Hancock's PTA Application, the Bankruptcy Appeal would only be relevant as to costs. This is because the effect of the monetary judgment given by HHJ Hodge QC was that the contractual rights under the Facility on which Promontoria founded its Statutory Demand merged in that judgment, such that it no longer had a right to demand payment based on those contractual rights. Promontoria accepted that it would have to present a new statutory demand in reliance on the money judgment in the event that it might wish to bankrupt Mr. Hancock.
73. As it is, I was told that there was already an extant bankruptcy petition pending against Mr. Hancock brought by another Promontoria group company to which Mr. Hancock is also indebted, namely Promontoria (Chestnut) Limited. In the circumstances, Mr. McWilliams accepted that the appropriate course of action for Promontoria to take following dismissal of the PTA Application would be to give notice to support that bankruptcy petition.
74. As indicated at the start of this judgment, the core reasoning of DDJ Williams' Set Aside Judgment turned on the fact that the signature and name of Promontoria's signatory to the Deed of Assignment had been redacted. DDJ Williams held that Mr. Hancock's inability to verify the credentials and authority of the signatory on behalf of Promontoria gave rise to a dispute on substantial grounds with respect to whether the Deed of Assignment had been validly executed so as to transfer AIB's rights under the Facility to Promontoria.
75. On behalf of Promontoria, Mr. McWilliams' main contention was that DDJ Williams was wrong as a matter of law in focussing on the execution of the Deed of Assignment by Promontoria. He contended that if the transfer of a debt takes place by a deed, it is only necessary for the deed to be executed by the transferor (AIB). He therefore submitted that Mr. Hancock's inability to verify the identity and authority of the signatory on behalf of Promontoria was irrelevant.
76. That argument turns on Section 136 of the Law of Property Act 1925 ("Section 136"), the relevant provisions of which are 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.”

The reference to the Trustee Act should be read subject to CPR Part 86 which now provides for stakeholder claims.

- 77. It is manifest that Section 136 only refers to “an absolute assignment by writing under the hand of the assignor” which, when coupled with notice to the debtor, will constitute an effective assignment of a debt at law. It is also the case that in contrast with the provision relating to the assignor, there is no express requirement under Section 136 for the assignment also to be executed by the assignee.
- 78. However, I consider that it is inherent in Section 136 that in addition to satisfying the requirements expressly set out in the section, the written document said to constitute the assignment must itself be legally effective as between transferor and transferee.
- 79. That would be so, for example, if a simple purchase and sale contract between two parties, which was intended to be legally binding, was executed by both parties and was supported by consideration. But I do not see how, for example, in the case of such a contract which was intended to be binding only when signed by both parties, a transferee who had not signed the contract (and so would not, without more, be bound) could nonetheless claim that merely because the transferor had signed, notice could be given to the debtor, and title to the debt would thereupon validly pass to him.
- 80. It is, of course, possible for a deed to be legally effective to transfer a debt notwithstanding that it is executed only by the transferor and is unsupported by consideration. That would be the case, for example, with a deed poll by which the transferor intends he should be bound on execution and delivery by himself alone. But just because a transfer is done by a deed, it does not necessarily follow that it will be legally effective to transfer the debt if only signed by the transferor. Whether that is so will depend upon whether the transferor intended to be bound once he alone had executed and delivered the deed: see e.g. Bibby Financial Services v Magson [2011] EWHC 2495 (QB) at paragraphs [332]-[335].

81. Applying these principles to the instant case, in my judgment it is significant that the Deed of Assignment took the form of a bilateral agreement for a commercial sale and purchase of a portfolio of loans under which both parties (AIB and Promontoria) had rights and obligations. As a matter of form, it is also important that the Deed concluded with an attestation clause which stated,

“IN WITNESS WHEREOF this Deed, together with Schedule 1 annexed, has been duly executed and delivered *by the parties to it* on the date set out at the beginning of this Deed.”

(my emphasis)

and the Deed included a place for execution by both AIG and Promontoria.

82. It therefore seems clear to me that, as with most commercial transactions of sale and purchase, the parties to the Deed of Assignment envisaged that it would only be binding as between them when they had both signed it. Given the nature and terms of the document, I see no basis to interpret the Deed of Assignment as signifying any intention on the part of AIB that it would be bound to transfer the loans merely because AIB had executed the deed, irrespective of whether Promontoria did.
83. For completeness I should add that it is possible that even if parties intend that a deed will only become binding when they have both signed it, if a party (A) who has signed it then takes the benefit of the consideration provided by the other party (B), he (A) may be held, as between them, to be bound and liable even though B never actually signed the document. This is the explanation of the old case of Cooch v Goodman (1842) 2 QB 580 to which Mr. McWilliams referred, in which the lessors of a property did not sign an indenture *inter partes*, but the lessee did sign and went into occupation and enjoyed the premises for the entire ten year term of the lease. When the lessee was sued under the repairing covenant for a lack of repair at the end of the lease he sought to rely upon the fact that the lessor had not executed the indenture. It was held that where there had been no failure of consideration, the lessee who had executed the indenture was bound by the covenant and could be sued, even though the lessor had not executed it. But Cooch v Goodman was a case on particular facts which have no obvious connection to the facts of the instant case, and it is not authority for the proposition that every deed *inter partes* will be legally effective even though one of the parties who is intended to sign it has not done so.
84. I thus reject Mr. McWilliams’ main argument that it was legally irrelevant to the decision of DDJ Williams whether Promontoria had validly executed the Deed of Assignment or not.
85. That is not to say, however, that I also consider that the law requires the legal assignee of a debt to give the debtor sight of an unredacted version of the instrument of assignment as a precondition of being able to demand payment of the debt. That was the position adopted on behalf of Mr. Hancock before DDJ Williams, but was (in my view rightly) rejected by him.
86. Mr. Sellers supported that argument by reference to the observations of Lord Denning in Van Lynn Developments Ltd v Pelias Construction Co. Ltd [1969] 1 QB 607. The

issue in that case was whether a notice given to the debtor under Section 136 should give the date of the assignment. At page 613B, Lord Denning stated,

“It seems to me to be unnecessary that [the notice of assignment] should give the date of the assignment so long as it makes plain that there has in fact been an assignment so that the debtor knows to whom he has to pay the debt in the future. *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. But the notice itself is good, even though it gives no date.*”

(emphasis added)

87. Mr. Sellers also referred in this respect to the decision of the decision of Murphy J of the High Court of Ireland in English v Promontoria (Aran) Ltd (No.1) [2016] IEHC 662. At paragraph 23, Murphy J stated:

“23. As a condition of granting the plaintiff loan facilities Ulster Bank Ireland Limited required the plaintiff to agree that Ulster Bank Ireland Limited could transfer his loans and the security provided in respect thereof, to whoever it wished, whenever it wished, without his consent and without notice to him. This is a significant power contractually granted by the plaintiff to UBIL. If, as in this case, it purports to exercise that right of transfer, then a complete stranger with whom the plaintiff has no connection can come knocking on his door claiming an entitlement to possession of his property. It appears to the Court that before ceding possession of his property, the plaintiff is entitled to insist that the stranger prove its entitlement to possession by showing that it duly acquired the interest of the bank in his loans and the security underpinning those loans, in particular, the mortgage on the property.”

88. Those dicta may reflect a sense of what good business practice might require when an assignee is dealing with a debtor, but in my judgment they do not represent the law. Section 136 contains no extra condition requiring an assignee to provide a copy of the deed of assignment to a debtor to make good the assignee’s rights to the assigned debt or its rights to exercise the remedies arising from that debt. In that respect I believe that the law is correctly set out in the judgment of Henderson LJ in the Court of Appeal in Hancock v Promontoria (Chestnut) Limited [2020] 4 WLR 100.
89. That case concerned a similar set of facts to the instant case. Mr. Hancock was seeking to set aside a statutory demand served upon him by the assignee (Promontoria (Chestnut)) of some of his property loans which it had acquired from Yorkshire Bank. At an earlier stage in that case, Barling J gave Mr. Hancock permission to appeal from the decision of a District Judge refusing to set aside the statutory demand on the question of whether the deed of assignment was effective to transfer title to the debt claimed to Promontoria (Chestnut), but limited to three points of interpretation of the deed. Those points included the question of whether the definition of assets to be

transferred included the loan to Mr. Hancock, and whether the assignment was not absolute but in some way conditional upon some other agreement.

90. That appeal was then heard and dismissed by HHJ Hodge QC ([2019] EWHC 2646 (Ch)), but permission was given for a second appeal to the Court of Appeal on the basis that it was arguable that HHJ Hodge QC could not have been satisfied as to the proper interpretation of the deed of assignment, and hence its application to Mr. Hancock's loan, in circumstances in which some potentially relevant parts of the deed had been redacted.
91. The Court of Appeal dismissed the appeal. Henderson LJ first directly addressed the issues of interpretation and rejected Mr. Hancock's arguments that the relevant deed of assignment did not apply to his loan or that it was in some way not an absolute assignment. Henderson LJ then addressed the relevance of Section 136 in the following way, at paragraphs [67]-[68],

“67. The significance of section 136(1), in the present context, is that if the Deed of Assignment constituted an absolute assignment by the Bank to Promontoria Chestnut of Mr Hancock's debts to the Bank, then the giving of express notice in writing of that assignment to Mr Hancock on 3 December 2014 had effect, subject only to any prior equities, to transfer the legal title to the debts, together with all legal and other remedies for them, and to enable Promontoria Chestnut to give a good discharge to Mr Hancock for the debts without the concurrence of the Bank. Furthermore, if Mr Hancock had notice that the assignment was disputed by the Bank, or any other person claiming under the Bank, or if he had notice of any other opposing or conflicting claims to the debts, he had two statutory remedies open to him: he could either pay the money into court, or commence a stakeholder claim under CPR Pt 86.

68. There is not a shred of evidence that the Bank has ever disputed the validity of the assignment to Promontoria Chestnut, even though it took place over five and a half years ago, or that Mr Hancock has ever asked the Bank to confirm that it no longer has any claims against him in respect of the debts. Nor has Mr Hancock provided any credible evidence of the existence of any other opposing or conflicting claims to the debts. In those circumstances, he would be fully protected by section 136 if he were to make payment to Promontoria Chestnut, and his assertion that the debt is disputed on substantial grounds has a correspondingly hollow ring to it.”

92. In my judgment, Henderson LJ clearly took the view in paragraph [67] that if Section 136 is complied with, the legal title and all legal and other remedies connected with a debt will be transferred to the assignee, and nothing more needs to be done to enable the assignee to demand payment and pursue any available remedies against the debtor.

93. Those conclusions do not, however, entirely dispose of the appeal. As I understood his submissions, Mr. McWilliams also contended that DDJ Williams was wrong on the facts to conclude that the particular redactions of the signature and identity of the person signing the Deed of Assignment on behalf of Promontoria gave rise to a substantial ground for disputing Promontoria's title to the debt.
94. In this respect it is first important to bear in mind that the context that DDJ Williams was hearing an application by Mr. Hancock to set aside the statutory demand, upon which Mr. Hancock bore the burden of showing that there was a substantial dispute about Promontoria's title to demand payment from: see the comments to this effect by Henderson LJ at the start of paragraph [77] of his judgment in the Promontoria (Chestnut) case.
95. Whether or not a debtor has a sufficient basis for satisfying the court that there is a substantial dispute about the title of the party claiming to be his creditor will depend upon the facts of the particular case. For example, and to take the point made by Henderson LJ in Promontoria (Chestnut) at paragraph [68], if a debtor does not dispute that he owes the debt in question, and if he has done nothing to challenge an assignment of which he was given notice many years earlier, he may well struggle to persuade a court that there are any substantial grounds for disputing that the assignee is entitled to the debt.
96. In the instant case, no such lengthy period had passed since Mr. Hancock had been given notice of the assignment to Promontoria, but neither did Mr. Hancock initially raise any specific issue over the execution of the Deed of Assignment. He simply denied that he had been given notice of the assignment and stated that,
- “I require Promontoria to prove service of the notice, prove the assignment, the terms, conditions and that my account with [AIB] was transferred with it.”
97. Promontoria chose to respond to that challenge, and in its evidence, an asset manager at the external service provider engaged by Promontoria (a Mr. Marcetic) exhibited a copy of the Deed of Assignment. Mr. Marcetic did not suggest, however, that he had any personal knowledge of the circumstances in which the Deed of Assignment had been executed, and Mr. McWilliams confirmed that Mr. Marcetic was not actually present when the Deed of Assignment was signed. Neither did Mr. Marcetic indicate that he had seen a copy of the unredacted executed Deed of Assignment. Mr. Marcetic's evidence therefore did not actually go any way towards showing that the Deed of Assignment had been executed, correctly or at all.
98. Mr. Marcetic simply explained that the copy of the Deed of Assignment which was exhibited had been redacted to preserve “commercially sensitive and confidential” matters which he asserted were of no legitimate concern to Mr. Hancock. His witness statement then stated, (in the context of a Deed of Assignment that applied to loans other than those owing by Mr. Hancock),
- “The signatures of those who executed the Deed of Assignment on behalf of [AIB] and Promontoria have been redacted in order to prevent debtors copying the signatures with a view to seeking to avoid liability.”

99. In fact, and as indicated above, the redaction of the execution details went much further than explained in Mr. Marcetic’s witness statement. Not only the signature, but the entire identity of the signatory on behalf of Promontoria was blanked out, together with the signature and address of the witness.
100. It was this state of the evidence that appears to have enabled counsel at the hearing before DDJ Williams, among many other points raised, to question whether the Deed of Assignment had in fact been properly executed on behalf of Promontoria.
101. The response of DDJ Williams was to note the importance for the parties of the issue of title, reiterating the points made by Murphy J in English v Promontoria (Aran). DDJ Williams then adopted an approach very much along the lines of that taken by Ms. Registrar Barber in Dowling v Promontoria (Arrow) Ltd [2017] BPIR 1477. At paragraphs [31]-[32], the Registrar stated, after referring to Murphy J’s decision,

“[31] ... even applying English law, a creditor claiming title to a debt by way of assignment must prove his title by way of assignment *where such title is put in issue*.

[32] Either way, therefore, whether considered under Irish or English law, the respondent, *having had its title put in issue*, has failed properly to evidence its status as assignee in respect of (and therefore its title to) the debt forming the subject matter of the statutory demand. That of itself gives rise to substantial grounds for disputing the debt.”

(my emphasis)

102. Whilst Mr. Hancock might not have been entitled to demand sight of the Deed of Assignment as a pre-condition to paying the debt (or paying it into court as suggested by Henderson LJ in the Promontoria (Chestnut) case), it seems to me that once the point of the validity of execution had been raised and Promontoria had engaged with it in the evidence, there was nothing wrong with DDJ Williams adopting the approach which he did.
103. In that regard, the fact is that Promontoria was the author of its own difficulties. Faced with the straightforward task of proving its title to the assigned debt, it inexplicably chose to redact more of the Deed of Assignment than could possibly have been legitimate on account of the reasons of confidentiality or security that it gave. Promontoria also did not seek to address the questions raised by its over-redaction by providing any direct evidence of due execution by alternative means from anyone who could say that they had seen the unredacted version and who could identify the signatory and verify their authority (as was subsequently done in advance of the hearing before HHJ Hodge QC).
104. From the other cases to which I have referred, this appears to have been a common practice by the Promontoria companies. Apart from the difficulties which arose in the Promontoria (Chestnut) case, this practice was also criticised in trenchant terms by Mann J in Nicoll v Promontoria (Ram 2) Limited [2019] EWHC 2410 (Ch). Although Mann J was able, on the evidence in that case, to conclude that the assignment of the debt in question had been satisfactorily established, he sounded a

clear warning at paragraph [65] about the risks that Promontoria was taking, commenting that

“If Promontoria wishes to risk success by implementing an overly enthusiastic and inappropriate redaction policy, then to that extent that is a matter for Promontoria. It would be the loser if it turns out badly for it. However, it is also the case that unnecessary and inappropriate redactions are capable of prolonging disputes quite unnecessarily, and the court has its own interests in making sure that that does not happen.”

105. I agree with Mann J. The result of Promontoria’s excessive redaction in the instant case was that DDJ Williams made an assessment that the evidence adduced by Promontoria was unsatisfactory, and that issues remained to be resolved that were unsuitable for resolution in the bankruptcy proceedings. For the reasons that I have given, I cannot conclude that this assessment of the evidence was obviously wrong or inappropriate.
106. The final point taken on appeal by Mr. McWilliams was that DDJ Williams wrongly rejected an argument that Promontoria was in any event entitled to make the Statutory Demand against Mr. Hancock on the basis of a separate covenant to pay which was contained in the Charges over the Properties. Mr. McWilliams pointed out that the Charges had been transferred to Promontoria and registered in its name at HM Land Registry. Mr. McWilliams also pointed to section 114 of the Law of Property Act 1925 which he submitted had the effect that unless a contrary intention was shown, a deed transferring a mortgage is deemed to carry with it the right to demand and sue for the unpaid mortgage money.
107. These points were briefly mentioned in passing in counsel’s skeleton argument for the hearing before DDJ Williams, but seemingly only in the context of supporting the point that the Deed of Assignment must have been validly executed and effective to transfer title to the debts owed by Mr. Hancock. It was asserted that had this not been so, the Charges would not have been registered.
108. To the extent that this point was raised as a support for the conclusion on the validity and effect of the Deed of Assignment, I do not think that is of sufficient weight to override the conclusion that DDJ Williams reached having regard to the inadequacy of the direct evidence of due execution of the Deed of Assignment.
109. It is by no means clear to me that any separate point was advanced to DDJ Williams that the Charges contained an independent right of action which would support the Statutory Demand, and DDJ Williams did not deal with such point in his Set Aside Judgment. Even if it were appropriate to permit such point to be raised for the first time on appeal, in any event I consider that there are considerable difficulties in its way.
110. The first, and decisive, point to make in this respect is that although the Statutory Demand referred to the existence of the Charges by way of background, the actual demand was made under the terms of the Facility, and not under the separate covenant in the Charges. Instead, as is conventional and required by the Insolvency Act and Rules, Promontoria deducted what it estimated was the present value of its security

under the Charges, and restricted its Statutory Demand to the (unsecured) balance owing under the Facility.

111. The second, and related, point is that the bankruptcy process is a class remedy for unsecured creditors. I therefore have some considerable doubt that it is open to a secured creditor who wishes to retain its security (as Promontoria plainly did) to serve a statutory demand on a debtor in reliance on a provision in the mortgage for payment of the secured debt without waiving the security for the benefit of the unsecured creditors of the bankrupt's estate. As I have indicated, Promontoria did not do that.
112. In the circumstances, I do not consider that the decision of DDJ Williams was obviously wrong by reason of any failure to have regard to the covenant in the Charges.
113. I therefore dismiss Promontoria's appeal against DDJ Williams' decision.

Further steps

114. I will adjourn this matter and extend all necessary time limits to a date to be fixed upon which I will hear submissions on costs and any other consequential matters.