IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
APPEALS (ChD)

Neutral Citation No: [2020] EWHC 104 (Ch)

Bristol Civil Justice Centre
2 Redcliff Street
Bristol

Date: 30 January 2020

Case No: 8BS0087C

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

PROMONTORIA (OAK) LIMITED

Claimant/Respondent

-and-

(1) NICHOLAS MICHAEL EMANUEL
(2) NICOLA JANE EMANUEL

Defendants/Appellants

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Mr Hugh Sims, QC and Mr Oliver Mitchell (instructed by **Brains Solicitors**) for the **Appellants**
Mr Jamie Riley, QC and **Mr Ashley Cukier** (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing date: 3 December 2019

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Judgment

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

Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The history of this appeal

1. On 25 July 2019, I heard an application for permission to appeal a decision of Mr Recorder Willetts made on 16 July 2018. In the proceedings before Mr Recorder Willetts, the Claimant, Promontoria (Oak) Limited (**Promontoria Oak**), claimed as the assignee of Clydesdale Bank (the **Bank**) debts owed by the Defendants, Mr and Mrs Emanuel (the **Emanuels**). The assignment relied upon was a deed of assignment dated 16 September 2016 (the **Deed of Assignment**). Promontoria Oak's claim succeeded before Mr Recorder Willetts (who I shall describe as the Judge), but on the basis of secondary evidence regarding the assignment between the Bank and Promontoria Oak. Essentially, a significantly redacted assignment (the **Redacted Assignment Deed**) was produced to the Court and it was on the basis of this – and some other evidence – that the Judge concluded, in the face of opposition from the Emanuels, that Promontoria Oak's title to the debts had been established. The Judge, in an order dated 18 July 2018, amongst other things ordered that judgment be entered in favour of Promontoria Oak (the **Order**).

2. The grounds of appeal were six in number, the first three grounds being very closely related (**Grounds 1 to 3**). Grounds 1 to 3 concerned the extent to which the Judge erred in failing to admit properly into evidence the complete Deed of Assignment by way of which Promontoria Oak's rights against the Emanuels arose or, to put the same question another way, whether the Judge was wrong in concluding (as he did) that Promontoria Oak could succeed in its case against the Emanuels without having the original of the Deed of Assignment in evidence before the court, in circumstances where the validity of that document was in issue and where the Emanuels were not accepting that the secondary evidence of the Deed of Assignment disposed of their contentions in relation to it.

3. More specifically, Grounds 1 to 3 are as follows:

   (1) *Ground 1*. The Recorder was wrong to admit into evidence the Redacted Assignment Deed.

   (2) *Ground 2*. Alternatively to Ground 1, the Recorder was wrong to conclude the Redacted Assignment Deed proved title.

   (3) *Ground 3*. Overall, the Recorder was wrong to conclude that Promontoria Oak had adduced sufficient evidence to prove chain of title.

4. I gave permission to appeal in relation to Grounds 1 to 3, permission having been refused on the papers by Zacaroli J. Like Zacaroli J, I declined to give permission to appeal in relation to the remaining grounds (**Grounds 4 to 6**) of appeal, and it is unnecessary for me to consider Grounds 4 to 6 any further in this Ruling.

5. At the hearing on 25 July 2019, there was a further application before me to admit new evidence in the appeal and – if that application were successful – to introduce a seventh ground of appeal – **Ground 7**. That application could not be heard on 25 July 2019, because Promontoria Oak (entirely properly) required time to adduce evidence in

response to that produced by the Emanuels. The application to adduce new evidence was heard before me on 29 October 2019 and, for the reasons I gave on that occasion,[1] I declined to introduce Ground 7 into the appeal and refused to admit the new evidence said to be in support of it.

6. Grounds 1 to 3 of the Emanuels' appeal were heard before me on 3 December 2019. Also before me was a Respondent's Notice on behalf of Promontoria Oak contending that the Judge's Order should be upheld. I reserved my judgment, and this is my reserved judgment.

(2) Overview of the background facts

7. In order to understand the nature of and basis for this application, it is necessary to set out some of the background facts:

(1) The Emanuels were customers of the Bank and – the details are irrelevant – borrowed money from the Bank for the purposes of their business, this borrowing being secured by a legal charge dated 2 October 2008 (the **Legal Charge**) over a property in Cornwall.

(2) The Legal Charge contained the usual statutory powers of sale and of appointing a receiver where a demand for the secured amounts – as defined in the Legal Charge – had gone unsatisfied. The Legal Charge contained an unfettered right in the Bank to assign its rights.

(3) In April 2012, the Bank wrote to the Emanuels giving notice that – in circumstances where loan repayments were not being made – it was making formal demand for repayment of the entire outstanding loan. That repayment was not made.

(4) On 24 June 2016, the Bank wrote to the Emanuels notifying them that – amongst other debts – their loan together with "all related rights and benefits, including, without limitation, guarantees and security" had been sold to Promontoria Holding 170 BV. This company – **Promontoria 170** – is, like Promontoria Oak, a company within the Cerberus group of companies. It is, however, to be differentiated from Promontoria Oak. Promontoria Oak and Promontoria 170 are different companies and distinct legal persons.

(5) The full details of the transfer of this loan, together with other loans, was <u>not</u> before Mr Recorder Willetts. As is apparent from Grounds 1 to 3, limited documentation evidencing the chain of title between the Bank and Promontoria Oak was before the Judge at trial. It will be necessary to consider precisely what was in issue before the Judge and what evidence was placed before him. I do so in Section B below.

[1] [2019] EWHC 2898 (Ch).

B. THE HISTORY OF THE PROCEEDINGS AND THE DECISION OF MR RECORDER WILLETTS

(1) The pleadings

8. Promontoria Oak's claim against the Emanuels was articulated in Particulars of Claim dated 4 April 2017. Promontoria Oak's title was asserted in paragraph 1 as follows:

> "By a deed of assignment dated 16 September 2016, between (i) National Australia Bank Limited (as seller), (ii) [the Bank] and (iii) [Promontoria Oak] (as buyer), all the rights and obligations under the facilities and security referred to herein were assigned to [Promontoria Oak]."

9. Paragraph 1 of the Emanuels' Defence and Counterclaim put this in issue in the following way:

> "…it is not admitted that all rights and obligations under the facilities and securities referred to in the Particulars of Claim, including the Legal Charge…were assigned to [Promontoria Oak], pursuant to the Deed of Assignment…as alleged or at all:
>
> (i) [Promontoria Oak], acting through its appointed LPA Receivers, has refused to produce an un-redacted copy of the aforementioned Deed of Assignment. A copy of the [Redacted Assignment Deed] is attached to this Defence at Schedule 1. Parts of the Assignment have been redacted, so that the [Emanuels] are unable to admit or deny the effect of that document and put [Promontoria Oak] to strict proof.
>
> …
>
> (iv) As [Promontoria Oak] specifically pleads in paragraph 1 of the Particulars of Claim that all rights and obligations have been assigned to [Promontoria Oak], the onus of proof lies with [Promontoria Oak] to prove the validity of the assignment and any transfer of obligations, and in the premises, the court is invited to stay the possession proceedings until such time as [Promontoira Oak] produces an un-redacted copy of the Deed of Assignment…"

10. In its Reply, Promontoria Oak said this:

> "4.1 It is admitted and averred that [Promontoria Oak] has produced a redacted copy of the Deed of Assignment for the purposes of this claim. The sections of the Deed of Assignment that have been redacted contain commercially sensitive material that have no bearing upon the existence and effectiveness of the Deed of Assignment and/or any rights or obligations arising thereunder and [Promontoria Oak] has a legitimate expectation that the confidentiality of such parts of the Deed of Assignment shall be protected in these – and other – proceedings where such information is irrelevant to [the] claim and where such material in no way prevents the just disposal of the proceedings.
>
> 4.2 For the avoidance of doubt, it is therefore denied, insofar as it is alleged, that the Defendants are unable to admit or deny the effect of the Deed of Assignment for the purpose of these proceedings. The [Redacted Assignment Deed] contains all the relevant provisions governing the assignment of the Facilities to [Promontoria Oak]; and, conversely, none of the redacted sections of the Deed of Assignment pertains to the effectiveness of the assignment of the Facilities themselves."[2]

[2] This point was also made in Promontoria Oak's Respondent's Notice.

(2) Disclosure

11. The Claimant made standard disclosure and to this end provided a list of documents. The list was in standard form:

    (1) It contained a list of documents that Promontoria Oak did not object to the Emanuels inspecting. The list did not include the Deed of Assignment, not even the Redacted Assignment Deed – although, as has been seen, this document was already in the Emanuels' possession.[3] The list did contain other letters, relevant to the assignment, which I shall refer to further below.

    (2) It identified various classes of document to which Promontoria Oak objected to inspection. It is unnecessary to set these out: all that needs to be noted is that none of these classes was defined in such a way as to include the Deed of Assignment.

12. Thus, the Deed of Assignment did not feature – as it should have done, one way or another – in Promontoria Oak's list of documents.

(3) Other interlocutory applications

13. It is important to note that there were no other interlocutory applications made regarding the Deed of Assignment. By way of example, the Emanuels could have – but did not – applied for specific disclosure of the Deed of Assignment.

14. There was an application for third party disclosure against the Bank, made by Promontoria Oak. This was to deal with certain allegations made by the Emanuels in their Defence which related to the Bank's conduct prior to the assignment.[4] This application resulted in the production of a number of documents by the Bank, but not of the Deed of Assignment.

(4) The proceedings before Mr Recorder Willetts

(a) The dispute regarding the assignment was "live" before the Judge

15. The trial of the proceedings came before Mr Recorder Willetts and was heard by him on 14, 15 and 16 May 2018.

16. The issue of the assignment was clearly live before Mr Recorder Willetts. Not only was this the case by reason of the pleadings,[5] the point that the assignment was challenged was also made by Mr Emanuel in his witness statement and in his evidence to the court; and by his counsel in both written submissions and orally.

(b) The evidence before the Judge regarding the assignment

17. The evidence before the Judge was as follows:

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[3] See paragraph 9 above.

[4] See paragraphs 8 and 9 of the evidence in support of the application of Ms Julie Burton, a legal executive at the solicitors of Promontoria Oak.

[5] See paragraphs 8 to 10 above.

(1) On 24 June 2016, the Bank wrote to the Emanuels explaining that there would be an assignment from the Bank to Promontoria 170:[6]

"As a customer of [the Bank], you will be aware of the decision in 2012 to withdraw from the UK Commercial Real Estate market ("CRE") at that time. As part of this decision, [the Bank] have now agreed to a sale of part of its CRE portfolio.

We are, therefore, writing to advise you that we have sold your facility/facilities (together will all related rights and benefits, including, without limitation, guarantees and security) to […Promontoria 170…]. In due course, we are expecting the transfer to take place on 16/09/2016 and we will write to you again at the point of transfer to confirm this."

(2) On 16 September 2016 – which is the date mentioned in the 24 June 2016 letter – the Bank wrote as follows to the Emanuels:[7]

"Further to our letter dated 24/06/2016, we are writing to confirm that [the Bank] have completed the sale of all amounts owing to another legal entity, namely [Promontoria Oak], an affiliate of Cerberus Global Investors (and successor in title to [Promontoria 170], the entity referred to in our letter dated 24/06/2016). Accordingly, all of the rights and benefits in, to and under:

- your loans (the account details of which are set out below) (the "Loan Accounts");
- the loan agreements, facility letters and any other credit documentation in connection with the Loan Accounts (the "Loan Agreements"); and
- all related security, mortgages, guarantees, other collateral and other rights in connection with the Loan Accounts and Loan Agreements (such security documents, together with the Loan Accounts and the Loan Agreements being the "Loan Assets"),

in each case have been transferred to [Promontoria Oak] (the "Transfer") with effect on and from 16/09/2016 (the "Transfer Date"). This letter constitutes notice to you of the Transfer and that, from the Transfer Date, all payments, amounts and obligations owing by you or that may become due or owing in respect of the Loan Assets will be owed to [Promontoria Oak]. Please note that, in respect of the Loan Assets, the balance transferred to [Promontoria Oak] will include the rights to all outstanding amounts, including all principal, interest, costs, charges and expenses (together with, as applicable, any third party professional fees)…"

(3) On the same date, the assignment was executed. Both the Judge and I only have the Redacted Assignment Deed. Based upon this document:

(a) The assignment is between the Bank and Promontoria Oak.[8] Promontoria 170 is not a party.

(b) The Redacted Assignment Deed refers to a **Sale and Purchase Agreement**. It would appear from the capitalisation of this term that this was a defined term under the assignment. It looks as if the term "Sale and Purchase Agreement" is defined in clause 1.1 of the assignment. However, it is not

[6] This is referred to in paragraph 7(4) above. Emphasis added.

[7] Emphasis added.

[8] There was another bank assigning rights to Promontoria – National Australia Bank Limited – but nothing turns on this.

possible to be sure, for the term defined in clause 1.1 (sitting between the term "Relevant Loan Asset" and the term "Settlement Date") is entirely redacted. Although "Sale and Purchase Agreement" fits alphabetically, it would only be an inference to say that this redacted part of the assignment is defining "Sale and Purchase Agreement".

(c) Nevertheless, it is clear from clause 1.1 of the assignment that the Sale and Purchase Agreement is the primary source of definitions in the assignment:[9]

> "Words and expressions used in this Deed shall (unless otherwise expressly defined) have the meaning given to them in the Sale and Purchase Agreement and…"
>
> The clause then goes on to define other terms, presumably not defined in the Sale and Purchase Agreement. The Sale and Purchase Agreement was not disclosed in the proceedings, nor was it listed in Promontoria Oak's list of documents.[10]

The Judge commented on these redactions as follows:[11]

> "…There are a number of observations I can make about this document. Firstly, the internal page numbering jumps from page 8 to 27 without explanation. Secondly, Schedule 1, entitled "relevant loan assets" included in the assignment is virtually unreadable, due to the small print. What appears to be an enlarged copy…does refer to the "Emanuel connection" and the [Emanuels'] names. The specific account numbers do not however feature. Thirdly (in my view unnecessarily) the signatures on the execution page have also been redacted."

(4) In her statement in support of the third party disclosure application,[12] Ms Burton noted (in paragraph 7.3 of her statement) that "[b]y way of Deed of Assignment dated 16 September 2016, the Bank transferred all rights and obligations arising under the Facilities, as secured by the Mortgage, to [Promontoria Oak]."

(5) Promontoria was also registered as the holder of the Legal Charge in the records of HM Land Registry, which – it is to be inferred – could only have occurred by way of the assignment of the Bank's rights to Promontoria Oak.

(c) Attack on the assignment by the Emanuels

(i) The secondary attack

18. Before the Judge, the Emanuels mounted a two-fold attack on Promontoria Oak's title to sue. The secondary – less extreme – attack was that, even ignoring the fact that Promontoria Oak had failed to disclose certain documents (notably, the unredacted Deed of Assignment and the Sale and Purchase Agreement), even on the face of the material before the Judge Promontoria Oak was unable to show a chain of title from the Bank to

[9] Emphasis added.

[10] See paragraph 11 above.

[11] At [16] of the Judgment.

[12] See footnote 4 above.

it. According to the Emanuels' written submissions, "even if the court might be willing to entertain proof of a claim other than by way of production of the original Deed, the evidence adduced remains woefully lacking".[13] The essential point was that whereas the letter from the Bank to the Emanuels dated 24 June 2016 referred to a transfer to Promontoria 170,[14] the transfer was in fact to Promontoria Oak.[15] Of course, it is perfectly possible for there to have been no assignment at all to Promontoria 170 and only an assignment to Promonotoria Oak; or else an assignment to Promontoria 170 followed by a re-assignment back and then an assignment to Promontoria Oak; or some other route by which the Bank's rights against the Emanuels came to be vested in Promontoria Oak. The Emanuels' point, however, was that it was as possible for the assignment to Promontoria Oak to have been defective, in that the rights against the Emanuels had already been assigned by the Bank to Promontoria 170. Without disclosing all of the documents regarding the assignment, Promontoria Oak could not – according to the Emanuels – show proper chain of title from the Bank to Promontoria Oak.

(ii) The primary attack

19. The Emanuels' primary position was more extreme. Through their counsel, the Emanuels contended that Promontoria Oak's failure to produce the Deed of Assignment in its original form meant that the claim had to fail, even if, on the face of it, the documents showed a good chain of title. In written submissions, the point was put thus:

> "12. The Emanuels have put in issue the validity and enforceability of the Deed of Assignment…They have only agreed to the redacted copy of the Deed being included in the trial bundle without prejudice to that contention.
>
> 13. Promontoria suggest in their pleading that commercial sensitivity/confidentiality reasons have dictated the redactions they have made and they refuse to disclose any further documentation…
>
> 14. The simple point here is that it is not good enough, when a challenge is made to the validity of a document, to seek to adduce a heavily redacted copy on grounds of alleged commercial confidentiality (confidential communications has never been a ground for claiming privilege: see commentary in The White Book, Vol 1 at 31.3.36). Furthermore, those grounds are not accepted by the Emanuels, and are not supported by the evidence that Promontoria have served.
>
> 15. The Emanuels are entitled to see the originals of all relevant documents which are challenged, without any redactions, yet Promontoria do not seek to produce such documents as an exhibit to the evidence of Mr Breen [the witness called by Promontoria Oak].
>
> 16. It follows their claim must fall at the first hurdle.
>
> 17. The court could make that determination at the outset or having heard evidence."

[13] See paragraph 23 of the Emanuels' written submissions.

[14] See paragraph 17(1) above.

[15] See paragraphs 17(2) and 17(3) above.

(iii) The Judge's approach

20. The Judge decided not to determine the point at the outset, but to admit the evidence of the assignment provisionally, reserving his position, hear all the evidence and then give a single, substantive, judgment.[16] In other words, the Judge admitted the Redacted Deed of Assignment, but reserved to later judgment its admissibility and/or weight.

21. In his written judgment dated 16 July 2018, Mr Recorder Willetts found in favour of Promontoria Oak. It obviously follows from this that the Judge rejected both the primary and the secondary attacks on the assignment made by the Emanuels. The essential question on this appeal is whether he was right to do so.

22. As has been described in paragraph 3 above, the Emanuels were given permission to appeal on the three grounds of appeal there set out. I consider that Grounds 2 and 3 in substance go to the same point, namely whether – on the evidence before him, including not only the Redacted Assignment Deed, but all the other evidence that I have described in paragraph 17 above – the Judge was entitled to conclude that the Bank's rights against the Emanuels had validly been assigned to Promontoria Oak. I propose to consider Grounds 2 and 3 first.

23. Ground 1 raises the question of whether, even assuming that the Judge was entitled to conclude, as he did on the evidence before him, that on that evidence there had been a valid assignment, this was a conclusion not open to him because there was additional evidence – for example, the unredacted Deed of Assignment and the Sale and Purchase agreement – which the Emanuels had not seen and which the court could not take into account. It seems to me that Ground 1, so framed, falls logically to be considered after Grounds 2 and 3.

C. GROUNDS 2 AND 3

(1) Introduction

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

25. In *Re B (Children)*, Lord Hoffmann put the point in the following way:[17]

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

[16] Transcript at p.4.

[17] [2008] UKHL 35 at [2].

26. There is an obvious correlation between: a judge's findings of fact; the evidence adduced by the parties before the judge; and the legal procedures that exist for ensuring that the evidence that the parties require, in order to make good their contentions, properly comes before the court. This correlation is properly the substance of Ground 1.

27. The substance of Grounds 2 and 3 involves the question whether, in light of the evidence that was adduced before him, and ignoring the fact that further evidence might have been adduced, the Judge was entitled to conclude, as he did, that the Bank's rights against the Emanuels had been assigned to Promontoria Oak. That was a question to be decided on the balance of probabilities, the burden resting on Promontoria Oak as the party asserting the right.

28. Essentially, Grounds 2 and 3 reflect the secondary argument that the Emanuels made to the Judge,[18] and which the Judge rejected. It is necessary to begin with the Judge's findings.

(2) The Judge's findings

29. The Judge set out the evidence very clearly in his Judgment. He described the Redacted Assignment Deed,[19] the letter of 24 June 2016,[20] and the subsequent letter of 16 September 2016[21] clearly.

30. As regards the Redacted Assignment Deed, having described and (to a certain extent[22]) criticised the redactions, he observed:[23]

> "Nevertheless, from what I can see, the document is a formal and properly worded deed of assignment. Clauses 3, 4 and 5 have been redacted, but what remains is sufficient for me to draw that conclusion. There does not appear to be any missing pages[24] and there is a common reference number to the bottom left of each page which suggests that it is all one document. The [Emanuels] are named in the accompanying schedule along with the reference "Emanuel connection", which has been used by the Bank previously. The assignment, at clause 2.1, provides, *inter alia*, that "…the [Bank] assigns absolutely to [Promontoria Oak] the following in relation to each such specified loan asset…all its rights, benefits and interests, in or to each relevant document…each of its rights in its capacity as Lender…to demand, sue for, recover, receive and give receipts for all monies payable or to become payable to, in its capacity as Lender (howsoever and whenever arising)…the right to exercise all rights and powers…in its capacity as Lender…in connection with the relevant documents…". The deed defines "specified loan assets" as that referred to in schedule 1 and "relevant documents" as including, in respect of specified loan assets, "each facility, loan or credit letter or agreement". In my judgment, I can safely infer that the deed was

[18] See paragraph 18 above.

[19] At [16] of the Judgment.

[20] At [14] of the Judgment.

[21] At [14] of the Judgment.

[22] See the passage quoted at paragraph 17(3) above.

[23] At [17] of the Judgment. Emphasis added.

[24] Although the Judge referred to pages that were missing from the Redacted Assignment Deed (see paragraph 17(3) above), it is clear that these do not relate to the substance or terms of the assignment, but comprised a schedule of the rights being assigned. Naturally, far more than merely the Bank's rights against the Emanuels was being transferred, and it seems to me an an entirely proper inference – which the Judge appears to have drawn – that the omitted pages simply specified debts that were altogether irrelevant to the present proceedings, because they concerned debts owing by persons other than the Emanuels.

duly executed as the signatories and witnesses have printed their names in manuscript save for [Promontoria Oak's] attorney, whose name is rubber stamped onto the deed, but has the same effect. Furthermore, I am also satisfied that the parties to the [Redacted Assignment Deed] consider it to be a binding agreement as evidenced by the correspondence firstly from the Bank and then from [Promontoria Oak] to the [Emanuels] that I have previously identified."

31. The Judge also relied upon the description of the assignment provided by Ms Burton.[25]

32. The Judge expressly considered the Emanuels' argument that chain of title had not been proved, in paragraphs 28 to 31 of the Judgment. Although the Judge was referred to other cases involving companies in the Promontoria group (which he considered fully and fairly) I am unsure how far such cases can assist in what is, ultimately, a question of fact in this case. The Judge concluded that "[o]n the face of the deed, there is no intervening involvement of any other company and it seems to me that there can be no further relevant documentation in that regard…I am satisfied that there are no further relevant documents required to prove [Promontoria Oak's] title to commence these proceedings. The [Redacted Assignment Deed] in my judgment provides the full picture as to the sale and purchase of the relevant facilities. I have already observed that the parties to the [assignment] are in no doubt about its validity and enforceability, as evidenced by my review of the correspondence immediately preceding and following its execution. For these reasons, this objection must also fail."[26]

(3) Conclusion in relation to Grounds 2 and 3

33. Clearly, an appellate court must be slow in interfering with the findings of fact of a trial judge. As was said by Birch J in *R v. Madhub Chunder*, "[f]or weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited".[27]

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

35. The three criticisms that I would make are as follow:

[25] At [21] of the Judgment. The evidence of Ms Burton is described at paragraph 17(4) above.

[26] At [29] and [31] of the Judgment.

[27] (1874) 21 WR Cr 13 at 19.

(1) I do not consider that it was appropriate for the Judge to place any weight on the evidence of Ms Burton. Ms Burton's statement was in support of an interlocutory application to obtain third party disclosure from the Bank. I do not consider that her statement can be regarded as probative of anything regarding the assignment. Her description of the assignment simply set out the background for the purposes of the disclosure application and cannot have weight beyond that.[28]

(2) The involvement of Promontoria 170 in the assignment – and clearly there was such an involvement – required further analysis. Whilst I accept that, on the evidence before him, the Judge was entitled to reach the conclusion that he did, there is undoubtedly an open question as to precisely what Promotoria 170's role was in the transaction and the extent to which this affected Promontoria Oak's title.

(3) The Judge, quite rightly, considered that the Redacted Deed of Assignment showed sufficient evidence of an assignment. Nevertheless, he never sought to understand the complete transaction, including the Sale and Purchase Agreement that obviously informed the terms of the assignment.[29]

36. Notwithstanding these criticisms, on the facts before him, the Judge was clearly entitled to reach the conclusion that he did, and there is no proper basis to overrule his decision in these regards. Grounds 2 and 3 of the appeal must fail.

D. GROUND 1

(1) Introduction

37. The question central to Ground 1 is whether the Judge was entitled to reach the conclusion that he did given the evidence that was not before the court.[30] When seeking to determine the facts, a judge will obviously have regard to the relevant and admissible evidence before the court. In weighing that evidence, he or she will take account of the imperfections in the evidence. Clearly, this is an important matter of judgment. The law is full of guidance as to how evidence should be weighed, but unsurprisingly contains very few hard-edged legal rules. Thus, for example, there is the well-known guidance of Leggatt J in *Gestmin* regarding the memory of witnesses;[31] the equally well-known dictum of Lord Goff in *Grace Shipping* regarding the relative importance of witnesses' recollection when compared with contemporary document;[32] and many statements as to what inferences may be drawn where a party could have, but did not, call a particular witness.

38. In short, the evaluation of the imperfections in the evidence before the court is as much a question of judgment as the evaluation of the evidence actually before the court: indeed, in many cases, these questions are simply two sides of the same coin.

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[28] As will be seen when I come to consider Ground 1, the Judge similarly relied on the evidence of Ms Burton. For the reasons here given, I consider that such reliance was misconceived.

[29] See paragraph 17(3)(b) above.

[30] Ground 1 essentially corresponds to the Emanuel's primary attack on the assignment, described in paragraph 19 above.

[31] *Gestmin SGPS SA v. Credit Suisse (UK) Limited*, [2013] EWHC 3560 (Comm) at [15]*ff*.

[32] *Grace Shipping v. Sharp*, [1987] 1 Lloyd's Rep 207 at 215.

39. In this case, as I have described,[33] the Emanuels disputed the validity and enforceability of the assignment and contended that, unless Promontoria Oak produced the original Deed of Assignment, Promontoria Oak's claim must fail "at the first hurdle". The legal principle that the Emanuels relied upon in support of this contention was the so-called "best evidence" rule. Before considering the decision of the Judge, it is necessary to consider the exact nature of this "rule".

(2) The "best evidence" rule

40. *Phipson* says this by way of introduction to the "best evidence" rule:[34]

> "The maxim that "the best evidence must be given of which the nature of the case permits" was once treated as expressing the great fundamental principle upon which the law of evidence depends. Thus, Lord Hardwicke went so far as to say that "the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will permit". But although this maxim played a conspicuous part in the early history of the subject, today it is of little practical importance. Indeed, the Divisional Court has described it as having gone by the board long ago, and one modern text refers to it as an "evidentiary ghost"."

41. In *R v. Governor of Pentonville Prison, ex parte Osman*,[35] the Divisional Court expressed the view that it "would be more than happy to say goodbye to the best evidence rule",[36] but that the rule was "still not quite dead".[37] The Divisional Court said this about the nature and content of the "best evidence" rule:[38]

> "But although the little loved best evidence rule has been dying for some time, the recent authorities suggest that it is still not quite dead. Thus, in *Kajala v. Noble*, (1982) 75 Cr App R 149, 152, Ackner LJ said:
>
> > "The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one's hands, one must produce it; that one cannot give secondary evidence by producing a copy."
>
> In *R v. Wayte*, (1982) 76 Cr App R 110, 116, Beldam J said:
>
> > "First, there are no degrees of secondary evidence. The mere fact that it is easy to construct a false document by photocopying techniques does not render the photocopy inadmissible. Moreover, it is now well established that any application of the best evidence rule is confined to cases in which it can be shown that the party has the original and could produce it but does not."
>
> What is meant by a party having a document available in his hands? We would say that it means a party who has the original of the document with him in court, or could have it in court without any difficulty. In such a case, if he refuses to produce the original and can give no reasonable explanation, the court would infer the worst. The copy should be excluded. If, in taking that view, we are cutting down still further what remains of the best evidence rule, we are content…"

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[33] See paragraph 19 above.

[34] Malek (ed), *Phipson on Evidence*, 19th ed (2018) at [7-37].

[35] [1990] 1 WLR 277.

[36] At 308.

[37] At 308.

[38] At 308.

42. Section 8 of the Civil Evidence Act 1995 provides as follows:

"**Proof of statements contained in documents**

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved –

(a) by the production of that document, or

(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it, authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original."

43. The most recent case to consider the "best evidence" rule is the decision of the Court of Appeal in *Masquerade Music Limited v. Springsteen*.[39] The claimant in the action and the respondent in the appeal was Mr Bruce Springsteen, the well-known American singer, songwriter and musician. Mr Springsteen sought damages and injunctive relief against the defendant appellants claiming infringement of his music and literary copyrights. The defendant appellants put Mr Springsteen to proof of his title to the copyrights. The question of how this might be proved was the question before the Court of Appeal. Jonathan Parker LJ (with whom the rest of the court agreed) put the point as follows:

"9. It is common ground in this appeal (as it was before the judge) that section 36(3) of the Copyright Act 1956 required that, to be effective, any assignment of the copyrights from the partnerships to the limited companies had to be in writing and signed on behalf the partnerships; and that by requiring Mr Springsteen to prove his title the appellants placed on him the onus of proving that these requirements had been met.

10. The best way of discharging that onus would, of course, have been for Mr Springsteen to produce the written assignments at the trial. In the event, however, he did not do so. Rather, he led evidence that inquiries as to their whereabouts had proved fruitless and on that basis he invited the court to admit secondary evidence as to their existence and their terms in the form of oral evidence from a Mr Jules Kurz (a New York lawyer with experience of the popular music industry) who was instructed by Mr Appel and Mr Cretecos to effect the transfer of assets from the partnerships to the limited companies, and from Mr Appel himself. The appellants objected that secondary evidence of the contents of a written document is only admissible where the party seeking to rely on the document can satisfy the court (and I quote from paragraph 45 of the appellants' skeleton argument at the trial) "that all possible measures had been taken to find the relevant documents", and that Mr Springsteen had failed to discharge that burden. It was accordingly submitted on behalf of the appellants that secondary evidence of the assignments was not admissible. However, the judge concluded that such evidence was admissible, on the footing that it was enough that the respondent had shown that he was not in a position to produce the written assignments in court "without difficulty". He held (at p.212) that:

"...what has been done on behalf of Mr Springsteen was reasonably thorough, albeit falling short of what might be considered to be exhaustive.""

[39] [2001] EWCA Civ 563.

44. After a careful review of the authorities, Jonathan Parker LJ made clear that, as a rule, the "best evidence" rule was now dead:[40]

> "In my judgment, the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. Where the party seeking to adduce the secondary evidence could readily produce the document, it may be expected that (absent some special circumstances) the court will decline to admit the secondary evidence on the ground that it is worthless. At the other extreme, where the party seeking to adduce the secondary evidence genuinely cannot produce the document, it may be expected that (absent some special circumstances) the court will admit the secondary evidence and attach such weight to it as it considers appropriate in all the circumstances. In cases falling between those two extremes, it is for the court to make a judgment as to whether in all the circumstances any weight should be attached to the secondary evidence. Thus, the "admissibility" of secondary evidence of the contents of documents is, in my judgment, entirely dependent upon whether or not any weight is to be attached to that evidence. And whether or not any weight is to be attached to such secondary evidence is a matter for the court to decide, taking into account all the circumstances of the particular case."

45. Thus, the "best evidence" rule is not a rule at all, but essentially guidance, like the other "rules" referenced in paragraph 37 above.

(3) Synthesis

46. Given that the "best evidence" rule is simply a (common sense) guide to the exercise of a judicial discretion as to whether or not to admit secondary evidence and – if so – what weight to attach to it, it is necessary to tread very carefully when seeking to identify the factors that should be taken into account. Recognising that the factors relevant to the question of the admissibility or weight of secondary evidence will vary from case to case and that the list of relevant factors will not be a closed one, the following seem to me to be factors of particular importance that a judge needs to bear in mind:

(1) *The probative difference between the "primary" and the "secondary" evidence.* The probative difference between primary and secondary evidence (or "best" and "second best" evidence) varies from case to case:

(a) Were the evidence in question to be an electronic document, it is meaningless to seek to differentiate between the identical saved document on different persons' computers. In *Kajala v. Noble*,[41] the Divisional Court held that justices had been entitled to rely on a copy of a video recording made from an original shown on BBC television news bulletins. The original was in the possession of the BBC and the copy was produced and identified by an employee of that organisation. The justices had been satisfied that it was an authentic copy. They accepted that the BBC policy of refusing to allow the original to leave their premises was reasonable and that the film crew who took the original was overseas.

[40] At [85].

[41] (1982) 75 Cr App R 15.

(b) Equally, there will be many cases were a photocopy will be as good, or nearly as good, as the original.

(c) On the other hand, there will be cases where primary evidence will be clearly and distinctly preferable to the secondary evidence. Were a court to be presented with a choice between the written agreement between *A* and *B*, and *B*'s effort to reconstruct the terms of that agreements some months after signing it, it is clear that (all other things being equal) the court would wish to see the written agreement, and that *B*'s reconstruction (no matter how careful and well-intentioned) would be a poor substitute for the primary evidence, namely the written agreement itself.

(2) *The point at issue between the parties.* The extent to which a court will wish to have primary as opposed to secondary evidence before it will be affected by the point at issue between the parties:

(a) Thus, for example, if the allegation is that a document has been forged, the court will wish to have the original before it in order to explore and resolve this question. If, on the other hand, the point at issue between the parties is the construction of a particular contractual provision, it is difficult to see why a court needs to see the original contract, as opposed to a photocopy or image of the original.

(b) It is worth noting that this sort of question may arise independently of the "best evidence" rule. Suppose the dispute between the parties is that emails between certain persons have been tampered with. A court would not wish to see the "original" emails – it is likely that no such thing could even be defined – but rather would wish to have evidence going to the integrity of the IT infrastructure whereby the emails were sent, in order to satisfy itself as to whether the products of that system, the emails, were or were not capable of being altered.

(3) *The reason for a party's inability to produce the original.* The point has been made in most of the cases articulating the "best evidence" rule, that a court's reaction to the non-production of primary evidence is significantly informed by the reason for the non-production of that evidence. If there is a good reason why the document cannot be produced – for instance, months before litigation commenced, the office storing a party's original documents burned down – then the extent to which the court will be inclined to draw adverse inferences from the failure to produce the original will be limited. If, on the other hand, the original is readily available, and the party who holds it can provide no coherent explanation for the failure to produce the original, adverse inferences of some sort are likely to be drawn. Why, the court will ask itself, is a party producing secondary evidence when better evidence – the primary evidence – is readily available? The natural inference, in such a case, is that the primary evidence does not tell the same story as the secondary evidence, and that the primary evidence is not being adduced for that reason.

(4) *The procedural history.* A trial is a culmination of a process. That process involves identifying and framing the issues between the parties, and then ensuring that proper disclosure of documentary evidence appropriate to the resolution of those

issues takes place. Generally speaking, the issue of a party's failure to produce an original ought to be raised and resolved well-before trial. The English courts have established procedures, taking place well before trial, to flush out the points parties are taking in relation to documents. Thus, for instance, the fact that a party is contending that a certain document is a forgery will not (absent wholly exceptional circumstances) be raised for the first time at the trial itself. There will have been anterior debate about the precise allegation being made, and the mechanism (for instance, the use of handwriting experts) whereby the allegation of forgery is to be resolved. When considering the best evidence rule, a trial judge will, plainly, take into account the interlocutory steps that have, or have not, been taken by the parties in bringing their dispute to trial.

47. Having articulated the sort of considerations that a judge ought to have in mind, I turn to the Judge's decision in the present case.

(4) The Judge's decision

48. The Judge found in favour of Promontoria Oak even though Promontoria Oak had failed:

(1) To adduce primary evidence of the assignment. Specifically, Promontoria Oak had failed to produce the original Deed of Assignment and the original of the Sale and Purchase Agreement, which (as I have described[42]) is the primary source for the definitions in the Deed of Assignment and which (as it seems to me) forms a necessary part of the Deed of Assignment.

(2) To adduce complete secondary evidence of the assignment. Promontoria Oak adduced a photocopy of the assignment – that is, the Redacted Assignment Deed – containing redactions and did not produce a copy of the Sale and Purchase Agreement at all.

49. The Judge's reasoning was as follows:

(1) Notwithstanding the redactions to the assignment (the Judge did not specifically consider the fact that the Sale and Purchase Agreement was not provided), the assignment did what Promontoria Oak alleged it did, namely transfer rights that had originally vested in the Bank to Promontoria Oak.[43]

(2) The failure to produce the original assignment and the redactions to the Redacted Assignment Deed were justifiable and in fact justified by commercial confidentiality. The Judge's reasoning is set out in [18]*ff* of the Judgment. The critical paragraph is [25]:

> "In this case, an explanation has been provided, at first instance in the pleadings and then in Mr Breen's evidence before me. The purpose and effect of the Assignment Deed has more generally been addressed by the unchallenged evidence from Ms Burton. Whilst I think it is likely that [Promontoria Oak] had given little thought to this issue before counsel became involved at trial, it could (and in my view should) have served a statement from its solicitor dedicated to this topic to avoid any evidential pitfalls. Nevertheless, I am satisfied that on the available evidence a satisfactory explanation of commercial

[42] See paragraph 17(3)(c) above.

[43] Judgment at [17].

confidentiality for the redactions has been provided. I will therefore permit [Promontoria Oak] to relay on the [Redacted Assignment Deed] which in my judgment is both a valid and enforceable agreement between the Bank and [Promontoria Oak]."

50. It is necessary to make a few points about this part of the Judgment:

(1) Mr Breen gave evidence for Promontoria Oak at the trial. Although his witness statement did not deal with the redaction of the assignment,[44] he was (during his evidence in-chief) asked about the redactions.[45] Unsurprisingly, he was then cross-examined on the same point:[46] his evidence was that he did not personally supervise the redactions, and he was not in a position to justify them specifically.

(2) I should explain that the evidence of Ms Burton, referred to by the Judge, is the statement referenced at paragraph 17(4) above. It is not clear to me what the Judge meant by "unchallenged". As I have described, Ms Burton's statement was adduced in support of Promontoria Oak's third party disclosure application, which the Emanuels did not oppose. But I do not consider that that fact can indicate assent, for the purposes of the matters in issue at trial, to everything Ms Burton said. As I have described, the dispute about the assignment was plain on the face of the pleadings.[47]

(3) To the extent that the Judge relied on other decisions involving redacted documents produced by companies in the Cerberus group of companies (of which Promontoria Oak was a part),[48] I regard such decisions as substantially irrelevant to the question before the Judge and the questions before me now. To the extent that these decisions involved assessment of what materials should be adduced before the court as evidence, these are questions of judicial discretion turning on the specific facts of each case. The issues before the Judge equally turned on specific questions of fact. If – and I do not consider that he did – the Judge allowed his discretion to be influenced by factual decisions in other cases, he should not have done so. To the extent that these decisions articulate legal principles – and the Judge did not find this, and I agree – these authorities were not binding on the Judge, but (at best) persuasive only. In short, I regard these decisions as entirely irrelevant to the matters before the Judge and before me.

(4) I consider that the Judge was entitled to rely on the fact that the redactions to the assignment had been made by Promontoria Oak's legal team. Whilst (as the Judge noted) Promontoria Oak's list of documents was verified by a director of Promonotia Oak (and not by a solicitor) and the redactions were not supported by a witness statement of Promontoria Oak's solicitors, nevertheless the case regarding redactions was put forward by counsel instructed by a highly respected firm of solicitors. In support of his application to introduce Ground 7,[49] Mr Sims, QC, for the Emanuels, sought to contend that the redactions were improperly made.

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[44] Transcript Day 1, p.25.

[45] Transcript Day 2, pp.2-3.

[46] Transcript Day 2, pp.10*ff*.

[47] See paragraphs 8-10 above.

[48] The Judge found he was "fortified" in his conclusion by reference to such decisions. See Judgment at [26] to [29].

[49] See paragraph 5 above.

In the course of my ruling against the introduction of Ground 7, I made clear that I would not permit either the introduction of evidence or argument that the redactions were improperly made by Promontoria Oak's legal team. It seemed to me that the Judge was entitled to accept, at face value, what Promontoria Oak's legal team were saying regarding confidentiality and relevance and that the Judge was limited to considering whether, on this basis, the plea of confidentiality was well-founded.

(5) Analysis

(a) Introduction

51. I turn to consider the decision of the Judge not to exclude, as he was invited to do, the Redacted Assignment Deed. I begin by making clear that this was a question of judicial discretion, and that the Judge's decision must stand unless I find that his decision was improper, in the sense that no judge, in his position, could reasonably have taken the course that he did. In short, it is not enough, given that the "best evidence" rule is not a rule of law, for me to conclude that, had I been the trial judge, I would have reached a different conclusion. The decision of the Judge must be outside the range of decisions that a judge could properly have reached in these circumstances.

52. In short, the burden on the Emanuels in this appeal is a high one. Nevertheless, I consider that the Judge's decision to permit Promontoria Oak to rely on the Redacted Assignment Deed was so flawed that it must be set aside. My reasons are set out in Section D(5)(b) below. In light of this conclusion, it seems to me that I must re-visit the decision that the Judge made that the Redacted Assignment Deed proved Promontoria's title: I do so in Section D(5)(c) below.

(b) Reasons why the Judge's decision was so flawed that it must be set aside

53. My reasons for concluding that the Judge's decision must be set aside are as follows.

(i) Flawed conclusion regarding the efficacy of the assignment

54. The Judge concluded that, notwithstanding the limited information that Promontoria Oak had provided in relation to the assignment, he could safely conclude that the assignment properly effected a transfer of the Bank's rights against the Emanuels to Promontoria Oak.[50]

55. Whilst I have accepted that this was a conclusion open to the Judge on the evidence that was before him, the Judge failed to have regard to the implications of the evidence that was not before him:

(1) Plainly, both the Bank and the Cerberus group of companies of which both Promontoria Oak and Promonotoria 170 were part contemplated that debts owing to the Bank should be assigned by the Bank to an entity within the Cerberus group. Equally clearly, there appears to have been a degree of uncertainty as to who the assignee was going to be. The letter to the Emanuels from the Bank dated 24 June 2016 unequivocally identified Promontoria 170 as the assignee.[51] The letter of 16

[50] See paragraph 30 above.

[51] See paragraph 17(1) above.

September 2016 indicated that the ultimate assignee was Promontoria Oak, and suggested that there was a chain of assignments from the Bank to Promontoria 170 and from Promontoria 170 to Promontoria Oak.[52] This is the obvious – indeed, the only – reading of the words:[53]

> "…we are writing to confirm that [the Bank] have completed the sale of all amounts owing to another legal entity, namely [Promontoria Oak], an affiliate of Cerberus Global Investors (and successor in title to [Promontoria 170], the entity referred to in our letter dated 24/06/2016)…"

Thus, on the face of it, there appears to have been an assignment from the Bank to Promontoria 170 and then a further assignment from Promontoria 170 to Promontoria Oak.

(2) This does not sit easily with the form of the Redacted Assignment Deed. On its face, this appears to be an assignment direct from the Bank to Promontoria Oak. Promontoria 170 is not even a party to the assignment. On the face of it, therefore, it would appear the Bank was assigning to Promontoria Oak rights that it no longer held (having already assigned them to Promontoria 170).

(3) It is, of course, perfectly possible that there was a proper chain of title between the Bank and Promontoria Oak. Both the Bank and the Cerberus group are sophisticated commercial entities, and it is fair to say that it is most unlikely that they would botch the transfer of a very significant book of debt. If, for some reason, only the documentation before the Judge had survived, then (as I have found) his conclusion in relation to that limited material was unimpeachable. However, the Judge's conclusion (in [31] of the Judgment) that "there are no further relevant documents required to prove [Promontoria Oak's] title to commence these proceedings" is simply wrong. In order to reach his conclusion, given the existence of additional material, the Judge ought to have seen the entire Deed of Assignment and the Sale and Purchase Agreement. Quite possibly, these documents would have indicated other documents relevant to the transfer of title from the Bank to Promontoria Oak. The Judge's conclusion that there was a proper assignment is only sustainable if the Judge was obliged to reach a finding on the basis of the evidence before him, ignoring the imperfections in that evidence.

56. In short, there was a significant probative difference between the primary evidence that was not before the court and the secondary evidence that was before the court. In his Judgment, the Judge failed to pay proper regard to this important factor.

(ii) Failure properly to consider the adequacy of Promontoria's reason for not producing relevant documents

57. It was accepted that Promontoria Oak could have produced the original of the Deed of Assignment or an unredacted copy of the original. The reason for the redactions was said to be confidentiality. For the reasons I have given,[54] I did not consider that it was open to the Emanuels to contend that the redactions were improperly made. Nevertheless, it

[52] See paragraph 17(2) above.

[53] Emphasis added.

[54] See paragraph 50(4) above.

was incumbent upon the Judge properly to apply the law regarding redactions made to documents on the grounds of confidentiality.

58. In [24] of the Judgment, the Judge directed himself to the then current edition of Hollander's *Documentary Evidence*.[55] Tellingly, the paragraph cited by the Judge comes under the heading "Irrelevance Redactions". Paragraph 10-15 of the current edition states:

> "The second, and rather different, basis on which it is permissible to blank out is on grounds of the combination of irrelevance and confidentiality. Where documents are irrelevant and not confidential, then it is simpler to disclose them, with the protection of the collateral undertaking. But where a document is disclosable, and there are parts of the document that are confidential, the possibility of blanking out arises.
>
> There is no difficulty where the document contains two or more distinct subject-matters, only one of which is relevant. The classic example is board minutes. There is no reason why the other side should see confidential board minutes where the minutes relate to matters nothing to do with the litigation…A distinction should be drawn between the blanking out of names and the blanking out of a separate part of a document. Where names are blanked out, it will usually be obvious to the other party what has occurred and why, and it will be open to the other party to make an application to court in case of dispute. But where part of a document is blanked out, it will not be apparent to the other party what has been blanked out and the other party may not have the basis of a challenge. So it is the solicitor's obligation not to blank out in such circumstances unless satisfied there is an entitlement to redact. Thus, it has been said that where documents are redacted it is important for the other side to be able to understand the basis for it, and for the disclosing party to provide an explanation. If the redacted information was not relevant, that was relatively straightforward. If it is asserted that the information was relevant but contained confidential material, or would breach foreign laws, or was privileged it was incumbent upon the redacting party to explain so that any debate about disclosure could properly take place."

59. With great respect to the learned author, I consider that the last sentence of this passage, insofar as it relates to <u>confidential but relevant</u> material, goes too far. It seems to me that where material is confidential but relevant it is *prima facie* disclosable, and it is for the disclosing party to come to the court to seek an order protecting confidence whilst ensuring the document is disclosed.[56]

60. In this case, however, the Judge appears to have concluded that the redactions were of <u>confidential and irrelevant</u> material.[57] Although the Judge himself expressed some doubts as to whether the redacted material was indeed confidential,[58] he concluded that "on the available evidence a satisfactory explanation of commercial confidentiality for the redactions has been provided".[59]

61. I am quite prepared to proceed on the basis that this is right: certainly, given Promontoria Oak's legal representation before the Judge (Addleshaw Goddard LLP instructing Mr Cukier) the Judge was absolutely entitled to proceed on the basis that the redactions had

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[55] The now current edition is Hollander, *Documentary Evidence*, 13th ed (2018). The passages in this edition are not materially different from the passages in the earlier edition cited by the Judge.

[56] In competition and intellectual property cases the use of confidentiality rings is prevalent.

[57] See [24] of the Judgment, which refers to blanking out "on the basis of irrelevance and confidentiality".

[58] See, for example, [16] and [25] of the Judgment.

[59] At [25] of the Judgment.

been properly carried out, in that the blanking out was of confidential material which, on Promontoria Oak's case, could make no difference to the outcome.

62. I do, however, consider that the Judge was wrong to accept, without more, that the redacted passages were irrelevant. The Judge appears to have considered that the redacted passages were irrelevant because, on the basis of the material that was before him, he was able to conclude that the Emanuels' debt had indeed been assigned.[60] But it does not follow that where a conclusion can properly be reached on the basis of the adduced evidence, evidence not adduced is irrelevant. That is a complete *non sequitur*: it is perfectly possible for the adduced evidence to compel one conclusion, only for that conclusion to be undermined rather than reinforced by other material not before the court. In this case, for the reasons given in paragraphs 54*ff* above, the unredacted Deed of Assignment was obviously relevant.

63. The Judge did not consider at all the failure to adduce the Sale and Purchase Agreement: the reason for its non-production was, I assume, also confidentiality and irrelevance. Whilst I am prepared to assume that the document was indeed confidential, for the same reasons as pertain in relation to the Deed of Assignment, the Sale and Purchase Agreement was obviously relevant.

64. Indeed, it seems to me that when one is talking about documents of title, *prima facie* the entirety of the document (and any documents incorporated by reference) is disclosable, simply because it is (generally speaking) necessary to consider the entire document in order to understand precisely the terms of the transfer.

65. It follows that Promontoria Oak's justification for not adducing the unredacted Deed of Assignment and the Sale and Purchase Agreement was insufficient. The documents may have been confidential: but confidentiality is, *per se*, not a reason to withhold relevant material, and I consider that the Judge was clearly wrong in concluding (as he appears to have done) that this material was irrelevant.

66. I should say that it is no part of my reasoning that Promontoria Oak was at fault in not producing the original of the Deed of Assignment and the original of the Sale and Purchase Agreement. Production of unredacted copies would have been sufficient.[61]

(iii) Failure to attach proper weight to the fact that chain of title was in issue between the parties

67. As I have described, the validity of the chain of title between the Bank and Promontoria Oak was put in issue by the Emanuels and was a dispute that was before the Judge to resolve.[62] In order to resolve this issue properly, the Judge needed to see (at least) the unredacted Deed of Assignment and Sale and Purchase Agreement, unless there was a good reason for not adducing this obviously relevant material. For the reasons I have

[60] See paragraph 30 above.

[61] That is because the Emanuels did not challenge the documents as forgeries, but merely asserted that chain of title had not been proved. Had the Emanuels, having before them copies of the Deed of Assignment and the Sale and Purchase Agreement at trial, sought to contend that their appeal should be allowed because the originals were not produced, this appeal would have been hopeless.

[62] See paragraphs 8-10 above.

given, there was no such good reason and the Judge therefore decided the issue of chain of title on a false basis.

(iv) Failure properly to consider the procedural history

68. As I have noted in paragraph 46(4) above, a trial is the culmination of a process, during the course of which process issues of disclosure ought to be entirely resolved. Questions of disclosure should not trouble the trial judge but should be resolved well before trial.

69. In this case, Promontoria Oak's disclosure was seriously defective, in that neither the Deed of Assignment nor the Sale and Purchase Agreement appeared anywhere in Promontoria Oak's list of documents. At the very least, these documents should have been listed, and Promontoria Oak's objections to inspection articulated.[63]

70. However, the Emanuels were well-aware of these deficiencies. They had, from an early stage in these proceedings, been provided with the Redacted Assignment Deed, and it is self-evident from that document that it has been redacted. Equally, the reference to the Sale and Purchase Agreement is plain on the face of the Redacted Assignment Deed, and the Emanuels would have been aware that this document had not been disclosed by Promontoria Oak.[64]

71. Yet the Emanuels made no application for specific disclosure and did nothing to remedy the deficiencies in Promontoria Oak's disclosure until trial – when the point was clearly and emphatically raised by Mr Sims, QC on behalf of the Emanuels.

72. Mr Sims sought to contend that the Emanuels could not be criticised for taking this course, and that it was for Promontoria Oak to comply with the rules on disclosure. Whilst I accept, of course, that the rules on disclosure are there to be followed, and that Promontoria Oak can be criticised for not following these rules, I do not accept that the Emanuels are not to be criticised also. They had, at their disposal, tools for resolving the issue of Promontoria Oak's defective disclosure and they (culpably) failed to avail themselves of those tools.

73. If, before the Judge, Promontoria Oak had contended that even though it had failed to adduce before the court relevant material (in the form of the unredacted Deed of Assignment and the Sale and Purchase Agreement), it was too late for the Emanuels to raise this point at trial, then it may be that the Judge would have been entitled to refuse what would have been a very late application for disclosure. He could then have proceeded, as he did, to determine the issues on the material before him.

74. I have some doubts as to whether refusing disclosure would have been the correct course – I do not understand that either the unredacted Deed of Assignment or the Sale and Purchase Agreement could not have been produced very quickly by Promontoria Oak – but the fact is that the Judge never considered this point and it forms no part of his reasoning in the Judgment. It follows that it is academic for me to debate whether his decision and the Judgment can be justified on this basis. I certainly do not consider that

[63] The Judge appears to have noted at least some of these issues – see [22] of the Judgment.

[64] These are points quite rightly emphasised by Promontoria Oak in its Respondent's Notice.

this point renders his decision right for the wrong reasons: as I have indicated, my own view is that a late disclosure application ought to have been acceded to.

(v) Conclusion

75. For the reasons I have given, the Judge was wrong to admit into evidence the Redacted Assignment Deed in the way that he did. I fully appreciate that this decision is one of judgment as regards the weight to be attached to evidence. As such, the primary decision-maker on such points is the first instance judge, and not the appellate court. The mere fact that I might disagree with the Judge's decision is not enough for the appeal to succeed. However, for the reasons I have given in the preceding paragraphs, the Judge's decision to admit into evidence the Redacted Assignment Deed and then to decide the question of title in Promontoria Oak's favour on the basis of that document was a decision no judge, considering the material before the court, could properly have reached.

76. It follows that the Judge's decision in this regard must be set aside, and I must proceed to re-visit the decision that he made.

(c) Re-visiting the decision

77. Had I been the trial judge, it is likely that I would have ordered immediate production of the Deed of Assignment, the Sale and Purchase Agreement and all other documents relevant to the transfer of the Emanuels' debt from the Bank to Promontoria Oak and either:

(1) Required Mr Sims to articulate any case he might have on chain of title within a matter of hours; or

(2) Adjourned the trial at the Emanuels' cost.

78. It is tempting to seek to achieve an approximation of this outcome by ordering disclosure of the Deed of Assignment, the Sale and Purchase Agreement and all other documents relevant to the transfer of the Emanuels' debt from the Bank to Promontoria Oak and then to remit the matter for a fresh trial. However, I do not consider that this would be the appropriate course, given the sums at stake, the length of the likely trial, and the fact that Promontoria Oak took the course of not adducing relevant material quite deliberately. Indeed, I consider that remission would be entirely disproportionate in this case.

79. It seems to me that the appropriate course – given the deliberation with which Promontoria Oak has proceeded – is either to exclude the Redacted Assignment Deed from the evidence or – which is much the same thing – to hold that the Redacted Assignment Deed is insufficient to prove Promontoria Oak's title to sue. Either course reflects the fact that Promontoria Oak chose how to prove its case in this way: and Promontoria knew, from a very early stage, that the assignment was going to be contentious. Even so, they proceeded to rely on the Redacted Assignment Deed.

80. Whichever course is taken (exclusion of the Redacted Assignment Deed or finding that the Redacted Assignment Deed is insufficient to prove Promontoria Oak's title to sue), the Judge's finding regarding Promontoria's title to sue was wrong and needs to be set aside. Inevitably, that will have an effect on the Order made by the Judge, although

precisely the extent of that effect (given, for instance, Promontoria's status as registered holder of the Legal Charge) is a matter that was not debated before me at the hearing, and on which it would be wrong for me to say more.[65]

E. CONCLUSION

81. For the reasons I have given, Grounds 2 and 3 fail and Ground 1 succeeds. The appeal is allowed. I will leave it to the parties to frame an appropriate order in the light of this judgment. If an order cannot be agreed, then there will have to be a hearing before me to determine its terms.

[65] The fact is that the argument focussed on the Judge's decisions regarding the admission of, and weight attached to, evidence regarding the assignment. The parties, quite rightly, did not seek to anticipate my decision on this point.