**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2023] CSIH 4**
XA3/22

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Remit from the Sheriff Appeal Court

in the appeal

GIOVANNI GIUSEPPE GUIDI

Pursuer and Respondent

against

(1) CLYDESDALE BANK Plc

Defenders

and

(2) PROMONTORIA (CHESTNUT) LIMITED

Defenders and Appellants

**Pursuer and Respondent: E MacLean; Gilson Gray LLP (at summar roll); Party (post-summar roll)**
**First Defenders: Non-participating party**
**Second Defenders and Appellants: Crawford, KC; Welsh; Addleshaw Goddard LLP**

24 January 2023

**Introduction**

[1] Mr Giovanni Guidi was the founding director of three property companies based in Glasgow. One of them was Fieldoak Limited. For many years it obtained loan facilities

from the Clydesdale Bank, which were secured by means of fixed and floating securities, and cross-group guarantees. In line with normal practice, Mr Guidi also stood as guarantor. He granted in favour of the Bank: (i) a personal guarantee, capped at £450,000; and (ii) a standard security over his home in Bothwell. He signed these financial instruments after taking independent legal advice.

[2] In 2015 the Promontoria group of companies purchased a large tranche of loans and securities from the Bank. The parties gave effect to their transaction by a bulk assignation, coupled with a sale and purchase agreement ("SPA"). Different members of the group received different assets. The full background is narrated by the Court of Appeal in *Promontoria (Oak) Ltd* v *Emanuel* [2022] 1 WLR 2004. The Bank transferred its portfolio of Fieldoak rights to Promontoria (Chestnut) Ltd ("PCL"), which intimated the assignation to Mr Guidi by letter dated 4 September 2015.

[3] There followed what can be characterised as a standard debt recovery procedure. PCL called on Fieldoak to repay its debts. When no sums were forthcoming, PCL appointed a receiver to the company. That exercise similarly did not realise sufficient funds. PCL then looked to Mr Guidi to honour his personal guarantee. No monies were paid. In late 2016 PCL served on him a charge for payment of £450,000. It proceeded on a warrant for summary diligence deriving from the registration for execution of the standard security in the Books of Council & Session. Again no sums were paid and PCL sequestrated Mr Guidi in early 2017.

[4] Mr Guidi disputes PCL's right and title to proceed in this manner. In 2018 he raised twin actions in Hamilton sheriff court. One sought recall of the sequestration. It is currently sisted. The other is the present action, which Mr Guidi originally brought against both PCL and the Bank. He claimed that the deed of assignation was invalid, because it did not

conform to the statutory requirements. Put short he challenged the sub-stratum of the transaction between the Bank and PCL. If the court grants the orders for declarator and reduction sought by him, that will almost certainly lead to the recall of his sequestration.

[5] Mr Guidi raised another matter. He submitted that he had the right to see the complete versions of the principal documents. That had not happened. PCL had instead lodged redacted versions of the deed of assignation and the SPA. Mr Guidi argued that it had been wrong to do so. It prevented his legal team and the court from construing the documents.

[6] PCL took the contrary position. It submitted that the assignation was valid. It described Mr Guidi's arguments as resting on no more than mere technicalities. As a result, his written pleadings were irrelevant and the claim should be dismissed. As to the redactions, PCL maintained that they had been made on grounds of commercial sensitivity. It had left intact all the relevant parts of the documents and only removed information about third party debtors.

[7] The case took some time to reach a substantive hearing. It was becalmed for lengthy periods. In 2019 the Sheriff at Hamilton transferred it to Glasgow Sheriff Court. In 2020 Mr Guidi substantially revised his pleadings. Later he abandoned his case against the Bank. Eventually the case came for debate before the commercial sheriff. He had to decide two principal issues. Was the assignation valid? Could PCL rely upon redacted versions of the documents?

[8] In a judgment extending to 137 pages, the commercial sheriff held that the assignation of the standard security was invalid. As we explain below, he did not do so on the main argument advanced on behalf of Mr Guidi. The commercial sheriff also held that PCL could not rely on redacted documents without the leave of the court. He ordered it to

produce complete versions. PCL did prevail, however, in respect of one argument. The commercial sheriff held that that the assignation of the personal guarantee was valid.

[9] PCL marked an appeal to the Sheriff Appeal Court, which remitted the case to this court. It did so on the footing that it raises issues of principle and that there has been a slew of "Promontoria cases" throughout the United Kingdom. Before canvassing these issues, we acknowledge the assistance we have derived from Professor Steven's valuable article *Assigning standard securities - Again* in "Conveyancing 2021", edited by Professors Reid, Gretton & Steven at page 155.

**Legal framework**

[10] The Conveyancing and Feudal Reform (Scotland) Act 1970 governs the validity of assignations. It introduced the standard security to our legal firmament. Section 14 regulates assignations, while schedule 4 includes the templates to be used (we are concerned with Form A) and indicates what information they should contain: see Note 2.

[11] The 1970 Act has an important feature. It does not demand strict adherence to the statutory wording. It is enough that the document in question conforms "as closely as may be": section 53 (1). That reflects the recommendations of the Halliday Committee, which gave rise to the 1970 Act: Report 1966 Cmnd. 3118. Its aim was to simplify the assignation of security rights.

[12] That legislative approach chimes with the wider jurisprudence. Where a document does not conform to prescribed wording, it is not necessarily invalid. The court must discern the intention of Parliament: *R* v *Soneji* [2006] 1 AC 340. In *Osman* v *Natt* [2015] 1 WLR 1536, at para [33], Sir Terence Etherton stated that the question is whether the discrepancy is of critical importance in the context of the legislative scheme.

[13] The underlying theme of flexibility coincides with the interests of justice. Forms should be servants, not masters. The Scottish Law Commission is considering this whole topic. It published its initial review in 2019: *Discussion Paper on Heritable Securities: Pre-Default* (DP No 168). The Commission published a second discussion paper on default and post-default issues in 2021 (No 173).

**Grounds of invalidity**

***The specification point***

[14] Mr Guidi's main contention at first instance was that the assignation required to specify the precise amount due by him to the Bank as at the date of transfer: 1970 Act, Note 2 of Schedule 4. As it had not done so, it was invalid.

[15] The commercial sheriff correctly rejected this argument. On a practical level, it will often be difficult to determine that figure. Further, it is not of critical importance. It is certainly of no moment to the assignee. We approve the previous decisions that have reached the same conclusion: *Shear* v *Clipper Holding II SARL*, Outer House (Lord Bannatyne), 26 May 2017; and *Promontoria (Henrico) Ltd* v *The Firm of Portico Holdings (Scotland)* [2018] SC GRE 5. We overrule the one contrary decision: *OneSavings Bank plc* v *Burns* 2017 SLT (Sh Ct) 129.

***The elements of an assignation***

[16] The commercial sheriff concluded that a deed of assignation should not only identify the subjects and the parties. It should also be unilateral, unconditional and only deal with standard securities, not for example personal guarantees or floating charges. With regard to the last three elements, we disagree. In the context of a bulk assignation of this type, it was

likely (if not inevitable) that there would be multiple parties and different financial instruments.

[17] The 1970 Act does not prohibit adaptations being made. The documents here were drafted to be as close as required to meet the circumstances. It would run counter to common and commercial sense to require a multiplicity of documents.

[18] The assignation was conditional on PCL paying the purchase price to the Bank. On behalf of Mr Guidi, it was faintly argued that there was no positive averment that payment had been made. We regard that to be an ineluctable inference. It defies belief to suppose that the Bank has arranged its affairs since 2015 on the basis that it has transferred the sheaf of debts to PCL without receiving the purchase price. In any event, the letter of 4 September 2015 advised Mr Guidi that the Bank had "completed the sale" of Fieldoak's debt to PCL.

***Another perspective***

[19] The position can be considered from another angle. Fieldoak's debt remains unpaid. Mr Guidi does not challenge that fact. If the assignation is invalid, the Bank must remain the true creditor. That analysis encounters a difficulty. The Bank disowns such a suggestion. It denies that it retained the rights in question. It expressly said so in its written pleadings when it was still a defender in the action. The difficulty is compounded by the fact that the assignation of the personal guarantee was valid. It did not require any distinct formalities. It would be odd if the debt is held by PCL, but the security by the Bank.

[20] The words of the assignation are unequivocal. PCL acquired the Bank's whole right, title and interest to the Fieldoak facility agreement, the personal guarantee and the standard security. There is no merit in Mr Guidi's arguments.

***Redaction***

[21] The issue of redaction has bedevilled this case. It should not have done so. PCL disclosed the whole of the main body of the deed of assignation. It only made redactions to the schedule and to the SPA. It explained that they were necessary on grounds of commercial sensitivity: *Hancock* v *Promontoria (Chestnut) Ltd* [2020] 4 WLR 100. It stated that they related to information about the loans and securities of a large number of other borrowers.

[22] Mr Guidi takes exception to this. He argues that PCL was obliged to produce the complete documentation. Confidentiality could have been achieved by restricting disclosure to his legal team and by requiring them to give undertakings: see *Iomega Corp* v *Myrica (UK) Ltd (No.1)* 1999 SLT 793. He refers to Promontoria's "overly enthusiastic and inappropriate redaction policy": *Nicoll* v *Promontoria (Ram 2) Ltd* [2019] BPIR 1519, para 65 per Mann J.

[23] Mr Guidi's argument goes too far. There is no absolute duty on a party to lodge all the documents upon which it founds in the pleadings. In a commercial case, it is only under a duty to lodge such parts as are necessary to prove its case: *Promontoria (Henrico)* v *Friel* 2020 SLT 230. If the other party is dissatisfied, then it can seek to recover unredacted copies by means of commission and diligence. There must, however, be a basis to do so. Supposition is not enough. In the event of opposition, the court can determine the matter.

[24] Mr Guidi was well aware of this remedy. He enrolled the appropriate motion, but then, following receipt of a further version of the documentation from PCL (which was less redacted than the version it had originally lodged), he did not insist upon it. He cannot now say that there might be something in the redactions that is relevant. He does not claim that any of them have a bearing on his case. In particular, he does not say how or why they might invalidate the transfer.

[25] Each case will turn on its own circumstances. The Court of Appeal has provided helpful guidance in *Hancock* v *Promontoria (Chestnut) Ltd* and *Promontoria (Oak) Ltd* v *Emanuel*, *supra*. The second case elucidates the correct approach:

> "In … all normal cases, the entire document should be placed before the court and if, exceptionally, any redactions are made, they should be fully explained and justified by the party making the redaction, with sufficient particularity for the court to be able to rule on the need for redaction if it is challenged." (para 44(5))
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> "But the present cases are not like that. The court is not being asked to resolve the meaning of an ambiguous provision, or choose between competing interpretations. Instead the question is a very limited one: does the document before the court effect an assignment of the relevant debt or not? That undoubtedly requires the court to consider the meaning and effect of the provisions relied on, but that does not usually present great difficulty, and it is far more likely that a clear and convincing justification can be made out that other parts of the same document are entirely irrelevant to that question. … The ultimate question is always whether it is possible for the court to reach a safe conclusion on the effect of the document …" (para 46)

**Conclusion**

[26] We shall recall the sheriff's interlocutor, sustain PCL's third plea in law and dismiss the action.