GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: MAY 2020

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In the May 2020 column, Ruth Bala considers redacted deeds of assignment following the High Court's judgment in *Promontoria (Oak) Ltd v Emanuel [2020] EWHC 104 (Ch)*.

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PROOF OF ASSIGNMENT FOLLOWING *EMANUEL*

Enforcement proceedings brought by assignees typically feature a witness statement on behalf of the claimant exhibiting a redacted deed of assignment (DoA). However, this practice may not survive the recent pronouncement of the High Court in *Promontoria (Oak) Ltd v Emanuel [2020] EWHC 104 (Ch)* (30 January 2020) (at [64]) 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".

This month's column considers the potential impact on assignees' claims off the *Emanuel* judgment.

Admissibility of redacted deeds of assignment

In *Emanuel*, the High Court allowed the appeal against the trial judge's decision to admit the redacted DoA into evidence. Although admitting such documents has been the practice of numerous county courts over recent years, the High Court held (at [51]-[52]) that the decision to admit it was improper, in the sense that no judge could reasonably have taken that approach.

The starting point when considering the admissibility of a redacted DoA is section 8 of the Civil Evidence Act 1998 (1998 Act). This provides that a statement contained in a document may be proved (a) by 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. On the face of it, therefore, a redacted DoA is admissible.

However, there remains the question of weight. A redacted DoA is "secondary evidence", as it is not a literal copy of the original. Before the enactment of the 1998 Act, there was some recognition of a "best evidence rule", namely that the best evidence must be given of which the nature of the case permits. This required disclosure of the original document where available. However, in *Masquerade Music Ltd v Springsteen [2001] EWCA Civ 563* (decided after the enactment of the 1998 Act), the Court of Appeal said "the time has now come where it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired". The High Court in Emanuel did not attempt to resuscitate the best evidence rule as anything other than guidance; instead the court considered the question of weight in the round.

Justifying redactions to deeds of assignment

There are aspects of the decision which can be distinguished, but the immediate impact is likely to be on how assignees justify any redactions. In *Emanuel*, the justification proffered was, as usual, commercial confidentiality. However, Marcus Smith J correctly noted (at [58]-[59]), that as part of the disclosure process, the solicitors making the redactions must first consider whether the material to be redacted is "relevant". Commercial confidentiality is not a reason per se to withhold relevant material (at [65]). If the redacted sections are relevant, then the unredacted DoA is prima facie disclosable and the assignee's recourse is to apply for an interlocutory order protecting confidence (at [59]). The judge refers in a footnote at this point to the practice in intellectual property cases of adopting "confidentiality rings", whereby inspection of certain parts of a document is restricted to a few individuals in the case, subject to confidentiality undertakings.

Nonetheless, in a run of the mill money claim by an assignee, redacted material in a DoA is unlikely to be "relevant". Indeed, in *Emanuel* the assignee had expressly pleaded in its Reply that the redacted sections were irrelevant. Marcus Smith J considered (at [62]) that the trial judge had been wrong to accept this. It appears that his primary concern stemmed from a letter from the original creditor to the borrowers pre-dating the assignment by a few months. This letter referred to the anticipated assignee as Promontoria Holding 170 BV, a sister company of the claimant.

Assignments ordinarily involve an executory sale and purchase contract, followed by a DoA that completes the transfer. This letter said that the sale had been concluded with the sister company, but that the original creditor would write again after the transfer date to confirm this. The subsequent Notice of Assignment said that in fact the sale had been completed with the claimant. However, it was unclear from the documents in the case whether a full assignment to the sister company had occurred and then been reversed. Marcus Smith J's concern (at [55]) was that if this had occurred, there was no documentary evidence of the sale back to the original creditor before the date the original creditor executed the DoA with the claimant.

However, there was no obvious linkage between the recent history of title and the relevance of the redactions. The judge accepted (at [55(3)]) that the original creditor, Clydesdale Bank plc, and the claimant were both sophisticated commercial entities and it was unlikely they would botch the transfer of a very significant book of debt. In these circumstances, it is difficult to see why it was outside the range of reasonable decisions for the trial judge to accept the claimant's case that the redacted material was irrelevant. The trial judge was being pragmatic: since it was unlikely the chain of title was defective, adjourning the trial part-heard for disclosure of the unredacted documents would result in increased costs with only a remote prospect of uncovering further relevant evidence.

Further, it is notable that no reference was made to *Ennis Property Finance Ltd v Thompson [2017] EHWC 3263 (Ch)*, where the High Court had permitted the claimant assignee to refuse inspection of the unredacted purchase agreement. In that case, the court had considered it would be disproportionate and commercially dangerous for the assignee to have to disclose sensitive material contained in the purchase agreement without any possibility of redaction on the terms set out in CPR 31.6. Although CPR 31.22 provided certain safeguards, they were not absolute and might well not provide sufficient comfort to the claimant. The court's order might be disregarded and irreparable commercial damage done before it could be enforced.

Distinguishing Emanuel

Emanuel may be distinguished in future cases on the basis that:

- The judge's primary concern seemed to stem from the anterior letter referring to the sale to the sister company.
- The assignee had failed to disclose even a redacted version of the Sale and Purchase Agreement.
- The assignee's witness at trial was unable to give evidence explaining the redactions in the DoA.

The judge himself indicated that other cases on proof of assignment were "substantially irrelevant ... these are questions of judicial discretion turning on the specific facts of each case" (at [32] and [50(3)]).

Lessons to learn

As the High Court in *Emanuel* recognised, ideally such disputes should not be left to trial. The claimant had failed to itemise the DoA and the Sale and Purchase Agreement in its disclosure list and the defendants had failed to apply for specific disclosure of the same.

It would be wise for those representing assignees to learn the following lessons from the decision:

- Any redactions should be minimised and solicitors should consider whether each piece of redacted material is relevant or irrelevant.
- The assignee's witness for trial should be involved in the redaction process and able to justify the redactions in their evidence for trial.
- Both the unredacted and redacted versions of the DoA and Sale and Purchase Agreement must be itemised in the disclosure list, indicating whether or not inspection is objected to.
- If the extent of the redactions is likely to be objected to, the assignee should consider applying for an order that inspection be limited to a confidentiality ring, particularly if any of the redacted sections may be relevant.

The final point of interest is that in a consequential judgment ([2020] EWHC 563), the judge held (at [30]) that the failure of the claimant's claim as assignee did not mean that its alternative route to claiming the debt, as registered proprietor of the charge, should fail. For this reason, the claimant was nonetheless entitled to possession and to realise the sums secured. This rendered the Emanuels' victory pyrrhic, and so it will be left to unsecured borrowers to avail themselves of the principal judgment. Assignees of secured debt must ensure they plead alternative claims in their capacities of both assignee and registered proprietor.

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