[2020] EWHC 2136 (Comm)

Case No: D40MA073

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CIRCUIT COMMERCIAL COURT (QBD)
(Sitting at Manchester)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: Wednesday, 22 July 2020

Page Count: 19
Word Count: 12190
Number of Folios: 170

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
(Sitting as a Judge of the High Court)

- -

Between:

PROMONTORIA (CHESTNUT) LIMITED	**Claimant**
- and -	
(1) SCOTT SIMPSON	**Defendants**
(2) TRACY SIMPSON	

- -
- -

MR JAMIE RILEY QC (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
MR JOHN PUGH (instructed by **Trinity Law**) for the **Defendants**

- -

Approved Judgment

.....

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE STEPHEN DAVIES:

1. I am giving this judgment on what is scheduled to be day 3 of a five-day trial in relation to three applications by the defendants. The first in time is an application to include additional documents into the trial bundle. That is now largely agreed. The second in time is the defendants' application for permission to re-amend their defence and to stay the proceedings. That is strongly opposed. The third in time is the defendants' application for specific disclosure. That has now largely been overtaken by the claimant's voluntary production of the majority of the documents sought. It has taken almost three days for these applications to be argued. That is very unusual, but it is explained by the importance of the re-amendment application to the parties and the detail in which it had to be argued, for reasons which I shall explain shortly before dealing with the substantive issues.

2. In short, the claimant, Promontoria (Chestnut) Limited, is seeking some £300,000, together with interest, against the defendants Mr Scott Simpson and Mrs Tracy Simpson, under two guarantees given by them to support lending from the Yorkshire Bank ("the bank") to their former company Properties For Sale or Let Limited ("the company"). The claimant is a company within the Cerberus group of companies which claims to have acquired the bank's rights in relation to the primary lending liabilities of the company and the secondary liabilities of the defendants under their guarantees pursuant to a deed of assignment dated 5 June 2015. The claim was issued in September 2017. The defendants were initially legally represented and the defence, in its original and amended form, raised a large number of defences directed to the conduct of the bank. It also raised a number of points, putting it neutrally, as to whether or not the claimant as alleged assignee from the bank was entitled to recover against the defendants. The trial was listed to take place in July 2019, but was adjourned due to the first defendant's ill health at a time when the defendants were unrepresented. The adjourned trial was scheduled to take place in February 2020 but was adjourned on the same basis.

3. The application to add further documents to the trial bundle was made on 24 May 2020 in accordance with a timetable set in a previous order and at a time when the defendants were still unrepresented. It was, as I held and recorded in my order from the hearing on 7 July 2020, a confused and confusing application.

4. On 26 June 2020, the claimant's current solicitors came on the record and made the application to re-amend and to stay. The draft re-amended defence was pleaded by newly instructed counsel Mr Pugh who has appeared before me at this trial. The application for specific disclosure was then made as a result of a discussion at the hearing on 7 July by reference to a decision of Marcus Smith J in a case known as *Promontoria (Oak) (No. 1) Ltd v Emanuel & Anor* [2020] EWHC 104 (Ch), handed down on 30 January 2020, about which I shall have to say more later.

5. The draft re-amended defence does two things. Firstly, it withdraws all of the defences previously pleaded which relate to the conduct of the bank. It has been expressly confirmed that this is unconditional, in other words not dependent on the success of the amendment application as a whole. It is made, as Mr Pugh explained, on the eminently sensible and realistic basis that given the evidence and the scale of the company lending liabilities it cannot realistically be said that any of these defences would either amount to a complete defence or could provide a set off sufficient to reduce the balance to zero or anything under the combined guarantee limit of £300,000. This has considerably reduced the scope of the trial and is to be welcomed on that basis.

6. Secondly, it introduces what are effectively three proposed new grounds of defence. The first is a positive assertion that the assignment was ineffective on the ground that, based on the evidence produced both before the application and as at trial, the claims had already been assigned to the claimant's parent company Promontoria Holding 97 BV, under a sale and purchase agreement dated 27 July 2014. Alternatively, and due to the redactions made from the documents disclosed by the claimant, the claimant has failed to demonstrate that such is not, at least arguably, the case. Secondly, a positive assertion that the deed of assignment was ineffective on the further ground that based on the evidence produced both before the application and as at trial the claims have been assigned, if they had ever been effectively assigned to the claimant, to a commercial lender known as Nomura International Limited. Alternatively, again, due to the redactions made from the documents provided by the claimant, it has failed to demonstrate that such is not, at least arguably, the case. Thirdly, and finally, a positive assertion that the demand was invalid because at the time it was made by the claimant the claimant was operating the current account where the lending liabilities were held when it was not lawful for it to do so under the Payments Services Regulations 2009.

7. Although the defendants have not explained in evidence the circumstances in which these proposed amendments came to be formulated, what is clear is that whilst the facts and matters underlying the amendments have always been known to or at least discoverable by them or by their advisers it was only on the instruction of the new legal team that the potential significance of the *Emanuel (No. 1)* case was brought to their attention as was the possibility of running defences along the lines identified above.

8. The claimant, represented by leading counsel Mr Riley QC, submit that the application should be dismissed both on discretionary grounds due to the lateness of the application and the absence of good reasons for that lateness, together with the impact of at least one of those proposed defences upon the trial, but also, and more fundamentally, on the basis that they do not disclose any real prospect of success which is an essential requirement for the grant of permission to amend. He points to the fact that since the defendants say, in terms, that even if the amendments are allowed there would be no need for an adjournment and they are content to proceed to trial on the basis of the evidence already before the court, this court has a good opportunity to assess the prospects of success in a way which may be more difficult at an earlier stage before disclosure has taken place and other evidence has been produced. It is for that reason that the merits of the proposed claims have been investigated in some detail on this application.

9. I am also satisfied that it is not unfair to the defendants to proceed on this basis. Sometimes it can happen that if a heavily contested amendment application is made on the first day of the trial, before the judge has fully immersed himself or herself into the details of the existing case and the proposed amendments, the judge can fail to see the wood for the trees. Here, however, I have had the benefit of full argument in order to enable me to decide whether the proposed claims have merit on the basis of the test of a real prospect of success. If I decide that they do not, that will have been on the basis that the defendants will have been able, and have taken the opportunity, to put forward their best case on the merits.

10. Mr Pugh also submitted, correctly, that the court should decide this application by reference to the overriding objective, in particular those factors referred to in paragraph 1.12. As often, however, those factors can pull in different directions, Mr Pugh relied upon the importance of ensuring an equal footing between the parties and proportionality having regard to the financial position of the parties given the disparity of their resources. However, it is clear that those considerations could not, by themselves, justify allowing the

defendants to run defences which, on a proper analysis, have no merit, or to obtain production of documents which, on a proper analysis, are not necessary for the fair determination of the case, out of some general sense of sympathy to the defendants as individuals without access to substantial resources, especially if that would involve unfairness to the claimant or any risk of loss of this trial date which could have been avoided had the defendants complied with the Civil Procedure Rules and with court orders.

The prior disposal proposed defence

11. With that introduction and explanation, I turn now to the first issue, the proposed prior disposal defence. I need to refer to two significant recent authorities before referring to the relevant documentation. The first is the *Emanuel (No. 1)* case to which I have already referred above. That is a decision of Marcus Smith J on appeal from the County Court. It is, I have been told, the subject of an application for permission to appeal, as is his second decision in that case, but I should proceed, of course, on the basis that it is a decision of a High Court judge from which I should, as a judge exercising the same jurisdiction, only depart if I was satisfied that it was wrong.

12. It is a case about the impact of the claimant's decision in that case to rely at trial upon a substantially redacted version of the deed of assignment relied upon by the claimant and not to disclose any part of the sale and purchase agreement referred to in the deed of assignment. As will be seen, it therefore has some similarities to the instant case, at least as was the position at the date of the application. The key relevant facts of the case are summarised at [7(4)] and [7(5)], [17(1)], [17(2)], [17(3)], [17(5)], and [50] of the judgment. I do not intend either to lengthen this decision by reading those out in full or to attempt to summarise them since it is unnecessary to do so. There are two relevant parts of the judgment. The first is the defendant's argument in that case, summarised at [39], that the lower court should simply have declined to admit the redacted deed of assignment into evidence on the basis of the best evidence rule. The judge considered that argument in detail by reference to the authorities and rejected it as a rule of law at [45]. The decision is not challenged before me as being wrong.

13. The second is the defendants' argument in that case that on the facts of that case the trial judge was wrong to conclude that the claimant had made out its case by reference to the redacted deed of assignment, given the other evidence and considerations which they contended indicated at least arguably a different conclusion than had been urged on the trial judge and had been accepted by the trial judge by reference to the redacted deed of assignment. On this point Marcus Smith J concluded at [75] that the decision of the trial judge was flawed on the basis of the factors which he identified at [54]-[74].

14. As Mr Riley submitted, an essential aspect of that decision was the finding in [55(1)] of the decision in which Marcus Smith J considered that the evidence before him suggested that there had been a chain of assignments from the bank to the holding company Promontoria 170, and then from Promontoria 170 on to Promontoria Oak. Indeed he considered that that was the obvious, indeed, the only reading of the words in the documents to which he referred. That was an important finding because, if that was so, it was at least arguably inconsistent with the case advanced by the claimant by reference to the deed of assignment upon which they relied. It is clear that it was the presence of that additional material which persuaded the judge that what otherwise appeared to be the case, which was that the deed of assignment was a simple and straightforward direct assignment from the bank to Promontoria Oak, may not in fact have been the case. It was on that basis that he concluded at [55(3)] that in order to reach his conclusion, given the existence of that additional

material, the trial judge ought to have seen the entire deed of assignment and the sale and purchase agreement.

15. As will be seen in due course, there is no equivalent wording in the equivalent documents in issue in this case.

16. Mr Pugh also referred me to [64] and [67] of the judgment. In [64], Marcus Smith J observed 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."

17. Mr Riley submitted that in this case the deed of assignment has now been produced in effectively a fully unredacted form as well – and to that extent only – the incorporated terms from the sale and purchase agreement. In *Emanuel (No. 1)*, as I have said, not only did Marcus Smith J not have the full deed of assignment but he had nothing from the sale and purchase agreement. It follows, and I accept Mr Riley's submission on this point, that it cannot be said from [64] that Marcus Smith J was purporting to decide that in any future case, it was necessary to disclose both documents in full. As will be seen, such an argument was not accepted in the subsequent and recent decision of the Court of Appeal in *Hancock* to which I refer later.

18. In *Emanuel (No. 1)* Marcus Smith J, having set aside the trial judge's decision for the reasons I have explained, proceeded to re-make the decision himself. He indicated that, had he been the trial judge, he probably would have ordered the immediate production of the deed of assignment, the sale and purchase agreement, and all other documents relevant to the transfer of the defendants' debt from the bank to the claimant. He concluded, however, that it was not appropriate to do so on appeal and thus allowed the appeal on the basis that the claimant had not discharged the burden of proof on the facts of that case on the evidence it had produced. As I have already indicated, it was largely in response to that part of the decision that the application for specific disclosure has been made by the defendants in this case.

19. I should also say that, subsequent to that decision, Marcus Smith J was invited to consider whether or not the claimant had an alternative route to success in any event in that case on the basis of the legal effect of the registered legal charges given by the defendants to the claimant in that case. He held that they were. His decision in that case, *Promontoria (Oak) v Emanuel (No. 2)* [2020] EWHC 563 has been put before me. Mr Riley has clarified that in this case, however, the claimant does not seek to achieve the same result, since the circumstances are different from those in that case, although he does seek to rely upon the effect of the legal charges in this case as a forensic point, as I shall explain.

20. The second of the two cases I need to refer to is, as I have already intimated, the decision of the Court of Appeal in *Hancock v Promontoria (Chestnut) Ltd* [2020] EWCA Civ 907, thus involving the same Promontoria company as the claimant in this case. It is hot off the press, having only been given last Tuesday, 14 July 2020. It as is a decision on appeal from HHJ Hodge QC sitting as a High Court Judge who had himself refused to allow an appeal from a district judge who had refused to set aside a statutory demand. The appeal was

dismissed by the Court of Appeal, Henderson LJ giving the only reasoned judgment with which the other two members of the court agreed.

21. Again, the issue was the validity of the deed of assignment relied upon by the claimant which was in the same or identical terms to that relied upon here, although in that case, the deed of assignment again remained substantially redacted. It is made clear at [6] of the judgment that the appeal turned, in large part, on the effect of those redactions to the deed of assignment and the non-production of the sale and purchase agreement together also, significantly, upon the explanations for those redactions given by Mr Cooper, the solicitor with Addleshaw Goddard Solicitors, who has also provided a witness statement in this case.

22. As was noted in [7] of the judgment, there was a burden upon Mr Hancock, as the applicant, to establish the existence of a substantial dispute to set aside the statutory demand. Mr Riley submits, and I accept, that there is a similar burden here on the defendants as parties seeking to amend to show a real prospect of success, whereas of course in a normal Part 7 claim there is no burden on the defendant and instead the burden lies upon the claimant to establish its title to sue.

23. So far as the relevant facts of that case are concerned, again it is unnecessary to refer to them in detail or to read them out in this judgment. At [22] Henderson LJ records that there had been a notice of assignment given to Mr Hancock on behalf of the claimant by a firm known as Engage Commercial, who are the same agents as have been used by the claimant in this case. At [25]-[27] Henderson LJ recorded the evidence given by Mr Cooper in that case, which is similar to the evidence which he has given in his second witness statement in this case, as to the commercial background to the acquisition by Cerberus of the Yorkshire Bank portfolio. At [28] he refers to what was provided in redacted form in the deed of assignment and to the fact that neither the sale and purchase agreement or the novation agreement were produced, as well as to the explanations and assurances given by Mr Cooper in that case as to his personal ability to speak as to the irrelevance of the redacted material and the documents which were not produced. These, again, are similar to those explanations and assurances given by Mr Cooper in this case in his second witness statement.

24. Having continued in [30], and subsequently, to record the terms of the deed of assignment and to refer at [39] onwards to Mr Cooper's evidence explaining their redactions and their lack of relevance, Henderson LJ referred at [46] to the fact that it was clear from the deed of assignment that there was and could be no dispute but that the loans made to Mr Hancock were relevant loan assets and thus specified loan assets for the purposes of the definitions contained in the deed of assignment. That is also the case here.

25. In [47] and [48] he accepted, importantly in my view, that clause 2.1(a) of the deed of assignment contained on the face of it an absolute assignment which included the benefit of the loans and the loan documentation. In [49] he concluded that, although the drafting of the deed was rather convoluted and not always easy to follow, it left no room for any reasonable doubt that the loans and the rights of the bank in relation to them were prima facie included in the assignment and that this was reinforced by the fact that notice of that assignment was given within a few days of the assignment.

26. In [51]-[57] he considered and rejected the arguments advanced on behalf of Mr Hancock based upon the redactions and the submissions as to the potential relevance of what might be in the redacted material. Importantly, in this section of his judgment he referred to and expressly accepted the evidence of Mr Cooper as to the irrelevance of the redactions, on

the basis that by reference to Mr Cooper's position as a responsible and reputable solicitor acting for the claimant it could safely be accepted that his evidence was truthful and reliable on these points, since Mr Cooper could not have said what he said in his statement unless he had been able to and had confirmed that it was true by examining the unredacted document. Equally importantly, in my view, Henderson LJ gained support for this conclusion from his analysis of the redacted documents themselves when considered in the light of the surrounding circumstances and his assessment of the inherent probabilities. Thus, notwithstanding the heavy redactions made from the deed of assignment and the non-production of the sale and purchase agreement and the novation document, on the basis of his assessment of the evidence Henderson LJ was satisfied that the claimant had made out its case as to the effect of the notice of assignment.

27. Having done so, he went on to address some further matters. In particular, at [66], he addressed the significance of section 136 of the Law of Property Act 1925. He concluded at [67]-[68] that the effect of the deed of assignment, being an absolute assignment of which notice in writing had been given to Mr Hancock and thus falling within section 136, was that since legal title was transferred to the claimant Mr Hancock could safely pay the claimant without being at risk, especially in the absence of any evidence that the assignment had ever been disputed by the bank. He gave that as a further reason for rejecting the defences raised by Mr Hancock.

28. At [69] onwards, he went on to consider the relevant principles in relation to redactions from documents. At [73], he rejected the submission that there was a rigid rule that the court should simply not engage with redacted documents, consistent with the decision of Marcus Smith J in *Emanuel (No. 1)*. At [74], he held that whilst the court should normally see all of a document which it is required to construe, if it was clearly explained and shown that the redacted material was irrelevant and that there were other good reasons to redact that material, for example, that it was confidential, then in principle such redactions might be acceptable.

29. As relevant to that case, and also as relevant to this case, he referred at [76] to the fact that because the deed of assignment incorporated by reference certain definitions to be found within the sale of purchase agreement then, ordinarily, those definitions ought also to be provided to the court so that it could undertake the construction exercise for itself fully and properly. That, of course, is why, as I have said, those relevant parts of the sale and purchase agreement have been produced here. However, despite his concern and disquiet that it had not been done in that case, at [77] he went on to make the following important findings. Firstly, as I have said, the burden of proof was on Mr Hancock. Secondly, that Mr Hancock had produced no credible evidence casting any doubt on the claimant's title. Thirdly, that Mr Hancock was protected by section 136 from any risk if he was to pay the claimant even if there was later to be any doubt based on the possibility that the bank had retained title. Fourthly, that even if, as in a normal Part 7 claim, the claimant had to prove title, on the facts of that case it had done so by reference to the deed of assignment as an absolute assignment, particularly in circumstances where Mr Hancock was not even a party either to the deed of assignment or to the sale or purchase agreement. As he recorded, there was not a shred of evidence that it had ever been disputed by the bank.

30. In paragraph 78, he said this:

> "Viewed in that context, the redactions to the Deed of Assignment seem to me to fade into relative insignificance ... the unredacted parts

> of the Deed are ... sufficient to show that title to Mr Hancock's debts was indeed assigned by the Bank to Promontoria Chestnut."

31. He went on to say that it would be wrong to lay down any overriding principle although he said that he had little doubt that the redactions in that case were far more extensive than they needed to be and that Mr Cooper's evidence ought to have condescended to greater detail about the specific reasons for particular redactions. However, as I have said, on the facts of that case those criticisms did not in the end alter the conclusion reached.

32. Finally, at [79] onwards, he went on to say something about the decision in *Emanuel (No. 1)*. Because it was the subject of a pending application for permission to appeal he made it clear that he did not intend to say very much about it. However in paragraph 83, he did explain some key differences between that case and the *Hancock* case. Firstly, that in the *Hancock* case, unlike in the *Emanuel* case, there was evidence from a solicitor both regarding the commercial background to the transactions and the reasons for the redactions. Secondly, Mr Hancock had the burden of establishing a real prospect of setting aside the statutory demand. Thirdly, I would add, the absence in *Hancock* of any contrary evidence as there was in the *Emanuel* case as recorded at paragraph 55(1) to which I have already referred.

33. At [89] Henderson LJ also provided some general guidance to the approach which a court should take to the redaction of documents, to which I need not refer here.

34. That concludes what, I am afraid, has been a lengthy reference to these two decisions because they bear so heavily on the first limb of the proposed amendments. They are to be found at paragraphs 7.1, 15.5.2.1 through to 15.5.2.3.6, and in the summary at 15.5.2.4. Again, I do not need to read them out. I need only confirm that there are two essential points made which, as I have indicated, are firstly the positive case that based on the evidence there has been was no effective assignment by the deed of assignment and secondly the alternative case, based on *Emanuel (No. 1)*, that by reference to the redactions, the court cannot safely conclude that the deed of assignment was effective given the redactions. I should also make clear that the defendants are not pleading, nor is there any basis for pleading, that the deed of assignment was in any way a sham document.

35. Turning to the relevant evidence in this case, I have already referred to the fact that Mr Cooper has explained at paragraph 20 of his witness statement the general structure of the transactions and their commercial background. I should also record that the documents which he has produced have all been certified by the reputable law firm, Linklaters, in whose custody they are, as being a true copies of the original versions which have been redacted for confidentiality reasons. They have also and separately been watermarked to reflect their source so that the claimant can police any wider unauthorised dissemination although the addition of this watermarking does not in any way hamper the ability to see the unredacted material so as to address their proper construction.

36. Turning to the deed of assignment. First and foremost, clause 2.1 and 2.2 are in the same terms as they were in the *Hancock* case. As in that case there is no dispute but that they include, by reference to the schedule 1 relevant loan assets, the lender liabilities and the guarantees the subject of this claim. There is, as I shall consider later, an issue as to whether or not the particular facility letter referred to in that schedule is the applicable facility letter as between the bank and the company, but that does not affect the analysis for these purposes.

37. Mr Pugh submitted that clauses 2.1(b) and (c) appeared to be novation provisions which did not make sense in their own terms and which needed to be explained by reference to a fully unredacted version of the sale and purchase agreement. In my view, that analysis is misconceived and mistaken. In no relevant sense can these provisions be described as seeking to effect a novation as opposed to an assignment. I note that the contrary was not a point which was argued before or occurred to the Court of Appeal in *Hancock*. He also submitted that there was some uncertainty caused by the fact that the effective date in clause 2.1 was defined as being 4 June 2015, which pre-dates the date of the deed by one day, however in my judgment, there is no reason whatsoever why the effective date of an agreement cannot pre-date the date of execution or the dating of the deed and there is nothing remotely suspicious, or surprising, or calling for explanation about that. The plain fact, in my judgment, is that the defendants have no credible answer to the deed of assignment, in its fully disclosed form, as amounting to an effective absolute assignment in precisely the way in which the Court of Appeal in *Hancock* found that it the redacted version produced in that case also was.

38. I then turn to the sale and purchase agreement which was entered into on 27 July 2014 between the bank, its holding company the National Australia Bank, and the claimant's holding company Promontoria Holding 97 BV. As I have said, those parts immediately relevant to the construction of the deed of assignment as discussed in *Hancock* have been disclosed. That is those provisions of clause 2.1 which have been incorporated by reference and the relevant definitions in clause 2.2. They include the definition of the buyer, from which it is clear that it includes the original and any novated buyer. This contemplation of here being a novation of the sae and purchase agreement also appears from the definition of the novation date and the novated buyer. Finally in this respect, clause 21 expressly permits an assignment to a novated buyer. There is also a definition of a transaction document which ties in with clause 4 of the deed of assignment. In short, the purport of those definitions is that it was clearly anticipated as at the date of the sale and purchase agreement that it was or might be novated to a subsequent buyer from Holding BV.

39. I have already said that Mr Cooper has explained in detail in his witness statement that the agreement is confidential and that the material redacted is irrelevant for reasons which he gives. What then do the defendants say about this? Their primary argument is that the sale and purchase agreement being described as such, might on its face be thought to amount to a contract of sale under which title would pass in the absence of words to the contrary. Thus, Mr Pugh submits, it is necessary to see the whole of the contract to see what the effect is and whether there are words to the contrary.

40. In my judgment, that reason for seeking an unredacted copy is mere surmise. I accept that it may well be, in the case for example of a simple contract for the sale of goods, that sale and completion should take place at the same time as provided for by the same contract document. However, there is no obvious reason in my judgment why that should be the case in relation to a sale and purchase agreement. This might equally well provide in the contract for completion to take place at the same time as the sale and by that document itself or for completion to take place by some subsequent event or through some subsequent transactional document, such as a deed of assignment. There can be no particular presumption one way or another. In my judgment there are strong indicators in this case why it is not to be expected that the contract of sale would also effect a transfer. In particular, if it effected a transfer there is no obvious need to include definitions referring to the initial buyer and the novated buyer or the novation date or a novation agreement as a transaction document. If the sale and purchase agreement effects the transaction which passes title, and thus there is no need for any further or other separate agreement such as a

deed of assignment, whether with the initial buyer or the novated buyer, all of these definitions as between the buyer and the seller appear to me at least to be otiose.

41. Moreover there is no analysis by the defendants, such as was attempted by the defendants in *Hancock* albeit unsuccessfully, to seek to identify specific provisions of the deed of assignment or the novation or the disclosed parts of the sale and purchase agreement which raise a particular question or issue which cannot be resolved save by production of the full sale and purchase agreement. In short, in my view, there is no solid basis for any submission that the sale and purchase agreement may well or might reasonably arguably contain material which would indicate that it was intended to and did effect an immediate and unconditional assignment to Promontoria Holding 97 BV.

42. I have already referred to the fact that there was as novation agreement on 29 September 2014 to which the parties were Holding 97, the National Australia Bank, the bank, and the claimant company. It therefore involved the same parties who, under the defendants' theory, had already effectively transferred title to Holding 97. Its effect, as per clause 3, is that it effects a novation of the sale and purchase agreement under which the claimant took over as party to the sale and purchase agreement from Holding 97. It might therefore be thought that the very existence of this contract is hopelessly inconsistent with an argument that there had already been an effective assignment as between the bank and Holding 97.

43. Mr Pugh submitted however that the novation by itself does not identify what was novated. That is clearly wrong, in my judgment, because what was novated was the sale and purchase agreement, so that this point does not take the defendants further. Mr Pugh also submitted that there ought to be some further purchase agreement with the claimant which post-dates the novation agreement. However, since the deed of assignment on its face makes good the process envisaged by the novation, which is why the deed of assignment expressly refers to the novation, it is not immediately obvious why anything more is required. So in my judgment this submission does not assist the defendants.

44. The final significant point about this novation agreement is clause 3.2.3, whereby the parties agreed that the claimant as the novated buyer should have the right to enforce the sale and purchase agreement. The importance of that, in my judgment, is that if the defendants were right and the sale and purchase agreement itself conferred some immediately effective right to an assignment upon Holding BV, then that is something which could be enforced by the claimant as the successor in title by novation to the sale and purchase agreement anyway and the rights which Holding BV had would be transferred to the claimant. This is important since the only party which could, on the defendants' analysis, have acquired the right to claim against the company or the defendants would be Holdings BV itself. If Holdings BV had ever sought to do so, any such claim would be immediately defeasible by the claimant by reference to clause 3.2.3. Whilst this is all complete speculation, since the fact is that Holdings BV has never made any such claim, the plain fact is that the novation agreement does not assist the defendants in any way.

45. Turning then to other relevant documentation, there are two powers of attorney which have been obtained. The first is that issued by the bank which gave the identified signatory to the deed of assignment authority to execute the deed on behalf of the bank. There was some issue as to whether or not it gave authority to enter into the deed of assignment. Whilst not specifically mentioned, in my judgment it plainly did by reference to the general wording. The same, in my judgment, is true of the other power of attorney given by the National Australia Bank. Whilst it is true it does not have an equivalent catch all provision in the schedule, it does have an equivalent provision in the main body at clause 2.2 so there

can be no issue based on the authority of the signatory to execute the deed of assignment. More generally, in my view, no particular reliance can be placed on those. The fact that as at the date of execution of those documents contemporaneous with the sale and purchase agreement the parties had not expressly identified that there should be a subsequent deed of assignment to this particular Promontoria company does not, in my view, provide any assistance when considering whether or not the deed of assignment is, indeed, a valid assignment.

46. I was also referred to various notices in relation to the assignment. In particular, I was referred to a letter from the bank to the company dated 1 May 2015 which explained that the bank had sold the facilities together with all regulated rights and benefits, including without limitation guarantees and security, to Promontoria Chestnut Limited, and:

> "We will be transferring our rights to them in due course. We expect the transfer to take place on 4 June 2015 and will write to you again to confirm this."

47. Mr Pugh points to the fact that it refers to the facilities having been sold. That, of course, is true but the further reference to the transfer, in my view, plainly indicates an intention that there should be two separate transactions, a sale, and a transfer and in my view, therefore, it entirely supports the claimant's case.

48. There is then the promised letter from the bank to the company dated 5 June 2015 writing to inform the company that the bank has completed a sale of all amounts owing to it to the claimant and going on to say that, accordingly, all of the bank's rights and benefits in relation to and under the loans *et cetera* have been transferred to Promontoria with effect on and from 5 June 2015. It is difficult, in my judgment, to see that this could be anything other than an effective notice of assignment which is consistent with the deed of assignment being a genuine contemporaneous document. Mr Pugh made a point that there was a discrepancy between dates but, in my judgment, there is no relevance in that discrepancy. It is simply immaterial for the same reason as I gave when referring to the discrepancy between the operative date and the date of the deed of assignment.

49. There were then a number of further subsequent notices. Thus here was, for example, a letter from Engage Commercial to the company dated 8 June 2015. Again, in my view, there is nothing in that which suggests it was not either a perfectly valid notice or a contemporaneous indication of what the parties to the deed of assignment believed that it had effected. The same is true of a subsequent letter of 29 June 2015 from the claimant itself to the company. Mr Pugh submitted that the notice could not be good if the assignment was empty but that, with respect to him, seems to be ignoring two separate propositions, namely the effect of the assignment and the effect of the notice. If that had been a good point, it would have been seen to be such in *Hancock* when the section 136 point was seen to be a further and additional reason for finding in favour of the claimant. In short, in my view the contemporaneous notices are entirely consistent with the claimant's case. Further, as Mr Riley submitted, is the fact that the legal charges were transferred by the bank to the claimant at the same time, as evidenced by the Land Registry TR4 form which has recently been produced. Again, this transfer of the legal charges is entirely consistent with a deed of assignment being a genuine transactional document.

50. There is then the Nomura charge of 28 November 2014, as to which I shall have to say more later but, again, it is clearly the case that the charge would only make sense as a commercial transaction if it was believed that the claimant either had or would have rights

in relation to the loan book whereas, of course, if there had already been an effective assignment to Holding 97, then it would not make sense for Nomura to enter into a charge with the claimant as its subsidiary in relation to those assets.

51. Mr Pugh sought to develop a point about the representations made in that charge to the effect that the claimant was the sole legal owner of the assets, which he said supported a submission that the claimant was already the owner pre-dating the date of the deed of assignment. Whilst ingenious, I prefer Mr Riley's submission that it simply related to the ownership of the bundle of rights created by the sale and purchase agreement and the subsequent novation agreement. However, in any event, whatever the true construction it seems to me to be a very small point in itself when set against the other documents.

52. The same on analysis is true of the documents upon which Mr Pugh placed some reliance, which were the filed accounts of the claimant and also an administrator's report in relation to the company. The accounts made reference to the effect that the claimant acquired assets from National Australia Bank Limited and the bank on 28 November 2014. Mr Pugh submitted that this was, on its face, inconsistent with the deed of assignment and led to a real basis for believing that there had been some separate anterior transaction. Whilst at first blush that appeared a point of some merit, it was answered, in my view, with the coincidence of the date as being the date of the Nomura charge but also the fact that - as was in evidence and referred to in the *Hancock* case itself, and explained in the evidence both in that case and in this - that the assignments did not all take place at the same time and that there was at least one deed of assignment on 28 November 2014 which did not extend to the particular assets the subject of this claim. This explanation is consistent with the reference in the accounts to the fact that a total of 83 connections were deferred and expected to transfer in June 2015.

53. The same is true in relation to the administrator's report to the creditors of the company where they referred to a debenture having previously been given to the bank by the company which had been assigned in favour of the claimant on 28 November 2014. There was an issue again as to what the impact of that was and it is clear, as Mr Pugh was able to demonstrate, that this same statement was also made in subsequent statutory demands. That is true but it is also true that before that the solicitors for the administrators had referred to the deed of assignment, the subject of this case, as being the relevant document and it is also clear that the debenture was indeed transferred.

54. I am prepared to accept that despite these explanations there remains some residual uncertainty about all of this however when, in my judgment, one sets that modest residual uncertainty against everything else in this case it seems to me that it is a very minor countervailing factor indeed. Indeed, I wonder what the relevance of this point would be in any event because even if there had been, as apparently stated in these accounts, an earlier assignment to the claimant in November 2014, it is difficult to see how that could have assisted the defendants in this case anyway, since that would not appear to invalidate the deed of assignment as being an effective and unconditional assignment in any event.

55. In conclusion, it seems to me that the evidence in totality really points all one way which is that the sale and purchase agreement was not an assignment to Holding 97 and that the absence of any contemporaneous indication to that effect is compelling. In contrast, the novation and the deed of assignment speak for themselves and are entirely consistent with what was envisaged and what took place. As said in *Hancock*, why would all of these sophisticated commercial parties, including the bank, go through this complicated charade of financial documentation if it was not intended and believed to be genuine?

56. In short, it seems to me that as in *Hancock*, no credible argument has been raised for disputing the authenticity of the deed of assignment or its legal effect and there is no credible basis for believing that anything in the redacted material could lead to any different conclusion, in the particular circumstances of this case where everything from the deed of assignment has been disclosed, the relevant incorporated material from the sale and purchase agreement has been disclosed, and one has the clear evidence of Mr Cooper.

57. In my judgment, whether one is looking at the matter on the basis of the burden upon the defendants as amending parties, or if one were simply looking at it on the basis of a Part 7 claim where the point has been pleaded from the start, the evidence really is all one way which is that the claimant has proved its title to sue and there is no proper evidential basis for any contrary submission. The end result therefore is that there is no real prospect of success and all amendments relating to this ground may not be allowed. I do not therefore need to deal with the alternative discretionary grounds and say no more about them.

The Nomura charge

58. I now turn to the second proposed amendment which concerns the Nomura charge. I have already said that the effect of the proposed pleaded case is to plead alternatively either that this was an absolute assignment or that the material demonstrates that it may have been such and, given the redactions, the converse cannot be established. There is also a further procedural point which is that the defendants contend that on that basis Nomura ought to have been made a claimant or a party to the litigation from the outset.

59. It is clear that if the security agreement as between the claimant and Nomura is on true analysis a transaction amounting to a charge then it is irrelevant because it would not impact on the claimant's ownership or right to sue. If it is, on its proper construction, an absolute assignment, then it would mean that as at the relevant dates, including the issue of proceedings, Nomura was the legal owner of the relevant rights and ought to have been either the claimant or a party. Even however in that scenario a question arises as to the effect of a subsequent deed of release to which I shall refer later.

60. So far as the law is concerned, it is common ground that there is a fundamental difference between a charge and an absolute assignment. That emerges very clearly from the decision of the Court of Appeal in *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 at [45] where Aikens LJ said, following earlier authority, that it is a question of the construction of the contract taken as a whole, looking at the substance and not the form.

61. I was also referred by Mr Riley to a decision of Simon J in the case of *Ardila Investments NV v ENRC NV & Anor* [2015] EWHC 1667 (Comm) where a similar exercise was undertaken in relation to a contract which contained a clause of some similarity to the present. I need not go through the facts of that case. What is important is that although it might have been said in that case, as it was in this, that the clause in question was the start and end of the case in terms of whether it was a charge or an absolute assignment, nonetheless what Simon J did was to consider the whole contract and on the basis of the construction of the contract as a whole to conclude that it was not an absolute assignment as opposed to a charge.

62. In this case, Mr Cooper has provided a similar explanation as with the deed of assignment and the sale and purchase agreement as to the intent and effect of the security agreement. He has also explained why he has in the same way only produced relevant extracts from the facility agreement which is referred to in the security agreement on the basis that it is

only those parts of the facility agreement which are expressly referred to in the security agreement and which might affect its construction which the claimant is required to produce.

63. In this agreement, Promontoria is described as the chargor and Nomura is described as the security agent. The most immediately significant clause is clause 2 headed "Creation of security", which draws a distinction in clauses 2.2 and 2.3 between assigned relevant documents and charged relevant contracts. Under clause 2.2, it says that the chargor assigns absolutely, subject to a proviso for re-assignment on redemption, a number of specified contracts which include under (g) the portfolio loans, the portfolio loan agreements, and the portfolio rights which it is common ground include therefore the relevant loans and bundle of rights, the subject of this case. Clause 2.3 provides that to the extent that any assigned relevant contract is not effectively assigned pursuant to clause 2.2, the chargor charges by way of first fixed charge all of its rights, title, interest and benefit present and future into and under the same categories of document referred to in clause 2.2.

64. It is submitted by Mr Pugh that clause 2.2 is a clear provision for a legal assignment, albeit subject to the proviso for reassignment on redemption. That, in my judgment, is clearly right, and indeed as Mr Pugh submits Simon J so found in the *Ardila* case.

65. Mr Riley submitted that clause 2.3 was the clause which applied in all cases where notice of assignment had not been given and therefore that clause 2.2 had very little application. I do not accept that argument, on the basis that it appears to me that clause 2.3 applies not in relation to notice but simply in relation to cases where, as it says, there was no effective assignment under clause 2.2. There is no express provision to notice or the lack of notice in clause 2.3. However, there is another important clause, in my judgment, which is clause 6.1(a), which provides in summary that the chargor must serve a relevant notice in particular circumstances. This would have to be a notice of charge, in the form set out in the schedule, to the counterparties to a charged relevant contract and to an assigned relevant contract. What is important is that there is a difference between some of the categories within clause 2.1 and other categories within that clause. The notice itself contains the option to insert either the words "assigned by way of security" or "charged".

66. By reference to the clause in this case, in my view the notice that was required to be served by reference to portfolio rights was a notice which referred to the charge rather than an assignment by way of security. The effect of that conclusion is that the form of notice required in this case would use the word charge and there would also by the notice still be an obligation for monies to be paid to the claimant. That is similar to the position in *Ardila* in which Simon J held that it was a matter of considerable significance as reflecting the true intention of the parties and, in my judgment, it is equally significant here.

67. This clause and form of notice is is reinforced by the fact that in clause 6.1(c), it was stated that nothing in this deed shall give the security agent the right to direct the exercise of any rights conferred by or comprising the security assets, or require the chargor to give notice of the security created by this deed before the security becomes enforceable. That is significant, in my view, because it does not envisage that notice should be given until or unless the security becomes enforceable and it also means that it is the claimant as the chargor who would until such event have the right to exercise the rights in relation to any liabilities. That is consistent, in my view, with the claimant retaining the relevant rights in relation to the assets and that is also consistent, as Mr Riley submits, with the provisions for the appointment of receivers, which would make no sense if the assignment was always absolute. The same is true of the provision for the application of proceeds.

68. Whilst I accept that the construction of a contract like this is not immediately straightforward by reference to the terms to which I have referred and the relevant authorities, nonetheless having considered the contract as a whole I am left in no doubt that in relation to the obligations in this case it creates a charge and not an absolute assignment. I am also quite satisfied that there is no reasonable prospect of the contrary being shown by any need to obtain the unredacted version of the facility agreement for essentially the same reasons as I gave in relation to the deed of assignment and the sale and purchase agreement. There is simply no credible basis for thinking that anything in that document is going to make any difference and Mr Cooper has confirmed, as a solicitor, that the redactions are for grounds of irrelevance.

69. Even if I was wrong about that, there is another fundamental difficulty with this argument, which turns on the deed of release. It is clear that the deed of release dated 22 October 2019 effects a clear and unambiguous release and effects a reassignment and retransfer from Nomura to the clamant, following the fiction in the security agreement clause 2.1 to which I have referred. It is clear from the schedules that it includes the obligations the subject of this case. Once the release came into force, it is apparent that whatever the position before the claimant became and still remains the only party with any rights and title to sue. It follows in my view that there is no basis for the defendants now to contend that it is an arguable defence that Nomura ought to have been the claimant at the time when the claim was issued or that this in some way affords the defendants a substantive defence. It is a procedural matter, not a substantive defence, and has been overtaken by events.

70. The law is made clear on this point by the decision of Asplin J in *Courtwood Holdings v Woodley Properties* [2016] EWHC 1167 (Ch) which Mr Riley helpfully located for my consideration. In that case, the judge held that a prior assignment was not effective to pass title to sue but that a subsequent assignment entered into after proceedings were issued was. She considered in some detail the Court of Appeal authorities and she held in terms, at [73], that a claim can be cured by amendment where there is only one claimant which, at the time of the issue of the claim form, lacked a cause of action at all and there is no absolute rule which precludes such an amendment at [74], saying that such question was therefore one of discretion. As Mr Riley submitted, any amendment in this case would be completely pointless because it would simply record if such was the case that there had been an earlier transaction which involved an absolute assignment to Nomura which had subsequently been retransferred back by the subsequent release.

71. Mr Pugh arrived at the same result in terms of the applicable principle, albeit by reference to CPR 19.3 - which I am not convinced applies in this case because it is not in my view a case of joint entitlement. As to the exercise of the discretion, Mr Pugh submitted that since Promontoria ought to have joined Nomura and disclosed the security agreement from the outset, then that has led the defendants into difficulties and there ought to be consequences. In particular, he suggested that there might either have to be costs consequences or the amendment ought to be allowed simply as a corrective measure. I do not accept either of those submissions. It does not seem to me that it would be proper on any basis to grant permission if there is otherwise no justifiable basis for doing so and it does not seem to me that there is any basis for considering that the claimant was seeking to take a tactical advantage. This was a point which was raised late by the defendants based on their perusal of charges registers which was a point which was always open to them to raise earlier and it does not seem to me that it has taken matters any further.

The 2009 Payment Services Regulations

72. I then turn finally to the payment services regulations point. This is an entirely new allegation which appears in 15.6.1 and 15.6.5, where it is alleged that the claimant operated a current account facility after the assignment and that it was not entitled to do so under the payment services regulations and thus it is not entitled to make a demand. The defendants' case was based primarily upon the documentation passing between the claimant and Engage, primarily, on the one hand, and the company on the other over the period March 2013 onwards. The relevance of March 2013 the bank wrote to the claimant offering a further three month overdraft facility which was scheduled to expire at the end of June 2013. It is common ground that it was accepted by the company.

73. On 18 July 2013, and thus after expiry of the March 2013 facility, the bank wrote a letter extending the overdraft facility. There is a dispute about that which I do not need to deal with at this stage of the argument, but the upshot of Mr Pugh's submission is that the relevant correspondence from 2015 onwards demonstrates that the claimant was still providing banking facilities to the company by reference to the facility letter of March 2013 and, in particular, was allowing the current account to be maintained and was debiting interest into that current account. On that basis, it is submitted, the claimant acted in breach of the Payment Services Regulations.

74. That is put in two ways. Firstly, that the operation of a business current account is in itself the provision of payment services whether or not, in fact, payment services are provided. The difficulty with that submission, as Mr Riley observed, is that the relevant contemporaneous correspondence simply does not support the proposition that a business current account was, in fact, being operated by the claimant or on its behalf post-assignment. Instead, the letter from Engage of 8 June 2015 to which I have already referred explained that Engage would provide portfolio and asset management services, stating that payments should be made into an account maintained by a company known as Thames Collections. This letter followed the 5 June 2015 letter from the National Australia Bank to which I have also already referred which also made reference to transactional banking still being available through the bank's branches. In other words, it is clear from that evidence that there was no question of the claimant through Engage providing a continuing current account service. All that it was doing was providing a service under which the company was to make payments into a separate account maintained by a separate company similar to a collection account opened by banks in similar cases.

75. Other than that, the only evidence is that, as I have said, continuing interest charges were being added to the current account on the basis that the current account had not been closed and some separate collections account or suspense account opened as sometimes banks do in such cases, but other than that, nothing was happening so far as the account is concerned. In particular, there is no evidence of any money being deposited, or cheques being written, or payments being transferred. As I say, if indeed there were any all that happened was that any payments went into the collection account arranged through Engage and interest was added to the current account. On that basis, it seems to me that Mr Pugh's broad argument simply has no prospect of success.

76. However Mr Pugh submitted as a fallback that the application of interest in itself to the business current account amounted to the operation of the account and therefore fell within the Regulations. As to this, the definition of 'payment services' in Schedule 1 of the Payment Services Regulations includes acquiring payment transactions. It is obvious, it seems to me, that simply levying interest on an account cannot be the same as acquiring payment transactions. If one goes further and looks at the definition of 'payment transactions' in Schedule 1, that is defined as an act initiated by the payer or payee of

placing, transferring, or withdrawing funds irrespective of any underlying obligation between the payer and the payee. As Mr Riley submitted, again it is quite clear from that definition if one refers to the definitions of 'payer', 'payee', 'funds', and the other associated definitions, that it relates to a transaction between parties using banking services and there is no basis whatsoever for believing that it includes the application of interest by a bank to an account.

77. It follows in my judgment that there is no realistically possible argument that the application of interest falls within that regulation. It therefore seems to me that this case falls at the first hurdle. However even if that was wrong, the question would arise as to what the consequences are. Paragraph 110 of the Regulations provides that a person may not provide a payment service in the UK, or purport to do so, unless the person is an authorised payment institution. It is common ground that the claimant is not. The sanction for non-compliance in subsection (2) is a criminal offence which can lead to imprisonment or a fine. There is no express civil sanction provided. It follows that the consequences of contravention are to be determined by the general law by reference now to the decision of the Supreme Court in the case of *Patel v Mirza* [2016] AC 467. In that case, Lord Toulson summarised the position at [120]. He said, as is well known, that the question ought to be determined by reference to a principled approach and that there are three particular considerations which apply.

78. Mr Pugh submitted that applying that guidance then the only proportionate response to the illegality is to deny the claimant its claim on the basis that there is a strong policy imperative in prohibiting any breach of the Regulations by unauthorised persons. Mr Riley submitted that that such a response would be manifestly disproportionate because the only breach, even on the defendants' case, would be the continued keeping alive of a current account which was not used other than for the application of interest. If the application of interest itself was unauthorised then the only obviously proportionate sanction would be to disallow recovery of that interest. However, in that case, there is no suggestion, for reasons I have already indicated, that this could result in a complete defence because of the points already made about the total amount of the liability when compared with the relatively modest guaranteed amounts.

79. It seems to me that that is clearly the case. It could not possibly be a proportionate response to this illegality for the whole of a pre-existing debt, including pre-existing lawfully applied interest, to be written off and there is no reasonable prospect of arguing to the contrary. It follows that for that reason as well, this amendment has no real prospect of success.

80. The final point is that, in my view, this is a case where discretionary factors do come into play and, in particular, the question of prejudice. Unlike the other points, which might be said to be points about construction of contractual documents, if the claimant was being accused of conduct which amounted to a criminal offence, as was its agents Engage, it seems to me to be elementary that the claimant would be entitled to have time and opportunity to consider those allegations to see whether it needed to respond and, if so, how, and whether it needed to put in further evidence. To suggest that it would not be unfair to the claimant, even as a substantial well-resourced organisation, to be pitched into a trial on this issue with no opportunity to prepare or to consider a response, where a consequence might be a finding of criminal conduct which might conceivably lead to a criminal prosecution, seems to me to be wholly wrong and that this would be another ground in itself for refusing permission.

81. In the event therefore, I am satisfied that all of the proposed amendments, the subject of these three arguments, should be disallowed primarily on the basis that they each have no real prospect of success.

82. Finally, there are a number of other minor amendments. In particular, paragraph 7 seeks to change a previous admission in a way which seems relatively modest on paper but could be significant and I am satisfied that there is no proper basis for that. There are further amendments which I think simply seek to set out parts of the history but, because they are only relevant to the substantive proposed issues which I have refused to allow, it does not seem to me that it would be proper simply to allow those either on the basis that they take matters no further. If the amendments are immaterial, then they should not be permitted, and if they are material, they should not be allowed for the reasons I have given. I therefore refuse the application in its entirety.

Stay of proceedings

83. I then deal with the question of stay. Since I have already refused the application to amend based upon the *Emanuel (No. 1)* argument, it seems to me that there is no proper basis left for any stay application. The case can and should be disposed of at a trial now by reference to the issues and the evidence before the court. In any event, even if I had granted permission, it does not seem to me that there would have been any proper justification for a stay. The fact is that this court now has the benefit of the judgment of Marcus Smith J and the benefit of the judgment of the Court of Appeal in *Hancock*. Simply adjourning this trial on the possibility both that permission to appeal will be given in Emanuel and that the outcome of the appeal would lead to a materially different outcome seems to me to be a surmise too far, in circumstances where the consequences of a stay would be wholly undesirable and disproportionate. So I reject the application for a stay.

84. Finally, and briefly, I can deal with the remaining applications. So far as specific disclosure is concerned, the only outstanding document is the sale and purchase agreement. That obviously now fails given that I have refused permission to amend to plead this point. For what it is worth, if I had granted permission, then I agree with the claimant that based on the *Hancock* guidance, there would still have been no basis for requiring disclosure of the unredacted parts of the document, in particular and apart from anything else, that on the basis of the section 136 Law of Property Act point, it would be irrelevant in any event.

85. Finally, and very briefly, I can deal with the other documents. They are very helpfully summarised in Mr Simpson's witness statement at paragraph 6. Paragraph (a), the witness statement and exhibit of Mr Cooper, goes in, for what it is worth now. Paragraphs (b) and (c) are now irrelevant. Paragraph (d), the emails and correspondence with Engage, are substantially taken away by my decision on the Nomura point but I am satisfied that they should all go in as a modest selection of correspondence but on the specific reservation that nothing to do with the separate facility letters in relation to the separate partnership is relevant and therefore should be relied upon. Paragraph (e) is an email of 8 April 2016 and that should go in insofar as it is still relevant. Paragraphs (f) and (g), the accounts and annual return, again should go in insofar as relevant as public documents. Paragraph (h), an email of 4 September 2018, should go in insofar as relevant. Paragraph (i) is the only contentious issue. It is an article from November 2015 in the Irish Times from a senior reporter, Mr Barry O'Halloran. It seems to me that, as Mr Riley said, since no permission has been given for evidence of opinion or expert evidence, to allow this article in on the basis that it is effectively opinion hearsay evidence, or expert hearsay evidence, would be

wrong and I therefore refuse to allow it in. Paragraph (j), the powers of attorney, insofar as still relevant can go in, and TR4, the transfer, again insofar as still relevant can go in.

86. That concludes my judgment.

This Judgment has been approved by the Judge.