OUTER HOUSE, COURT OF SESSION

[2019] CSOH 2

CA105/16

OPINION OF LORD ERICHT

In the cause

PROMONTORIA (HENRICO) LTD

Pursuer

against

JAMES FRIEL

Defender

Pursuer: Dunlop QC, Welsh; Addleshaw Goddard
Defender: Ferguson QC; Pinsent Masons LLP

8 January 2019

Introduction

[1] The defender was a director and shareholder of Glen TV Rentals Ltd (the "Company"). The Company's bankers were Clydesdale Bank Plc (the "Bank"). The Bank subsequently sought to transfer part of their loan book, including the lending to the Company, to the pursuer. The pursuer now seeks payment under a personal guarantee which the pursuer says was granted by the defender in favour of the Bank on 28 November 2008. The pursuer sought to prove the tenor of the guarantee and sought the sum of £800,000 under the guarantee.

[2] The defender opposed the proving of the tenor and also defended the action on a number of technical grounds, submitting:

(a) The copy of the assignation produced to the court purporting to transfer the loan book by the Bank to the pursuer had not been proved in accordance with the laws of evidence and accordingly the pursuer had failed to prove its title to sue;

(b) On a proper construction of the terms of the assignation, the lending to the Company had not been assigned by the Bank to the pursuer and so the pursuer had no title to sue;

(c) The pursuer had failed to rebut the presumption against delegation;

(d) Esto the defender was liable under the guarantee, the pursuer had not proved that £800,000 was due.

The pursuer's response was that the defender's position was a highly technical one, resting on putting the pursuer to strict proof of its claim, but that the pursuer had proved its case on the balance of probabilities.

Background

[3] The background to the dispute was largely agreed in the joint minute and was otherwise uncontroversial.

[4] As at November 2008, the defender and his daughter Miss June Friel were directors and shareholders of the Company. The defender is now the sole director and shareholder of the Company.

[5] The Bank entered into facility agreements with the Company in and after 2007.

[6] The first such facility agreement was for a Tailored Business Loan and was dated 23 March 2007 ('the 2007 Facility Agreement').

[7] Clause 14.2 of the Terms and Conditions of the Tailored Business Loan provides:

> "14.2 Our rights and obligations
>
> (a) We may assign or otherwise transfer any of our rights and/or obligations under the Finance Documents to any person."

[8] Clause 17.4 of the Terms and Conditions of the Tailored Business Loan provides:

> "Certificates
>
> Any certificate or determination by us of a rate or amount under a Loan Document is, in the absence of manifest error, conclusive of the matters to which it relates."

[9] The second such facility agreement the Bank entered into with the Company was for overdraft facilities and was dated 29 July 2011 ('the 2011 Facility Agreement'), and renewed on 30 March 2012.

[10] Clause 4.2 of the Schedule to the 2011 Facility Agreement provided:

> "All notifications, determinations and calculations given or made by the Bank under this letter will be conclusive and binding except in any case of manifest error."

[11] Clause 6 of the Schedule to the 2011 Facility Agreement provided:

> "6 Transfer and Disclosure
>
> 6.1 The Borrower may not assign, transfer or otherwise deal with any of its rights or obligations in respect of this letter or the Loan or any other Relevant Document.
>
> 6.2 The Bank may (l) assign any of its rights or benefits and/or (2) transfer by novation any of its obligations, under this letter or any other Relevant Document to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing ln loans, securities and other financial assets or to any other person or persons and/or (3) otherwise deal with its rights, benefits and/or obligations under this letter or any other Relevant Document, in whole or in part."

[12] On 9 October 2012, the Bank received from the sale of the Company's premises in Byres Road, Glasgow the sum of £1,242,850.80. The Bank used some of the said sum of £1,242,850.80 to discharge *in toto* the amount due to it by the Company in terms of the 2011 Facility Agreement, applied £470,542.80 to the outstanding capital, and £578.57 to the interest due to it, on the loan advanced to the said company in terms of the 2007 facility agreement, leaving surplus funds at that time of £21,729.43.

[13] By letter dated 28 October 2014 the Bank demanded of the Company repayment by 5 November 2014 of an overdraft of £57,224.89.

[14] That sum not being repaid, on 7 November 2014 the Bank issued a demand letter to the Company in the following terms:

> "Dear Sirs
>
> Glen T.V. Rentals Limited (Company Number SC092146) (the 'Company')
> Business Account 82-56-04/80266348
> Business Term Loan TBLKFL33028
> Business Credit Card 5473536360012587
>
> We, Clydesdale Bank PLC (the 'Bank'), refer to:
>
> (i) the business term loan facility letter issued by the Bank to the Company on 23 March 2007 relating to a business loan facility of up to £1,400,000 (reference TBLKFL33028) (the 'Business Term Loan') and made available on the terms and conditions set out therein (as the same may have been supplemented, varied or amended from time to time);
>
> (ii) the unauthorised debit balance on the Company's business current account (account number 80266348, sort code 82-65-04) (the 'Account'), which constitutes unplanned borrowing; and
>
> (iii) the £9,000 business credit card facility made available to the Company (account number 5473536380012587) (the 'Business Credit Card').
>
> Event of Default
>
> We further refer to the letter issued to the Company on 28 October 2014, demanding repayment of the unauthorised debit balance on the Account by 5 November 2014.

No repayment has been made by the Company and no repayment proposals have been received by the Bank. As a result, an Event of Default has occurred under clause 13.1 of the terms and conditions which apply to the Business Term Loan. Pursuant to clause 13.2(b) of the applicable terms and conditions, while an Event of Default is continuing, the Bank may demand immediate repayment of all sums due by the Company under the Business Term Loan, together with accrued interest. All amounts outstanding from the Company to the Bank under the Business Credit Card are repayable on demand."

[15] The letter went on to formally demand repayment of the total sum of £1,180.403.61 as certified on an annexed Stated Account which was in the following terms:

" Stated Account showing the sums due by Glen T.V. Rentals Limited to Clydesdale Bank Public Limited Company

Balance at debit of current account 80266348 in name of Glen T.V. Rentals Limited	£	56,029.66
Interest accrued thereon to 6th November 2014	£	763.14
Tailored Business Loan TBLKFL33028	£	1,112,403.08
Interest accrued thereon to 6th November 2014	£	1,967.74
Business credit card number 5473536360012587	£	9,119.39
Interest accrued thereon to 6th November 2014	£	120.60
TOTAL	£	1,180,403.61

GLASGOW, 7th November 2014, I certify that the gross amount of principal and interest due at this date by Glen T.V. Rentals Limited to Clydesdale Bank Public Limited Company is £1,180,403.61 (On million, one hundred and eighty thousand, four hundred and three pounds and sixty-one pence Sterling).

Signature: Andrea Stuart
Manager
National Australia Bank Ltd
For and on behalf of Clydesdale Bank PLC"

[16] The Company did not make payment of the sums demanded under the 7 November 2014 letter and certificate.

[17] On 20 March 2015, Her Majesty's Revenue & Customs presented a petition to this court which sought orders to wind up the Company. On 2 April 2015, Mr Derek Forsyth and Mr David Hunter of Campbell Dallas LLP were appointed Administrators of the Company.

[18] On or about 7 July 2015, the pursuer wrote to the defender giving notice of the assignment of the Guarantee and demanding payment of £800,000 under it.

[19] The defender has not made payment to the pursuer of the sums demanded as falling due under the Guarantee.

Proving the Tenor of the Guarantee

[20] The pursuer sought declarator that the personal guarantee granted by the defender in favour of the bank in respect of the company on 28 November 2008 and executed by him on that date was of the tenor of a copy document lodged in process.

Evidence on proving the tenor of the guarantee

[21] The copy document was in the form of a standard form bank guarantee. It provided that the defender's liability was limited to £800,000 plus, if applicable, certain interest and costs.

[22] The signature page included a *proforma* testing clause. The testing clause stated:

> "Signed by the above-named Mr James Friel
>
> At Glasgow (place of signing)
>
> On 28/11/08 (date of signing before this witness)
>
> Signature: Pamela McHarg
>
> PAMELA MCHARG, 151 St Vincent Street, Glasgow."

A signature which looked like the name "James Friel" appeared to the right of the proforma testing clause. The following words appeared in bold capitals letters in a box immediately above the proforma testing clause:

"IMPORTANT

BY SIGNING THIS GUARANTEE AND INDEMNITY YOU MAY BECOME LIABLE INSTEAD OF OR AS WELL AS THE BANK'S CUSTOMER. THE MAXIMUM OF WHICH YOU MAY BE REQUIRED TO PAY IS LIMITED TO THE SUMS REFERRED TO AT THE BEGINNING OF THIS DOCUMENT.

YOU SHOULD TAKE INDEPENDENT LEGAL ADVICE BEFORE SIGNING THE GUARANTEE AND INDEMNITY."

[23] In his oral evidence the defender maintained that he had not signed the bank guarantee in the form of the copy which the pursuer sought to use to prove the tenor. His evidence was that he had signed a guarantee but liability under the guarantee which he had signed was limited to £600,000 and not £800,000. However he did not accept that that £600,000 was due under the guarantee which he claimed to have signed.

[24] In her oral evidence, the pursuer's daughter, June Friel, who had been a director of the Company from 1999 to 2012 maintained that there had been a guarantee signed on 28 November 2008 but it was not the one a copy of which was now produced to the court. There had been a £600,000 limit in place for decades and the limit was to be kept as that.

[25] Affidavit evidence was led from Pamela McHarg. She is a solicitor specialising in real estate finance. She qualified as a solicitor with Maclay Murray & Spens in 2008. Her evidence was that in Glasgow on 28 November 2008 she had witnessed the defender sign the guarantee in the form now produced to the court. While she could not recall the specifics of the meeting with the defender, she could confirm that the copy she had been shown bore her signature. She would not have witnessed the guarantee had the defender

not executed the principal document first. She was shown a copy of a letter from Maclay Murray & Spens to the bank dated 27 January 2009. She confirmed that the letter had been signed by her. The letter was in the following terms:

> "Dear Andrena
>
> **Clydesdale Bank plc ('Clydesdale')**
> **Glen TV Rentals Limited (the 'Company')**
>
> I refer to the above matter and enclose the undernoted original documentation for your retentions. I also enclose our fee invoice in respect of this matter for all work undertaken to date and would be grateful if you could arrange for payment just as soon as possible.
>
> ...
>
> Yours sincerely
>
> Pamela McHarg
> Maclay Murray & Spens LLP
>
> Note referred to:-
>
> 1. Certified true copy floating charge by the Company in favour of Clydesdale dated 23 November 2008 together with original Certificate of Registration of a charge dated 28 November 2008;
>
> 2. Original Board Minutes of the Company dated 28 November 2008;
>
> 3. Certificate by Guarantor to Clydesdale confirming Independent legal Advice dated 28 November 2008; and
>
> 4. Original Guarantee by Mr James Friel in favour of Clydesdale on behalf of the Company dated 28 November 2008."

The certificate confirming independent legal advice referred to in the note to that letter was in the following terms:

> "**Certificate by Guarantor to Clydesdale Bank ('the Bank')**
>
> I confirm that prior to signing the guarantee ('the Guarantee') given by me to secure the liability to the Bank of
>
> Glen T.V. Rentals Limited

('the Customer') for a sum of £800000 together with interest as provided in the Guarantee.

1. I was given full opportunity to read the Guarantee at a private meeting with a solicitor acting for me.

2. I was told by my solicitor and understand that:

   (a) if at any time in the future the Customer fails to pay the monies then due and owing by the Customer to the Bank the Bank can make a demand for payment on me under the terms of the Guarantee; and

   (b) if I do not make a payment then the Bank can take legal proceedings against me to recover the monies then due by me to the Bank under the Guarantee.

3. I took the independent legal advice of a solicitor of my own choice.

I acknowledged receipt of a copy of the Guarantee and a copy of this certificate.

Signed J Friel

Full name of the Guarantor MR JAMES FRIEL

I confirm that prior to the signing of this certificate the full effect of its contents was explained to and understood by the Guarantor and that this certificate was signed in my presence.

I further confirm hat in advising the Guarantor I am acting independently of the Bank and the Customer.

Signed J Friel Pamela McHarg

Full name of the witness PAMELA McHARG

Dated this 28 day of November 2008"

[26] Marta Piwowarska was an employee of the bank who gave evidence as to efforts which had been made to find the original of the guarantee. She had been part of the team at the bank who assisted in relation to "Project Henrico" from December 2014 to June 2015. That was the project of the transfer of parts of the Bank's loan book to the pursuer. Her work involved checking whether there was any discrepancy between what was recorded on

the electronic system and the physical principal documents actually held by the Bank. She had not personally dealt with documents relating to the Company. Her evidence was that the principal personal guarantee was not available within the bank storage facilities by the time of Project Henrico. This was apparent from the electronic systems she checked in June 2018, and in addition there was no record of the personal guarantee having been returned to the pursuer by the bank. There was no record of the personal guarantee having been destroyed, and this would not be usual practice. Her searches had been unable to locate it. After she performed the electronic checks she also went to the storage facilities. She asked the member of staff who is responsible for looking after the physical documents to physically search the storeroom. No documentation in respect of the company was found in the storeroom. Miss Piwowarska was unable to locate the principal personal guarantee granted by the defender.

[27] There was also affidavit and oral evidence from Laura Balloch and Andrea Stuart who were employees of the Bank but as they had little direct involvement with the issues in dispute in this case their evidence was of no assistance other than background.

Pursuer's submissions on proving the tenor of the Guarantee

[28] Counsel for the pursuer submitted that on the evidence of Miss Piwowarska, the personal guarantee did not appear to have been sent to the pursuer as part of the project of transfer of the loan book , nor could it be found in the bank's records: it had been lost. On the evidence, it had been established that the production lodged was a true copy, and was thus of the tenor, of the guarantee signed by the defender on 28 November 2008.

Defender's submissions on proving the tenor of the Guarantee

[29] Under reference to *Walkers on Evidence* paragraph 20.4.2 counsel submitted that proving the tenor required proof of three things: execution, tenor of the document and the circumstances of their loss. These three matters were not wholly independent and the burden of proof of each depended on the way to evidence in relation to the other elements. The fact that a pursuer was unable to produce a document of debt on which he founded raised a presumption that the debt had been paid and the document in consequence destroyed (*Gloag on Contract* (2nd edition) page 717; *Walkers* paragraph 3.9). Very clear proof of the *casus amissionis* was required (*Gloag*). The loss must be proved in such a manner as implied no extension of the right (*Walkers* paragraph 20.7.1).

[30] Counsel accepted that the court could be satisfied in relation to the first two of these things. The defender accepted the signature in evidence that the signature on the copy was similar to his signature, and there was no evidence that it was not in fact his signature. The weight of the evidence established that the tenor of the document as being a personal guarantee for £800,000 and not £600,000.

[31] However he submitted that the circumstances of disappearance of the guarantee had not been proved: all that had been proved was that the principal guarantee could not be located after a short search. It had not been established that the primary evidence had been lost: all that was established was that no one had been able to find it (*Scottish & Universal Newspapers Ltd* v *Gherson's Trustee* 1987 SC 27 at page 51 and 54.)

Discussion and decision on proof of tenor of the Guarantee

[32] In order to succeed in proving the tenor of a document, a pursuer must prove (1) the execution of the document (2) its tenor (in other words its terms) and (3) the *casus amissionis* , (in other words the circumstances of the loss) (Walkers on *Evidence* para 20.4.2).

[33] I am satisfied that the pursuer has proved the execution of the document and that its tenor was that of the copy produced by the pursuer to the court. There was no dispute that a guarantee document was signed that day. I accept the evidence of Pamela McHarg that the document she witnessed the defender signing is the document a copy of which was produced by the pursuer to the court. I found her to be a credible and reliable witness. Her evidence was supported by the other contemporaneous documentation relating to the transaction. The certificate relating to independent legal advice signed by the defender specifically referred to a guarantee for £800,000. The letter from Ms McHarg sending the original guarantee to the Bank specifically referred to a guarantee for £800,000.

[34] I do not accept the evidence from the defender and Miss Friel that what was signed was a different guarantee for the lesser sum of £600,000. I found them neither credible nor reliable on this matter. Their oral evidence was inconsistent with the contemporaneous documentation I have just referred to.

[35] I am also satisfied that the pursuer has sufficiently proved the *casus amissionis*, ie the circumstances of the loss.

[36] What is required for proof of the circumstances of the loss in an action for proving the tenor depends on the circumstances of the case and is not to be considered in isolation from proof of the execution and tenor. As long ago as 1847 Lord Jeffrey stated the principle that:

> "where the tenor was clearly instructed by proper adminicles, under the hand of the granter (which of course also settled its authenticity), a very general and slight proof of the *casus amissionis* would be sufficient." (*Graham* v *Graham* (1847) 10D 45 at 49).

[37] The case of *Scottish and Universal Newspapers Ltd* v *Gherson's Trustees* does not detract from this principle as that case is clearly distinguishable from an action of proving the tenor. That case deals with proof of *casus amissionis* not in relation to proving the tenor but in relation to the best evidence rule. The Lord President explained at p 47 that secondary evidence of the contents of missing documents will be admitted as an exception to the best evidence rule only if it is shown that they have been destroyed or lost without fault on the part of the pursuers who had effective control of the records when the action began. He further explained that fault means failure in a duty to take all proper steps and use all diligence to see that the documents are preserved and remain accessible for use in the proof. In my opinion, the requirement to show destruction or loss without fault applies only in relation to the leading of a document in evidence as an exception to the best evidence rule, and does not apply to an action of proving the tenor.

[38] One particular circumstance which can be relevant proof of the *casus amissionis* arises when the document whose tenor is sought to be proved is one which is normally destroyed, cancelled or returned when the obligations in it are extinguished.

[39] *Winchester* v *Smith* ([1863] 1 M 685) was an action of proving the tenor in which the judges were equally divided on the issues and therefore directed the cause to be judged by the Inner House judges of both divisions. The Lord President, giving the opinion of the consulted judges, stated:

> "But proof of [execution and tenor] is of no avail in such an action as the present, unless there be likewise sufficient proof of what is called the *casus amissionis* – and which, as we understand the phrase, means not only that the writing has actually been destroyed or lost, but that its destruction or loss took place in such a manner as implied no extinction of the right of which it was the evident.

> Such *casus amissionis* requires to be supported by much stronger evidence in some cases than in others…..If it be such a writing as is usually cancelled or destroyed when it has served its purpose – as, for example a bill of exchange or promissory note, or a personal bond; and if it has been destroyed, or has been found in the hands or in the repositories of the granter actually cancelled, the presumption is that the right of which it had originally been the evident no longer subsists; and very clear evidence is requisite to overcome the presumption… In order therefore to judge the sufficiency of the evidence of the *casus amissionis* of a writing in an action of proving the tenor, the nature of the writing must be carefully attended to" (p689)

[40] In my opinion the presumption does not apply in the current case. The defender did not direct me to any legal authority or custom or practice which suggests that a personal guarantee to a bank is usually cancelled or destroyed after it has served its purpose. Indeed, the copy Guarantee specifically provides the opposite: clause 15 provides that even if the defender has paid all the sums due by him under the Guarantee the Bank may keep the Guarantee in its custody as evidence of its contents. In any event, the presumption applies to cancellation or destruction, neither of which the pursuer is seeking to prove in this case: the pursuer's first plea in law refers only to the principal Guarantee "having been lost".

[41] In my opinion the pursuer has led sufficient evidence of the loss of the principal guarantee. I accept the evidence of Ms McHarg that she sent the principal Guarantee to the Bank. I found Ms Piwowarska to be a credible and reliable witness and I accept her account. I accept her evidence that the electronic record showed that the principal guarantee was not available in the bank storage systems and was not found in a physical search of the storeroom, and that there was no record of the principal Guarantee having been returned to the defender. In the whole circumstances, the loss of the principal Guarantee implies no extinction of the obligation: there was no suggestion from any Bank witness, nor from the defender himself, that the Bank had at any time agreed to release him from it, or that the Guarantee had been formally discharged in writing. In all the

circumstances, including the strong evidence of execution and tenor, I find that the pursuer has proved the *casus amissionis.*

[42] Accordingly, I shall uphold the pursuer's first plea in law and repel the defender's first plea in law and grant declarator that the guarantee was of the tenor of the copy lodged and equivalent to the original deed.

Proof of pursuer's title to sue: proof of copy Assignation

[43] The Guarantee is in favour of the Bank. However, the Bank is not the pursuer in this action. The pursuer averred that by Assignation dated 1, 2 and 5 June 2015, the Bank assigned the Guarantee to the pursuer.

[44] The defender's position was that the Assignation had not been proved in accordance with the laws of evidence. As the pursuer's title to sue depended on proof of the Assignation, the pursuer's title to sue had not been established and the defender should be assoilzied.

The evidence relating to proof of the Assignation

[45] The original of the Assignation was not produced to the court. Instead, the pursuer founded on a copy Assignation which bore a certificate on the cover page in the following terms:

"CERTIFIED TO BE A TRUE
COPY OF THE ORIGINAL
Linklaters LLP
DATE 13 April 2018"

[46] The words "Linklaters LLP" and "13 April 2018" were in manuscript, with the other words having been applied by a rubber stamp.

[47] The certified copy Assignation was by National Australia Bank Limited (defined as the "seller") and Clydesdale Bank PLC (defined as "Clydesdale") in favour of Promontoria (Henrico) Limited (defined as "the Novated Buyer" or the "buyer").

[48] The certified copy Assignation was governed by Scots law. It bore to have been signed on behalf of the Bank, National Australia Bank Limited and the pursuer on respectively 1, 2 and 5 June 2015.

[49] The substantive clauses of the certified copy Assignation were as follows:

> "1. Interpretation
>
> 1.1 **Definitions**
>
> Words and expressions used in this Assignation shall (unless otherwise expressly defined) have the meaning given to them in the Sale and Purchase Agreement and
>
> '**Ancillary Rights and Claims'** means:
>
> (a) all claims, suits, causes of action, and any other right of the Seller or Clydesdale, whether known or unknown, against any Obligor, or any of their respective affiliates, agents, representatives, contractors, advisers, or any other person but only to the extent that they are based upon, arise out of or relate to the Specified Loan Assets and which are held by the Seller or Clydesdale in its capacity as Lender or as holder of the benefit of any security or guarantee in relation to such assets; and
>
> (b) all claims (in contract or in tort or delict), suits, causes of action, and any other right of the Seller or Clydesdale against any auditor, valuer, legal, tax, financial or other professional adviser, or other person arising under or in connection with the applicable Relevant Documents in respect of any Specified Loan Asset.
>
> '**Effective Time'** means the Settlement Date immediately following the receipt by the Seller of the Purchase Price for the Specified Loan Assets.
>
> '**English Assignment and Assumption Deed'** means the assignment and assumption deed dated on or around the date of this Assignation between the Seller, Clydesdale and the Buyer.
>
> '**Excluded Liabilities'** means in relation to each Specified Loan Asset:

(a) all Liabilities of the Seller or Clydesdale with respect to payment obligations due to, or to be performed by, the Seller or Clydesdale (as applicable) under the Relevant Documents prior to the Pricing Date;

(b) all Liabilities of the Seller or Clydesdale to any Obligor for breaches by the Seller or Clydesdale (as applicable) of their obligations (other than payment obligations) under the Relevant Documents prior to the Settlement Date;

(c) any Liability expressly reserved to the Seller or Clydesdale under this Assignation or the Sale and Purchase Agreement;

(d) any Liability that does not relate to the Specified Loan Asset, or that relates to the Seller's or Clydesdale's obligations in respect of the Specified Loan Asset in any capacity other than as a Lender;

(e) any Liability that arises out of the Seller's or Clydesdale's fraud or wilful default;

(f) any Liability that arises out of the Seller's or Clydesdale's breach of any Applicable Law where such breach has a material and adverse effect on the value of such Specified Loan Asset (as against the value of such Specified Loan Asset had such breach not occurred) **provided that** such Liability shall not constitute an 'Excluded Liability' if the Seller or Clydesdale (as the case may be) makes a compensation payment to the Buyer with respect to such deterioration in value, and/or

(g) any Liability in respect of any Existing Litigation,

provided that, for the avoidance of doubt, a Liability in relation to such Specified Loan Asset which has been discharged or otherwise extinguished as a result of any Remediation Action which has been finally concluded shall not constitute an 'Excluded Liability'.

'**Novation Agreement**' means the novation agreement dated 21 April 2015 between the Seller, Clydesdale, Promontoria Holding 93 B.V. and the Novated Buyer whereby the rights and obligations of Promontoria Holding 93 B.V. under the Sale and Purchase Agreement were novated to the Novated Buyer.

'**Party**' means a party to this Assignation.

'**Related Security**' means, in relation to a Specified Loan Asset:

(a) any Collateral which is subject to (or which is purported to be subject to) any Encumbrance Security in favour of the Seller or Clydesdale in

respect of the Financial indebtedness of an Obligor under that Specified Loan Asset, and

(b) any guarantee or right of indemnity granted by an Obligor in favour of the Seller or Clydesdale in respect of the Financial Indebtedness owed to the Seller or Clydesdale (as applicable) under that Specified Loan Asset.

'**Relevant Documents**' means, in respect of a Specified Loan Asset, each facility, loan or credit letter or agreement (including aL schedules and appendixes to that facility or credit agreement), security document, guarantee, contingent funding or indemnity agreement, letter of credit, performance bond, fee letter, restructuring agreement, subordination agreement, intercreditor agreement, ranking agreement, deed or priority, common terms agreement, consensual sale agreement, duty of care agreement, collateral warranty and/or any other document evidencing any Related Security in each case governed by Scots law and relating to that Specified Loan Asset (including any written amendment, supplements, consents, accessions, waivers or variations to each document but excluding any release letters, discharges, deeds of release or agreements of release in respect of any assets which no longer comprise the Property Collateral).

'**Relevant Borrower Asset Group**' means in relation to any Specified Loan Asset, the Borrower Asset Group to which that Specified Loan Asset relates.

'**Relevant Loan Asset**' means a loan asset or debt claim described in the Schedule (*Relevant Loan Assets*) to this Assignation.

'**Sale and Purchase Agreement'** means the sale and purchase agreement dated 15 December 2014 between the Seller, Clydesdale and Promontoria Holding 93 B.V. (as the Initial Buyer), as amended by the Novation Agreement.

'**Settlement Date**' means 4 June 2015 or such other date as may be agreed by the Parties in writing.

'**Specified Loan Asset**' means:

(a) a Relevant Loan Asset; and

(b) a Relevant Loan Asset as defined in the English Assignment and Assumption Deed.

1.2 **Construction**

Clause 1.2 (*Construction*) of the Sale and Purchase Agreement shall be incorporated in this Assignation as if set out in full herein.

2. **Assignation and Acceptance**

2.1. **Assignation**

Subject to the terms of this Assignation and in consideration for the payment by the Buyer to the Seller of the Purchase Price for each Relevant Borrower Asset Group, with effect on and from the Effective Time in relation to each Specified Loan Asset comprised within that Relevant Borrower Asset Group.

(a) each of the Seller and Clydesdale (with the consent of the Seller) hereby assigns absolutely to the Buyer the following in relation to each such Specified Loan Asset comprised within that Relevant Borrower Asset Group:

(i) all of its right, title, benefits and interests under, in or to each Relevant Document;

(ii) each of the Seller's and/or Clydesdale's rights in its capacity as Lender (if any) under, to and in connection with the Relevant Documents, to demand, sue for, recover, receive and give receipts for all monies payable or to become payable to it in its capacity as Lender (howsoever and whenever arising);

(iii) the right to exercise all rights and powers of the Seller or Clydesdale (as applicable) in its capacity as Lender (if any) under, to and in connection with the Relevant Documents, and, in such capacity, to enforce its rights (if any) under the Relevant Documents including (without limitation) any such rights (if any) arising under or in connection with any Related Security comprised within or evidenced by the Relevant Documents; and

(iv) all Ancillary Rights and Claims in respect of the Relevant Documents, and the Specified Loan Assets;

but for the avoidance of doubt, excluding the Excluded Liabilities;

(b) each of the Seller and/or Clydesdale (as applicable):

(i) are released of all of their respective obligations under the Relevant Documents; and

(ii) resigns from each Relevant Document in its capacity as the Lender;

but, in each case and for the avoidance of doubt, other than in respect of, and excluding, the Excluded Liabilities; and

(c) the Buyer becomes a party to each Relevant Document in the capacity of the Lender and is bound by obligations equivalent to those from which the Seller and/or Clydesdale (as applicable) are released under paragraph (b) above but, in each case and for the avoidance of doubt, other than in respect of, and excluding, the Excluded Liabilities.

2.2 **Acceptance**

The Buyer agrees that with effect on and from the Effective Time:

(a) it accepts the assignation of the rights, title, benefits, interests, powers and Ancillary Rights and Claims referred to in Clause 2.1(a) (*Assignation*) above; and

(b) It shall assume, perform and comply with the terms of and the obligations of the Lender under the Relevant Documents as if originally named as a party in the Relevant Documents in place of the Seller and/or Clydesdale (as applicable) but, in each case, and for the avoidance of doubt, other than in respect of, and excluding, the Excluded Liabilities.

3. **Notification**

On the Settlement Date, the Seller shall notify the Buyer in writing promptly upon receipt by it of the Purchase Price for each Relevant Borrower Asset Group and shall confirm to the Buyer in such notice that the Effective Time has occurred.

4. Sale and Purchase Agreement

Each of the Seller, Clydesdale and the Buyer hereby agree that this Assignation is a Transaction Document for the purposes of the Sale and Purchase Agreement. Each of the Seller, Clydesdale and the Buyer hereby agree and acknowledge that their entry into this Assignation is without prejudice to the rights and obligations granted and assumed by them, as appropriate, by virtue of their entry into the Sale and Purchase Agreement."

[50] The Schedule started on page 7 which stated:

"This is the Schedule referred to in the preceding Assignation by National Australia Bank Limited and Clydesdale Bank PLC in favour of Promontoria (Henrico) Limited.

SCHEDULE

Relevant Loan Assets"

[51] The rest of page 7 was blank. The remainder of the certified copy Assignation consisted of six pages containing a table with headings and then row giving information about the Company under these headings. There were no further rows giving information about any other company.

[52] The table was in the following terms:

Borrower Data								
Tranche ID (31/10/2014)	Connection ID	Connection Name	Borrower ID (CIF)	Borrower Name	Borrower Transfer Status	How are the borrowers within this connection aggregated (please select from drop down options)	Is there an outstanding event of default (eg repayment default, covenant breach etc)? (Y/N)	If yes, please confirm type of default (where multiple please state the principal default (using the following order): a) Interest repayment b) Principal repayment default (including expired/matured facilities) c) Covenant breach default - LTV d) Covenant breach default - ICR e) Covenant breach default - Information default f) Covenant breach default - Other g) Bankruptcy/ liquidation h) Other
TRANCHE 1	1232	Glen Tv Rentals Ltd	837817	Glen Tv Rentals Ltd	Ready for Transfer	n/a - Single entity/ payment	Yes	Covenant breach default - Other

Have there been any waiver letters issued in respect of the default (Y/N)	Have there been any reservation of rights letters issued in respect of the default (Y/N)	Have any demand letters been issued in respect of the default? (Y?N)	Is the borrower in an insolvency Process / Receivership (Y?N)	Is in an insolvency process, does the IP/ Receiver have any overdraft facilities (Y/N)	I yes (in insolvency process and IP/ Receiver has an overdraft) please provide sort code(s) and account number(s).	Type of process	Name of Insolvency Practitioner/ Receiver	Borrower Default (Y?N)
No	Yes	Yes	Yes	No	N/A	Administration	Campbell Dallas LLP	Yes

Type of Default	Does the Bank hold equity in the borrower (Y?N)	Are the Bank's borrowings to this borrower syndicated with a third party?	Please confirm any notices of default, reservation of rights letters and related correspondence have been provided to the review team. Please copy the file name(s) of the document here.	Please confirm any standstill agreements and/or waivers and related correspondence have been provided to the review team. Please copy the file name() of the document here	CATEGORISASTION
Defaulted - IP/LPA appointment	NO	No	GLEN TV RENTALS LTD _ Enforcement _ Demand Letters _ 826504 - 80266348 _ 18-24 _ West Blackhall Street _ PA15 1UE _ 28-Oct-14 _ v01	N/A	DEFAULT WITH NO LOSS

[53] During the course of this litigation, the pursuer had produced two other versions of the Assignation which to differing extents redacted some of the wording set out above . On the first day of the proof the pursuer sought to lodge a late inventory of productions containing yet another version of the assignation, which I refused to allow on the ground of lateness. Accordingly the proof proceeded on the basis that the pursuer was founding on the copy which bore to have been certified by Linklaters on 13 April 2018 and is set out above.

Evidence on the Assignation

[54] Johane Murray gave affidavit and oral evidence. She is a solicitor and a partner and head of real estate at Brodies LLP. Her evidence was that the pursuer had instructed Linklaters LLP to act on their behalf in relation to the acquisition of a portfolio consisting of debt and related security from the Bank. Brodies were instructed, via Linklaters, to act for the pursuer in relation to Scots law aspects of the transfer from the Bank to the pursuer of the debt and related security. At a conference call on 5 June 2015 between the various solicitors and others completion of the loan acquisition was confirmed. She was shown the certified copy Assignation.

[55] Johane Murray gave further evidence that the principal of the Assignation was delivered to Brodies in triplicate and following receipt Brodies sent two principal copies to the Bank's Scottish solicitor and one principal copy to Linklaters to retain on behalf of the pursuer.

[56] In cross-examination, Ms Murray stated that the principal Assignation would have been scanned into Brodies file and that she had compared the copy to the scanned version.

[57] Johane Murray further gave evidence that Brodies submitted assignations by the Bank in favour of the pursuer of standard securities over the Company's property to the Land Register of Scotland for registration. The defender objected to this evidence on the basis that there was no record for it. In the event, the pursuer did not found on these assignations, and accordingly I have taken no account of it.

[58] Ms Murray gave further evidence in which she sought to explain the nature of the agreement and certain clauses and parts of it. This was objected to on the ground that the agreement had been reduced to writing and oral evidence of its content was not best

evidence and was inadmissible. In my view there is merit in that objection and accordingly any view I express on the certified copy assignation is based on the wording of that document and not this witnesses' explanation of it.

[59] Darren Janes gave evidence. He was a Commercial Loan Servicing Manager for Pepper (UK) Limited trading as Engage Commercial. He joined Engage Commercial in or around February 2016. One of the services provided by Engage Commercial is loan servicing for lenders. This means that Engage Commercial manages and administers loan portfolios on behalf of lenders. Mr Janes' role was to provide primary and special servicing facilities in line with client service level agreements and to manage the day to day relationship with clients. He gave evidence that the pursuer acquired a portfolio of commercial loans from the Bank. The portfolio included facilities that had been granted to the Company and a personal guarantee by the defender. Although in submissions counsel for the defender commented that this was not best evidence, he did not object at the time to the evidence in this paragraph, and I take it into account but place little weight on it as it adds little if anything to what is said in the certified copy assignation.

[60] Mr Janes also gave evidence that the pursuer instructed Engage Commercial to provide loan servicing in respect of the portfolio. He gave evidence that the facility letter dated 29 July 2011 and renewal letter dated 30 March 2012 were provided to Engage Commercial by the pursuer when Engage Commercial were instructed to manage the Portfolio. Only an electronic copy of the document was provided to Engage.

[61] Mr Janes also gave evidence that an electronic copy of the personal guarantee was provided to Engage Commercial by the pursuer when Engage were instructed to manage the portfolio.

[62] Mr Janes explained that after the transfer of the portfolio to the pursuer the accounts comprising the portfolio were migrated onto the systems of Engage Commercial, a system referred to as "boarding". The boarding process was completed on 5 June 2015. When the accounts were transferred, the Bank provided the pursuer with a data tape containing the Bank's data in relation to the outstanding balance as at the date of transfer to the pursuer.

[63] In cross-examination, Mr Janes accepted that he had joined Engage in February 2016, that is after the transfer. He was not personally responsible for the boarding process. He had not seen an original copy of the Assignation, merely an electronic copy. That electronic copy was not of the whole Assignation but only parts of it.

[64] In his evidence, the defender was referred to a letter to him from Clydesdale Bank dated 5 June 2015.

> "Further to our letter dated 01/05/2015 we are writing to advise you that National Australia Bank Limited and Clydesdale Bank PLC (trading as both Clydesdale Bank and Yorkshire Bank) completed the same on 05/06/2015 of the facility / facilities made available to C/O DEREK FORSYTH (together with all related rights and benefits, including, without limitation, guarantees and security) to Promontoria (Henrico) Limited ('Promontoria') an affiliate of Cerberus Global Investors.
>
> Please find enclosed a copy of our letter to C/O DEREK FORSYTH in respect of this matter.
>
> An introductory letter will be sent to you from Engage Commercial, which is a trading name for Pepper UK Limited, who will be servicing the loan accounts on behalf of Promontoria.
>
> In the meantime, if you have any queries, please contact Engage Commercial directly via the contact details listed below."

[65] The enclosed letter to Mr Forsyth, the joint Adminstrator of the Company, was in the following terms. Mr Forsyth was the joint administrator of the Company.

> " **IMPORTANT INFORMATION ON YOUR FACILITIES**
>
> Further to our letter dated 01/05/2015 we are writing to inform you that National Australia Bank Limited and Clydesdale Bank PLC (trading as both Clydesdale Bank

and Yorkshire Bank) (together the '**NAB Group**') have completed a sale of all amounts owing to the NAB Group to another lender, Promontoria (Henrico) Limited ('**Promontoria**') an affiliate of Cerberus Global Investors. Accordingly, all of the NAB Group's rights and benefits in, to and under:

- your loans (the accounts 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 from the NAB Group to Promontoria (the '**Transfer**') with effect on and from 05/06/2015 (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. Please note that, in respect of the Loan Assets, the balance transferred to Promontoria 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.)

The details of the Loan Accounts are as follows:

Account number / s 80266348; CRCUTBLKFL33028

We can confirm that your obligations under the terms and conditions applicable to the Loan Accounts will not change as a result of the Transfer. Your transactional banking arrangements will remain and you will still be able to use branches of Clydesdale and Yorkshire Banks for your day to day transactional banking. Please be aware that the data we hold about you, both on computer systems and in paper files, will be transferred to Promontoria, although we will retain your details for a further seven years in accordance with The Data Protection Act 1998.

A letter will be sent to you shortly from Engage Commercial, which is a trading name of Pepper UK Limited. Engage Commercial will be servicing the Loan Assets on behalf of Promontoria and will confirm to you how to make loan payments.

With effect on and from the Transfer Date, we irrevocably authorise and instruct you (without any reference to or further authority from the NAB Group):

- to disclose to Promontoria and/or Engage Commercial such information relating to the Loan Assets as Promontoria and/or Engage

Commercial may at any time reasonably request in accordance with the Loan Assets;

- to deal with the Promontoria and/or Engage Commercial in relation to the Loan Assets unless you receive written instructions from Promontoria and/or Engage Commercial to the contrary; and
- to comply with any written notice or instructions from Promontoria and/or Engage Commercial in any way relating to the Loan Assets.

If you have any questions concerning the Loan Accounts and their ongoing administration please contact Engage Commercial directly via the address or telephone number listed below."

[66] The defender agreed in cross-examination that the letter to Mr Forsyth was enclosed with the letter to him and informed him that there had been a transfer from the Bank to the pursuer.

Defender's submissions on pursuer's title to sue: proof of copy assignation

[67] The defender submitted that what had been produced as the certified copy assignation was inadmissible evidence and accordingly the pursuer had failed to prove their title to sue.

[68] The defender submitted that the best evidence rule excluded secondary evidence of a document. The court had no discretion to allow secondary evidence. The only way in which the effect of the rule may be tempered is if a copy of the document meets the requirements at section 6(2) of the Civil Evidence (Scotland) Act 1988 (in *Walker and Walker on Evidence* (4th edition) para 20.1 and 20.2.2; *Dickson on Evidence*, paras 195, 196, 203, 204 and 206; *Scottish and Universal Newspapers Limited* v *Gherson's Trustee* 1987 SC 27; *Japan Leasing (Europe) PLC* v *Weir's Trustee (No 2)* 1998 SC 543). Counsel submitted that certification under that section needs to be by a natural person, not a legal person such as an LLP, and in any event, the copy had not been signed in a way that had any legal effect.

[69] Developing his submission that certification can be done only by natural persons, counsel referred to the Interpretation Act 1978 and submitted that the general rule that person includes legal persons is qualified by the words "unless the contrary intention appears". Here the contrary intention appears from the fact that the court had a discretion as to whether to deem a document to be a true copy. If the court directed that a document was not to be a true copy it would be necessary to lead oral evidence from a person to speak to the copy that was made – that person could only be a natural person. That was the position here: it was obvious that what had been produced as a true copy of the Assignation was not in fact a true copy. While it was acceptable for a document to be lodged under redaction of sensitive or confidential information that is not material to the issue before the court (*Alliance Trust Savings Limited* v *Fraser Currie and others* [2016] CSOH 154, paras 44-46; *Dowling* v *Promontoria (Arrow) Limited*, 11 September 2017, Chancery Division Bankruptcy Court; *English* v *Promontoria (Arran) Limited* [2016] IEHC 662), the redaction in this case went beyond what was permissible. The court could not properly understand what had been agreed between the parties to the Assignation if only part of the Schedule had been produced. The failure to produce all relevant parts of the document that is alleged to found title to sue is an abuse of process (*Shetland Sea Farms Ltd* v *Assuranceforeningen Skuld* 2004 SLT 30 at paras 143 to 146.) The poor quality of the evidence before the court was striking. None of the witnesses were involved in the transfer. There was no evidence from Chris Lee, the relationship manager at the time the Bank was demanding payment, and no direct evidence from a bank employee as to the security insisted on by the Bank in 2007 to 2008. The integrity of the court's procedure was being undermined by the deliberate withholding of material potentially irrelevant to the issue for determination. The copy Assignation

should not be deemed to be a true copy as the original Assignation was in the hands of Linklaters LLP on 13 April 2018.

[70] Counsel for the defender further submitted that *esto* certification could be by a natural person, the copy document had not been properly authenticated by Linklaters and was not self-proving. The statutory formalities for execution by a limited liability partnership set out in *Whitaker The Law of Limited Liability Partnerships* (4th edition: 2016) paragraph 413 citing SI2009/184 and under the Requirements of Writing (Scotland) Act 1995 had not been complied with.

[71] Counsel for the pursuer submitted that the certified copy Assignation was admissible in evidence. It was the subject of an admission in the defender's pleadings (*Macphail* at 9.60). It had been certified as a true copy by Linklaters LLP, who hold the principal and was accordingly admissible as if it were a principal (Civil Evidence (Scotland) Act 1988, section 6).

[72] Counsel further submitted that an Assignation need not be in writing so it could not be the case that writing was needed to prove the Assignation (Requirements of Writing (Scotland) Act 1995, section 11(3). There was unchallenged evidence that the Bank sold its loan book to the pursuer and the sale included the indebtedness of the Company. Darren Janes give evidence of the provision of the data tape and the copy guarantee to Engage, which would not have happened if the sale had not happened. Marta Piwowarska was involved in the sale of the loan book to the pursuer which completed. Johane Murray in her oral evidence deponed that the transaction to sell the loan book to the pursuer completed on 5 June 2015. The defender accepted receiving the letter from the Bank dated 5 June 2015 and the enclosed letter to Mr Forsyth which clearly indicated that the Bank had sold the facilities to the pursuer.

[73] Counsel further submitted that the defender's title to challenge the Assignation was limited as he was a stranger to it (*Walker* v *The Bradford Old Bank Limited* (1884) 12 QBD 511; *Shear* v *Clipper Holdings,* unreported, Lord Bannatyne, 26 May 2017 at para [3].) The defender's only interest was in ensuring that he did not pay the wrong party as he should not be called upon to pay twice given the clear intimation by the Bank, it would be barred from attempting to seek payment from the defender now, and in any event there was unchallenged evidence that the Bank no longer has any financial interests in either the company or the defender. As there were only two candidates for the party with title to sue, that is the Bank or the pursuer, on the balance of probabilities the pursuer enjoys title to sue. Where the defender leads no evidence on the issue, the evidential bar is low (*Vehicle Control Services Limited* v *Laird* [2018] SAC (Civ) 18).

[74] Counsel acknowledged that the certified copy of the Assignation contained the Assignation in full but not the Schedule in full. He submitted that the Schedule would be very large indeed and contain highly confidential material and therefore it was acceptable for parts of it to be excluded. (*Alliance Trusts Savings Limited* v *Fraser Currie and others* [2016] CSOH 154 at [44]-[46])

Statutory provisions

[75] Section 6 of the Civil Evidence (Scotland) Act 1998 provides:

> "Production of copy document
>
> (1) For the purposes of any civil proceedings, a copy of a document, purporting to be authenticated by a person responsible for the making of the copy, shall, unless the court otherwise directs, be—
>
> (a) deemed a true copy; and
>
> (b) treated for evidential purposes as if it were the document itself.

(2) In subsection (1) above, "copy" includes a transcript or reproduction."

[76] Section 6 of the Interpretation Act 1978 (c 30) provides:

"In any Act, unless the contrary intention appears—

…

'person' includes a body of persons corporate or unincorporate"

"Act" is defined in Schedule 1 as meaning an Act of Parliament.

[77] Section 3 and Schedule 2, paragraph 3A(5) of the Requirements of Writing (Scotland) Act 1995 provide:

"… where

(a) a traditional document bears to have been subscribed on behalf of a limited liability partnership by a member of the limited liability partnership;

(b) the document bears to have been signed by a person as a witness of the subscription of the member of the limited liability partnership and to state the name and address of the witness; and

(c) nothing in the document, or in the testing clause or its equivalent, indicates–

(i) that it was not subscribed on behalf of the limited liability partnership as it bears to have been so subscribed; or

(ii) that it was not validly witnessed for any reason specified in paragraphs (a) to (e) of subsection (4) below,

the document shall be presumed to have been subscribed by the limited liability partnership.

(1A) Where a document does not bear to have been signed by a person as a witness of the subscription of the member of the limited liability partnership it shall be presumed to have been subscribed by the limited liability partnership if it bears to have been subscribed on behalf of the limited liability partnership by two members of the limited liability partnership."

[78] The following provisions apply to the formalities of doing business by a limited liability partnership under the Companies Act 2006 as modified by law of England and Wales under the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009:

> **"LLP contracts**
>
> **43.**—(1) Under the law of England and Wales or Northern Ireland a contract may be made—
>
> (a) by an LLP, by writing under its common seal, or
>
> (b) on behalf of an LLP, by a person acting under its authority, express or implied.
>
> (2) This is without prejudice to section 6 of the Limited Liability Partnerships Act 2000 (c. 12) (members as agents).
>
> (3) Any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of an LLP.
>
> **Execution of documents**
>
> **44.**—(1) Under the law of England and Wales or Northern Ireland a document is executed by an LLP—
>
> (a) by the affixing of its common seal, or
>
> (b) by signature in accordance with the following provisions.
>
> (2) A document is validly executed by an LLP if it is signed on behalf of the LLP—
>
> (a) by two members, or
>
> (b) by a member of the LLP in the presence of a witness who attests the signature.
>
> (3) A document signed in accordance with subsection (2) and expressed, in whatever words, to be executed by the LLP has the same effect as if executed under the common seal of the LLP.

(4) In favour of a purchaser a document is deemed to have been duly executed by an LLP if it purports to be signed in accordance with subsection (2).

A 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

(5) Where a document is to be signed by a person on behalf of more than one LLP, or on behalf of an LLP and a company, it is not duly signed by that person for the purposes of this section unless he signs it separately in each capacity.

(6) References in this section to a document being (or purporting to be) signed by a member are to be read, in a case where that member is a firm, as references to its being (or purporting to be) signed by an individual authorised by the firm to sign on its behalf.

(7) This section applies to a document that is (or purports to be) executed by an LLP in the name of or on behalf of another person whether or not that person is also an LLP.

Common seal

45.—(1) An LLP may have a common seal, but need not have one.

…

(6) This section does not form part of the law of Scotland.

Execution of deeds

46.—(1) A document is validly executed by an LLP as a deed for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 (c. 34) and for the purposes of the law of Northern Ireland if, and only if—

(a) it is duly executed by the LLP, and

(b) it is delivered as a deed.

(2) For the purposes of subsection (1)(b) a document is presumed to be delivered upon its being executed, unless a contrary intention is proved.

Execution of deeds or other documents by attorney

47.—(1) Under the law of England and Wales or Northern Ireland an LLP may, by instrument executed as a deed, empower a person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf.

> (2) A deed or other document so executed, whether in the United Kingdom or elsewhere, has effect as if executed by the LLP."

[79] Section 6 of the Limited Liability Partnership Act 2000 (c 12) provides that every member of a limited liability partnership is the agent of the limited liability partnership.

Discussion and decision on pursuer's title to sue: proof of copy Assignation

[80] If parties were required to prove the original of every document on which they rely, then the efficient and cost-effective administration of justice would be impeded as much court time would require to be expended on proving documents rather than addressing the substance of a case. There are various ways in which it such inefficiency can be avoided. For example, parties can agree documents by admissions on record or by signing a joint minute. However in this case the defender chose to put the pursuer to his proof.

[81] Another method of avoiding such inefficiency is by the lodging of a copy document authenticated under sec 6 of the *Civil Evidence (Scotland) Act 1998*. Such a document is deemed by law to be a true copy and is treated as if it were the document itself. The issue which arises in this case is whether the certified copy assignation lodged by the pursuer was "a copy of a document, purporting to be authenticated by a person responsible for the making of the copy" in terms of section 6.

[82] In my opinion the word "person" in sec 6 is not limited to a natural person. There is nothing in the wording of sec 6 which shows the contrary intention which would be required to displace the normal position under the Interpretation Act that it includes both legal and natural persons. The practical consideration that a legal person cannot give evidence in court does not demonstrate such a contrary intention. Accordingly, in my

opinion the correct interpretation of sec 6, as interpreted in accordance with the Interpretation Act, is that authentication may be by a legal or a natural person.

[83] The certified copy assignation produced in this case was certified by a firm of solicitors as being a true copy. The defender says that this is not enough: the certification must comply with the formalities of execution relevant to the type of legal person which that firm of solicitors is. If the defender is correct, then this would mean that as the copy assignation was signed by an English Limited Liability Partnership, the certification as a true copy would have to have the common seal of the firm of solicitors attached to it, or would have to be signed by two members or by one member in the presence of a witness (*Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009).* In my opinion this high level of formality is not required when certifying under sec 6 of the 1988 Act. Section 6 is clear. It does not require any particular formality of execution. It merely requires that it purports to be authenticated by the person making the copy. In this case the certificate is signed in the name of a firm of solicitors acting for the pursuer in a manner consistent with section 43(1)(b) and 44(6) of the Companies Act 2006 as it applies to an English Limited Liability Partnership. In my opinion that is sufficient to satisfy the requirement under section 6 of the Civil Evidence (Scotland) Act 1998 for a copy document "purporting" to be authenticated by the person responsible for making the copy.

[84] I am fortified in my view by consideration of the consequences for the administration of justice if the defender's argument is correct. If certification under sec 6 required to comply with the statutory requirements for formal execution, the method of execution could vary depending on what form of legal person the certifier happened to be. If a solicitors firm was a traditional partnership under the Partnership Act 1990, it would execute differently from a solicitors firm operating as a Limited Liability Partnership or a limited

company, or from a solicitor signing his or her own personal name. It is in the interests of justice that sec 6 facilitates the efficient conduct of court business by providing a simple straightforward method for certifying copy documents for use in court, rather than a method which requires various differing highly technical formalities with the attendant possibility of confusion and technical errors.

[85] In my view the production of a duly certified copy of a legal document under redaction of parts not relevant to the issues before the court is not an abuse of process. On the contrary, it assists in the efficient conduct of judicial business. This is particularly so in commercial cause procedure where a party who is not satisfied with redactions can seek appropriate orders from the court at preliminary and procedural hearings.

Title to sue: construction of the Assignation

[86] The defender's position was that on a proper construction of the terms of the assignation, the lending to the Company had not been assigned by the Bank to the pursuer and so the pursuer had no title to sue.

Defender's submissions

[87] Counsel for the defender invited me to apply the well-settled principles of contractual construction in *Wood* v *Capita Insurance* [2017] AC 1173 at paragraphs 8 to 15, *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900 at paragraphs 14 to 23, *Arnold* v *Britton* [2015] AC 1619 at paragraphs 14 to 23 and 76 to 77 and *@SIPP Pension Trustees* v *Insight Travel Services* 2016 SC 243 at paragraphs 17 and 44. He submitted that there was no evidence of the purpose of the Assignation or that there was a wider purpose to the transfer of the Company's debt claim: nothing was known about the circumstances surrounding the

grant of the Assignation or what other debts may have been transferred, just that the company was not the only customer that this transaction affected. The pursuer had withheld the whole document from the court, as well as the Share and Purchase Agreement and there was no record for and no evidence of those surrounding circumstances. There was a very limited factual matrix and the court could not embark on the exercise of reviewing the surrounding circumstances as an aid to construction.

[88] Counsel submitted that all that was known from the evidence was that a price was paid on 5 June 2015, which was spoken to by Johane Murray. No weight should be attached to the evidence of Marta Piwowarska to the effect that the Bank had no ongoing financial interest with the Company as supporting a transfer of all debts owned by the Company and the Bank. She could not competently give evidence as to the subjective intention of either the Bank or the pursuer at the time of transfer. The Assignation was reduced to writing and that was a measure of what was transferred. She was administrative officer with no legal qualifications and had no direct involvement in checking the electronic records and physical documentation. On her own evidence the Bank knew that they did not have all the documentation necessary to enforce the guarantee against the defender. In any event, it did not follow that if it was correct to say the Bank did not have any ongoing financial interest then that was because any such interest had been transferred.

[89] Counsel further submitted that taking clauses 1 and 2 together, it was clear that the parties intended to transfer to the pursuer rights in the Relevant Documents in relation to each Relevant Loan Asset comprised within a Relevant Borrower Asset Group: the rights that were assigned were defined by reference to a loan asset or debt claim, the rights were not transferred by reference to the borrower's identity or any reference number that might identify a loan asset or debt claim.

[90] Counsel further submitted that there was no description of a loan asset in the Schedule. The words used in the Schedule were unambiguous and did not describe a loan asset. The borrower ID is the identification of a borrower, not a description of a loan asset or debt claim. The boarding process was carried out after transfer so the number allocated by Engage cannot inform the understanding of what was transferred.

[91] Counsel further submitted that there was no description of a debt claim in the Schedule. The reference to the demand letters was far removed from a description of a debt claim. The use of the words "ready for transfer" implied that transfer had not taken place on the date of the Assignation. The only description that might conceivably be considered to be a description of debt claim is for the unplanned borrowing in the region of £57,224.89. There was nothing which could amount to a description of a debt claim on the 2007 facility agreement and on no reasonable interpretation of the Assignation could it be said to have been a transfer of a debt claim in relation to the loan account or a credit card. The letter of 22 September 2014 was a letter of concern not a demand letter and the terms of the letters of intimation and boarding were not part of the surrounding circumstances as they post-date the Assignation.

Pursuer's Submissions

[92] Counsel for the pursuer submitted that the unchallenged evidence of Johane Murray established that the "effective time" was 5 June 2015 . There was plain identification of the borrowing to the Company in the Schedule: the Company was named and there was express reference to the letter of 28 October 2014. Clause 2.1(a) catches the guarantee as it is included within the definition of "Relevant Documents". Even if that is wrong, the pursuer as assignee may call upon the defender as cautioner to make payment under the principle

accessorium sequitur principale (*Promontoria (RAM) Limited* v *Moore* [2017] CSOH 88 at paras [49] and [88]).

[93] Counsel further submitted that there was no difficulty with the assignability of either the loan facility or the guarantee as clause 14.2 of the loan facility permitted assignation and the guarantee defined the "Bank" as meaning Clydesdale Bank and any other person to whom rights under the guarantee were transferred. Intimation had taken place in terms of the two letters of 5 June 2015, and a further demand made of the defender on 7 July 2015. This sufficed for the purposes of intimation: *Libertas-Kommerz GmbH* v *Johnson* 1997 SC 191, *Christie Owen and Davies PLC* v *Campbell* 2009 SC 436, *Fieldoak Limited* v *Dounis*, unreported, Lord Tyre, 26 January 2016.

Discussion and Decision

[94] Having concluded that the certified copy assignation is admissible, the next question for the court is whether the pursuer has proved that the Bank's claim against the defender was assigned to the pursuer.

[95] In my opinion the pursuer has done so. I find the wording of the certified copy Assignation to be unambiguous and clear.

[96] Clause 2.1 contains an assignation by the Bank to the defender in relation to each Specified Loan Asset comprised within a Borrower Asset Group. A "Specified Loan Asset" is defined as inter alia a "Relevant Loan Asset" which in turn is defined as a loan asset or debt claim described in the schedule.

[97] The Schedule is headed up "Relevant Loan Assets" The certified copy Assignation does not include the entire schedule, but only the part which the pursuer sought to found upon as being relevant to the defender. In my opinion the pursuer was entitled to lodge

only the part of the schedule which it was founding on in this action. The court expects that parties will endeavour to focus their case before the court. It is clear from the wording of the Assignation that the schedule would have included details of other borrowers apart from the Company. The wholesale lodging of an extensive schedule of information which is not relevant to the pursuer, and contains confidential commercial information about third parties, does not assist in the focussing of the case before the court.

[98] The part of the schedule which has been produced is headed up "Borrower Data" and lists the Borrower Name as "Glen TV Rentals Ltd". It states that there has been a Covenant breach default and that the borrower is in administration, naming Campbell Dallas LLP as the insolvency practitioner. The schedule clearly identifies that the Company has borrowed from the Bank. In my opinion this is sufficient description of a loan asset or debt claim to bring lending by the Bank to the Company within the definition of "Relevant Loan Asset", and therefore within the definition of "Specified Loan Asset". On a correct interpretation, the purpose of the reference in the schedule to the demand letter of 28 October 2014 is not to restrict the assignation to sums demanded in that letter, to the exclusion of other borrowing by the Company. The purpose of that reference is to provide a record of which documents had been seen by a review team.

[99] Clause 2.1 (a) goes on to assign certain rights under each "Relevant Document" There is a lengthy definition of "Relevant Document" but in essence it includes documents of debt and security documentation. In particular it includes facility, loan or credit letters or agreements and guarantees. Accordingly it includes the documentation setting out the lending to Company by the Bank, and the guarantee of that lending which is sought to be enforced in this action.

[100] The assignation was intimated both to the administrator of the Company and to the defender by the letters dated 5 June 2015.

[101] In all the circumstances, I find that the pursuer has proved on the balance of probabilities that the Bank has assigned its rights against the Company, and its rights under the guarantee, to the pursuer. Accordingly, the pursuer has title to sue.

Delegation

[102] The defender's position was that the pursuer had failed to rebut the presumption against delegation and accordingly the assignation was ineffective.

Defender's submissions

[103] Counsel for the defender submitted that there was a strong presumption against delegation and the onus was on the pursuer to prove that the defender had assented (*W J Harte Construction* v *Scottish Homes* 1992 SC 99 at pages 110-111; Erskine III, IV, 22, Gloag on Contract(2nd edition, 1929), page 258). The assignation was an attempt to substitute the pursuer for the Bank as a party to the relevant documents. What the agreement between the Bank and the pursuer sought to do was to delegate to the pursuer the obligations of the Bank to the customer. The Bank had undertaken certain obligations to the customer under the terms and conditions . There was no evidence that the defender or Miss Friel or the Company had consented or assented to novation of the contract with the Bank, with the consequence that there had been no delegation. The transaction was a unitary transaction which sought to transfer the rights and obligations of the bank to the pursuer. The absence of consent rendered the whole ineffective.

Pursuer's Submissions

[104] Counsel for the pursuer submitted that the Bank and the Company contracted on the basis that the Bank could assign its rights and delegate its obligations. In any event the defender was not a party to the assignation and had no title nor interest to raise questions liable to disturb the assignation's *prima facie* validity, force and effect.

Discussion and decision

[105] The pursuers in this action are suing on a personal guarantee which has been assigned to them by the Bank for payment of a principal sum which has also been assigned to them by the Bank. The defender's argument is that the assignation of the right to payment and of the personal guarantee fall because even if the Bank's right to payment was validly assigned then this is invalidated because the Company's rights against the Bank were not transferred.

[106] The defender founds upon *WJ Harte Construction Limited* v *Scottish Homes.* However, the circumstances of this case are very different from the current case. That case involved a building contract under which the pursuer was obliged to construct 24 houses. In that case, there was no evidence that the intention was for the pursuers to be discharged from the contract and another party substituted in its place (p111).

[107] By contrast, in the current case, the contractual arrangement between the Bank and the Company expressly provided for the substitution of another person for the Bank. This is set out in Clause 14.2 of the Terms and Conditions of the Tailored Business Loan and Clause 6 of the Schedule to the 2011 Facility Agreement. Accordingly the Company's intention was that there could be such a substitution. That intention was given effect to by clause 2.1(c) of the Assignation, which provided for the substitution of the pursuer for the Bank as

party to the contract with the Company. In my opinion in these circumstances the Assignation is valid and the pursuer is entitled to seek recovery under the personal guarantee.

Whether the pursuer has proved that £800,000 was due.

[108] The defender's position was that *esto* he was liable under the guarantee, the pursuer had not proved that the principal sum of £800,000 concluded for was due.

The pursuer's submissions

[109] Counsel for the pursuer submitted that the defender in his evidence had accepted that the amounts demanded by the Bank on 7 November 2014 were then due and have never been repaid. The amount demanded exceeded the limit in the guarantee. The events of default having occurred, the term business loan was repayable by the company and by the defender as its cautioner subject to limitation of liability.

The defender's submissions

[110] Counsel for the defender submitted that the furthest the evidence goes is the sum of £56,029.66 with interest of £763.14. This was the amount certified in the letter of 7 November 2014 in respect of the current account. The other amounts certified in that letter were for the Tailored Business Loan and the credit card and these debts had not been transferred under the Assignation. There was no evidence to allow the court to pronounce a decree for a sum of accrued interest or to pronounce decree for interest at a particular percentage from 6 November 2016.

Discussion and decision

[111] In this action the pursuer seeks £800,000, which is the maximum liability of the defender under the Guarantee. In order to succeed the pursuer does not need to establish the full amount due under the principal obligation. He merely needs to establish that the amount due under the principal obligation is at least £800,000.

[112] In its demand letter of 7 November 2014, the Bank certified a total sum due of £1,180,4031,61. The contractual documentation between the Bank and the Company provided for a certificate by the Bank to be conclusive of the amount due. This was set out in clause 17.4 of the conditions relating to the Tailored Business Loan and clause 4.2 of the Schedule to the 2011 Facility Agreement. The effect of these clauses is that the Company agreed that a certificate by the Bank of the amount due would be conclusive for evidential purposes. The Company has contractually agreed to a mechanism to conclusively determine the amount due. The mechanism is that the amount is certified by the Bank.

[113] In my opinion the certification of the amounts due was unaffected by the Assignation. The assignation assigns to the pursuer the Bank's rights to recover all monies payable by the Company. The contractual mechanism for determining the amount due has been complied with. Certification was made by the Bank prior to the date of the assignation. That certification exceeds £800,000. The defender is obliged under the guarantee to pay all sums due up to the limit of £800,000. In these circumstances I hold that the pursuer has proved that the principal sum due under the guarantee is £800,000.

Order

[114] I shall sustain the pursuer's second plea in law and repel the defender's second and fourth pleas in law and grant decree in terms of the second conclusion.

[115] The third conclusion was for expenses on an agent client, client paying basis. Parties invited me to put the case out by order to hear submissions on expenses and I shall do so. I reserve all questions of expenses in the meantime.