OUTER HOUSE, COURT OF SESSION

[2020] CSOH 56

CA105/19

OPINION OF LORD DOHERTY

in the cause

PROMONTORIA (CHESTNUT) LIMITED

Pursuer

against

THE FIRM OF BALLANTYNE PROPERTY SERVICES

First Defender

and

GILLIAN BALLANTYNE SMITH

Second Defender

and

THOMAS ALAN SMITH

Third Defender

Pursuer: Dunlop QC, Welsh; Addleshaw Goddard LLP
Defenders: Sandison QC, Gardiner; MBM Commercial LLP

29 May 2020

Introduction

[1] The first defender is a partnership and the second and third defenders are the partners of, and trustees for, the partnership. In this commercial action the pursuer avers

that it is the assignee of the Clydesdale Bank plc ("the Bank"). It seeks to exercise rights which it avers that the Bank had against the defenders, including the right to repayment of monies which it avers the Bank advanced to them. The matter came before me for (i) a debate on the relevancy of the defences; and (ii) a hearing of the pursuer's motion for summary decree.

The pleadings

[2] The pursuer concludes for payment by the defenders of (a) £1,180,742.49; and (b) £905,508.41; with interest on both sums at the rate of 3.75% per year from 11 June 2009 until payment. It avers that by a facility letter dated 16 July 2007 the Bank agreed to make available to the defenders the banking facilities described in that letter; and that the facilities were restructured on 29 September 2008, 23 June 2009, 30 July 2010 and 15 July 2011 on the terms set out in facility letters of those dates. The terms of all of the facility letters are adopted and repeated *brevitatis causa* by the pursuer. The pursuer avers (art 5) that the facility letter of 15 July 2011 provided:

> "3.1 All amounts outstanding or in respect of the Facilities are repayable on demand."

It also avers:

> "7. The Bank sold and assigned to the pursuer its whole right, title and interest in the Facilities by assignation in favour of the pursuer dated 24th and 27th November 2014 ('the Assignation'). A certified copy of the Assignation is produced, adopted and held to be incorporated herein brevitatis causa. The right to be repaid any sums outstanding in relation to the Facilities now vests in the pursuer... The defenders were informed about the Assignation effectively. *Esto* the Assignation was not effectively intimated on the defenders (which is denied), it is judicially intimated on them by way of these proceedings..."

The pursuer further avers (art 8) that by letters dated 10 September 2015 ("the demand letters") it wrote to each of the defenders demanding repayment of the facilities, and that the

total sum then outstanding was £1,803,954.84. It avers (art 10) that that sum was the outstanding balance in relation to Business Account No [a] (now known as account no [c]) and Term Loan Account no [b] (now known as account no [d]); that it remains outstanding; that interest has been running and continues to run on that sum; and that the defenders are jointly and severally liable to make payment of the outstanding balance to the pursuer, but that they refuse or delay to make payment. The pursuer also avers that as at 11 June 2019 the sums due on accounts numbers [c] and [d] were respectively the sums first and second concluded for. The pursuer has incorporated the demand letters *brevitatis causa* in its averments.

[3] In the defences the defenders admit that they entered into the various facility letters with the Bank and that they made use of the facilities. However, they aver that in 2005 the first defender was formed as a buy to let ("BTL") property firm. They aver (ans 2) that in June and July 2007, before the grant of the facility letter of 16 July 2007, the third defender emphasised to a Bank employee, Adam Heslop, the long-term nature of the first defender's business model; and that the third defender "was assured by Mr Heslop that that model would coincide with the Bank's wish to be its long term funding partner". The defenders aver that the third defender and Mr Heslop met on 16 July 2007 to discuss a draft facility letter. They further aver:

> "The proposed facility had a 5-year duration and the third defender raised this as an immediate concern. It was inconsistent with his funding strategy and was considerably shorter than his existing lending terms. The third defender told Mr Heslop that the term of the loan had to be for 15-20 years. Mr Heslop told the third defender that the 5 year term was a standard clause and had to remain in the contract. Mr Heslop told the third defender that the clause would not be enforced at the end of the 5 year term. He reiterated that the Bank had made a strategic commitment to BTL lending and wished to be the first defender's long term funding partner. Mr Heslop stated to the third defender that the facility would be renewed at the end of the 5-year term. Mr Heslop said additionally, 'imagine the public outcry if Clydesdale Bank ever pulled in its business loans, it will never happen.' The third

> defender said: 'This is important. Are you sure?' Mr Heslop repeated 'It will never happen.' The third defender sought further reassurance by asking 'And you'll definitely make me a loan offer at the 5 year point?' to which Mr Heslop answered 'Yes'. On a proper construction of those statements by Mr Heslop the Bank thereby made a legally binding promise to the defenders to extend the facility at the end of the 5 year term. By letter dated 15th July 2007 the Bank agreed to provide the facility to the defender. The defenders accepted the facility relying on Mr Heslop's promise. All their future property purchases were undertaken in reliance on that promise, which they understood to be a statement binding the Bank. The underlying promise upon which all of their future actions proceeded was that they would be no worse off, at least in terms of duration, through this form of finance arrangement as opposed to through long-term mortgages. The defenders continued to rely in the promise (which was not subsequently withdrawn or further qualified) in all of their dealings with the Bank and, in particular, on each occasion they entered into a facility agreement. The promise was explicit and unequivocal and, in the circumstances, was intended by the Bank to have legally binding effect."

The defenders also aver (ans 3) that the purpose of the facility agreements of 29 September 2008, 23 June 2009, 30 July 2010 and 15 July 2011 was to reflect the drawdown on the 16 July 2007 facility; that when the defenders purchased a property for their BTL portfolio they drew down on the overdraft to make a purchase; and that the facility agreements in 2008 to 2011 were to convert the sums drawn down on the overdraft to term loans secured against the purchased properties and to reflect the overdraft which remained available to be drawn down by the defenders. In answer 4 the defenders aver that the obligations under the facility letters included the promise made by Mr Heslop. The averments continue:

> "Had the Bank not breached the promised terms, the facilities would not have expired. The third defender was not in default under the original facility upon the expiry of its initial term. No offer to renew the loan was forthcoming from the Bank, in breach of its contractual obligation. In those circumstances, the Bank was not entitled to insist on performance of the Borrower's counterpart obligations (including payment). *Esto* the pursuer now stands in the Bank's shoes as its assignee (which is denied), the same pleas may be taken by the defenders against its claim as would have been open to them in a claim initiated by the Bank. On the foregoing disputed hypothesis, the pursuer is therefore unable to enforce the payment obligation. *Esto* Mr Heslop's statements do not constitute a legally binding promise (which is denied), they constituted a representation made on the Bank's behalf upon which the defenders have relied to their detriment. But for the statements, the defenders would have sought and obtained long term mortgage financing from a different lender. The

> Bank (and the pursuer as its putative successor in title) is therefore personally barred from acting in a manner inconsistent with the represented position."

In answer 7 the pursuer's averments in art 7 are denied. Under a heading "Undisclosed links in title" the defenders aver that what the pursuer has produced is a redacted copy of the Assignation, and that the defenders are entitled to disclosure of the whole deed so as to be satisfied that it is valid and that the pursuer can give them a good discharge; and that the unredacted copy ought to be the original or a copy certified by a natural person. They aver that the Assignation is insufficient in itself to establish the validity of the pursuer's title because in terms of clause 1.1 the expressions used in the deed are to have the meaning given to them in the Sale and Purchase Agreement ("the SPA") dated 27 July 2014 between National Australia Bank Limited, the Bank, and Promontoria Holding 97 BV, as amended by a Novation Agreement ("NA") dated 29 September 2014 between National Australia Bank Limited, the Bank, Promontoria Holding 97 BV and the pursuer; and because clause 1.2 of the Assignation incorporates clause 1.2 of the SPA. They aver that the SPA and the NA ought to have been produced. Under a heading "Non-purification of payment condition" the defenders aver that it was a condition precedent to transfer of Specified Loan Assets under the Assignation that the Seller (National Australia Bank Limited) receive the Purchase Price for the Specified Loan Assets. They aver that the pursuer's title to sue is predicated upon the payment of a price which it does not offer to prove was paid, and they call upon the pursuer to aver and vouch purification of the payment condition. Under a heading "Ineffective Intimation" the defenders aver:

> "Clause 6.2 within the Schedule to the various Facilities permits the Bank to assign and/or novate any of its rights or obligations under the letters or any other 'Relevant Documents' to certain defined classes of parties. The pursuer is called upon to explain and vouch which of those defined classes it allegedly falls within. Absent the clause taking effect, at least in relation to the novation of obligations, the consent of the other contracting party would be required..."

The defenders go on to refer to two letters to them from the Bank dated 24 and 28 November 2014, the first of which advised that on 28 November 2014 the NAB Group would complete the sale to the pursuer of the facilities made available to the first defender together with all related rights and benefits; and the second of which intimated that the NAB Group had sold all amounts owing to it to the pursuer, and that all of the NAB Group's rights and benefits in, to and under the Loan Accounts, Loan Agreements and Loan Assets were being transferred with effect from 28 November 2014. They aver:

> "The pursuer's purported links in title are: (i) SPA in July 2014 to Promontoria Holding 97 BV; and (ii) NA in September 2014 to the Pursuer. The purported intimation correspondence, by contrast, advises the debtor of a direct transfer from the NAB Group to the pursuer which is said to take effect from 28 November 2014. Said intimation, being inconsistent with the manner in which title was purportedly transferred, was accordingly ineffective. The defenders *qua* common debtors are left unsure whether, and, if so, how, when and to whom the Bank qua cedent assigned its rights under the Facilities. The Defenders are therefore unclear as to whether the pursuer may grant lawfully a discharge of the underlying debt (*esto* any such debt exists, which is denied)..."

[4] In answer 12 the defenders also aver that any obligation they may have had to make payment to the pursuer has been extinguished by the operation of prescription. However, counsel for the defenders did not seek to support the relevancy of those averments. He accepted that they ought not to be admitted to probation, and that the defenders' corresponding plea-in-law 8 should be repelled.

The facility letters

[5] In terms of the facility letters the Bank agreed to make funds available to the defenders (as "the Borrower") to be drawn down by them as loans to purchase residential properties. The principal facility provided in the facility letter of 16 July 2007 was an overdraft of up to £2 million with an expiry date of 19 June 2012. As loans were drawn

down on the facilities the sum remaining available to be drawn down reduced. By the time of the facility letter of 15 July 2011 the sum remaining available for drawdown was less than £200,000. The facility letters contained the following clauses:

> "**3 Repayment and Cancellation**
>
> 3.1 All amounts outstanding under or in respect of the Facilities are repayable on demand. If the Bank makes a demand for any Facility, all facilities will be immediately cancelled. The Bank may also, at any time, cancel all or any part of any Facility by notice to the Borrower.
>
> 3.2 Subject to clause 3.1, each Facility will be available until the expiry of such facility specified in clause 1 when it will be cancelled in full unless the Bank has agreed in writing to extend or renew such Facility, in which case it will, subject to clause 3.1 and the terms and conditions of any letter renewing such Facility, be available until the date in such letter when it will be cancelled in full.
>
> ...
>
> 10.2 From the date of receipt by the bank of all of the items specified in clause 4, this letter will replace all previous letters, agreements or arrangements between the Bank and the Borrower in relation to the provision of the Facilities."

Paragraphs 6.2 and 9 of the Schedule to each letter stated:

> "6.2 The Bank may (1) 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 in loans, securities or 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.
>
> ...
>
> **9 Definitions and interpretation**
>
> 9.1 Definitions
>
> In this letter, the following words and phrases have the following meanings:
>
> ...
>
> (d) 'Relevant Document' means (1) this letter (2) each other document under which any person (including the Borrower) grants security or issues a guarantee, in respect

of the borrower's obligations under this letter and (3) each letter or agreement varying, amending, supplementing, restating, substituting or novating this letter or such document;
..."

Expiry of the facilities

[6] The facilities expired on 19 June 2012 without the Bank offering the defenders a new facility, but the Bank did not demand repayment of the loans. The defenders made some repayments on the loans until December 2013, but no repayments were made after that date.

The Assignation

[7] The copy Assignation lodged by the pursuer contains the following certification:

"Certified as a true copy of the original document although due to commercial sensitivity the schedule to the document (which contains information relating to a large number of borrower connections) has been redacted so that it includes only all of the information expressed to relate to the borrower connection identified therein referencing the name 'Ballantyne Property Services' and to exclude all other information expressed to relate to other borrower connections.

Linklaters LLP [in manuscript]

Name R J Harbach [signed in manuscript]

Linklaters LLP ROBERT JAMES HARBACH (Solicitor)

One Silk Street

London

Date 18/09/2018 "

[8] The Assignation was in the following terms:

"ASSIGNATION by:

(1) CLYDESDALE BANK PLC ... ('Clydesdale')
in favour of

(2) PROMONTORIA (CHESTNUT) LIMITED ... (the 'Novated Buyer' or the 'Buyer')

with the consent of

(3) NATIONAL AUSTRALIA BANK LIMITED ... (the 'Seller')

THE PARTIES AGREE 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:

'...

'Effective Time' means the Settlement Date immediately following receipt by the Seller of the Purchase Price for the Specified Loan Assets.

...

'Novation Agreement' means the novation agreement dated 29 September 2014 between the Seller, Clydesdale, Promontoria Holding 97 BV and the Novated Buyer whereby the rights and obligations of Promontoria Holding 97 BV under the Sale and Purchase Agreement were novated to the Novated Buyer.

...

'Relevant Documents' means, in respect of a Specified Loan Asset, each facility, loan or credit letter or agreement ... collateral warranty ... in each case relating to that Specified Loan Asset...

...

'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 relevant Pool A Loan Asset or a Relevant Pool B Loan Asset.

...

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

'Sale and Purchase Agreement' means the Sale and Purchase Agreement dated 27 July 2014 between the Seller, Clydesdale and Promontoria Holding 97 BV as the initial Buyer, as amended by the Novation Agreement.

'Settlement Date' means 28 November 2014 (or such other date as may be agreed by the parties in writing).

'Specified Loan Asset' means:

(a) a Relevant Loan Asset; ...

...

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 the Borrower Asset Group:

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

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

(ii) 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 to it in its capacity as Lender (howsoever and whensoever arising);

(iii) the right to exercise all rights and powers of Clydesdale in its capacity as Lender under, to, and in connection with the Relevant Documents...

(iv) all Ancillary Rights and Claims in connection with the Relevant Documents...
...

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 Clydesdale...

3. Notification

On the Settlement Date, the Seller shall notify the Buyer in writing promptly upon receipt 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 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.

...."

The Schedule to the Agreement included details of the lending to the defenders but the details of loans to other parties were redacted.

The letters of 24 and 28 November 2014

[9] The Bank's letter of 24 November 2014 advised the defenders that on 28 November 2014 National Australia Bank Limited and the Bank would complete the sale to the pursuer of the facilities made available to the defenders, and that the Bank would write again on or shortly after 28 November 2014 confirming completion of the sale. The Bank's letter of 28 November 2014 informed the defenders that the sale had been completed and that the Bank's rights to and under the loan accounts, the loan agreements, facility letters, any other credit documentation in connection with the loan accounts, and all related security, mortgages, guarantees, other collateral and other rights in connection with the loan accounts

and loan agreements, had been transferred to the pursuer with effect on and from 28 November 2014. The letter stated that it constituted notice to the defenders of the transfer to the pursuer, and that from 28 November 2014 all payments, amounts and obligations owing by the defenders or that may become due or owing were owed to the pursuer; and that the balance transferred to the pursuer included rights to all outstanding amounts. The letter also stated that with effect from 28 November 2014 the Bank irrevocably authorised and instructed the defenders to deal with the pursuer and or its agent in relation to the loan assets unless they received written instructions from the pursuer and/or its agent to the contrary.

The demand letters

[10] The defenders admit that the pursuer sent each of them a demand letter dated 10 September 2015 demanding repayment of the loans. The demand letters stated:

> "...
>
> **1. Background and Interpretation**
>
> 1.1 The benefit of the Facilities and all supporting security and other documentation were assigned to Promontoria (Chestnut) Limited on 28 November 2014.
>
> **2. Expired facilities**
>
> The facilities have expired and are immediately due and repayable.
>
> **3. Demand**
>
> 3.1 Without prejudice to paragraph 2 above, we hereby demand immediate repayment of the sum of £1,803,954.84 from you being your liabilities to us in terms of the Facilities...
>
> .... "

Other actions

[11] In May 2017 the defenders raised an action in the Court of Session (A184/17) against the Bank and the pursuer seeking *inter alia* payment of damages of £300,000 said to have been caused *inter alia* through the Bank's breach of promise. The averments in the summons relating to promise were similar to those made by the defenders in the present action, but they also included the following averments (art 6):

> "Mr Smith asked what would happen at the end of the five years. Mr Heslop replied that, '*Obviously, we cannot predict what interest rates will be in five years' time*.' He then said, '*But we will make you an offer at as competitive a rate as we can because we want to keep you as a long-term customer*.'"

In articles 22 and 23 of the summons it was averred:

> "22. ... [O]n 19 June 2012, the Facilities expired. Clydesdale refused to refinance. Had it offered to refinance the pursuers would have accepted... refusal to refinance was a breach of Clydesdale's promise that it would grant an option to refinance at the end of the Facilities' five-year duration...
>
> 23. In 2014, Clydesdale assigned its rights under the Facilities to [the pursuer]..."

In art 28 of the summons it was averred that the loss suffered was estimated at £300,000, which was made up of (a) interest at a rate "above the market rate" which the defenders had paid since the expiry of the facilities; (b) reasonable legal costs of £75,120.96 contesting actions raised by the pursuer to obtain repossession of security subjects; (c) loss of profits which would have been made in the BTL business had the defenders had financing from the Bank; and (d) loss of interest they would have earned on deposits they would have made with the Bank.

[12] The pursuer has raised a summary application in Edinburgh Sheriff Court seeking enforcement of securities granted by the defenders.

Payments made by the defenders in respect of the facilities

[13] As already mentioned, the last payment which the defenders made to the Bank in respect of the facilities was in December 2013. The defenders have not paid the pursuer any sum in respect of the facilities.

Counsel for the pursuer's submissions

[14] Mr Dunlop submitted that the defences were irrelevant and that decree *de plano* should be pronounced. Alternatively, he submitted that having regard to the terms of the defences and the documents before the court summary decree should be pronounced.

Assignation

[15] The defenders' averments suggesting that the Assignation was defective were irrelevant *et separatim* clearly unfounded.

[16] It was clear from the terms of the Assignation without any need for production of the SPA or the NA that the Bank's rights against the defenders had been assigned to the pursuer. The pursuer ought not to be put to its proof that the purchase price had been paid because it was clear from the documents before the court, in particular from the Bank's letter of 28 November 2014 and from the demand letters, that it had been paid. It was also wrong to suggest that the Bank had not validly exercised the power to assign contained in paragraph 6.2 of the Schedule to the facility letters. The power was a very wide one. It was plain that there had been power to grant the Assignation.

[17] Arguments along the same lines as the defenders' arguments had been advanced in *Promontoria (Henrico) Limited* v *Friel* 2019 SLT 153, but they had been rejected by the commercial judge. They had met the same fate in the Inner House (2020 SLT 321). While

that case had concerned different parties and a different assignation, there were no material differences between the terms of that assignation and the Assignation.

[18] The pursuer's averments that there had not been effective intimation of the Assignation to the defenders were clearly unfounded. The letter of 28 November 2014 had been effective intimation. In any case, there had been judicial intimation of the Assignation (*Carter* v *McIntosh* (1862) 24D 925, Lord Justice-Clerk Inglis at p 934; *Promontoria (RAM) Limited* v *Moore* 2018 SCLR 299, Lord Bannatyne at [44] and [94]).

Promise

[19] The defenders' averments that Mr Heslop promised to extend the facilities at the end of the 5-year period were irrelevant. A promise could only be created by clear words. The words said to have been used by the promisor had to be examined in order to determine objectively whether there had been an intention to incur a legal obligation (*Regus (Maxim) Limited* v *Bank of Scotland* 2013 SC 331, Lord President Gill [36]-[38]). Mr Heslop was not said to have specified the terms upon which an offer of new facilities would be made. What he is said to have said was not indicative of an intention to bind the Bank to offer to extend the facilities in 2012.

[20] Moreover, even if, contrary to Mr Dunlop's submission, Mr Heslop's statements could be construed as a promise to renew the facilities on the same terms in 2012, any such promise did not survive the agreements entered into in the facility letters in 2007 to 2011. In terms of clause 10.3 of those letters the parties agreed that each letter replaced all previous letters, agreements or arrangements between the Bank and the Borrower in relation to the provision of the facilities. If there had been a promise, it had been an arrangement which

had been replaced (cf (in a different context) *Grant Estates Limited* v *Royal Bank of Scotland Plc* [2012] CSOH 133, Lord Hodge at [78], proposition 94).

[21] In any case, even if there had been a binding promise to offer to extend the facilities in June 2012, and if that promise had not been superseded by the facility letters, the defenders' remedy for breach of the promise was damages (cf *Royal Bank of Scotland* v *Carlyle* [2010] CSOH 3, Lord Glennie at [44]). Breach of the promise was not a relevant ground for resisting repayment of the loans.

Personal bar

[22] The averments of personal bar were irrelevant, for much the same reasons that the defenders' averments of promise were irrelevant. The averments did not disclose that Mr Heslop made a clear representation that the Bank would offer to extend the facilities in 2012. If they did disclose such a representation, at best for the defenders the representation was only to the effect that there would be an offer that the facilities would be extended on the same terms for 5 years from 2012. Even if there had been a representation that the facilities would be extended, that representation would have been an arrangement which was superseded by clause 10.2 of the facility letters.

Quantum

[23] For the purposes of the present motions the pursuer was content to restrict the principal sum for which decree should be granted to £1,758,544, with interest thereon from 1 April 2018. In answer 6 of their defences to the summary application the defenders averred that the sum of £1,758,544 was the balance due under the facilities as at the end of March 2018. Interest should run on that sum at the contractual default rate of 3 per cent

above the Bank of England base rate per year until payment, failing which at the normal contractual rate of 1 per cent above that base rate per year until payment.

Counsel for the defenders' submissions

[24] Mr Sandison submitted that the pursuer's motions should be refused and a proof before answer allowed. The motion for decree de *plano* could not be granted unless the defenders were bound to fail even if they proved all of their averments (*Jamieson* v *Jamieson* 1952 SC (HL) 44, Lord Normand at p 50, Lord Reid at p 63). The motion for summary decree could only be granted if the court was satisfied that there is no defence to the action (Rule 21.2; *Henderson* v *3052775 Nova Scotia Ltd* 2006 SC (HL) 85). While rule 21.2 is not confined to questions of relevancy, and the court could proceed on the basis of facts which could be clarified from documents, articles and affidavits, where there are disputed issues of fact to be resolved the appropriate person to resolve them is the judge who hearing a proof, not the judge who hears a motion for summary decree.

Assignation

[25] The defenders have a plea of no title to sue. The averments supporting that plea are in answer 7. There were four matters in relation to which Mr Sandison submitted that the defenders were entitled to inquiry. First, the copy Assignation that the pursuer had produced referred to the SPA and the NA. Some terms in the Assignation are said to have the same meaning as defined terms in the SPA, and clause 1.2 of the Assignation had incorporated by reference clause 1.2 of the SPA. It was necessary to have sight of those parts of the SPA and the NA in order to ascertain the effect of the Assignation. Second, the defenders could not be satisfied from the documents produced that there had been

purification of the suspensive condition that the pursuer paid the purchase price. Third, it was not clear that the Bank had been entitled to grant the Assignation. The pursuer did not say which of the powers in paragraph 6.2 of the Schedule to the facility letters the Bank had exercised. Unless these three matters were clarified the defenders could not be sure that the pursuer could grant them a good discharge. Fourth, the court should not be satisfied at this stage that there had been effective intimation of the Assignation, because the terms of the letters of 24 and 28 November 2014 were inconsistent with the terms of the Assignation. While there had been judicial intimation of the Assignation, that did not resolve the conflict between the Assignation and the letters. While some, but not all, of these points had been argued unsuccessfully in *Promontoria (Henrico) Limited* v *Friel,* that case had involved different parties and a different assignation, and it had been decided after proof, rather than on the pleadings and the documents alone.

Promise

[26] The defenders' averments of promise were suitable for inquiry. Mr Heslop's undertaking had been clear and specific - that the Bank would offer to renew the facilities, to extend them - at the end of the initial 5-year term. Renewal meant that the offer would be on the same terms. What Mr Heslop had said required to be construed against the background circumstances which he and the third defender had discussed. He knew from the third defender that the first defender required long-term funding. The third defender told him that the term of the loan had to be 15-20 years. The promise was that the Bank would offer to renew so that loan facilities would be offered for at least 15 years. It would be wrong to try to decide whether there had been a promise, and, if so, what had been promised, without inquiry into the facts.

[27] Clause 10.2 of the facility letters did not apply to the promise. It was not a general entire agreement clause. Its scope was limited to "previous letters, agreements or arrangements". *Prima facie,* none of those terms was concerned with an oral unilateral promise. Facility letters and agreements involved bilateral obligations and so did arrangements. The application of the *ejusdem generis* rule was appropriate. Even if the *ejusdem generis* rule was not applicable, the court should be slow to hold at this stage that a reasonable person in the position of the parties at the time the facility letters were entered into would have understood that clause 10.2 had the effect of superseding the promise; and in particular, that the parties were agreeing that the promise was an "arrangement" which was to be superseded.

[28] If it could not be said at this stage that the pursuer was bound to fail to prove a promise that the bank would offer to renew the facilities so that they would be provided for at least 15 years, it was wrong to say that the defenders' only remedy was to seek damages. The pursuer's obligation to perform the promise and the defenders' obligations under the facility letters were counterpart obligations. The pursuer could not insist upon performance of the defenders' obligations under the facilities while refusing to perform its part of the bargain.

Personal bar

[29] The defenders' averments of personal bar were also suitable for inquiry. The pursuer was personally barred from acting in a manner inconsistent with Mr Heslop's statements.

Quantum

[30] If the court was not persuaded that any of the points raised by the defenders provided a defence to the action, then Mr Sandison accepted that £1,758,544 was the sum due by the defenders as at 31 March 2018.

Decision and reasons

The relevant criteria

[31] The test of the relevancy of a defender's averments mirrors the test of the relevancy of a pursuer's averments. Defences will not be dismissed as irrelevant unless a defender is bound to fail even he proves all of his averments (*Jamieson* v *Jamieson*, *supra*, Lord Normand at p 50, Lord Reid at p 63; *Henderson* v *3052775 Nova Scotia Ltd, supra,* Lord Rodger of Earlsferry (delivering the Opinion of the Appellate Committee) at [16]).

[32] Paragraphs 13 to 19 of *Henderson* provide authoritative guidance as to the correct approach to a motion for summary decree. Rule 21.2 applies where the court is satisfied that there is no defence to the action disclosed in the defences. That may be because the defender's averments, taken *pro veritate,* are legally irrelevant. However, the rule is not confined to questions of relevancy. The court may look beyond the pleadings and may consider what in substance the defender is saying. Their Lordships concluded, at paragraph 19:

> "[19] In our view... a judge who is considering a motion for summary decree is entitled to proceed not merely on what is said in the defences, but on the basis of any facts which can be clarified, from documents, articles and affidavits, without trespassing on the role of the proof judge in resolving factual disputes after hearing the evidence. The judge can grant summary decree if he is satisfied, first, that there is no issue raised by the defender which can be properly resolved only at proof and, secondly, that, on the facts which have been clarified in this way, the defender has no defence to all, or any part, of the action. In other words, before he grants summary decree, the judge has to be satisfied that, even if the defender succeeds in proving the

> substance of his defence as it has been clarified, his case must fail. So, if the judge can say no more than that the defender is unlikely to succeed at proof, summary decree will not be appropriate: it is only appropriate where the judge can properly be satisfied on the available material that the defender is bound to fail and so there is nothing of relevance to be decided in a proof."

With these criteria in mind I turn to look at the defences to the pursuer's claim for repayment.

Promise

[33] Taking the defenders' averments *pro veritate* at this stage, I am not satisfied that they are bound to fail to establish that Mr Heslop made a promise to make an offer of further facilities to take effect on the expiry of the existing facilities on 19 June 2012. While it is true that the defenders do not aver that Mr Heslop stated what the terms of the offer would be, it seems to be at least possible that a reasonable person in the position of the parties might have understood him to be committing to renew on the same terms but at the Bank's market rates at the time of renewal.

[34] However, I am satisfied that what Mr Heslop is averred to have said, viewed objectively and in the context of the surrounding circumstances which the defenders aver, would not have bound the Bank to make an offer of facilities for a period of more than 5 years from 19 June 2012. Nor would it have bound the Bank to make a further offer of facilities in 2017. It follows that in my opinion the defenders have not pled a relevant case that Mr Heslop promised that in 2012 the Bank would offer to renew the Facilities for at least 15 years.

[35] I should add that at this stage, prior to evidence being led, I am not convinced that it would have been right to decide that any promise which was made was an "arrangement" in terms of clause 10.2 of the facility letters (and was therefore superseded by the first facility

letter or by subsequent facility letters). In my view, the ordinary meaning of the word "arrangement" is capable of including a promise. I am not persuaded that the *ejusdem generis* rule is applicable here. A letter may involve bilateral dealings (eg a facility letter), but the ordinary meaning of letter has a wider ambit. In my opinion the words "letters, agreements" do not identify a genus of bilateral transactions. Nevertheless, I would not have been disposed to discount the possibility that the evidence of the surrounding circumstances known to the Bank and the defenders at the time that the facility letter of 16 July 2007 was entered into might have caused a reasonable person in the position of the parties to have understood that "arrangement" in paragraph 10.2 did not include the promise. I bear in mind that that facility letter was very soon after the promise is said to have been made, and that Mr Heslop appears to have been the representative of the Bank who signed that letter (albeit that he did so on behalf of a colleague). If the circumstances which the defenders aver are all proved, it also seems to me to be possible that the reasonable person may have concluded that the word "arrangement" had the same meaning in each of the facility letters.

Mutual obligations

[36] A signal feature of the defenders' averments is that, rather than averring that they are entitled to withhold performance of the obligation to make payment, they aver (art 4) that the pursuer is not entitled to enforce performance of that obligation because the Bank breached its promise. The plea-in-law dealing with this matter states:

> "3. *Esto* the pursuer has title and interest to sue in terms of the Assignation (which is denied), its cedent having breached a promise by it to the common debtor and thereby not being entitled to insist on performance of the common debtor's payment obligations, the pursuer is not entitled to decree as concluded for."

The proposition appears to be that, because of the cedent's breach of promise, the defenders' obligation to make repayment of the sums advanced can now never be enforced. That result, so the argument runs, follows because the obligation to make repayment and the promise were mutual obligations. Thus, it is said, the pursuer cannot enforce the former because the Bank failed to perform the latter.

[37] If it were indeed truly the case that on a proper construction of the parties' obligations the defenders' obligation to make repayment of the sums loaned to it was conditional upon the promise being performed, the proposition would be correct (cf *Forster* v *Ferguson & Forster, Macfie & Alexander* 2010 SLT 867, Lord Clarke at [15]). However, it would be a startling outcome, which made no commercial sense, if the defenders' contractual obligation to repay loans of the order of £1.8 million could never be enforced because an offer to extend facilities by 5 years from 2012 was not made. Under the facility letters the loans were repayable on demand. An offer to extend facilities by 5 years would also have been on the basis that loans were repayable on demand. It is very difficult indeed to see why it is that breach of the promise should put the defenders in a stronger position to resist the demand for repayment than they would have been had the promise been performed.

[38] In *Bank of East Asia Ltd* v *Scottish Enterprise* 1997 SLT 1213, at p 1216 F-G, Lord Jauncey of Tullichettle referred to the well-known statement of general principle which had been outlined by Lord Justice-Clerk Moncrieff in *Turnbull* v *McLean* (1874) 1 R 730:

> "At ... p 738 the Lord Justice Clerk said: 'I understand the law of Scotland, in regard to mutual contracts, to be quite clear - 1st, that the stipulations on either side are the counterparts and the consideration given for each other; 2d, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance; 3d, that where one party has refused or failed to perform his part of the contract in any material respect, the other is entitled either

> to insist for implement, claiming damages for the breach, or to rescind the contract altogether, - except in so far as it has been performed.'"

Lord Jauncey reviewed later authorities and concluded (at p 1217H-K):

> "In the light of these cases I turn to consider in a little more detail the three principles enunciated in *Turnbull* v *McLean*. The first one is readily applicable to a case where the obligation by A to pay the price is the counterpart of the obligation by B to complete the works or deliver the goods. I do not, however, consider that the Lord Justice Clerk intended to state that each and every obligation by one party to a mutual contract was necessarily and invariably the counterpart of each and every obligation by the other. It must be a matter of circumstances. Thus in a contract to be performed by both sides in stages, the counter obligation and consideration for payment of stage one is the completion of the work for that stage conform to contract. The second principle must, having regard to the first principle, be construed as referring to performance by the other in relation to the part of the contract which the one party has failed to perform, rather than to the whole contract, although in many cases the part will amount to the whole. The third plainly has in contemplation the material part of a contract which the one party has refused to perform and which may be the subject of specific implement. So analysed it becomes apparent that these principles do not produce the result that any claim under a mutual contract can be set against any other claim thereunder howsoever or whensoever such claim may arise."

The second principle is of particular importance in the present case. The defenders have failed to perform their repayment obligation. It is the counterpart of that obligation which is relevant, not the totality of the obligations of the Bank/the pursuer arising from the facility letter and the promise as a whole.

[39] *Ex hypothese* of the defenders' averments, I would have no difficulty in accepting that the facility letter and the promise were part of a package, and that for the purposes of considering the effect of the mutuality principle the package should be approached in the same way as if all of the obligations were contained within a single contract, or in two interdependent contracts. However, that does not mean that the defenders' obligation to make repayment was conditional upon the Bank (or its assignee) performing the promise and each of its obligations under the facilities agreement. It was conditional upon the Bank performing the obligations which were the counterpart of the repayment obligation. The

most obvious counterpart obligation was the obligation to advance funds in accordance with the agreement contained in the facility letters. There is no suggestion that the Bank did not perform that obligation. It is possible that the Bank had further counterpart obligations. Even if it did, in my opinion the promise was not such an obligation. The promise was that the Bank would offer to extend the provision of facilities for five years from 19 June 2012. Under the extended facilities, as under the existing facilities, the loans would have been subject to the repayment and cancellation term in clause 3.1. In my opinion there is nothing in the promise which makes it a counterpart of the repayment obligation. The reasonable person in the position of the parties at the time when the loan obligations were entered into would not have understood that repayment of the loans was to be conditional upon performance of the promise (cf *Macari* v *Celtic Football and Athletic Club Ltd* 1999 SC 628, Lord President Rodger at pp 640I-641D, 642D-E; Lord Caplan at p 650A-B).

[40] Instead of maintaining that the obligation to make repayment was conditional upon the promise being performed, the defenders might have averred and argued that they are entitled to withhold performance of the repayment obligation temporarily because of the Bank's breach - either because of mutuality retention or equitable retention. They have not done that. I am not making a technical pleading point: far from it. There was not a whisper of any such argument in the defenders' note of argument or in their oral submissions. That is not intended as a criticism. I do not think that the defenders would have had a relevant basis for asserting a right to temporarily withhold performance.

[41] The principle of mutuality retention may apply where contracting parties have mutual obligations (Gloag, *The Law of Contract* (2nd ed), pp 625–627; *Bank of East Asia Ltd* v *Scottish Enterprise, supra; Inveresk plc* v *Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106; *McNeill* v *Aberdeen City Council* 2014 SC 335; *JH & W Lamont of Heathfield Farm* v *Chattisham*

Ltd 2018 SC 440). It allows a contracting party to withhold performance temporarily of an obligation incumbent upon him if and while the other contracting party does not perform a reciprocal, counterpart obligation. It normally operates where the reciprocal obligations arise from the same contract - but that need not be the case as long as the obligations are truly interdependent (*Inveresk plc* v *Tullis Russell Papermakers Ltd, supra)*. In identifying counterpart obligations the search is for substantive obligations, as opposed to ancillary or incidental obligations (*Bank of East Asia Ltd* v *Scottish Enterprise, supra,* Lord Jauncey at pp 1217-1218 ; *McNeill* v *Aberdeen City Council, supra,* Lord Drummond Young at [27]; *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd, supra,* Lord Drummond Young at [30] and [34]; Lord Malcolm at [52]-[53]). Generally, the starting point is that all of the substantive obligations on one side of the contract will be the counterpart of the substantive obligations on the other (Gloag, *The Law of Contract, supra,* p 594; *Macari* v *Celtic Football and Athletic Club Ltd*, *supra*,, Lord President Rodger at p 639; *Inveresk plc* v *Tullis Russell Papermakers Ltd, supra,* Lord Hope of Craighead at [42]; *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd, supra,* per Lord President Carloway at [20], Lord Drummond Young at [34] and [36]*)*. It follows that a substantive obligation may have more than one counterpart substantive obligation (or, putting matters another way, that a counterpart may have a number of components) (*Inveresk plc* v *Tullis Russell Papermakers Ltd, supra,* Lord Hope of Craighead at [45]; Lord Rodger of Earlsferry at [74], [75] and [77]). Exercise of the right to mutuality retention is subject to the court's equitable control (Gloag, *supra*, p 627; McBryde, *The Law of Contract*, paragraph 20.77; Gloag and Henderson, *The Law of Scotland* (14th ed), paragraph 10-17; *McNeill* v *Aberdeen City Council, supra*, Lord Drummond Young at [30]; *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd, supra,* Lord President Carloway at [24], Lord Drummond Young [26], [43] - [46]; cf Lord Malcolm at [58]).

[42] Here, the defenders maintain that they would not have contracted for the facilities but for the promise - that the promise and the contract were interdependent. I agree that, if the defenders establish their averments, the facilities and the promise ought to be treated as a package. The obligation which the pursuer seeks to enforce is the defenders' obligation to repay the sums advanced together with the interest contractually due. The Bank's obligation to make the advances in accordance with the terms of the facilities (which the Bank has performed) was clearly a counterpart of the defenders' obligation to make repayment. However, for the reasons already outlined, in my opinion the promise was not a counterpart of the obligation to make repayment of the loans.

[43] Even if, contrary to my view, for the purposes of mutuality retention the promise ought to be treated as a counterpart of the defenders' obligation to make repayment, in my opinion that would not have availed the defenders. They are not withholding repayment in order to seek performance of the promise. The promise was made by the Bank, not by the pursuer. It was never a possibility for the pursuer to extend the Bank's facilities with the defenders. On the defender's account, the Bank breached the promise on 19 June 2012, long before the Assignation. In any case, the promise was to offer to extend the facilities for 5 years from 19 June 2012. On any view, it cannot now be performed by the Bank or by the pursuer. Had the facilities been extended the further 5 year period would have ended in June 2017 (if not before). *Ex hypothese* of the pursuer's averments, the promise has already been breached. It cannot now be performed, and the defenders cannot withhold performance of the repayment obligation in order to compel performance of the promise. Accordingly, even if the promise had been a counterpart obligation of the right to repayment, the defenders would not have had a good basis for temporarily withholding performance until the promise was implemented (see eg *Macari* v *Celtic Football and Athletic*

Club Ltd, supra, Lord Caplan at p 650D-E; *McNeill* v *Aberdeen City Council, supra,* Lord Drummond Young at [29]; *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd, supra,* Lord President Carloway at [18] and [21]).

[44] On the other hand, the defenders might have sought mutuality retention in security of the damages claim for breach of the promise (Gloag, *The Law of Contract, supra,* pp 626-7; *Inveresk plc* v *Tullis Russell Papermakers Ltd, supra,* Lord Hope of Craighead at [30]-[33]; Lord Rodger of Earlsferry at [73]-[76]; *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd, supra,* Lord Drummond Young at [25], [27], [44]-[47]). Had they done so I think it very likely that the court would have concluded that it was not equitable in the whole circumstances to allow mutuality retention. The outcome of the damages claim is uncertain. The sum claimed is a small fraction of the repayment liability. The heads of loss are inspecific. It does not appear that the damages action has been prosecuted with any vigour. Its resolution may be years away. The defenders have made no repayments towards the debit standing on their accounts since December 2013. If the damages action is ultimately successful, there is no suggestion that the defenders would have difficulty enforcing an award of damages. If that was thought to be an issue the defenders could seek diligence on the dependence of that action. In the whole circumstances in my opinion it would not have been fair and just to allow retention in security of the damages claim (cf *McNeill* v *Aberdeen City Council, supra,* Lord Drummond Young at [30]; *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd, supra,* Lord Drummond Young at [24], [43]-[46]).

[45] The option of seeking equitable retention (*Inveresk plc* v *Tullis Russell Papermakers Ltd, supra,* Lord Hope of Craighead at [32]; Lord Rodger of Earlsferry at [77] - [112]; *JH & W Lamont of Heathfield Farm* v *Chattisham Ltd, supra,* Lord Malcolm at [55] - [59]) was open to the defenders even though the promise was not a counterpart of the defenders' repayment

obligation. However, once again it is not hard to see why the defenders do not ask the court to exercise its power to permit equitable retention. In my opinion it is clear that it would not have been fair and just for the equitable power to have been exercised in the defenders' favour in the whole circumstances.

Personal bar

[46] In my opinion the defenders' averments of personal bar are irrelevant. Even if it is established that Mr Heslop said what the defenders aver he said, the representation was that there would be an offer to renew the facilities on the same terms other than as to interest rates and charges. It was not a representation that, no matter what the circumstances, a demand for repayment would not be made before 2017. The pursuer was not personally barred from demanding repayment in 2015; nor is it personally barred from enforcing its right to repayment now.

The Assignation

[47] Mr Sandison did not argue that the defenders' averments that the certification of the copy Assignation was ineffective are relevant. In my opinion they are irrelevant. Certification does not require to be by a natural person (*Promontoria (Henrico) Limited* v *Friel* 2020 SLT 321, at [47]). In any case, here there was certification by Linklaters LLP *and* by Mr Harbach.

[48] I turn then to the four points which Mr Sandison did raise. I find it convenient to deal with his first point after I have dealt with his second, third and fourth points.

[49] The second point is that the defenders cannot be satisfied from the documents produced that there was purification of the condition of the Assignation that the pursuer

paid the purchase price. The defenders do not aver that the pursuer did not pay that price. Nevertheless, they call upon the pursuer to aver, and vouch, satisfaction of the payment condition.

[50] In my opinion it is clear from Bank's letter to the defenders of 28 November 2014 that, as anticipated in the letter of 24 November 2014, the sale completed on 28 November 2014. In addition, in my view confirmation that the sale price was paid may reasonably be inferred from the terms of the demand letters of 10 September 2015. The defenders' averment in their action for damages that in 2014 the Bank assigned its rights under the facilities to the pursuer is further confirmation of the defenders' awareness that the transaction had completed. For the purposes of the summary decree motion I am satisfied from these materials that the second point is not a good defence.

[51] The third point is that the defenders say it is not clear to them that the Bank was entitled to grant the Assignation, because the pursuer has not said which of the powers in paragraph 6.2 of the Schedule to the facility letters the Bank exercised. Once again, the defenders do not aver that the Bank was not entitled to grant the Assignation. All that they do is (i) call upon the pursuer to explain and vouch which of the powers the Bank exercised; and (ii) aver that "Absent the clause taking effect, and at least in relation to the novation of obligations, the consent of the other contracting party would be required".

[52] In my opinion there is no substance in this point. It is not a relevant defence to the pursuer's claim for repayment.

[53] Clause 6.2 (1) is in very wide terms. It confirms that the Bank may assign its rights and benefits under the facility letters. Clause 6.2 (1) echoes the common law position, *viz* that a creditor is entitled to assign the claims which it has against a debtor as well as any accessory rights. At common law, the consent of the debtor to an assignation of such claims

and rights is not required (see McBryde, *The Law of Contract in Scotland* (3rd ed), paragraph 12-02; R G Anderson, *Assignation* (2008), paragraph 1-03). Nevertheless, clause 6.2 (1) provides the defenders' consent to assignation. In my opinion it is clear that the Bank was entitled to assign the claims which it had against the defenders.

[54] I turn to clause 6.2 (2). The common law position is that a debtor cannot transfer his obligations to a third party unless his creditor consents (R G Anderson, *Assignation*, paragraph 1-04). If such consent is obtained, that enables novation of the obligations. The debtor's obligations to his creditor are extinguished in exchange for him undertaking the same obligations to a new creditor. Here, in terms of clause 6.2 (2) the defenders agreed that the Bank could transfer by novation any of its obligations under the facilities letters or other Relevant Documents to a financial entity of the type described. They consented to such novation. It is not suggested that the pursuer is not a financial entity falling within the description in clause 6.2 (2). In my opinion it follows that the Bank was entitled to novate its obligations under the facilities letters and the Relevant Documents to the pursuer. It would appear to have done so in terms of clauses 2.1(b), 2.1(c) and 2.2 of the Assignation.

[55] It is at least moot whether the promise was an obligation under the facilities letters or other Relevant Documents. If it was, then it would have been one of the obligations which were novated in terms of 2.1(b), 2.1(c) and 2.2 of the Assignation. If, on the other hand, it was not such an obligation but was a collateral obligation (a view to which I incline), it would not have been novated (because it would not have been conveyed in terms of the Assignation, and because it would not have been an obligation which the defenders had agreed (in terms of clause 6.2 (2) of the schedule to the facilities letters) could be novated). Nonetheless, even on the latter scenario the defenders would still have been able rely on the

promise as a defence to a repayment action by the pursuer if it was a defence which they could have taken against the Bank prior to the Assignation: *assignatus utitur jure auctoris.*

[56] In my opinion it is important to keep in view that the obligation which the defenders aver that the Bank did not perform was the promise to offer to extend the facilities. For the reasons already given, the promise is not a relevant defence to the pursuer's claim for repayment.

[57] The fourth point is that the defenders say the court should not be satisfied that there was effective intimation of the Assignation. I disagree. I am satisfied that there has been effective intimation.

[58] Intimation can be by the assignor (*A* v *B* (1540) Mor 843; *Libertas-Komerz GmbH* v *Johnston*, 1977 SC 191; *Fieldoak Limited* v *Dounis & Others*, 26 January 2016, Unreported, Lord Tyre; *Promontoria (Henrico) Limited* v *Friel* 2019 SLT 153, Lord Ericht at [100] (read with [64] and [93]), 2020 SLT 321, Lord President Carloway at [22] and [50]) or by the assignee. In my opinion the Bank's letter of 28 November 2014 to the defenders was effective intimation of the Assignation. It communicated *inter alia* that the debts which the defenders owed to the Bank had been transferred to the pursuer. It made it very clear that from that date the debts were owed to the pursuer and not to the Bank. In my opinion that satisfied the requirements for effective intimation (*Libertas-Komerz GmbH* v *Johnston, supra,* per Lord Kincraig at p 206; *Christie, Owen and Davies Plc* v *Campbell* 2009 SC 436, Opinion of the Court delivered by Lord Clarke at [14]). Had it been necessary for the pursuer to found upon the demand letters of 10 September 2015 as being effective intimation, I would have been satisfied that they were. Like the Bank's letter, they made clear what had been transferred by the Bank to the pursuer, and that the pursuer was asserting a right to repayment. In any case, even if, contrary to my opinion, neither the Bank's letter nor the

demand letters constituted effective intimation, there has been judicial intimation of the Assignation (*Carter* v *McIntosh, supra*).

[59] It follows that, for the purposes of the summary decree motion, I am satisfied that the defenders' averments that intimation was not effective are not a good defence to the action.

[60] That brings me back to the defenders' first point, the gravamen of which is that without sight of the SPA and the NA neither the court nor the defenders can be satisfied that the Assignation did indeed assign *inter alia* the right to repayment which the pursuer now seeks to enforce.

[61] In my opinion this point has substance. If the correct approach to the construction of the Assignation had been (i) to give those of its terms which are defined within the body of the deed their defined meaning; and (ii) to construe all of the Assignation's terms - those defined within the deed and those not so defined - according to the ordinary canons of interpretation, I would have had no difficulty in concluding that the Bank's right to repayment had been assigned to the pursuer. However, the difficulty is that the Assignation may in fact provide that a different approach is required. Two factors may point to that being the case.

[62] First, in terms of clause 1.1 unless words and expressions used in the Assignation are expressly defined therein, they are to have the meaning given to them in the SPA (as amended by the NA). In other words, the SPA (as amended) provides a further lexicon of defined terms. Access to that lexicon is necessary in order to construe the Assignation.

[63] Second, clause 1.2 of the SPA is incorporated in the Assignation. It would appear that it makes provision relating to the construction of the Assignation. Once again, neither the court nor the defenders are in a position to know what that provision is.

[64] I accept, of course, that the pursuer is not obliged to produce documents which are unnecessary to prove that the right which it is seeking to enforce has indeed been assigned to it (*Promontoria (Henrico) Limited* v *Friel* 2020 SLT 321, at [49]). Moreover, the pursuer may redact documents as long as the redactions are not material to proof of the right upon which it relies (*Promontoria (Henrico) Limited* v *Friel* 2019 SLT 153, at [97]; 2020 SLT 321, at [49]). The redaction of the schedule to the Assignation to remove details relating to other borrowers is an example of legitimate redaction in respect of which the defenders can have no complaint. However, in my opinion the SPA's lexicon of defined terms and clause 1.2 of the SPA ought both to be produced, as should any amendment (if any) of those provisions effected by the NA. The defenders have a legitimate complaint that that material has not been made available.

[65] I am conscious that a very similar point appears to have been argued without success by the defender in *Promontoria (Henrico) Limited* v *Friel*. In that case the terms of the assignation (see 2019 SLT 153, [47]-[51]) were similar to (but not identical to) the terms of the Assignation. However, in that case it appears that although the fact that the SPA had not been produced was mentioned *en passant* before the commercial judge, the present argument was not developed before him. Rather, the thrust of the argument which he had to consider seems to have been a complaint about redaction of the schedule to the assignation (2019 SLT 153 at [69], [87] and [97]). On the other hand, in the Inner House the present point does seem to have been advanced (2020 SLT 321 at [28]). The court was critical of the fact that this and other challenges to the assignation had not been focussed by the defender in his pleadings or otherwise clearly raised by him in advance of the proof ([47]). It opined that the commercial judge ought to have determined that such challenges were not open to the

defender, given the state of his pleadings and his position at the preliminary and procedural hearings ([37], p 328L). The court stated:

> "[49] In the interests of clarity and efficiency in a commercial case, a party is entitled to produce only such parts of a document as are necessary to prove the case averred. If only part is produced, there may be a risk that the other party can present certain arguments based on the absence of the whole document. Whether such arguments will succeed must depend on the particular circumstances of the case. In determining the matter the court may have regard to the fact that the other party has not chosen to recover, or to produce, the missing parts of the document in order to substantiate his argument. In this case, there was no requirement for the pursuers to produce the sale and purchase agreement in the absence of any real indication that it might have a bearing on the central issue of whether the assignation covered the Glen TV debt and the defender's guarantee."

The court went on to hold ([50]) that on the evidence the commercial judge was entitled to find that the assignation was adequately proved. In the circumstances that was a wholly unsurprising conclusion. The present argument had not been raised before or during the proof, and it was focussed only in submissions during the reclaiming motion.

[66] Here, by contrast, the point has been raised timeously in the defences. As yet, there has been no proof. The defenders have given the pursuer fair notice that they are putting it to its proof as to the material terms of the Assignation. In my opinion they are entitled to do that. It cannot be said without sight of the defined terms in the SPA and clause 1.2 of that document that those provisions have no real bearing on the issue of whether the Assignation conveyed the defenders' debts to the pursuer.

[67] Nonetheless, it would be surprising if, once the SPA's defined terms and clause 1.2 are available, the conclusion was that the Assignation did not convey the defenders' debts to the pursuer. That outcome must be a possibility; but it is not what would be expected. In my opinion that is a material consideration when it comes to determining appropriate further procedure.

Conclusions

[68] Had I been satisfied that the Assignation conveyed the defenders' debts to the pursuer I would have granted the motion for summary decree. It is the absence of the two parts of the SPA already mentioned which prevents me from reaching a conclusion on that critical issue. In my opinion none of the other points raised by the defenders provides a good defence to the motion for summary decree.

Disposal

[69] In the whole circumstances I shall continue both motions to a hearing to be afterwards fixed. I shall order the pursuer to produce certified copies of (i) that part of the SPA containing defined words and phrases; (ii) clause 1.2 of the SPA; and (iii) any part of the NA which amended the provisions described in (i) or (ii).