Mortgage Claims by Assignee Mortgagees: Evidencing the Right to the Mortgagee's Remedies

It has long been a known problem in mortgage law that s.114 of the Law of Property Act 1925, which automatically transfers the right to the mortgage debt when the mortgage is transferred by deed, does not apply to registered land. That has been clear since at least *Paragon Finance Plc v Pender* [2005] EWCA Civ 760 by reference to the Land Registration Act 1925. Thus, for registered land, the debt must be assigned separately. *Pender,* however, also makes clear that the registered proprietor of a legal charge has the right to possession, even if no right to the debt.

Despite these long-standing principles, mortgage cases brought by an assignee of the mortgage often face defences that they are not entitled to the relief they have sought. One solution, to produce the deed of assignment, can raise issues about redaction of non-relevant parts, when one deed transfers many mortgages.

Two recent cases discuss these issues. On procedure, the court has considered the more general question of when a party can redact parts of a document which the court is asked to construe on the basis that such parts are irrelevant. On substantive law, the courts have recently considered which documents are necessary to evidence an assignment of a debt secured by mortgage. In this paper, we consider issues of evidence in light of those cases and discuss the practical implications for practitioners, particularly in the context of mortgages.

Production of Documentary Evidence

The first part of this paper looks at redaction of documents in the context of disclosure.

Standard disclosure, under CPR 31, that is the production of documents on which a party relies or which may adversely affect or support a parties case, is an intrinsic part of the way civil ligation operates. Trials are not to be conducted by ambush thus each party must have an adequate opportunity to deal with the other side's evidence fairly. That said, there are a number of rules of both law and procedure which can operate to prevent the production of relevant documents in a given case; litigation

privilege is one obvious example. But what about the redaction of documents adduced as evidence by one party on the ground of confidentiality or irrelevance?

The practice of blanking out parts of documents is not a new one. Practitioners have routinely done so where part of the document is privileged or contains what they consider to be irrelevant material. In *GE Capital v Bankers Trust* [1995] 1 W.L.R. 172, CA, just before the introduction of the Civil Procedure Rules, Hoffmann LJ said:

"It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant … In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. The test for whether part can be withheld on grounds of privilege is simply whether that part is privileged. There is no additional requirement that the part must deal with an entirely different subject-matter from the rest."

Redaction within the CPR has been discussed in the more recent case of *Atos Consulting v Avis Plc* [2007] EWHC 323 (TCC). In that case, Ramsey J gave guidance as to the correct judicial approach to be taken where the documents disclosed by one party were redacted and another party, by application, sought to challenge the redactions, either on the ground of lack of privilege or on the ground that the redacted text was relevant. At 37 the following 5 helpful principles as to redaction were outlined:

"(1) The Court has to consider the evidence produced on the application.
(2) If the Court is satisfied that the right to withhold inspection of a document is established by the evidence and there are no sufficient grounds for challenging the correctness of that asserted right, the Court will uphold the right.
(3) If the Court is not satisfied that the right to withhold inspection is established because, for instance, the evidence does not establish a legal right to withhold inspection then the Court will order inspection of the documents.
(4) If sufficient grounds are shown for challenging the correctness of the asserted right then the Court may order further evidence to be produced on oath or, if there is no other appropriate method of properly deciding whether the right to withhold inspection should be upheld, it may decide to inspect the documents.
(5) If it decides to inspect then having inspected the documents it may invite representations."

There is, however, a distinction between application to redaction of the rules which apply when a party is giving disclosure of documents in the ordinary course of litigation, and the separate question of the relevance of redaction in the process of construction of a document which a court has to embark upon when considering the meaning or legal effect of a document. Since the process of construction requires the document as a whole to be considered, the starting point must always be that the entire document should be made available to the court, and any redactions to it on

grounds of irrelevance should either be forbidden or, if permitted at all, convincingly justified and kept to an absolute minimum. This situation, where the redacted document needs to be construed, is the precise issue raised in the recent Court of Appeal decision of *Hancock v Promontoria (Chestnut) Ltd* [2020] EWCA Civ 907.

Hancock v Promontoria (Chestnut) Ltd [2020] EWCA Civ 907

In *Hancock,* Promontoria Chestnut sought to recover the payment of an undisputed debt of approximately £4.09 million by serving a statutory demand. The debt represented the unsecured balance due under loans originally made to Mr Hancock by Clydesdale Bank PLC. Promontoria Chestnut claimed to have acquired title to the loans by assignment, and in the Statutory Demand, Promontoria Chestnut claimed to be entitled to all of the Bank's rights by virtue of a deed of assignment.

Proceedings were brought by Mr Hancock to set aside the statutory demand. In them, Mr Hancock sought to challenge Promontoria Chestnut's title to the debts on the basis that the copy of the Deed of Assignment, which Promontoria Chestnut had put in evidence, had been redacted heavily. Promontoria Chestnut's solicitor had produced a witness statement explaining the reasons for the redactions, pointing in the main to the irrelevance of the materials redacted to the issue to be determined. However, Mr Hancock argued that the redacted deed of assignment was insufficient to prove Promontoria Chestnut's title and its corresponding status as a lawful assignee. He said that part of the redactions related to the very clauses which the court was required to construe.

Notwithstanding the arguments of principle advanced, Mr Hancock was unable to produce any credible evidence casting doubt on the title of Promontoria Chestnut to the debts. The Court highlighted the fact that this was not a case where Promontoria Chestnut was required to prove its title to sue Mr Hancock and viewed in context, the redactions to the deed of assignment faded into relative insignificance. It was held that the unredacted parts of the deed were sufficient to show that title to Mr Hancock's debts indeed had been assigned by the Bank to Promontoria Chestnut.

However, in reaching its decision the Court of Appeal considered the scope of the law on this issue of redaction more generally and the basis on which a party to proceedings could rely on redacted documents.

When Can Redacted Documents be Relied On?

It is settled law that a written contract has to be construed as a whole, in the light of admissible evidence of the relevant background facts (or surrounding circumstances) known to both parties at or before the time when the contract was made, but excluding evidence of prior negotiations. In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, per Lord Hodge JSC (with whose judgment the other members of the Supreme Court agreed) at [10], it was said:

"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

How can such a task can be properly undertaken by the court where part of the document has been redacted so that the court does not have before it the entirety of the relevant contract? Construction of a written document is a matter of law for the court, and questions of relevance require an evaluative judgment which it is for the court, not the solicitor of one of the parties, to perform. Thus, in *Hancock*, Mr Hancock argued that as a matter of principle, it was no answer to an objection to production of a redacted document only to say that the redactions were certified by an experienced solicitor as being irrelevant to the question which the court has to decide.

However, Mr Hancock's submission that the court should simply refuse to engage with the construction of the deed of assignment in its redacted form because it is not in a position to construe it as a whole went too far. There could be no such rigid rule which admitted no exceptions. For example, there can be no reasonable objection to redaction, on the grounds of irrelevance, of the details of third party loan assets and title numbers in the schedule to the deed of assignment or the personal details of signatories and/or attesting witnesses. Those details were unlikely to have any bearing on the construction of the operative clauses of the Deed, particularly, in relation to the personal details of signatories and witnesses, where there was no issue in the case concerning its due execution.

However, even in such a clear case a clear explanation must be provided of the nature and extent of the omissions, and the reasons for making them. Where it was obvious that the provisions in question would on any reasonable view be completely irrelevant to the issue of construction, and if the reasons for taking that view can be clearly and fully articulated by a solicitor acting for the party seeking the redaction, the court will be more inclined to accept that the redaction may be defensible.

In *Hancock*, it was held that, in general, irrelevance alone cannot be a proper ground for redaction of part of a document which the court is asked to construe, and there must be some additional feature, such as protection of privacy or confidentiality, relied upon to justify the redaction.

Conversely, however, it is seldom, if ever, that it would be appropriate for one party unilaterally to redact provisions in a contractual document which the court is being asked to construe, merely on grounds of confidentiality, where there is no irrelevance in the text redacted. Confidentiality alone cannot be a good reason for redacting an otherwise relevant provision in a contractual document which the court has to construe, and where there are other ways in which problems of that nature can be addressed, by allowing the unredacted document to be available to a 'confidentiality ring': the court and a limited number of the parties' lawyers for example.

Thus, where a redacted document is to be construed, redactions, to be defensible, must be on the grounds of irrelevance and privacy, or irrelevance and confidentiality, not on one of irrelevance, privacy, or confidentiality alone.

The Emmanuel Decision

Just prior to the Court of Appeal decision in *Hancock*, the High Court (Marcus Smith J) had considered the issue of a redacted assignment of a mortgage in *Promontoria (Oak) Limited v Nicholas Michael Emanuel and Nicola Jane Emanuel* [2020] EWHC 104 (Ch) ("*Emanuel I*") but in the different situation of the assignee mortgagee's claim.

This case involved another company within the Promontoria group, Promontoria (Oak) Limited. Promontoria Oak brought possession proceedings against the defendants, Mr and Mrs Emanuel, owners of residential property in Cornwall charged as security for business loans to Clydesdale Bank. Promontoria sought possession

and a money judgment as the assignee of the Bank, relying on a deed of assignment as evidence of the same.

Similar to the position in the *Hancock* case, in *Emanuel,* Promontoria put in evidence a significantly redacted version of the assignment, alleging that the redactions contained commercially sensitive material which had no bearing upon the existence and effectiveness of the assignment. Again as in the *Hancock* case, written notice of the assignment had been given to the Emanuels.

At first instance it was held that Promontoria Oak was entitled to possession of the property and a money judgment was given. The judge at first instance had made his decision with only a redacted version of the deed of assignment, plus some additional evidence, before him. This decision was appealed by the Emanuels on various grounds, including, as ground 1, that, as a matter of evidential rules, the judge had been wrong in exercising his discretion to admit the redacted version of the assignment into evidence. He could not be satisfied, as he had to be to allow the redacted version to be admitted, that the redacted passages were of confidential and irrelevant material because he could not be satisfied on the evidence that they were irrelevant.

This first ground of appeal was successful. The judge at first instance was wrong to admit the redacted assignment deed into evidence. He had failed to have regard to the implications of the evidence that was not before him, and ought to have seen the unredacted assignment. Marcus Smith J said that there was a significant probative difference between the primary evidence that was not before the court and the secondary evidence that was before the court. Even if the judge could conclude on the adduced evidence that the debt had been assigned, it did not follow that evidence not adduced, for example the redacted material, was irrelevant. The evidence not adduced could undermine the conclusion based on the adduced evidence. The judge had failed to pay proper regard to this important factor.

This was in the context of some uncertainty in the correspondence with the Emanuels as to who, of various Promontoria entities, the assignee for this mortgage was to be. What was said in the correspondence did not sit easily with what the redacted assignment deed showed, and it was unclear that Promontoria Oak had had the mortgage assigned to it via a chain of assignments through the Promontoria

entities. In saying that no other documents were needed to prove Promontoria Oaks title to commence proceedings he was simply wrong. He was thus wrong to conclude that the redacted material was irrelevant, and thus wrong to conclude that there was sufficient justification for redaction to allow the redacted assignment to be admitted into evidence. Promontoria Oak had not thus done enough to prove its claim.

What did the Court of Appeal in *Hancock* make of this earlier decision about redaction in *Emanuel* I? Since there was a pending application for permission to appeal in *Emanuel* I, it limited its comments. It did however make three observations.

First, it was noted that the High Court in *Emanuel I* had rejected grounds 2 and 3, that the redacted deed if admitted into evidence was not enough to prove Promontoria Oak's title. Marcus Smith J concluded in *Emnauel I* that the trial judge had clearly been entitled, on the redacted assignment adduced before him, to reach the conclusion that the mortgage and debt had been assigned to Promontoria Oak. Nevertheless, the appeal succeeded on ground 1, that there should have been no admission of the redacted assignment into evidence, as the trial judge's decision to permit Promontoria Oak to rely on the redacted deed "was so flawed that it must be set aside".

Secondly, there are significant differences between the facts in the *Emanuel* case and that of *Hancock*. Promontoria Oak had to establish its title to sue, as the claimant in Part 55 proceedings for possession and a money judgment. By contrast, Mr Hancock was seeking to set aside a statutory demand, and the burden was on him to show the existence of a substantial dispute. In addition, in *Emanuel* I, unlike in *Hancock*, there was little evidence from Promontoria Oak's solicitors to explain the commercial background to the assignment, reasons for the redactions, and informing the court that he had inspected an unredacted version of the assignment so as to verify it's irrelevance to the issues in dispute as there was in *Hancock*.

Finally, the parties to the litigation and the assignment relied upon in the two cases were of course different, though the Court of Appeal in *Hancock* noted that the redactions appeared to be rather similar.

In light of these key differences, the outcome of any *Emmanuel I* appeal is far from a forgone conclusion. Indeed the tone of the Court of Appeal's commentary in *Hancock*

does not suggest that those particular Justices of Appeal at least agreed with Marcus Smith J. It appears that they might happily have concluded that it was enough that the redacted assignment proved Promontoria Oak's title. That does seem a likely more practical outcome. The Emanuels' appeals do appear likely to be simply a delaying tactic.

Evidencing Assignment

A further aspect of the *Hancock* case related to the effect in law of the notice of the assignment from the Bank to Promontoria Chestnut, given to Mr Hancock. Section 136 of the Law of Property Act 1925 ("**LPA 1925**") provides that an absolute assignment by writing of any debt or thing in action, of which express notice in writing is given to the debtor, is effectual in law to pass and transfer the legal right to the debt, all legal and other remedies and the power to give a good discharge without the concurrence of the assignor.

Thus, in *Hancock*, if the deed of assignment did assign the benefit of Mr Hancock's debts to the Bank to Promontoria Chestnut, then the giving of express written notice of that assignment to Mr Hancock would transfer the legal title to the debts, together with all remedies for them. There was no evidence in that case that the Bank had ever disputed the validity of the assignment to Promontoria Chestnut or that Mr Hancock had ever asked the Bank to confirm that it no longer had any claims against him in respect of the debts. Mr Hancock would be fully protected by section 136 if he were to make payment to Promontoria Chestnut because the effect of s.136 was to prevent the Bank making a separate claim for the debt. Because of s.136, Promontoria Chestnut could give good receipt for any payments of his debt that Mr Hancock made. In the context of his application to set aside Promontoria Chestnut's statutory demand, Mr Hancock's assertion that the debt was disputed on substantial grounds had a correspondingly hollow ring.

The operation of s.136 LPA 1925, and the contrast of its role in assignment of a debt to the role of registration of an assignment of a charge in passing a mortgagee's proprietary rights, has also been given recent consideration by the High Court in yet another piece of Promontoria litigation, *Promontoria (Oak) Limited v Nicholas Michael Emanuel and Nicola Jane Emanuel* [2020] EWHC 563 (Ch) ("*Emanuel II*").

In a hearing of the order to be made given the *Emmanuel I* decision, Promontoria Oak successfully argued that the first instance orders for possession and a money judgment should be upheld, despite its inability to rely on the redacted deed of assignment, but on the alternative ground that it had title to sue and recover possession in its capacity as registered proprietor of the legal charge granted by the Emanuels over their property.

Marcus Smith J agreed. He held that as the registered proprietor of charge on property, Promontoria Oak had title and therefore standing to claim possession. The claim based on the proprietary interest succeeded simply because of the company's registration of its assigned mortgage pursuant to the Land Registration Act 2002 ("**LRA 2002**"). This is simply the *Paragon Finance Plc v Pender* [2005] EWCA Civ 760 point: the right to possession goes with registration of the legal owner of a legal charge.

What about the money claim? Under s.114 LPA 1925 a deed purporting to transfer a mortgage carries with it a right to sue for the mortgage money or any unpaid part of it. Yet s.114 does not apply to registered land. One must thus make a distinction between the remedies of an assignee of a mortgagee's rights in its guise as registered proprietor, and reliance on the deed of assignment. Thus Promontoria Oak could not rely on the deed of assignment and s.136 LPA 1925 because there was no evidence as to the deed in evidence before the court. However it could succeed on its possession claim as registered proprietor of the charge over the Emanuels' land.

Moreover, Marcus Smith J concluded, though without much detail in reasoning, that 'by analogy with section 114' and pursuant to s.51 LRA 2002, Promontoria Oak had a right to claim any outstanding debt as the holder of the proprietary interest, even though it could not rely on the deed of assignment to show assignment of the right to the debt. This appears to be a strengthening of the position. Post *Paragon Finance* it appeared that the debt had to be assigned separately in cases of registered land if a money claim was to succeed. Nevertheless the minimal reasoning on this issue in *Emanuel* II should be noted. Marcus Smith J made reference to s.51 LR 2002. However, unlike s.114 LPA 1925, s.51 LRA 2002 does not explicitly refer to the transfer of the right to sue.

This judgment in *Emanuel II*, however, is also subject to an outstanding application for permission to appeal. If permission is given, it will be useful to see what the Court of Appeal makes of the long vexed question of assignment of the mortgage debt and whether it is a result of registeration as legal owner of a mortgage despite the lack of application of the useful machinery of s.114 of the 1925 Act. If there is no equivalent of s.114, then the registered proprietor of a mortgage, who took as assignee of the charge, can require the debt secured, plus interest and costs, to be paid to it as a condition of redemption, since that is inherent in a mortgage. Yet that assignee may have to account to the original lender, and, subject to the decision in *Emanuel II*, may not be able to sue for the debt. An odd position.

Pending any such appeal, *Emanuel II* is a useful case outlining the law under the 2002 Act and what registration as proprietor of a charge necessarily carries with it. The result of the findings made by the court was that Promontoria Oak effectively sidestepped the issues concerning its redacted documents and achieved its aims via a different route.

The Practicalities

What evidence to adduce?

When a assignee of a mortgage is claiming possession, or the other clear proprietary remedies, sale or the appointment of a receiver, it need only plead its registered title to the charge and that is sufficient to establish its right. That has long been the case, since the decision in *Paragon Finance v Pender*. That is so even if its registration is a mistake, unless and until that registration is unwound by a claim for rectification of the Land Register.

What if a claim for a money judgment is sought? Though the common current practice is always to seek a money judgment with a possession claim, since the registered mortgagee is entitled to the debt, interest and costs, out of the proceeds of its sale, a money judgment might only be needed if a shortfall is feared, or clarity as to what is owed is sought before sale.

However, if a money judgment is sought, at present at least, pending any appeal of *Emanuel II*, registration as mortgagee it appears should suffice. By s.51 of the LRA 2002, any assignee once registered is entitled to make a claim for the debt.

When to redact?

What if an assignment of a mortgage is to be produced, for example if the mortgage is not registered, or if the *Emanuel II* decision is overturned? What should practice be on redaction?

Where documents are redacted it is important for the other side to be able to understand the basis for it, and for the disclosing party to provide an explanation. A witness statement ought to be produced explaining the background to the redacted document, reasons for the redactions and informing the court that the complete version had inspected so as to verify it's irrelevance to the issues in dispute. It should be prepared in quite some detail, and redactions kept to a minimum. Thus, for example, in *Hancock* the redactions were said to be far more extensive than needed and the evidence provided by Promontoria Chestnut's solicitor would have been of greater assistance to the court if he had condescended to greater detail about the specific reasons for particular redactions.

As for the redactions themselves, where part of a document is irrelevant but not confidential, then it might be simpler to disclose it in its entirety. Where the issue is one of confidentiality however, then the issue of redaction arises. If the document can be separated into distinct parts, where one is confidential and the other isn't, it may be a straightforward process. For example, if a document attaches board minutes or a schedule of third-party transactions which are irrelevant to the litigation.

In some cases there will be real issues about the admissibility of a redacted version. In such cases, another approach will be needed, for example the use of a confidentiality ring within which the document could be made available in its unredacted form to the court and/or a limited number of lawyers on each side may offer a practical solution. Another approach might be for the parties to agree for the judge alone to see the document in its unredacted form.

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