Update on Promontoria Debt Recovery Actions:

Debtors not entitled to challenge the effectiveness and validity of assignment

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So held Mann J on 13 September 2019 in *Nicoll v Promontoria (RAM2) Ltd* [2019] EWHC 2410 (Ch) when determining Mr Nicoll's appeal against the ICC Judge's dismissal of his application to set aside Promontoria's statutory demand.

The decision has implications for debtors who are subject to debt collecting claims (whether by possession action or via the bankruptcy route) currently pursued by Promontoria companies as they work through the realisation of the voluminous debt positions purchased from Clydesdale Bank and other lenders.

Initially, Promontoria encountered some judicial resistance in the context of summary proceedings when seeking to prove its entitlement to sue on the allegedly assigned debt and security. Although different Promontoria companies and different instruments of assignment are involved in these actions, all of the cases have one thing in common: Promontoria habitually carries out heavy redactions to the disclosed assignment instrument and withholds the source documentation (sales and novation agreements) referred to in it. This has frustrated a complete and full understanding of the transaction.

Unsurprisingly, debtors have raised various arguments to the effect that, as the action was based on a redacted and incomplete instrument, Promontoria, without more, could not prove that it had title to sue on the allegedly assigned rights pursuant to facility agreements and personal guarantees between the debtors and the originally contracting bank. At summary level, these arguments sometimes succeeded. Notably in *Dowling v Promontoria* [2017] BPIR 1477 Registrar Barber, referring to the Irish case of *English v Promontoria (Aran) Ltd* [2016] IEHC 662 (Murphy J), stated that under Irish authority Mr Dowling would have "a clear and strong defence to judgment being entered against him on the First Guarantee" [30]. She decided that (among other things) Promontoria's failure properly to evidence its status as assignee of the debt forming the subject-matter of the statutory demand gave rise to substantial grounds for disputing the debt, such that the statutory demand had to be set aside.

Ultimately, however, title challenges have not succeeded when Promontoria provided further evidence (without removing much of the redactions). By way of example, on 17 May

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2017 Murphy J held that Promontoria had discharged the burden of proving that it had acquired the interest in the relevant loan and security assets after it disclosed further (redacted) documents and served an affidavit by its director deposing to the acquisition and its manner: *English v Promontoria (Aran) Ltd* [2017] IEHC 322. Interestingly, in the context of what follows below, the learned judge emphasised that the debtor was a stranger to the transaction and the instrument, and that "…There may well be frailties, defects or deficiencies in the arrangements between Promontoria in its various guises and the various Ulster Bank entities, but that is not a matter of concern to the plaintiff. If any such issues exist, they lie between the parties to the deeds." [60]

That brings me to the judgment of Mann J that Mr Nicoll was not entitled to challenge Promontoria's title to sue either as a matter of evidence or law. In so doing, the learned judge accepted as correct the decision of Andrew Hochhauser QC sitting as a deputy judge of the High Court in *Ennis Property Finance Ltd v Thompson* [2018] EWHC 1929 (Ch). In that case the defendants (who were resisting a claim on a purportedly assigned debt and personal guarantees) had argued that, as a result of redactions to a deed of assignment and in the absence of other evidence, the claimant had not proved that the assignment had in fact taken place. The court, accepted as correct the analysis provided by the claimant that once completion of the deed of assignment had taken place, the assignment had crystallised, and the only parties who could take any point on whether or not completion had taken place were the parties to the deed. The defendants/debtors had an interest in the issue limited only to requiring knowledge of whom to pay and to ensuring that they were not asked to pay twice. The court accordingly found at [66] that the claimant had established that there was a valid assignment to the claimant of the facilities, a charge over property and personal guarantees.

In *Nicoll* at [41] of his judgment, Mann J said this:-

> "I agree with Mr Bickford Smith [counsel for Promontoria] that that authority [*Ennis*] supports a finding that the assignment in the present case should be treated as complete. In that case [*Ennis*] a slightly different set of documents was treated as providing evidence that all matters relevant to completion of the assignment had been carried out, or, at the very least, it was none of the business of the debtor to challenge an assignment whose validity and effectiveness was not being challenged by either of the actual parties to it. Applying that to the present case, the terms of the notice, which, it will be remembered, emanated from both assignor and assignee, made it clear that the parties to the assignment considered it to be complete. In the face of that, Mr Nicoll is not entitled to challenge the title

> of Promontoria. This point is both an evidential and a legal one, but that does not matter for present purposes."

In *Ennis* the assignor had acknowledged in writing that it considered the assignment to be effective, and that it did not dispute its validity. That, the court ruled, put the matter beyond doubt. In *Nicoll* no such separate acknowledgement was produced, but Mann J was satisfied that the terms of notice of the assignment which emanated from both Clydesdale/NAB and Promontoria sufficed as evidence that the parties to the instrument considered the assignment complete and effective.

Only 10 days prior to the judgment in *Nicoll*, His Honour Judge Cooke (sitting as a deputy judge) gave judgment in *Promontoria (Henrico) Ltd v Gurcharan Samra* [2019] EWHC 2327 (Ch). In relation to the challenged assignment the learned judge decided that, notwithstanding the usual heavy redactions to the assignment deed, the operative provisions remaining visible, nevertheless, provided for an absolute assignment. As written notice of the assignment had been given to Mr Samra, the transaction took effect as a statutory assignment pursuant to s.136 of the Law of Property Act 1925 (erroneously referred to as s.137 in the judgment). In that case the learned judge appears not to have been troubled at all by question marks hanging over the provisions of the redacted instrument, being content to find that, at any rate, the requirements for a statutory assignment had been proved by Promontoria.

It will be small comfort to debtors defending proceedings by one of the Promontoria companies that Mann J expressed strong criticism of Promontoria's enthusiastic and unwarranted redaction policy: [65]. Unfortunately this judicial intervention has no practical impact on the general position which has been clarified and can be summarised as follows: if Promontoria has given notice of the assignment to the debtor, and the assigning bank has confirmed by notice or has otherwise acknowledged that it considers the assignment complete, the debtor is not entitled to challenge the efficacy or validity of the assignment.

Scope for more promising defences against the Promontoria claims remains. In practice, we have seen very many Promontoria recovery claims founded on TBLs (Tailored Business Loans) assigned by Clydesdale/Yorkshire Bank. These structured loans were mostly unsuitable for Clydesdale's small and medium sized business borrowers, and in some cases they proved to be truly toxic. We take the view that the lender's conduct before, during and after the loan sale should always be examined for inappropriate behaviour in the light of the unfair relationship provisions in s.140A of the Consumer Credit Act 1974. Claims and

defences under s.140A (if viable on the facts) are available to natural persons and small partnerships and may be asserted for up to 12 years after the banking relationship with the contracting bank has ended. If the originally contracting lender has conducted itself in a manner likely to give rise to an unfair relationship, a s.140A claim or defence may be maintained also against Promontoria who, as assignee, takes its assignments subject to the debtors' rights to relief against the assignor lenders.

Where a fixed rate TBL was sold, Clydesdale routinely charged break costs on early exit in reliance on the provisions of its loan documentation. Currently it is unclear, but unlikely in light of the evidence given by David Thorburn (former CEO of Clydesdale Bank) to the Treasury Select Committee, whether Clydesdale did in fact suffer costs or losses from cancelling third party arrangements. If it did not, in fact, enter into the third party arrangements described in the loan documentation as founding and justifying its entitlement to break costs, Clydesdale has laid itself open to claims for damages (recovery of break costs paid and knock-on losses) for misrepresentation and deceit and for restitutionary relief. Such conduct could also be advanced in an unfair relationship claim for recovery of the break costs payment (by the limited group of customers entitled to rely on s.140A Consumer Credit Act).

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