FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 1
CA105/16

Lord President
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

PROMONTORIA (HENRICO) LTD

Pursuers and Respondents

against

JAMES FRIEL

Defender and Reclaimer

Pursuers and Respondent: Sandison QC; Pinsent Masons LLP
Defender and Reclaimer: Dunlop QC, Welsh; Addleshaw Goddard

10 December 2019

Introduction

[1] This is a reclaiming motion, arising in the context of an action of proving the tenor, against the interlocutor of the commercial judge dated 8 January 2019 ([2019] CSOH 2). The judge: (i) found and declared that on 28 November 2008 the defender executed a personal guarantee in favour of the Clydesdale Bank plc in respect of debts due by Glen TV Rentals Ltd up to a maximum of £800,000; and (ii) decerned against the defender for that sum in favour of the Bank's assignees, namely the pursuers.

[2] The defender maintains that the commercial judge erred in holding that: (a) the pursuers had adequately proved the *casus amissionis* (the circumstances of the loss) of the principal guarantee; (b) a certified copy assignation, which the pursuers had produced, was admissible in terms of section 6 of the Civil Evidence (Scotland) Act 1988; and (c) the copy produced proved that the benefit of any guarantee had been validly assigned to the pursuers.

[3] The case raises a broader issue in relation to the proof of documents, especially in the commercial court; in particular where there has been no challenge to the authenticity of a copy in advance of a proof.

Background

[4] In November 2008 the defender and his daughter were directors and shareholders of Glen TV. On 23 March 2007, Glen TV had entered into a loan agreement with the Bank. The pursuers averred, and the commercial judge ultimately found, that, in terms of a written guarantee dated 28 November 2008, the defender had guaranteed payment to the Bank of all sums due to them by Glen TV up to a maximum of £800,000. The averments had explained how the principal guarantee had been lost. These averments were met with an admission that the defender had granted a guarantee and continued:

> "The document produced as the Guarantee is referred to for its terms, beyond which no admission is made".

This was followed by a number of calls relating to the pursuers' and the Bank's preservation of, and searches for, the principal. On 29 July 2011, Glen TV and the Bank had entered into a further agreement; this time for overdraft facilities.

[5] By letter of 28 October 2014, the Bank demanded re-payment of *inter alios* the overdraft, which was then standing at about £57,000, by 5 November 2014. That sum not having been repaid, on 7 November 2014 the Bank wrote a letter stating that, repayment of the overdraft and other sums not having been made, an "Event of Default" had occurred in terms of the 2007 agreement. This meant that the Bank were entitled to demand immediate repayment of all sums due.

[6] A total of £1,180,403.61 was certified as due on behalf of the Bank by a manager of their parent company, namely the National Australia Bank Ltd. On 20 March 2015, a petition was presented by HM Revenue & Customs seeking orders to wind up Glen TV. On 2 April 2015, administrators were appointed.

[7] On or about 7 July 2015, the pursuers wrote to the defender, giving him notice of an assignation of the guarantee by the Bank to them, and demanding payment of the maximum £800,000.

The Commercial Judge's reasoning

(i) Proving the Tenor of the guarantee

Evidence

[8] The pursuers had lodged a photocopy of what they had averred to be the guarantee. The backing or cover sheet described the document as a guarantee by the defender to the Bank for £800,000 relative to Glen TV. The first page set out the guarantee in those terms. There then followed eleven more pages before a signature page, which carried a warning about the need to take independent legal advice. The signature page contained a completed *pro forma* testing clause which stated that it had been signed by "Mr James Friel". This was

accompanied by a signature which read "James Friel". The document was signed by a witness who was named in the testing clause as "Pamela McHarg".

[9] The defender was called to give evidence by the pursuers. The defender accepted that he had signed a guarantee, but his liability had been limited to £600,000. Miss Friel accepted that a guarantee had been signed on 28 November 2008, but it was not in terms of the copy which had been lodged. The limit of £600,000 had been in place for decades and was to be kept at that.

[10] An affidavit from Ms McHarg was produced. Its content had been agreed by joint minute as being her evidence. Ms McHarg was a solicitor specialising in real estate finance. She had witnessed the defender sign the guarantee in the form of the copy lodged. She could not recall the specifics of her meeting with the defender, but confirmed that the copy bore her signature. She would not have witnessed the guarantee if the defender had not signed it first. Ms McHarg had also signed a letter from her firm, namely Messrs Maclay Murray & Spens, to the Bank, dated 27 January 2009, enclosing *inter alia* the "Original Guarantee by [the defenders] in favour of [the Bank] on behalf of [Glen TV] dated 28 November 2008" and a "Certificate by Guarantor to [the Bank]" confirming that the defender had taken legal advice from Ms McHarg. The certificate, which was produced, bore to have been signed by the defender in acknowledgement of his receipt of a copy of the guarantee and the certificate. It confirmed that prior to signing the guarantee, which had been given by him to secure the liability to the Bank of Glen TV "for a sum of £800,000 together with interest", the defender was given "full opportunity to read the Guarantee at a private meeting with a solicitor acting for me" and had taken independent legal advice. Ms McHarg had countersigned the certificate.

[11] An employee of the Bank, Ms Piwowaska, spoke to the efforts which had been made to locate the principal guarantee. She had been part of a team at the Bank, which had, from December 2014 to June 2015, assisted in the project to transfer parts of the Bank's loan book to the pursuers. She had not personally dealt with documents relating to Glen TV, but had been involved in checking for discrepancies between what was recorded on the Bank's electronic system and what was physically held by the Bank. The principal guarantee had not been within the Bank's storage facilities at the time of the transfer. The electronic systems, which she had checked in June 2018, had confirmed this. There was no record of the guarantee having been returned by the pursuers to the Bank. There was no record of it having been destroyed. This would not have been usual practice. Ms Piwowaska had gone to the storage facility and asked the person, who was responsible for looking after the physical documents, to search the storeroom. No documents relating to Glen TV had been found. Ms Piwowaska had been unable to locate the principal guarantee.

Commercial Judge's decision

[12] The commercial judge found that, in order to prove the tenor of a document, a pursuer had to prove: (i) the execution of the document; (ii) its tenor; and (iii) the *casus amissionis*. There was no dispute that a guarantee had been signed on 28 November 2008. Ms McHarg was a credible and reliable witness, whose evidence was supported by contemporaneous documents. The certificate signed by the defender had specifically referred to a guarantee for £800,000, as had the letter of 27 January 2009 from Ms McHarg to the Bank. Neither the defender nor Miss Friel was credible or reliable on the matter of the sum guaranteed. The pursuers had satisfied the requirements as to the execution and tenor of the Guarantee.

[13] On *casus amissionis*, what was required depended on the circumstances of the case and was not to be considered in isolation from the proof of execution or tenor (*Graham* v *Graham* (1847) 10D 45 at 49). The discussion of *casus amissionis* in *Scottish and Universal Newspapers Limited* v *Gherson's Trustees* 1987 SC 27 related not to cases involving proving the tenor of a document, but to the application of the best evidence rule. The requirement, to show destruction or loss without fault, applied only to the use of a document in evidence, as an exception to the best evidence rule.

[14] One circumstance, which could be relevant to proof of *casus amissionis*, arose where the document was one which was normally destroyed, cancelled or returned when the obligations in it were extinguished (*Winchester* v *Smith* (1863) 1 M 685). The presumption in such circumstances did not apply to the guarantee. The testimony of Ms McHarg and Ms Piwowaska was credible and reliable. The loss of the principal guarantee implied no extinction of the obligation. There was no suggestion from the Bank, nor from the defender himself, that the Bank had agreed to release him from the guarantee. The pursuers had proved the *casus amissionis*.

(ii) Proving the assignation

Evidence

[15] The pursuers had averred that, by assignation dated 1, 2 and 5 June 2015, the Bank, with the consent of National Australia Bank Ltd, had assigned the liabilities of Glen TV and the defender to the pursuers. This was met with the following answer:

> "Believed to be true that by 'assignation' dated 1, 2 and 5 June 2015 [the Bank] attempted to assign certain obligations owed to it to the pursuer[s]. The redacted document produced as 'the relevant parts' of the Assignation is referred to for its terms, beyond which no admission is made".

[16] The pursuers produced a certified copy of the assignation. This was followed by an averment in answer that the assignation was a "complete delegation to the pursuer[s] of the obligations owed by the Bank ... to their customers". It was invalid in the absence of customer consent. The copy bore a certificate as follows:

"CERTIFIED TO BE A TRUE
COPY OF THE ORIGINAL
Linklaters LLP
DATE *13 April 2013*".

The words "Linklaters LLP" and "13 April 2013" were in manuscript; the other words having been applied by a stamp. During the course of the proceedings, the pursuers had produced two other copies of the assignation which, to differing extents, redacted some of the wording contained in the version ultimately founded upon. On the first day of the proof, the pursuers had sought to lodge a further copy with different redactions. That motion was refused.

[17] Evidence was led from Ms Johane Murray, a solicitor, partner and head of real estate at Brodies LLP. Brodies had been instructed by Linklaters LLP to act for the pursuers in relation to the Scots law aspects of the assignation. Completion of the transaction had been confirmed at a conference call on 5 June 2015. The principal assignation had been delivered to Brodies in triplicate. Brodies had sent two principal copies to the Bank's Scottish solicitor and one principal to Linklaters to retain on behalf of the pursuers. The principal had been scanned onto Brodies' file. Ms Murray had compared the scanned version with that produced.

[18] Darren Janes, a commercial loan servicing manager for Pepper (UK) Ltd, trading as Engage Commercial, gave evidence that Engage Commercial provided loan servicing for

lenders. The pursuers had acquired a portfolio of loans from the Bank. An electronic copy of the guarantee had been provided to Engage by the pursuers when Engage had been instructed to manage the portfolio. Once the transfer had been completed, the accounts in the portfolio had been "migrated" to Engage's systems. This had occurred on 5 June 2015. Once the accounts had been transferred, the Bank provided the pursuers with a data tape of the Bank's outstanding balances. Mr Janes had joined Engage sometime after the transfer. He had not participated in the migration exercise. He had not seen the principal assignation.

[19] The defender accepted that he had received a letter to him from the Bank dated 5 June 2015. This stated that the Bank had completed a transfer of the loan facilities and all related rights, including guarantees, to the pursuers. The letter, in turn, enclosed a letter from the Bank to one of the joint administrators of Glen TV. The letter to the defender had told him that there had been a transfer from the Bank to the pursuers. Both letters were produced. The letter to the administrator confirmed that, as at 5 June 2015, all of the Bank's rights and benefits in, to and under, Glen TV's loans and loan agreements, and all related security, guarantees and other rights in connection with the loans and loan agreements, had been transferred to the pursuers.

Commercial Judge's decision

[20] The issue was whether the certified copy assignation, which had been lodged by the pursuers, was "a copy of a document, purporting to be authenticated by a person responsible for the making of the copy" in terms of section 6 of the Civil Evidence (Scotland) Act 1988. If it was, it would be deemed to be a true copy and was to be treated as if it were the document itself. The judge concluded that the word "person" in section 6 was not

limited to natural persons. The normal position, under the Interpretation Act 1978, was that "person" included both legal and natural persons. The copy assignation had been certified as a true copy by a firm of solicitors. It was not necessary for the certificate to comply with the formalities of execution applicable to Limited Liability Partnerships. Section 6 of the 1988 Act did not require any particular formality; merely that the copy had been authenticated by the person responsible for making it.

[21] The certificate had been signed in the name of the firm of solicitors who had acted for the pursuers in a manner consistent with sections 43(1)(b) and 44(6) of the Companies Act 2006, as it applied to an English Limited Liability Partnership. That was sufficient to satisfy the requirements of section 6 of the 1988 Act. There would be consequences for the efficient administration of justice if the court were to find otherwise. It was in the interests of justice that section 6 of the 1988 Act facilitated the efficient conduct of court business by providing a simple method for certifying copy documents for use in court. Redaction of parts of a document, which were not relevant to the issues before the court, assisted the court in the efficient conduct of judicial business, particularly in the context of commercial court procedure.

(iii) Construction of the assignation

Commercial Judge's decision

[22] The wording of the assignation was clear. It contained an assignation by the Bank to the pursuers in relation to each "Specified Loan Asset" comprised within a "Borrower Asset Group". "Specified Loan Asset" was defined as *inter alia* a "Relevant Loan Asset", which in turn was defined as a loan asset or debt claim described in a schedule. The schedule was headed "Relevant Loan Assets". The part of the schedule which had been lodged recorded

that Glen TV had borrowed from the Bank. The information was sufficient, as a description of a loan asset or debt claim, to bring lending by the Bank to Glen TV within the definition of Relevant Loan Asset and therefore within the definition of Specified Loan Asset. The wording assigned certain rights under each "Relevant Document"; the definition of which included documents of debt and security, and in particular facility letters, loan agreements and guarantees. It included the documentation which set out the lending to Glen TV by the Bank, and the guarantee. The assignation had been intimated to both the administrator of Glen TV and the defender by the letters dated 5 June 2015. It was proved that the Bank had assigned its rights against Glen TV, and under the guarantee, to the pursuers.

Submissions

Defender and Reclaimer

[23] The defender's first ground of appeal was that the pursuers had not adequately proved *casus amissionis*. They had proved only *amissio*. The legal requirements for proving the tenor of a missing document should not be less exacting than those applicable when seeking to adduce a copy of a lost document in place of the principal. A guarantee was a document which was capable of being cancelled by destruction. The pursuers had been required, and had failed, to lead evidence to displace the presumption that the absence of the principal inferred the extinction of the obligation said to be evidenced by it.

[24] When a document was lost, while in the hands of the party seeking to rely on it, secondary evidence could be admitted only if the principal was shown to have been lost or destroyed without fault on the part of that party. Proof of mere *amissio* did not suffice. Fault meant a failure to take all proper steps, or to use all due diligence, to see that the document was preserved; the appropriate amount of care and diligence, and the steps

required, being affected by the nature and importance of the document (*Scottish & Universal Newspapers* v *Gherson's Trs* 1987 SC at 46 – 47, 51 and 53 – 54, applying and approving Dickson*: Evidence* (Grierson ed) at paras 236-237). Guarantees were documents of debt which, when missing, required very clear proof of *casus amissionis* (Gloag, *Contract*, (2nd ed) at 717, citing *Winchester* v *Smith* (*supra*) at 689 and *Walker* v *Nisbet* 1915 SC 639(see pp 640-1, 642 and 644-5)).

[25] None of the three requisites (execution, tenor and *casus amissionis*) had been made out. In relation to the first two elements, the only direct evidence was that of the defender and his daughter. Both had maintained that the document produced did not reflect the terms of the guarantee which had been granted. The commercial judge was wrong to reject their evidence on the basis that it was inconsistent with the documentation. The only other witness who could speak to the matter, namely Ms McHarg, could not recall the specifics of the meeting. Her evidence, which was only in affidavit form, was entirely the product of looking at the copy document whose tenor was in issue.

[26] The second ground was that the copy assignation was not "a copy of a document purporting to be authenticated by a person responsible for the making of the copy" within section 6 of the 1988 Act. It did not purport to have been authenticated by a natural person. The legal person, which had purported to authenticate it, had not executed it in the manner permissible for such a person. That person had made no claim to have been responsible for making the copy. Considerations of administrative efficiency did not warrant the conclusion reached by the commercial judge.

[27] The contrary intention necessary to displace the provisions of the Interpretation Act 1978 did appear in the 1988 Act. That Act referred to a "person" on four occasions (s 2(1)(b), s 3, s 4 and s 6(1)). To hold that "person" referred to both legal and natural persons would

mean that the word was being used differently in section 6 from every other occasion of its use in the Act, and in which it was inconceivable that the reference was to a non-natural person, for no apparent reason. Where certification was made, or evidence on behalf of a business or undertaking was given, it was explicit that such certification or evidence had to come from an officer of the undertaking and not from the undertaking itself. The certificate had not been executed in the manner permissible for an English LLP (Companies Act 2006 (s 44(1) and (2)), as modified by the Limited Liability Partnerships (Application of Companies Act 2006) Regulations (2009/1804, reg 4)). Even on the hypothesis, that an LLP could authenticate documents for the purposes of the 1988 Act, the document had been ineptly authenticated. Linklaters' authentication said nothing about who had made the copy.

[28] The third ground was that the copy assignation contained no coherent account of the extent to which any particular loan asset or debt claim had been assigned to the pursuers; far less a claim amounting to or in excess of £800,000. The pursuers had not adequately proved that the benefit of the guarantee had been validly assigned to them by the Bank. The assignation had to be read along with a sale and purchase agreement (SPA) which had been entered into between the Bank, National Australia Bank Ltd and Promontoria Holding 93 BV on 15 December 2014. The SPA had not been produced. Clause 1.2 of the assignation contained a requirement that the assignation was to be construed in accordance with the construction clause in the SPA. The defender and the court were being asked to construe the assignation without the necessary tools (the code) with which to do so. The rights and obligations of the parties under the assignation were expressly subordinated to their rights and obligations under the SPA. The defender and the court had no way of determining whether the SPA said anything different from the assignation.

[29] The assignation left open the question of whether, on the assumption that it was otherwise valid, it had taken effect in respect of any debt of Glen TV referred to in the schedule. The pursuers required to prove: the Borrower Asset Group to which the Glen TV Specified Loan Asset belonged; and the occurrence of the Effective Time in respect of that Group in order to establish the coming into effect of any relevant assignation. Proof of neither matter was offered or furnished.

Pursuers and Respondents

[30] On the first ground of appeal, the reasoning of the commercial judge was correct. Where there was strong evidence of: (1) the execution of a document; and (2) its tenor, only very general and slight proof of *casus amissionis* was required (*Graham* v *Graham* (*supra*) at 49). Determining what was required was a matter for the judge at first instance, in light of the facts and circumstances of each case, on equitable grounds. *Scottish & Universal Newspapers* v *Gherson's Trs* (*supra*) was not about the requirements for proving the tenor of a lost document (on which see *Dickson* (*supra*) para 1340). The commercial judge accepted credible and reliable evidence that the principal guarantee had been sent to the Bank and had subsequently been lost. Since there was no transcription of the evidence, the defender was not in a position to argue that the judge had erred in his acceptance of the pursuers' witnesses (*Robertson* v *Council of the Law Society of Scotland* 2016 SLT 103 at para [21]). The defender had accepted that he had signed a guarantee, but for £600,000. This had not been apparent from his written pleadings. Ms McHarg's evidence was in affidavit form because it had been agreed in the joint minute. The judge had been entitled to reject the evidence of the Friels because it was inconsistent not only with the copy guarantee but also the other contemporaneous documentation.

[31] Where the document was of a type where destruction signified revocation, such as a testamentary writing (*Clyde* v *Clyde* 1958 SC 343), the court could decide that detailed evidence of the circumstances of the loss or destruction was required. No evidence had been led to demonstrate that the guarantee was revocable or of a type which was usually destroyed once it had served its purpose. There was no evidence of performance of the guarantee, which may have led to it being destroyed. On the contrary, it was accepted that there was a balance outstanding under the loan facilities. There was no evidence to suggest that the guarantee had ever been discharged or waived. The commercial judge had been correct to find that there was strong evidence of execution and tenor and that the pursuers had led sufficient evidence of the circumstances of the loss of the principal guarantee.

[32] On the second ground, the pursuers again adopted the reasoning of the commercial judge. The issue of certification had only been raised in submissions at the conclusion of the evidence. There was no provision in the 1988 Act that sought to qualify the word "person" for the purposes of section 6. In any Act, unless the contrary intention appeared, "person" included a body of persons corporate or unincorporated (Interpretation Act 1978, section 5 and schedule 1). Section 6 of the 1988 Act permitted a person, corporate or unincorporated (ie a natural or a legal person), to authenticate a copy.

[33] The defender had not sought to dispute the document on the basis of English law, as he would have been required to do because the LLP was registered in England & Wales. Regulation 4 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations (2009/1804) modified section 43 of the 2006 Act whereby, under English law, "a contract may be made […] on behalf of an LLP, by a person acting under its authority, express or implied". The authentication had been carried out in a manner frequently used and accepted in commercial transactions. The assignation purported to have been

authenticated by the person responsible for making the copy, *viz.* Linklaters. To require any further formality would be contrary to the interests of justice.

[34] The defender had initially been deemed to have accepted the authenticity of the assignation, following a notice to admit. This concession had later been withdrawn. On the first day of the proof, the pursuers had offered, and moved, to produce a copy of the assignation which was *inter alia* signed by a natural person in order to prevent a technical point having to be taken. The pursuers could not be criticised for having done so (*cf Japan Leasing (Europe)* v *Weir's Trustee (No. 2)* 1998 SC 543). The defender opposed the motion, which was ultimately refused by the commercial judge. The point was entirely technical and lacking in substance.

[35] On the third ground, the pursuers again adopted the reasoning of the commercial judge. Read as a whole, the objective meaning of the language, in which the parties had chosen to express their agreement, was clear. Clause 2.1 of the assignation had assigned to the pursuers the Bank's full right, title and interest in relation to each Specified Loan Asset comprised within the Relevant Borrower Group. A Specified Loan Asset was a Relevant Loan Asset which, in turn, was a loan asset or debt claim described in the schedule. The schedule was headed Relevant Loan Assets and consisted of a table headed Borrower Data. The schedule unambiguously identified a principal borrower as Glen TV. It clearly showed the loan account number and recorded that enforcement/demand letters had been issued. The commercial judge was correct to find that: (i) the schedule identified the loan asset or debt claim so as to bring it within the definition of Relevant Loan Asset for the purposes of the assignation; (ii) the assignation had been validly intimated to the principal debtor and defender; and (iii) the pursuers had proved its title to sue.

Decision

The issues for proof

[36] The commercial court is a specialist forum for the efficient disposal of mercantile disputes. The progress of each case is managed by the same judge, whose task is, in part, to see that the real issues in the case are fully and clearly identified and matters proceed to a substantive hearing as speedily and efficiently as possible (Macfadyen ed: *Court of Session Practice* Div F at para [451]). Prior to a preliminary hearing, a statement of issues setting out, in concise form, the issues which require determination, should be lodged (Practice Note No. 1 of 2007: *Commercial Actions* para 18). Unlike ordinary procedure, when a cause is sent to proof, the judge can decide that proof is unnecessary in respect of a particular issue or that it should take a particular form (RCS 47.12(2) (f and c)). In a case of proving the tenor, if a photocopy of what is alleged to be the original is to be challenged, the court would expect that to be clearly flagged as an issue at the stage of the preliminary and procedural hearings. In this case, the opposite is the case. The defender's pleadings did not challenge the authenticity of the copy guarantee. On the contrary, they referred to it for its terms; a form of averment in answer which means that the authenticity of the document is admitted, albeit that the pursuers' interpretation of it is not (see Lord Carloway: *Civil Procedure Court of Session Defences*; *Stair Memorial Encyclopaedia* (re-issue) para 122(4)).

[37] Similarly, if a copy document, purporting to be certified as a true copy of the original, were to be the subject of challenge on the ground that the certification was defective, the court would expect such a fundamental, if technical, point to be raised clearly in advance of proof in a commercial action. That was not done. Again, on the contrary, the defender met the pursuers' averments about the assignation with the response "Believed to be true", albeit that he introduced a degree of obfuscation with the introduction, into what is

essentially an admission, about the assignation constituting only an attempt to achieve its object. Once more, the defender himself referred to the assignation; a form of pleading which accepts its provenance but not its meaning. In so far as the issues were focussed, the defence to the averment concerning the assignation was not a challenge to its authenticity, but a contention that it was not an assignation at all but a complete delegation of all of the Bank's customers' obligations, which was ineffective in the absence of the customers' consent. That defence having failed, there was no other averment on this aspect of the case. In relation to what became challenges to both the copy guarantee and the assignation, the commercial judge ought to have determined that such challenges were not open to the defender, given the state of his written pleadings and his position at the preliminary and procedural hearings.

The execution and tenor of the guarantee

[38] Both the pursuers and the defender had agreed by joint minute that "the evidence of Pamela McHarg is ... as set out in her Witness Statement" (Joint Minute para 25). Her statement is that she had "witnessed [the defender's] signature on the Guarantee in Glasgow on 28 November 2008". If accepted, that was clear evidence proving both the execution of the guarantee and its tenor. Ms McHarg's evidence also covered proof of her covering letter to the Bank dated 27 January 2009 and its enclosures; the guarantee and the certificate of independent legal advice. Ms McHarg said that she would not have signed the certificate had she not given the defender such advice.

[39] The defender accepted that he did sign a guarantee on the date stated on the copy which was produced. His issue came to be only whether the figure of £800,000, which is shown twice on the face of the guarantee, ought to have been £600,000. If it had been

£600,000, the defender did not produce his principal to demonstrate that. His position was inconsistent not only with the copy guarantee produced, but also with the content of the covering letter to the Bank with its enclosures. Similar considerations apply to the evidence of the defender's daughter. The commercial judge was entitled to accept the evidence of Ms McHarg, who was an independent professional adviser, on the authenticity of the copy guarantee and its execution, as supported by the contemporaneous correspondence, and to reject that of Mr Friel and his daughter because of its inconsistency with the documents produced.

The casus amissionis

[40] When it appears that a revocable deed, such as a will, has been destroyed or lost, a pursuer who is attempting to prove its tenor will need to demonstrate that: "its destruction or loss took place in circumstances as implied no extinction of the right of which it was the evident" (*Winchester* v *Smith* (1863) 1 M 685, LP (McNeill) and Lords Curriehill and Ardmillan at 689). That is simply because it is presumed, especially if the deed has been in the possession of the grantor, that the destruction or loss has been deliberately brought about to end the deed's effectiveness (see eg *Clyde* v *Clyde* 1958 SC 343). Similarly, in the case of deeds, such as promissory notes, which are proved to have been destroyed while in the hands of the grantee, the presumption will be that the destruction was intentional with a view to extinguishing the obligation, if such destruction is normal in such circumstances. In such situations, proof of *casus amissionis* will involve demonstrating that the destruction was not deliberately effected for the purpose of terminating the obligation (*ibid*; see eg *Walker* v *Nisbet* 1915 SC 639 in which no copy of the promissory note was available).

[41] In the present case, there is, and can be, no suggestion that the pursuers or the Bank have destroyed the guarantee as part of an exercise designed to end its effect. The debt of in excess of £800,000 subsists and there would be no reason to destroy or lose the principal guarantee when, as the defender accepts, the sum remains outstanding. There is no evidence to suggest that a bank, or its assignee, would simply destroy a principal guarantee of this nature and magnitude even if the debt had been paid. A formal discharge would be the more obvious route.

[42] As it is put in Dickson: *Evidence* (Grierson ed) (at para 1340):

> "The rule that a special *casus amissionis* is necessary in regard to deeds which are usually discharged by redelivery, does not prevent a proving of the tenor in cases where there is proof or strong probability that the deed was not given up or cancelled, but where the party who founds on it cannot condescend on the occasion of its loss".

Care must be taken not to read too much into the older cases which may have raised issues about whether parole proof could ever be admitted to prove written obligations. It is, however, useful to consider Lord Jeffrey's *dicta* in *Graham* v *Graham* (1847) 10 D 45 (at 49), which reads as follows:

> "In later times, no doubt, this original strictness was relaxed; and where there was no challenge of the genuineness of the lost deed, and no circumstances of suspicion in the case, parole proof of a very direct and conclusive sort was admitted to instruct its tenor, with the aid of very slight adminicles in writing ...
>
> The other relaxation which came to be introduced in practice was easier, and trenched less on principle. It was, that where the tenor was clearly instructed by proper adminicles, under the hand of the granter (which of course also settled its authenticity), a very general and slight proof of the *casus amissionis* would be sufficient. But the important thing, in the case of both relaxations, is, that they were introduced solely on equitable grounds; and that the Court, in allowing them, was entirely guided by its impressions as to the perfect safety of such a proceeding; or the impossibility of fraud on the part of the individual deriving any benefit from the indulgence."

[43] In the present case, the tenor was clearly demonstrated as was the execution. There was at least a very general and slight proof of the *casus amissionis*. The principal was, and remains, lost; probably mislaid in the repositories of the Bank or the pursuers at the time of the transmission of the obligations to the Bank under the assignation. Sufficient *casus amissionis* has been proved. On this basis, the first ground of appeal falls to be rejected.

[44] *Scottish & Universal Newspapers* v *Gherson's Trs* 1987 SC 27 was not concerned with proving the tenor of a document but with the circumstances in which secondary (parole) evidence could be used to establish the content of documents (primary financial records) which had been lost whilst in the hands of the party founding on them to prove the case. *Quantum valeat* it is difficult to envisage the court reaching the same decision in the modern era had photocopies of the records been available.

Proving the assignation

[45] Section 6 of the Civil Evidence (Scotland) Act 1988 provides that:

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

The Act followed the Report of the Scottish Law Commission on *Corroboration, Hearsay and Related Matters in Civil Proceedings* (No. 100, 1986), which repeated (at para 1.3) two of the guiding principles which the SLC had stated in an earlier Consultative Memorandum (No. 46 at para A.03) as follows:

> "(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.
>
> (2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible".

[46] The Act heralded (ss 1 and 2) the abolition of corroboration and hearsay in all civil proceedings. It simplified (s 5) the rule in relation to the proof of business and other records by providing that they could be proved if certified by a docquet "purporting to be signed by an officer of the business". A facsimile signature was acceptable for this purpose. It then went on in section 6 to allow copies to be accepted as principals if they were "authenticated by a person responsible for the making of the copy". This was intended to modify the effects of the "best evidence" rule, which was causing considerable practical difficulties, especially in the context of commercial disputes, in an era in which accurate, ie photo copying, technology was rapidly developing.

[47] Section 6 is broadly phrased and allows any "person", who was responsible for making the copy, to authenticate it. It does not restrict itself to natural persons (cf Interpretation Act 1978, s 5 and Sch 1 "person") nor does it state that the person has to be the one who had physically pressed the button on the copier. It is the person who is responsible for making the copy who can authenticate it. It may be that it would be better, in certain situations, for a natural person to be specified, but it is not a requirement. In this case, it was a firm of solicitors that was responsible for making the copy, albeit that it could also be said that a partner, associate or the actual employee of the firm who made the copy was responsible within the meaning of the section. No formalities of execution are designated. A firm or LLP may authenticate a copy by signing in the firm's name. The certificate does not require to state that the signatory was responsible for making the copy. It is sufficient that that is in fact the position. That does not require separate proof in the absence of a challenge. The fact that, for certain sections of the Act, a person would require to be a natural one is immaterial.

[48] The important point is that, where a certified copy of a document is produced by one party, the other party can request the court to "direct otherwise". Such a request can arise if the other party "reasonably wishes to question the accuracy of the alleged copy or ... whether the document is truly a copy of another document at all" (SLC Report (*supra*) at para 3.71). In a commercial case, at least, the challenging party ought to have sought such a direction in advance of the proof and given reasons for doing so. For these reasons, the second ground of appeal fails.

Construing the Assignation

[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.

[50] As the commercial judge held, the document produced contains (clause 2.1(a)) an assignation by the Bank to the pursuers (the Buyer) of all of the Bank's title, benefits and interests in or to each "Relevant Document"; the latter including guarantees in relation to a "Specified Loan Asset", which in turn means a "loan asset or debt claim described in the Schedule". The Schedule contains a reference to: Glen TV; a "default" having occurred;

demand letters having been made and there being an insolvency process in the form of an administration. As already noted, there had been due intimation of the existence of the assignation to the defender in terms of the letters of 5 June 2015. The assignation of the guarantee was adequately proved and the third ground of appeal is accordingly rejected.

[51] For all of these reasons, the reclaiming motion is refused and the court adheres to the commercial judge's interlocutor of 8 January 2019.