



## The Enforcement of Assigned Standard Securities

This note summarises the issues raised in the cases of *OneSavings Bank plc v Burns & Shear v Clipper Holdings* and comments on the potential implications of the decisions for creditors pursuing possession proceedings based upon secured loans assigned to them.

### OneSavings Bank plc v Burns

An application was presented at Banff Sheriff Court to recover possession of The Old School, Bogton Row, Forglen, Turiff. The property was used for residential purposes. Court proceedings were issued following the expiry of calling up notices.

OneSavings Bank plc (OSB) asserted their interest as creditors in a standard security registered against the property by virtue of an assignation in their favour recorded on 22 September 2008 in the General Register of Sasine. The style of assignation used was a style commonly used by solicitors acting for lenders in the purchase and sale of loan books. The assignation contained the information required by the Keeper to record the transfer and had an annexed schedule which listed details of the standard securities being assigned. The assignation did not specify the sums due and outstanding for each of the securities being assigned.

The defender challenged the validity of the assignation as not conforming to the statutory style set out in the 1970 Act. The defender contended this meant the creditor's interest in the Standard Security had not been assigned to OSB, and that OSB did not have title to insist upon the possession proceedings.

### Decision

Sheriff Mann agreed with this argument. Whilst he considered that the assignations were sufficient to make OSB the creditors in the loan to the defenders, he considered the absence of certain words specified in the 1970 Act rendered the assignation fatal to the vesting of the standard security in favour of OSB.

In reaching his decision, Sheriff Mann reviewed the legislative provisions dealing with assignations in the 1970 Act. Those provisions are section 14 and Schedule 4 of the Act. Reference was also made to section 53, which provides guidance as to the level of compliance required when issuing forms in terms of the 1970 Act.

Section 14 sets out the requirements for assigning standard securities under the 1970 Act. It states:

*"Any standard security duly registered or recorded may be transferred, in whole or in part, by the creditor in an assignation in conformity with Form A or B of Schedule 4 to this Act, and upon such an assignation being duly registered or recorded, the security, or as the case may be, part thereof, shall be vested in the assignee as effectually as if the security or the part had been granted in his favour".*

Schedule 4 sets out the statutory style for Form A (being the style that was to be used).

Form A is as follows: "*I, AB (designation), in consideration of £ hereby assign to CD (designation) a standard security for £ (or a maximum sum of £, to the extent of £ being the amount due thereunder; in other cases described as indicated in Note 2 to this Schedule) by EF in my favour*

*recorded in the Register for on (adding if necessary, but only to the extent of £ of principal); with interest from ..."*

The standard security was an all sums standard security, and Note 2 of Schedule 4 provides guidance as to what is required when dealing with this type of security.

Note 2 states:

*"In an assignment, discharge or deed of restriction, (1) a standard security of an uncertain amount may be described by specifying shortly the nature of the debt or obligation (eg all sums due or to become due) for which the security was granted adding in the case of an assignment, to the extent of £ being the amount now due thereunder"*

The customer's argument was that the omission of the words in the assignment "to the extent of £ being the amount now due thereunder" as detailed in Note 2 meant that it did not follow the statutory style, and section 53 did not assist the lenders as the assignment did not conform "as closely as may be to the statutory style".

## Commentary

Sheriff Mann was sitting alone as a Sheriff at first instance. His decision is therefore persuasive and not binding. Unless and until a ruling is provided by an Appeal Court on this issue, the decision will not bind other Sheriffs and does not require to be followed. A decision of the Sheriff Appeal Court is binding on all Sheriffs, unless that decision of the Sheriff Appeal Court is overturned by a higher appellate court.

In the meantime and pending any clarification provided by an Appeal Court it is possible that other Sheriffs and Judges could reach a different conclusion to Sheriff Mann.

The decision has provoked a degree of market commentary with differing views expressed as to whether the Sheriff was correct and if so, the impact of the decision. Interestingly, the Land Register of Scotland, which administers both the Land Register and the Sasine Register, are taking the view that the decision of the Sheriff in the OSB case is incorrect and have confirmed that they will continue to register assignments in the style which the Sheriff in the OSB case decided was ineffective.

## Shear v Clipper Holdings

An application for interim interdict was made by a pursuer seeking to prevent a creditor, who had acquired its title by assignment, relying upon an expired calling up notice. The assignment was in similar terms to the style used in the OSB case and was registered in the Land Register.

The pursuer relied on the decision in OSB in contending that the creditor did not have title to enforce the Standard Security. The issue was considered by Lord Bannatyne in the Commercial Court of the Court of Session at a hearing on 25 May. His Lordship issued his judgment from the bench on 26 May 2017.

## Decision

Lord Bannatyne refused the pursuer's application for interim interdict. His Lordship is expected to write on the matter, but in the meantime the salient points from the judgment which he read from the bench are as follows:

The argument for the pursuer was extremely technical in nature. It sought to make the wording of Note 2 to Form A in Schedule 4 to the 1970 Act 1970 mandatory, such that failure to use this wording resulted in invalidity.

The pursuer's argument failed to take account of modern developments in the law regarding the mandatory/directory dichotomy. Invalidity does not follow inevitably from a failure to follow statutory procedure. Rather, the court should look to the statute to see if the scheme of the Act is such that

invalidity should follow. In so doing, the court should strive to be fair and exercise commercial sense: *Newbold and others v Coal Authority* [2014] 1 WLR 1288; *CTB v White* [2015] UKPC 39. The seriousness of any breach is a primary consideration. In the present case there was no serious breach, and it would be a grave injustice to rule in favour of invalidity.

Further, the Court should apply a purposive interpretation. The statutory purpose can be seen in s.14 of the 1970 Act, which says that on registration, an assignation of a security will result in the security being vested in the assignee as effectually as if the security had been granted in his favour.

Such an outcome is not achieved applying the pursuer's argument. Stating the sum outstanding in the assignation as required by Note 2 converts an all sums due security into a fixed sum security. The security is therefore not vested in the assignee as effectually as if the security had been granted in his favour as the form of security has altered.

## Commentary

In a similar way to Sheriff Mann in OSB, Lord Bannatyne was sitting alone as a judge at first instance. His decision is therefore persuasive and not binding. It is nevertheless a decision of a Lord Ordinary sitting in the Commercial Court of the Court of Session and is therefore likely to be more persuasive than the decision in OSB. The Lord Ordinary's reasoning takes account of the courts willingness to apply an interpretation that makes commercial sense and achieves a fair outcome.

It remains the position however then unless and until clarification is provided by an appellate court, there will continue to be a degree of uncertainty as to how the courts will deal with similar challenges in the future.

## Land Register Titles

There is an important distinction that can be drawn between the Burns case where the Standard Security was registered in the Sasine Register and the majority of cases where the Standard Security is registered in the Land Register. When a deed is registered in the Land Register, a party derives its title or interest from the registered title rather than from the underlying deed which transfers the title or interest.

Since April 2003 all property sales for consideration have required to be registered in the Land Register. In April 2016 this was extended to cover property transfers for no consideration meaning that all property transfers now need to be registered in the Land Register. The only deeds still capable of being recorded in the Sasine Register are discharges and assignations of Standard Securities.

When a Standard Security in the Land Register has been assigned, and the creditor's interest in the assignation has been registered, the registration of the creditor's interest in the Register creates the real right from which the creditor's title to raise proceedings is derived.

Unless or until the Register is rectified by removing that registered interest, the creditor remains entitled to enforce the Standard Security even if the customer contends that the assignation by which the creditor had acquired his interest was ineffective.

Absence any attempt to rectify the Register, our advice is that if the assigned Standard Security is registered in the Land Register, a creditor is entitled to proceed as before without making any alteration to its current possession process.

## Sasine Register Titles

The OSB case concerned an assignation recorded in the Sasine Register. Whilst a creditor remains entitled to commence the possession process on Sasine assignation cases in the usual manner, the safer course of action would be for the creditor to re-assign the Standard Security upon which the claim is founded as a preliminary step prior to commencing the Calling Up procedure. This would remove the risk of an OSB type challenge.

There is of course no obligation on a creditor to re-assign the Standard Security before commencing legal proceedings, and Lord Bannatyne's decision in Shear suggests such a course of action is unnecessary. Not changing the process however leaves open the possibility of the customer challenging the validity of the assignation of the Standard Security and hence the creditor's title to bring proceedings.

The way in which any re-assignment would take place will depend on the circumstances of the original title transfer. There are likely to be provisions in the Mortgage Sale Agreement which may be relied upon to compel the original creditor to grant a new assignment of the Standard Security. The simplest and most straightforward way to deal with this, particularly where multiple securities are involved, would be to obtain a Power of Attorney from the original creditor to grant the assignments as and when required.

It is not necessary to grant new assignments for all Sasine recorded deeds as most of the properties potentially impacted by the OSB decision will never be the subject of possession proceedings. We would recommend that if doing so, Sasine recorded deeds be re-assigned on a case by case basis as the possession process is commenced.

### **Current Cases**

There will be a number of cases involving Sasine recorded deeds where proceedings have already been raised. We are not aware of any challenge being made as yet in any of these cases on the basis of the OSB decision. We would recommend that if a challenge is made to the assignment in any such case, a review is undertaken at that stage of the relevant factual circumstances to determine the most appropriate course of action.

Similarly, we are not aware of any challenge being made as yet in any case involving a land registered assignment on the basis of the OSB decision. We would advise adopting a similar approach to any such challenge as that proposed for dealing with any challenge involving Sasine recorded deeds.

This publication is intended for general guidance and represents our understanding of the relevant law and practice as at 25 May 2017. Specific advice should be sought for specific cases; we cannot be held responsible for any action (or decision not to take action) made in reliance upon the content of this publication.

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