OUTER HOUSE, COURT OF SESSION

[2021] CSOH 54

P659/20

OPINION OF LORD CLARK

In the petition of

UK AGRICULTURAL LENDING LIMITED

Petitioner

for

Rectification of documents in terms of section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985

Petitioner: Brown; Shepherd and Wedderburn LLP
First Respondent: Paul Newsham (Lay Representative)
Third Respondent: Party Litigant
Fourth Respondent: Party Litigant

21 May 2021

Introduction

[1] The petitioner seeks rectification of the terms of certain standard securities granted in its favour by the first respondent. The terms of the standard securities state that they are granted in respect of the first respondent's indebtedness to the petitioner. The petitioner contends that the intention of the parties at the time of the grant of the standard securities was that these documents would grant security in respect of the indebtedness of the second respondent to the petitioner. Rectification is sought to reflect that intention, said to be

shown in an antecedent agreement to that effect and to be supported by other evidence. The petitioner's application is opposed by the first, third and fourth respondents.

[2] The petitioner is a finance company, specialising in the agricultural market. The first respondent is Hamilton Orr Limited. The second respondent is Orrdone Farms Limited (in administration), previously named Avocet Agriculture Limited. On 23 January 2020, joint administrators were appointed to the second respondent. No answers to the petition were lodged by the joint administrators. Mr Martin Frost (who is subject to an order under section 1 of the Vexatious Actions (Scotland) Act 1898) is the third respondent. He is a director of the first and second respondents. His wife, who is also a director of the first respondent and who became a director of the second respondent on 7 September 2016, is the fourth respondent.

Background

[3] The first respondent owned various farming properties, including Harcarse Hill Farmhouse, Harcarse Hill Steading, Harcarse Hill Cottages and adjacent fields, and Sunwick Farm. At the material time, two brothers of the fourth respondent, along with relatives of those brothers, were directors of the first respondent. Accordingly, the directors of the two companies had close family links. In July 2016, the first respondent was indebted to Ilona Rose Investments Limited ("IRIL") in the sum of £2,375,942.81. Following discussions, it was agreed that the petitioner would make a new loan in the sum of £3.25 million which would allow that debt to IRIL to be discharged. The petitioner contended that the arrangement was that it would make the loan to the second respondent, in the form of offsetting the first respondent's debt to IRIL, with the remaining monies being transferred to the second respondent. By email dated 27 July

2016, an adviser acting on behalf of the petitioner emailed Russell Spinks of Kerr Stirling LLP, the petitioner's solicitors, advising of the new transaction. The adviser noted that the borrower was to be the second respondent and stated that "The security is being provided by [the first respondent]". On 3 August 2016, Mr Spinks emailed a solicitor who acted on behalf of two of the directors of the first respondent and in due course came to act on its behalf. He enclosed drafts of the standard securities, and stated that the petitioner had:

> "agreed to lend [the second respondent] the sum of £3,250,000 secured over 30 months with an interest rate of 12% per annum. Martin Frost, the director of [the second respondent], is, I am told, the brother in law of your clients Duncan and Stewart Orr who have agreed to put up security and personal guarantees for the loan as per the previous loan to [the first respondent]".

In a reply dated 4 August 2016, the solicitor noted that the petitioner was interested in lending to the second respondent on a secured basis and said that "The land at Sunwick is now owned by [the first respondent] (you are aware of this)". He also noted that he considered there was a conflict of interest as between the first and second respondents and so he would be unable to act for both in the transaction. On 8 August 2016 he sent a further email to Mr Spinks noting that "On the face of it, [the second respondent] will borrow £3.2 million [*sic*] and get [the first respondent] to put up security".

[4] On 8 August 2016, the petitioner sent a Facility Letter to the second respondent. Clause 1.1 of the letter stated:

> "… the Facility will be made available to the Borrower [the second respondent] for the purpose of repaying existing borrowing held against securities granted by [the first respondent] in favour of Ilona Rose Investments Limited over the Property, providing working capital and servicing of interest…".

The Facility Letter also provided that an unlimited personal guarantee was to be provided by the individual directors of both the first respondent and the second respondent and debentures were to be granted by the first and second respondent. The letter also stated "By

signing and returning the acknowledgment and acceptance ("the Acceptance") you have agreed to the terms of the Facility set out in this letter".

[5] On 15 August 2016, Mr Spinks advised the petitioner that there was a new proposal that the properties be transferred by the first respondent to the second respondent. On 18 August, the petitioner's adviser told Mr Spinks that there had been a discussion with the third respondent that morning "and it has been agreed that the transaction will complete under the original structure i.e. [the first respondent] will provide the security for a loan to [the second respondent]".

[6] On 24 August 2016, final documentation was sent by Mr Spinks to the solicitor for the first respondent for review and execution. On the same day, another solicitor was instructed for the second respondent. On or around 25 August 2016, the first respondent granted the standard securities ("the Harcarse Hill and Sunwick Farm Securities") in favour of the petitioner. The Facility Letter was accepted on behalf of the second respondent on 25 August 2016. On or around 25 August 2016, the third and fourth respondents, having received independent legal advice, gave personal guarantees in favour of the petitioner in respect of the debt owed by the second respondent. Other directors also gave personal guarantees. The Facility Letter was signed on behalf of the petitioner on 1 September 2016. On 22 September 2016, debentures were granted by the first and second respondents, executed on their behalf by the third respondent. The securities were registered in the Land Register for Scotland on 23 and 26 September 2016 respectively and subsequently registered with the Registrar of Companies. After payment was made to the outgoing lender (IRIL) and of sundry other charges, the remaining balance was paid to the second respondent, through its solicitors.

[7] In about September 2017, the first respondent disponed the subjects at Harcarse Hill and Sunwick Farm to the second respondent. The consideration in the dispositions was narrated as being for certain good and onerous causes. The second respondent was registered as proprietor of Harcarse Hill and Sunwick Farm on 3 September 2018. The petitioner's position is that the transfer of title took place without its knowledge or consent. An action of reduction has been raised in this court by the first respondent against the second respondent in respect of the Sunwick Farm disposition. The second respondent is presently interdicted *ad interim* from taking any action to obtain possession of Sunwick Farm. Bankruptcy proceedings have been raised in England by the petitioner in respect of the third and fourth respondents.

Procedural history

[8] Shortly after the petition was raised, permission for Mr Paul Newsham, a director of the first respondent, to act as lay representative of the first respondent was granted by the Lord Ordinary who dealt with that application. The case called for a by-order hearing on 12 November 2020. On behalf of the petitioner, it was said that the third and fourth respondents did not have any proper interest to oppose the petition, although no motion to deal with that issue at that stage was enrolled. The respondents' answers were also criticised. Mr Newsham, as lay representative for the first respondent, and Mr and Mrs Frost, appearing in person at the teleconference hearing, indicated that they were seeking to obtain legal representation.

[9] At the continued by order hearing on 7 January 2021, Mr Newsham again appeared for the first respondent (no legal representation having been obtained) but senior and junior counsel appeared on behalf of Mr and Mrs Frost. Counsel for the petitioner submitted that

the answers initially lodged for the respondents were patently untrue and deliberately dishonest and that they sought to raise a number of irrelevant matters. Senior counsel for the third and fourth respondents indicated that the answers had been substantially adjusted with much material stripped out, but that some further information and investigation was needed. A period of adjustment was allowed, with a continued by order hearing fixed for 5 February 2021 and a substantive hearing fixed for 12 March 2021. On 2 February 2021 the solicitors who had acted for the third and fourth respondents withdrew from acting. On 5 February 2021 the third and fourth respondents, appearing personally, moved to have the cause sisted, on the ground that it might be capable of being resolved by discussions between the parties. Counsel for the petitioner advised the court that no such discussions were occurring. The motion was refused.

[10] Certain preliminary and other matters were raised at the beginning of the substantive hearing. On behalf of the petitioner, objection was taken to any lines of defence in the Note of Argument which were not in the pleadings. There were points which had been in the original answers but then deleted when counsel became involved. There had been no motion to amend the answers to re-open such lines. The affidavit of Mr Frost was said to contain some extraordinary material but was of little relevance to the issues. If Mr Newsham was merely following the arguments of the third and fourth respondents and there was an absence of a legitimate interest on the part of the third and fourth respondents then there was some concern that the first respondent should not artificially become a conduit for them.

[11] Mr Newsham submitted that the actual points of argument were very similar and represented the first respondent's position. Mr Frost, making submissions on behalf of himself and his wife, moved for the substantive hearing to be delayed so as to facilitate

(a) proper intimation by the petitioner to all interested parties and (b) the conclusion of relevant investigations by Police Scotland and the outcome of a trial due to take place in August 2021, which involved persons related to the first and second respondent companies and the disposition of the land which is the subject of the standard securities. He advised that no legal proceedings had been raised against the joint administrators seeking to challenge their appointment. Counsel for the petitioner opposed this motion on the following grounds. Any other persons who gave guarantees did not have interest in the petition. Any motion that others should have been given intimation should have been made some time ago. If any of those parties felt they had an interest then given the other proceedings one could readily infer that if any of them wanted to become involved they could have done so.

[12] The question of whether a guarantor had an interest was an issue to be dealt with at the substantive hearing. On the matter of the police investigations, I was not persuaded that this caused any difficulty in proceeding with the substantive hearing. I therefore refused the motion to adjourn the hearing.

Statutory provisions

[13] Section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 provides, in part:

> "(1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—
>
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made; or
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> (b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above, fails to express

accurately the intention of the grantor of the document at the date when it was executed, it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.

(2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral."

[14] Section 9 includes the following provisions:

"(1) The court shall order a document to be rectified under section 8 of this Act only where it is satisfied—

(a) that the interests of a person to whom this section applies would not be adversely affected to a material extent by the rectification; or

(b) that that person has consented to the proposed rectification.

(2) Subject to subsections (2A) and (3) below, this section applies to a person (other than a party to the agreement or the grantor of the document) who has acted or refrained from acting in reliance on the terms of the document with the result that his position has been affected to a material extent.

…"

Affidavits

[15] The petitioner lodged affidavits from Emma Porter, one of the joint administrators of the second respondent, and Russell Spinks, the solicitor who acted on behalf of the petitioner in relation to the standard securities. Ms Porter explained that the joint administrators were appointed by the petitioner following upon the second respondent having been in default of its payment obligations under a debenture granted in favour of the petitioner. The joint administrators had no objection to the petition. She commented upon the answers as originally lodged by the respondents, viewing these as being exceptionally surprising and containing a number of quite strange claims and accusations which were hard to follow. She commented upon a number of the financial matters raised in the original

answers. As these were removed in the adjusted answers, I need not summarise these comments.

[16] In his affidavit, Mr Spinks explained the correspondence, noted above, that had occurred prior to the standard securities being executed. He said that all of the relevant prior documentation identified the second respondent as the borrower. There was some discussion of an alternative arrangement but that was not carried through. He also stated that on 23 August 2016 he received a telephone call from the solicitor for the first respondent saying that his client was now content to proceed on the basis set out in the Facility Letter and the original exchange. The suggestion in the respondents' answers that the solicitors for the three entities had agreed to lend the money to the first respondent rather than the second was at odds with what all of the documentation vouched, and was vehemently denied as simply untrue. He also referred to an email dated 23 August 2016, recovered from the solicitor for the first respondent, in which that solicitor advised Mr Frost that the loan to the second respondent was to be secured over land owned by the first respondent.

[17] In relation to the terms of the standard securities, Mr Spinks explained that he had used styles from earlier standard securities dealing with the first respondent as the borrower. He had erred in failing to revise the terms to indicate that the loan was to the second respondent, which was the clear understanding and position of the parties.

[18] On behalf of the third and fourth respondents, an affidavit from Mr Frost was lodged. Among other things, it narrated Mr Frost's own experiences and background and made a number of peculiar and disparaging comments and insinuations about individuals with whom he has had dealings. Virtually nothing in his affidavit is of any assistance or relevance for present purposes.

Submissions for the petitioner

[19] The third and fourth respondents had no interest to act in respect of the second respondent, that being a matter for the joint administrators. It was quite wrong for the third and fourth respondents to suggest that there was an issue in respect of the joint administrators' appointment, when no challenge had been raised for well over a year since that took place. In relation to whether their provision of guarantees formed a basis for title and interest, if one asked where their liability could arise, the liability of the second respondent was contractual, in terms of the agreed Facility Letter. Their liabilities as guarantors subsisted regardless of the standard securities. The petitioner could have demanded payment from the second respondent and then sought winding up, without seeking to enforce the securities. These were guarantees granted by various individuals in respect of the debt of the company. No guarantor would be exposed to a new liability if the prayer of the petition is granted. The guarantors were not shielded from liability by the current defect in the securities.

[20] The arrangement was that, following upon existing borrowing by the first respondent, the petitioner would lend to the second respondent and obtain securities from the first respondent. The error was noticed when it became necessary to seek to enforce the standard securities. All that was sought was to bring the standard securities into line with the Facility Letter, as the agreed grant of the Harcarse Hill and Sunwick Farm Securities by the first respondent in favour of the petitioner was intended by the petitioner and the first respondent to secure the debt of the second respondent to the petitioner. The intention of all three parties was that the funds advanced would be used firstly to repay borrowing by the first respondent to IRIL. It was accordingly clear from the circumstances of the transaction that the petitioner and first respondent (in addition to the second respondent) had agreed

that the first respondent would grant standard securities to secure the second respondent's obligations as borrower. There was no other reason for the first respondent to grant the Harcarse Hill and Sunwick Farm securities, given that the first respondent was repaying its existing borrowing (using the funds from the second respondent), rather than borrowing further sums from the petitioner.

[21] As drafted, the Harcarse Hill and Sunwick Farm Securities bore to secure obligations of the first respondent to the petitioner. They ought, instead, to have secured the liabilities of the second respondent, as parties had intended. The standard securities accordingly failed to express accurately the common intention of the parties. The securities should be rectified (the changes required being the same in each document) by making a number of specified alterations, including inserting a new definition of "Borrower" and making a number of further references to the Borrower.

[22] Where the answers claimed there never was an agreement of any debt by the second respondent that was an untrue assertion and a false defence. It did not deal with the overwhelming weight of the conflicting documentary evidence. To reinvent matters and say that the three solicitors, acting contrary to instructions, and the lender all deliberately proceeded with the standard securities in the existing terms was not supported by any material. Further, there was no reason provided as to why a debenture was executed on behalf of the second respondent or why guarantees were executed in respect of that indebtedness if the intention had been that the second respondent was not the debtor. The guarantors obtained independent legal advice, invoiced to the second respondent.

[23] Moreover, the audited accounts lodged on behalf of the first respondent gave no mention of the debt, while those for the second respondent expressly referred to the loan of £3.25 million. In relation to the appointment of the joint administrators, no proper ground

of challenge was put forward. There was no need for a proof as the third and fourth respondents had made plainly dishonest assertions.

Submissions for the respondents

[24] Mr Newsham, on behalf of the first respondent, was content to follow the lines taken in the Note of Argument for the third and fourth respondents and added only some brief further points. When a company borrowed money, the legal documents would commonly be prepared after the Facility Letter. If the petitioner was correct, then the question arose as to why the debentures were drafted in the terms used. There were in fact three occasions when the petitioner or its solicitor could have checked the wording of the securities, all signed and approved by one of its directors. It had ample opportunity to make changes if something else had been agreed. One needed to follow the flow of the money, which supported the joint intention. The accounts for the second respondent in 2016 were not audited.

[25] Mr Frost made submissions on behalf of himself and his wife. In relation to title and interest, by deeds of guarantee and indemnity dated 1 September 2016, the third and fourth respondents guaranteed on demand to pay to the petitioner the whole and every part of all monies and liabilities then or in future to become due, owing or incurred by the second respondent to the petitioner. If the prayer of the petition is granted, the third and fourth respondents will become guarantors of obligations which would become owed by the second respondent under and in terms of the standard securities mentioned in paragraph 2 of the petition. They accordingly had title and interest to oppose the prayer of the petition. In any event, they had title and

interest to oppose the prayer of the petition on behalf of and for the benefit of the second respondent.

[26] No intimation had been made to those others who had provided personal guarantees in respect of the obligations of the second respondent to the petitioner and hence to whom section 9 of the 1985 Act applied. The joint administrators of the second respondent had, throughout their appointment, failed to acknowledge that their appointment was invalid for the very straightforward reason that no loan was made by the petitioner to the second respondent. The recipient of the loan referred to was the first respondent. Accordingly, the qualifying floating charge, upon which the joint administrators were appointed, had not become enforceable and any purported consent to their appointment was of no effect. The appointment of the joint administrators was not valid. The purpose of the petition was to seek permission, in effect, to rewrite the terms of the liabilities as stated in the standard securities granted over both Harcarse Hill and Sunwick Farms. The joint administrators falsely stated that the rectification action does not affect the status of the ownership of the properties by the second respondent.

[27] As to rectification, at the date of the execution of the securities (25 August 2016), no agreement had been reached amongst the parties on the essential terms of the proposed loan. In particular, no agreement had been reached that the first respondent would grant standard securities in favour of the petitioner to secure any obligations of the second respondent. The essential terms of the proposed loan were not agreed until the Facility Letter dated 8 August 2016 was executed by the petitioner on 1 September 2016. Thus, the Harcarse Hill and Sunwick Farm Securities did not give effect to any antecedent agreement. The rectification sought should be refused. In any event, the terms of the loan agreed between the petitioner

and the second respondent were never implemented. The petitioner and the first and second respondents agreed that the proposed loan should be made by the petitioner to the first respondent rather than the second respondent. At that time, the first respondent was indebted to IRIL in the sum of £2,375,942.81 or thereby. On or around 22 September 2016, the loan funds were offset. The petitioner settled the balance then due by the first respondent to IRIL. The first respondent then arranged for payment of the balance of the loan funds to be made to the second respondent. No loan was ever made by the petitioner to the second respondent. The second respondent has never owed any money or obligation to the petitioner.

[28] The stated purpose of the petition was to rewrite the standard securities to create a falsehood by substituting the second respondent as the debtor and borrower in place of the first respondent. The true position was the complete opposite to what was stated in the petition. The standard securities in their present form, signed and agreed by the parties to the transaction and registered as appropriate, reflected the actual intended position of the parties. Funds were not transferred from the second respondent to the first respondent to repay their prior security. The security documents were an accurate reflection of the actuality of events in 2016 which were agreed by the parties to the transaction at the time and exampled by their signatures on the standard security.

[29] Section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 applied to the guarantors and in particular to the third and fourth respondents. Logically, the directors of the first respondent were of the view that the aim is to achieve repayment of the loan to the petitioner. The simplest method of achieving that goal was to maintain the existing standard securities as intended by the parties. The three farms must be restored from the Crown through *bona vacantia* to the first respondent. This would enable the

three farms to be sold in order that repayment of the petitioner can be achieved. That process would be a straightforward honest process involving no falsehoods. Personal guarantees were not given in respect of the obligations of the first respondent to the petitioner.

[30] It was not suggested that the petitioner, when signing, was unaware of or disagreed with the contents of the said standard securities. The draft standard securities were reviewed three times, presumably to ensure that there was no dubiety, before being completed. What the solicitors had done was in effect a novation. The solicitor who acted for the first respondent must have agreed to offset part of the money that the petitioner was lending against the debt to IRIL. He was not acting at that stage for the second respondent. The balance of the funds was sent by the first respondent to the second respondent. The loan funds were not sent to the second respondent or its solicitor. There was intended to be a sale of the properties by the first respondent to the second respondent. Missives were agreed. The petitioner was aware of that intended transaction and the petitioner's representatives had attended meetings where it was discussed. If the loan had been made to the second respondent there would have been no security and so the loan was to the first respondent. If the sale had gone ahead the monies would have revolved and the first respondent could have repaid the sums to the petitioner. That was the arrangement reached. There was no point in the second respondent borrowing money from the petitioner to then give it to the first respondent. That created no advantage to the second respondent. The disposition granted in 2018 in respect of the security subjects had been wrongly backdated and that had caused problems. There was no error in the standard securities. They reflected what the lawyers thought was a prudent thing to do bearing in mind the

missives. The lawyers were attempting to cover up their errors. Reference was made to other factual circumstances.

Decision and reasons

[31] Dealing firstly with the issue of title and interest on the part of the third and fourth respondents, submitted by them to arise because they have given personal guarantees and also because the joint administrators had wrongly been appointed, I reject that submission. The personal guarantees, given after independent advice, were in respect of the second respondent's indebtedness to the petitioner. The Facility Letter sets out that agreement. The second respondent is liable under that agreement. The present petition adds nothing to the basis upon which the personal guarantees can be enforced. The third and fourth respondents, and indeed any other guarantor, gave their guarantees based on an existing obligation and will not be exposed to a new liability if the prayer of the petition is granted. Accordingly, the existence of the personal guarantees does not assist in giving anyone title and interest to oppose this application. As to the points made about the joint administrators, they have the interest to act in respect of the second respondent and as there has been no challenge to their appointment that excludes any right of the third and fourth respondents to act on behalf of the company.

[32] However, as Mr Newsham for the first respondent adopted the position advanced by the third and fourth respondents, I do require to consider the substance of that position. While I see some force in the submission for the petitioner that Mr Newsham could be viewed as a conduit to ventilate the arguments for the third and fourth respondent, he was allowed to act as the lay representative and the fact that he has adopted arguments

presented by others who have no title or interest does not exclude those arguments from consideration.

[33] The law, with particular reference to evidence relevant to rectification, is set out by Lord Hodge in *Patersons of Greenoakhill Limited* v *Biffa Waste Services Limited* 2013 SLT 729 (at paras [32]-[47]) and I respectfully adopt that approach. For present purposes, the following principles are of relevance:

> "[34] … that earlier agreement does not have to be legally binding …
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> …
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> [40] … the court has to assess the existence of the antecedent agreement and the common intention of the parties objectively …
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> [41] The evidence that is relevant to rectification will include statements which one contracting party (A) has made to the other contracting party or parties (B & C) during negotiations about his intentions because it will show that B and C were aware of A's subjective view. The court has to assess those statements and other manifestations of the parties' intention to ascertain whether there was an agreement and also a continuing shared intention at the time the document sought to be rectified was executed.
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> …
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> [43] It may also be relevant to consider the conduct of the parties after they signed the impugned contractual document as that may cast light on parties' intention when they entered into the contract … The weight to be attached to such conduct will vary depending on the nature and quality of the pre-contractual evidence.
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> [44] Where the contract is negotiated by solicitors as well as by their clients, the court looks to the disclosed intention of the principals. This flows from the statutory wording, which refers to 'the common intention of the parties'. But because the court assesses the intention of the parties objectively, it will look to the communicated statements and conduct of an agent acting within his authority, actual or ostensible, as well as the communicated statements and conduct of the principal to discover the principal's intention.
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> …
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> [47] … The question for the court is whether on a balance of probabilities the party seeking rectification has proved the grounds of rectification under the 1985 Act

> … Because proof of those grounds is an inherently difficult task … [i]t is a stiff hurdle."

[34] This case has proceeded upon the basis of a petition and answers. Parties were appointed to lodge, in advance of the substantive hearing, all documents and affidavits upon which they intended to rely. At no stage did Mr Newsham or the third or fourth respondents contend that a proof before answer was required. No witnesses were identified by them and the only affidavit lodged was that of the third respondent. Ample opportunity to lodge all relevant documentation was given. No evidence of any kind was produced seeking to vouch the factual position advanced by the respondents, in particular that the three solicitors had agreed (in contradiction of the terms of the Facility Letter) that the proposed loan should be made by the petitioner to the first respondent rather than to the second respondent and were now seeking to cover up their errors. In any event, this was a matter removed from the pleadings when these were revised by responsible counsel and I sustain the petitioner's objection to the respondents now founding upon it. In the whole circumstances, there was no good reason to require a proof before answer rather than a substantive hearing. In light of the material produced by the petitioner, including the contemporaneous correspondence and documentation and the affidavit of Mr Spink, and the absence of any vouching for the respondents' position, I conclude that the respondents' assertions on the facts have no basis and indeed must be false. Nor is there anything that warrants the application of section 9 of the 1985 Act.

[35] I have already set out the factual position as disclosed in the productions. I have no reason to question the terms of the affidavit of Mr Spinks. I accept that solicitors erring in this manner, and not discovering it when reviewing the drafts, is unfortunate and perhaps unusual. But Mr Spinks was entirely frank in fully explaining and accepting his mistake,

caused by adopting a previous style of standard security which did not deal with a separate debtor. The petitioner's position on the parties' intention, and indeed their agreement, is strongly supported by that evidence and by a number of other separate factors. The correspondence prior to the Facility Letter makes clear the intention of the parties, that the loan is to be to the second respondent. The Facility Letter itself expressly states that agreement. In light of the reference in the Facility Letter to agreement being reached on acceptance by the second respondent, this does constitute an agreement reached antecedent to the standard securities being executed. Even if for some reason it was not at that point legally binding, that is not a barrier to rectification. The respondents relied upon it not being signed on behalf of the petitioner until 1 September 2016, but all that does is to further reinforce the existence of the agreement. The actings of the second, third and fourth respondents after 25 August 2016 also firmly demonstrate the existence of the agreement. There was no reason for the grant of a debenture in favour of the second respondent, executed by the third respondent, if there was no indebtedness by the second respondent to the petitioner. The same applies in relation to the giving of personal guarantees of that indebtedness. The route by which the balance of the funding reached the second respondent is of no material consequence. The accounts of the first and second respondent, whether audited or not, plainly show that the latter is the debtor and the former is not. In these convincing circumstances, and in the absence of any support for the positions advanced by the respondents, the stiff test is met and grant of the application for rectification is appropriate. The Harcarse Hill and Sunwick Farm Securities were documents intended to give effect to an agreement and they failed to express accurately the common intention of the parties to the agreement at the date when it was made.

Disposal

[36] I shall therefore repel the pleas-in-law for the respondents and grant the prayer of the petition.