FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 35
XA61/25

Lord President
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal in the cause

DANIEL DONALD

Appellant

against

DAVID BOOTH

Respondent

Appellant: Lord Davidson of Glen Clova KC, Massaro; Harper Macleod LLP
Respondent: Giles Reid; Brodies LLP

2 July 2026

Introduction

[1] This appeal raises an important legal issue. It was mentioned but left undecided in an earlier decision of this court (*Societe Generale SA* v *Lloyds TSB Bank plc and another, unreported, 17 September 1999)*. It concerns whether and when the terms of a registered standard security over land are to be ruled by a prior oral agreement of the parties to it. The standard security in the present case recorded a personal obligation by Mr David Booth to pay Mr Daniel Donald £1.15m, the obligation being secured over land known as Caldonia, Peterculter. Mr Booth resisted the calling up of the security and asked the sheriff at

Aberdeen to ordain Mr Donald to grant its discharge. After evidence was led, that request was granted. An appeal to the Sheriff Appeal Court was refused. Subsequently this court granted Mr Donald permission to appeal against that judgment.

The sheriff's findings and orders

[2] The sheriff heard oral evidence from the parties, their solicitors, a Mr Ross, and Mr Booth's trustee in sequestration. Mr Booth's contention that the standard security should be quashed because it was induced by a fraudulent misrepresentation was rejected. However, the sheriff upheld an alternative case that it should be discharged.

[3] So far as relevant to the current appeal, the findings of the sheriff can be summarised as follows. The parties are property developers. Mr Donald specialises in obtaining planning consents which enable land to be developed and sold for a profit. In the summer of 2019, Mr Ross, an adviser to Mr Booth, suggested to him that he should meet Mr Donald to discuss the potential development of land previously owned by Mr Booth, namely Caldonia, at that time vested in his trustee in sequestration, Mr Booth having been sequestrated in 2013.

[4] Thereafter a series of meetings occurred. It was agreed that Mr Donald would fund the purchase of Caldonia from Mr Booth's trustee in sequestration. Using Mr Donald's acumen in such matters, planning permission would be sought for its development for housing. After taking account of all costs met individually, any profit from the sale of the land thereafter would be shared equally. The vehicle for this joint venture was to be a new company called Caldonia Developments Ltd. The acquisition costs, including land and buildings transaction tax (LBTT) and registration dues, would be met by Mr Donald. The

parties were to be equal shareholders. Their individual financial investments in the project would be recorded as directors' loans to the company.

[5] Mr Booth agreed with his trustee on a purchase price of £930,000 for Caldonia, notwithstanding that the highest valuation he had obtained was £650,000. Previously he had negotiated a price of £220,000 for the recovery from the trustee of another property called Northlasts. Barclays were funding the £220,000. (Mr Donald was not involved in any plan to develop Northlasts.) The Royal Bank of Scotland agreed to relinquish its securities over Caldonia and Northlasts in return for the combined purchase price of £1.15m. Settlement was to be on 6 November 2020 with the properties revesting in Mr Booth.

[6] On 30 October 2020 a meeting was held, attended by Mr Booth, Mr Ross, Mr Donald, and his solicitor Mr Burnett. It occurred in Mr Burnett's office. There was a session in the morning and another in the afternoon. After failing to persuade Mr Booth that title to Caldonia should be taken by a company of which he was the sole shareholder, Mr Donald suggested that it should pass directly from the trustee to Caldonia Developments Ltd. After the first session this was communicated to the trustee. He insisted that Caldonia should be conveyed to Mr Booth. In the light of that, in the afternoon it was agreed that immediately after it vested in Mr Booth, he was to transfer ownership of the land to the company.

[7] Mr Donald was funding the purchase of Caldonia from the trustee. It was recognised that should an unforeseen occurrence prevent its transfer from Mr Booth to the new company, Mr Donald's substantial investment would be at risk. Accordingly, in the course of the meeting, and after initial reservations, Mr Booth agreed to grant a standard security over the subjects in favour of Mr Donald for £930,000. This would not be registered and would be destroyed once the company owned Caldonia.

[8] The sheriff held that it was agreed that the £930,000 and the other costs of acquisition were to be a loan from Mr Donald to the company. Mr Booth was under no obligation to repay them. The purpose of the standard security was to protect Mr Donald should Mr Booth be unable to transfer title to Caldonia to the company.

[9] In the period immediately after the meeting of 30 October, Barclays were delaying in providing the funds for Northlasts. Mr Booth's trustee was insisting that both Caldonia and Northlasts be sold on 6 November. Thus, Mr Donald agreed to what was, in effect, a bridging loan of £220,000 to Mr Booth to allow the purchase of Northlasts and Caldonia to go ahead on the settlement date. It was to be repaid when Barclays provided the funds.

[10] Mr Booth's solicitor, Ms Perfect, prepared a standard security over Caldonia for the combined sum of £1.15m. It was signed by Mr Booth and witnessed on 2 November but required to be re-signed and witnessed on 6 November because of an error regarding an address. On that date it was sent to Mr Donald's solicitor. It stated that Mr Booth undertook to pay to Mr Donald the sum of £1.15m due by him to Mr Donald when called on to do so, and in respect of which a standard security over Caldonia was granted.

[11] The sheriff held that the reason for the secured personal obligation incumbent on Mr Booth was twofold. First, it was to reflect the purpose of the standard security, namely that it would be relied on should it transpire that Mr Booth was unable to transfer ownership of the land to the company. Secondly, it provided a heritable security for the repayment of the £220,000 loan for the purchase of Northlasts. The deed had a clause consenting to registration, and it was registered. The sheriff held that the undertaking not to register concerned the previous proposed standard security for the payment of £930,000. In his note the sheriff explained that the subsequent bridging loan of £220,000 for Northlasts

justified the registration. On 6 November both properties were purchased by Mr Booth for the agreed sums.

[12] The sheriff concluded that it was an implied term of the parties' agreement that the standard security would be discharged once Mr Booth repaid Mr Donald's loan of £220,000 and Caldonia Developments Ltd gained title to Caldonia. It was in reliance on the company gaining ownership of the land and the subsequent discharge of the security that Mr Booth accepted the funds from Mr Donald, granted the security, and took title to Caldonia at a price which was well above its valuation. The agreement to discharge the standard security was not in writing but was nonetheless enforceable in terms of sections 1(3) and 1(4) of the Requirements of Writing (Scotland) Act 1995; in summary because Mr Booth, to the knowledge of Mr Donald, had acted upon it to his detriment should Mr Donald be able to withdraw from it.

[13] In February 2021 the loan of £220,000 was repaid by Mr Booth. He signed and delivered a disposition conveying Caldonia to Caldonia Developments Ltd; however, Mr Donald has not co-operated and has in effect blocked its registration. He has lost interest in the project to develop Caldonia. He wants repayment of the £930,000 and seeks to enforce the standard security. Without Mr Booth's knowledge, Mr Donald instructed the dissolution of Caldonia Developments Ltd. On Mr Booth's application, it was restored to the register.

[14] The sheriff decided that Mr Donald is obliged to discharge the security and register the disposition after funding the associated costs, including LBTT and registration dues. He was not entitled unilaterally to withdraw from the agreement for the acquisition and development of the land by the company. Relative orders were pronounced.

The sheriff's note

[15] In a note attached to his interlocutor, the sheriff stated that Mr Donald's evidence was neither credible nor reliable. His insistence that the £930,000 was a loan to Mr Booth was wholly at odds with the other evidence. Its purpose was to allow him to share in the anticipated capital appreciation of Caldonia after its development. Mr Donald's evidence was self-serving and calculated solely towards the return of his money. His evidence was reliable only if it coincided with acceptable evidence from another source. The other witnesses were credible and doing their best to assist the court. Nonetheless, given the passage of time their recollections had to be treated with care.

[16] The sheriff chose not to rehearse the evidence in detail. He recounted it only if he considered this to be required when discussing and reaching decisions on the main issues in the case. This approach has caused difficulties and has rendered his judgment more open to plausible challenge than might otherwise have been the case. It would have been of assistance to have a separate account of the evidential foundations of the sheriff's reasoning and conclusions. This could have been no more than a reasonable summary of the evidence on the key matters, and especially that of Mr Booth and Mr Ross whose testimony was preferred to that of Mr Donald.

[17] The sheriff was asked to enforce the repayment obligation contained in the standard security. However, he considered that this failed to take account of the terms of the parties' agreement summarised earlier, including the limited purpose of the standard security; in case Mr Booth, as it was put, was "hit by a bus". In his evidence Mr Donald had confirmed that there was no intention that Mr Booth would be personally liable for any shortfall in the event of a sale of Caldonia. The £220,000 had been repaid and a disposition of the land to the company delivered to Mr Donald, which he is bound to register. There remained no

purpose to be served by the standard security. The sheriff concluded that it was an inevitable inference from the parties' agreement that it should be discharged.

[18] The evidence of Mr Booth and Mr Donald satisfied the sheriff that Mr Donald agreed to meet the costs involved in purchasing Caldonia, including those associated with registering the disposition from Mr Booth to the company. For the reasons explained in his note, the sheriff rejected a submission for Mr Donald that it had been agreed that the company would grant a standard security in favour of him in respect of the £930,000, and thus there should be no discharge until this occurred. The interests of Mr Donald were adequately protected once the company owned the land. The money could be recorded as a director's loan and would be repaid in due course before profits were shared between the two equal shareholders.

The appeal to this court

[19] The presentation of the appeal by senior counsel fell into four chapters. The first was a claim of inadequate findings and reasoning for the discharge of the security based on the prior oral agreement. Secondly, the sheriff was said to have misapplied the terms of sections 1(3) and 1(4) of the 1995 Act. Thirdly, there was an insufficient foundation for the implied term identified by the sheriff. Finally, it was alleged that he erred by failing to take account of evidence given by Mr Booth's solicitor, Ms Perfect. While there is a degree of overlap, each chapter will be addressed in turn.

Is the standard security subject to the prior oral agreement?

Submissions

[20] For Mr Donald the submission was that the standard security contained a formal acknowledgement of a debt of £1.15m secured over the land. The deed was constitutive of a personal obligation incumbent on Mr Booth. The parties' agreement on 30 October related to a different standard security arrangement for £930,000 which did not proceed. That was demonstrated by the departure from the no-registration agreement. The subsequent security for £1.15m was not contemplated at that time. It was a different and separate matter. It superseded and contradicted the earlier arrangement. In any event, there was no express agreement that a security would be discharged in circumstances other than repayment. The formal deed takes precedence. It could have been drafted to record any prior agreement, but it was signed unamended by Mr Booth.

[21] The sheriff's findings as to the agreement he deemed enforceable were vague and inadequate. There was no specification as to when the agreement was reached, who was present, and in what circumstances. What was the evidence supporting an intention to enter legally binding relations? The Sheriff Appeal Court referred to the findings on an important matter being in "somewhat diffuse terms". The sheriff accepted that further agreement was needed for the joint venture to be effective. Attention was drawn to Mr Donald's position at the proof, including that there was no binding agreement to transfer the land to the new company, although we note that this proposition seemed to be contradicted by his counsel at the hearing.

[22] The evidence did not support an agreement that the security should be discharged without repayment to Mr Donald. Any implications arising from an earlier agreement or intentions regarding directors' loans to the company were overtaken and rendered

irrelevant by the agreement to provide the security for £1.15m. It is not clear which agreement the sheriff was referring to when he found that there was an implied term. There was no meeting of minds in respect of a completed joint venture. As at 30 October, nothing was concluded. More needed to be resolved.

Analysis

[23] The findings made by the sheriff are summarised above. He rejected Mr Donald's evidence, preferring that of Mr Booth and Mr Ross on the terms of the agreement at the time when the standard security was granted. As the Sheriff Appeal Court held, Booth and Ross's evidence was sufficient to support the sheriff's findings and was consistent with the nature and purpose of the overall commercial transaction. Anyone reading his judgment can be left in no real doubt as to how and why the sheriff decided that the security should be discharged. It would have been helpful to have a fuller account of the evidence, but we have had no difficulty in identifying the building blocks which led to the finding that there was an enforceable agreement and associated success for Mr Booth in his resistance to the calling up of the security. The test for a binding agreement is an objective one; *RTS Ltd* v *Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 at paragraph 45. Thus, even had Mr Donald's evidence as to his understanding been accepted, the outcome is likely to have been the same. We have identified no good reason to interfere with the sheriff's assessment of the evidence and his findings of fact. Notably, no alternative findings in fact have been proposed on behalf of the appellant.

[24] As to the submission that the 30 October arrangement was overtaken by subsequent events, it is true that the details of the agreement as it stood as at the 30 October meeting were not carried through. At that time, it was anticipated that Barclays would come up with

the funds for Northlasts in time to allow the trustee's insistence that both subjects be sold on 6 November to be met. When it became clear that there was a delay in this regard, Mr Donald filled the gap on a temporary basis to keep the joint venture on track. Unlike the £930,000, the £220,000 was a loan to Mr Booth for which a registered security was required.

[25] The change in the arrangements explained the departure from the undertaking that the security would not be registered, but it is wholly unrealistic to describe what happened as a new agreement separate from all that had gone before. The joint venture to develop Caldonia began before the 30 October meeting, and had all gone well no doubt further agreements to put flesh on the bones would have been needed after the company took ownership of the subjects. However, those bones were sufficient to explain the role of the standard security, a document which only makes sense in the context of the joint venture. It is well established that recognition that further details of an agreement are required does not necessarily postpone a binding contract in the meantime, especially if, as here, it is executed by payment of a large sum by one of the parties and the purchase of a property by the other.

[26] The £1.15m standard security granted by Mr Booth was part of the mechanics designed to facilitate the parties' agreement to develop Caldonia to their mutual benefit. The new company was to acquire the subjects with the costs thereof, including the purchase price of £930,000, funded by Mr Donald. He had taken the risk of losing out if the joint venture failed to produce the expected profits. Had the trustee agreed to a direct transfer to the company, there would have been no question of a security from Mr Booth over Caldonia. It was needed solely to cover the anticipated short period when the subjects once again belonged to Mr Booth in case something unexpected prevented him from conveying Caldonia to the company. Nothing of that nature occurred, and Mr Donald now seeks to

insist on calling up the security because he no longer wishes to proceed with his obligations under the joint venture.

[27] There was no contradiction between the position on 30 October and that on 6 November. Barclays had not provided the funds for Northlasts and the trustee was insisting that both sales complete on 6 November. Thus, the picture had evolved, in particular there had to be a registered security for the £220,000 bridging loan. However, the original purpose of the security remained, namely, to cover the anticipated short period when Mr Booth owned Caldonia.

[28] Many of the criticisms of the sheriff's findings and note fall away when it is appreciated that he is referring to a single joint venture agreement, albeit one which was modified as matters developed and the deadline for action approached. Much of what was submitted ignored the fact that the sheriff rejected the evidence on Mr Donald's side and preferred that tendered for Mr Booth.

The legal issue referred to at the outset

[29] None of the above would avail Mr Booth if, as a matter of law, the terms of the standard security, and in particular the unqualified formal written acknowledgement of an obligation to pay Mr Donald £1.15m secured over the land, prevail over the prior oral agreement. It is generally true that a formal deed relating to land such as a disposition or a heritable security, even if it bears to be in implement of a previous contract, supersedes that contract and is the sole embodiment of the parties' rights and obligations, see *Lee* v *Alexander* (1883) 10R (HL) 91 per Lord Watson at 96. This is an example of the common law rule, sometimes called the "supersession rule", which renders inadmissible evidence as to communications prior to the formal document.

[30] Though not required for the decision itself, in similar circumstances to the present case, this area of the law was discussed by the Second Division in *Societe Generale SA* v *Lloyds TSB Bank plc and another* (unreported, 17 September 1999). The court referred to observations in the speech of Viscount Cave in *Claddagh Steamship Co* v *Steven & Co* 1919 SC (HL) 132 at 137 that it was competent to prove "that the actual contract between the parties was not embodied or intended to be embodied in the formal document, but that the latter was a mere piece of machinery obtained as subsidiary to and for the purpose of the verbal and only real agreement." Counsel for Societe Generale had drawn a distinction between that situation and a reference to a prior communing during the lead up to a formal agreement. The court stated that the letter relied upon showed that the parties intended that it be given effect notwithstanding the contrary terms of the formal security deed. That letter came after the security. Nonetheless the court offered the view that the same should apply to a subsequent security, provided that "it was clear that the parties intended that it should be treated as governed by the terms of the letter." This comment was *obiter* (not necessary for the decision and thus not binding in subsequent cases); however, we would endorse it.

[31] It is helpful to mention a judgment issued by Lord Hamilton after a debate in the earlier stages of the same case, albeit the names of the parties differ, namely *Hambros Bank Ltd* v *Lloyds Bank plc* 1999 SLT 49. Citing Gloag and Irvine, *Rights in Security*, page 2, his Lordship noted that a standard security is accessory to the underlying personal obligation, see page 52D-F. If the creditor is not entitled to require repayment because of the personal rights and obligations as between him and the debtor, in a question between them where no third parties have an interest, the security does not take precedence. "That personal right does not appear on the face of the record but will have legal effect by way of

personal objection to prevent the creditor standing upon the existing recorded deed", page 53B-C.

[32] The debate in *Hambros Bank* proceeded on the basis that timing did not matter. However, Lord Hamilton recognised that a question might arise if the security came after the agreement relied upon, and in particular in respect of the possible supersession of a prior agreement. In the present case there can be no question of supersession. The parties' agreement envisaged the creation of the standard security over Caldonia and the limited part it was to play. In *Societe Generale* it was stated that there is no sound reason for extending the rule in *Lee* v *Alexander* to the modern relationship between a loan agreement and a standard security, the latter being "*ancillary* to the former which was intended to, and did, define the primary obligations of the parties" (emphasis added). We agree.

[33] The increase from £930,000 to £1.15m arose out of necessity when Barclays delayed the funding for Northlasts. It is clear that with regard to the joint venture to develop Caldonia, the standard security did not replace or overrule all that had gone before. On the contrary, it was granted in implement of the prior arrangement and was subject to its terms, both express and implied. The proposition that only an express provision therein could take effect seems unprincipled. In any event the limited purpose of the security was part of the terms of the oral agreement; the only implication concerns the obligation to grant a discharge. No doubt in an ideal world all of this would have been made clear in a formal manner, but the pressure was on to meet the trustee's deadline of 6 November.

The Requirements of Writing (Scotland) Act 1995

[34] In terms of section 1(2)(a) of the 1995 Act, formal writing is required for the valid constitution of, amongst other things, a contract providing for the extinction of a real right in

land. Thus, on its own, an oral agreement that a standard security will be discharged is unenforceable. Either party can withdraw from it. However, this will not apply if (a) one of the parties to the contract has acted in reliance on it with the knowledge and acquiescence of the other party, (b) as a result of so acting that party has been affected to a material extent, and (c) they would be adversely affected if the other party was able to withdraw from the bargain, see sections 1(3) and 1(4); in effect a form of statutory personal bar. The sheriff held that these provisions were met on the facts of the case, thus the absence of a formal written discharge agreement did not allow Mr Donald to withdraw.

[35] The sheriff referred to Mr Booth granting the standard security; accepting the funds from Mr Donald; and acquiring Caldonia for a price well above the highest valuation of the land, all with the knowledge and acquiescence of Mr Donald. If Mr Donald was entitled to withdraw, Mr Booth would remain the owner of the land with all the liabilities that involves; he would owe Mr Donald £930,000; and he would be personally liable for any shortfall arising from the sale of Caldonia after the calling up.

[36] For Mr Donald, it was submitted that these actings were neutral given the overall intention of the joint venture plan to develop the land using funds provided by him. Mr Donald did not know that the actings were in reliance on an oral agreement. Mr Booth is a property developer who wants to develop Caldonia. It was suggested that ownership of the land is not harmful to his interests. He signed the standard security and voluntarily entered the personal obligation set out therein. In summary the sheriff's findings were inadequate and insufficient to allow him to apply the terms of sections 1(3) and 1(4).

[37] We have no difficulty in understanding the sheriff's decision. Mr Booth's actings were clearly referable to the joint venture agreement, which includes both its express and implied terms. In his evidence Mr Donald stated that he appreciated that calling up the

security and selling the land would not raise £930,000. He knew that the valuation was £650,000. The hope was that in time the land would be worth more. The submissions made in this context largely depended on success in undermining the findings as to there being a concluded agreement in the terms already discussed. There is no good reason to interfere with the sheriff's findings in respect of sections 1(3) and 1(4) of the 1995 Act. We agree that in view of the facts established at proof, the agreement did not require to be in writing.

The implied term as to discharge of the standard security

[38] Mr Donald contends that there was no basis for the implication of an obligation to discharge the security once the £220,000 was repaid and Mr Booth had delivered a disposition in favour of the company. The implied term involves a re-writing of the agreement. There was no necessity for it. The sheriff had gone too far in seeking to fill perceived gaps.

[39] We see no merit in these submissions. Caldonia was to be owned and developed by the new company. The standard security was to protect the possibility of something unexpected preventing it from gaining title. In his evidence, Mr Donald accepted that it did not place Mr Booth with responsibility for any shortfall should the property have to be sold. In effect, and again as conceded by Mr Donald in his evidence, the £930,000 was a director's loan to the company. The initial no registration and subsequent destruction aspects of the security arrangement were overtaken by the bridging loan for £220,000. However, this did not subvert the intention in respect of the £930,000 once the lesser amount was repaid.

[40] In the whole circumstances the sheriff held that it was an implied term that the standard security would be discharged on transfer to the company. Mr Donald's counsel observed that this left Mr Donald unsecured, and questioned why he should he be happy

with that. The answer is that, happy or otherwise, it flows from the terms of the agreed project. He took the risk. Once again, the submission is based on Mr Donald's assertions rather than the evidence accepted by the sheriff. As the Sheriff Appeal Court observed, the implied term was obviously necessary to prevent the agreement being legally incoherent. Were it otherwise, the security would cover property no longer held by Mr Booth and for a debt which was never his, but that of the company. We agree with the sheriff that an obligation to discharge the standard security in the current circumstances was an inevitable inference from the parties' agreement. Any and all of the various tests laid down over the years for the implication of a contractual term in a commercial contract listed by Lord Neuberger of Abbotsbury in *Marks & Spencer plc* v *BNP Paribas Securities Services* [2015] UKSC 72, [2016] AC 742 at paragraphs 16-20 are met.

[41] We also agree with the Sheriff Appeal Court's comment that the remedy for Mr Donald's *cri de coeur* that he has paid for Mr Booth's discharge from sequestration with nothing to show for it, is to proceed with the agreed venture regarding the development of Caldonia by the new company.

The evidence of Ms Perfect

[42] The submission was that the sheriff failed to take into account material evidence given by Mr Booth's solicitor, Ms Perfect. However, there is no reason to think that the sheriff over-looked her evidence, and his decision to make little or no reference to it is explicable. She was not present at the meeting on 30 October. She was instructed to prepare and handle the necessary legal documentation, including the standard security, and did so in conjunction with Mr Donald's solicitor during the following week in the lead up to settlement of the transactions with the trustee on 6 November.

[43] It is asserted that Ms Perfect's involvement and input led Mr Donald and Mr Burnett to the view that the security was a stand-alone document prepared by two solicitors on behalf of their clients and enforceable according to its terms. However, nothing that Ms Perfect did or thought was material to the sheriff's findings as to the parties' agreement on the limited role to be played by the standard security over Caldonia. The same can be said as to any assumptions made by Mr Donald and Mr Burnett flowing from Ms Perfect's involvement. Contracts are governed by what people say and do, not by what they think. In any event, nothing that Ms Perfect said or did could reasonably lead Mr Donald and Mr Burnett to believe that the agreement on 30 October was superseded. As it is sometimes put, she was "papering-up" the transaction.

[44] We were provided with a copy of Ms Perfect's witness statement and reference was made to a couple of short passages in her cross examination. We have also seen the email correspondence between the two solicitors when the funds were provided and the security prepared and delivered. None of this was of material importance on the key issues before the sheriff.

Disposal

[45] For the above reasons, the appeal is refused.