OUTER HOUSE, COURT OF SESSION

[2024] CSOH 93

CA18/24

OPINION OF LORD BRAID

In the cause

(FIRST) DUNCAN ANDREW ALEXANDER ORR; (SECOND) AILEEN ORR and (THIRD) DAO FARMS LIMITED

Pursuers

against

UK AGRICULTURAL LENDING LIMITED

Defender

First and Second Pursuers: Party Litigants
Defender: Brown; Shepherd and Wedderburn LLP

3 October 2024

Introduction

[1] This commercial action arises out of a series of transactions which the pursuers aver were part of an allegedly fraudulent scheme orchestrated by one Martin Frank Frost against them and the wider Orr family, who farm in the Scottish Borders, culminating in the theft (as the pursuers would have it) and imminent loss of the family farm which they have farmed for over 60 years. The pursuers who remain in the action, respectively (first) Duncan Andrew Alexander Orr (known as Alexander, to distinguish him from Duncan Stewart Orr Senior (his uncle) and Duncan Stewart Orr Junior (his cousin)) and (second) Alexander's mother, Aileen Orr, seek production and reduction of a decree of

20 June 2022 granted by the sheriff at Jedburgh in favour of the defender (UKALL) in an action brought by it against Orrdone Farms Ltd (in administration) (previously known as Avocet Agriculture Ltd). That decree, it appears (although no copy of the decree has been produced), required Orrdone Farms Ltd, and its sub-tenants, dependants and others deriving a right to occupy the premises from it, to remove from Sunwick Farm and Greenwood Farm, being the subjects registered in the Land Register of Scotland under title BER2353; and the action itself, it also appears, was founded upon calling up notices served in relation to a standard security granted over those subjects (which for simplicity, I will refer to as Sunwick Farm, or the farm) by Hamilton Orr Ltd (HOL) dated 25 August and 1 September 2016. The farm is occupied not by Orrdone Farms Ltd but by the pursuers, who also seek interdict preventing the defender from removing them from the farm, on the strength of averments that Alexander Orr is the lawful tenant of the farm by virtue of a lease granted by HOL in his favour dated 20 September 2016. The second and third pursuers are said to derive their right to occupy the farm from the first pursuer. Accordingly, argue the pursuers, none of them can lawfully be evicted under the decree in the defender's favour.

[2] Reduction of the decree is opposed by the defender, which counterclaims for declarator that the pursuers have no right or title to occupy any part of Sunwick Farm; and for decree ordaining the pursuers to remove themselves from the farm (thus rendering redundant any argument that the sheriff court decree does not authorise removal of the pursuers). The defender maintains that the lease is a sham and has either been fabricated so as to delay the pursuers' removal, or at any rate, was never intended by either party to it to have legal effect; failing which, that despite the use of the term "lease", it is not a lease under Scots law; and moreover, that it was entered into in bad faith. For these reasons, the defender seeks reduction of the lease *ope exceptionis.*

[3] For completeness, the action insofar as brought by the third pursuer, DAO Farms Ltd (the first pursuer's company) was dismissed following that company's failure to appear at a peremptory diet. However, the counterclaim remains live as against that pursuer and, to that extent, it remains in the action.

[4] After sundry pre-proof procedure, the action called before me for proof. Although the pursuers were represented at a previous stage by (different) senior and junior counsel (and the summons was drafted by counsel), by the time of the proof they appeared as party litigants. Mrs Orr took the lead in examining and cross-examining witnesses, with the aid of a lay supporter. The witnesses for the pursuers were: Alexander Orr; Aileen Orr; Duncan Stewart Orr Senior; Duncan Stewart Orr Junior; and John Raymond Orr. The witnesses for the defender were Richard Kenneth Cameron, the solicitor who acted for HOL in the security transaction; Mark Thompson and Graham Noble, both directors of the defender; and Emma Porter, the administrator of Orrdone Farms Ltd. With the exception of Mr Cameron (in relation to whom privilege was waived only minutes before he gave evidence), all of the witnesses provided witness statements which they adopted as their evidence-in-chief.

[5] At this stage, it is worth pointing out one signal feature of the action, at least insofar as it is directed towards reduction of the sheriff court decree, which is that, for all that the pursuers complain that they have been the victims of a fraud resulting in "their" farm being stolen, they do not aver that the defender was implicated in the fraud, nor, critically, do they seek reduction of the standard security over the farm on which the decree was founded.

[6] It follows that the remedies sought in this action, even if granted, would not give the pursuers that which they ultimately seek, which is restoration of the farm to them (or, more strictly, to HOL, the entity which most recently had title to the farm prior to its disposal to

Orrdone Farms Ltd), nor would they result in reduction of the defender's security. All that the remedies sought would achieve would be a stay of execution, in that the pursuers' removal from the farm by the defender would be delayed until the expiry of the lease. The defender would continue to hold a standard security over the farm and for that matter would continue to be entitled to exercise all remedies available to a secured creditor who has served calling up notices, as the defender has.

[7] For all her undoubted skill in conducting the proof, at times Mrs Orr overlooked this essential deficit in the pursuers' action, with the inevitable result that much - indeed, most - of the evidence which she elicited was irrelevant and, as a result, inadmissible, an issue to which I will return. Indeed, much of her closing submissions on the evidence was devoted towards trying to persuade me that the Orrs have been the victims of a wider fraud. This is as convenient a time as any to acknowledge that, articulate as she is, Mrs Orr understandably lacks any knowledge of substantive law or procedure and as such, she was at a considerable disadvantage in conducting the proof, and for that matter, the procedure leading up to it. Nonetheless, it is well-established, if it was ever in doubt, that although a party litigant may receive some indulgence from the court, they must nonetheless comply with the rules of court in the same way as any other party; to give them special indulgence would render the court system unfair: see the Supreme Court case *Barton* v *Wright Hassall LLP* [2018] 1 WLR 1119, Lord Sumption at para [18] and Lord Briggs at para [42]; and, in a Scottish context, *AW, Applicant* [2018] CSIH 25 and *Aslam* v *Royal Bank of Scotland* [2018] CSIH 47, both decisions of Lady Paton. Accordingly the pursuers are bound, one might say in this instance, hamstrung, by the substantive law, and the law of evidence in the same way as any other litigant. Having mentioned Mrs Orr's submissions, this is convenient a point as any to mention that they largely consisted of assertions, by reference to documents not in

process, or other evidence not led, that various pieces of evidence given by the defender's witnesses were untrue or mistaken. I can have no regard to any of that, since it did not form part of the evidence in the case.

The issues

[8] The two fundamental issues for resolution are:

(i) Have the pursuers proved a relevant ground upon which the sheriff court decree ought properly to be reduced? (Issue 1)

(ii) Is the "lease" of 20 September 2016 genuine; and if so, what is the status of that document? Is it a lease, or some other form of agreement? Was it entered into in bad faith? (Issue 2)

Depending on the answers to those questions, either, the pursuers must be found entitled to one or more of the remedies sought (in which event the counterclaim will fall to be refused); or, if the pursuers fail to establish their entitlement to any remedy, the defender will be entitled to both remedies sought in the counterclaim. There is no middle ground.

Timeline

[9] The following narrative is distilled from undisputed evidence.

[10] Mr Frost introduced himself to the Orr family in about 2012 having been aware of litigation in which they had been involved. He offered to help them. He subsequently became romantically involved with the sister of Duncan Orr Senior and Andrew Orr (the now-deceased husband of Aileen Orr, and father of Alexander), Janet Orr, whom he married. At some stage he established a business under the "Avocet" banner, the precise nature of which remained unclear on the evidence, but involved innovative fuel technology,

for which Mr Frost claimed to hold valuable intellectual property rights. The precise extent to which the Orrs had a financial interest in that business is unclear.

[11] On 18 December 2015, the then owner of Sunwick Farm, Sunwick Farm Ltd, disponed the farm to Hamilton Orr Ltd (mistakenly referred to in the disposition simply as "Orr Ltd", but no-one appears concerned by that error) for no consideration. The evidence left it unclear whether that was done with the full consent of all the Orrs, (there being several cryptic allusions to the need for DS Orr & Sons Holdings Ltd to have given its consent, possibly as a shareholder, which it did not do), but at all events the Orr witnesses all appeared to agree that HOL was incorporated on 28 October 2015 with the intention that it hold the property in various farming subjects operated by or associated with various members of the Orr family in and around the Scottish Borders, and that the farm was disponed to it as part of a succession planning exercise to ensure that the farms were passed on to the next generation of Orrs (that is, Alexander and his cousins Duncan Orr Junior and John Raymond Orr). The shareholders in HOL are Alexander Orr (4,000 shares); Aileen Orr (2,000 shares); John Orr (2,000 shares); and Duncan Orr Junior (2,000 shares). Thereafter, taking the various transactions at face value for now, the following occurred. On or about 17 November 2015, at the instigation of Mr Frost, HOL purchased Harcarse Hill, a small farm but one with a very desirable farmhouse, for the use/residence of Mr Frost and his Avocet business, at a price of £1.2 million. To fund that purchase (and provide extra capital) a loan of £2.1 million was obtained from Ilona Rose Investments Ltd, secured by (i) a standard security over Harcarse Hill and (ii) a standard security over Sunwick Farm. The following year, that loan was refinanced by the defender, a commercial lender with an interest in the "agricultural space" as Mr Noble put it. On 25 August 2016 HOL granted standard securities over Sunwick Farm and Harcarse Hill in favour of the defender, in

security of sums lent to Avocet Agriculture Ltd (being a company controlled by Mr Frost in which the Orr family members had no interest). Personal guarantees by the directors of HOL (Andrew Orr, Duncan Orr Senior, Alexander Orr, Duncan Orr Junior, John Orr, Martin Frost and Janet Frost) were also granted on that date. That standard security was, on the face of it at least, signed by Andrew Orr. Although the Orrs maintain that they were unaware of the true position at the time, and believed the loan was for only £1.2 million and to fund the purchase of Harcarse Hill, in fact the loan to Avocet Agriculture Ltd was in the sum of £3.25 million, £2.3 million of which was required to repay the Ilona Rose loan for the purchase of Harcarse Hill the previous year. The Ilona Rose standard securities were discharged. To that extent, HOL benefited from the loan to Avocet. The loan transaction completed on 25 September 2016. On 27 September 2016, without the knowledge or consent of the defender as secured creditor, HOL disponed the farm to Avocet Agriculture Ltd. The disposition was signed by Mr Frost as a director of HOL and was registered in the Land Register on 3 September 2018. The delay between execution and registration was not explained. Avocet Agriculture Ltd subsequently changed its name to Orrdone Farms Ltd.

[12] There was a falling out between the Orrs and Mr Frost. On or shortly after 2 June 2019, Mr Frost wrongly registered information with Companies House that Duncan Orr Senior, Duncan Orr Junior, Alexander Orr and John Orr had all resigned as directors of HOL on that date. They had not. Steps were taken by the Orrs to regularise the position, culminating in their reinstatement as directors, and the removal of Mr and Mrs Frost as directors, by resolution of HOL dated 26 August 2019. On 21 August 2019 Mr Frost changed the name of Avocet Agriculture Ltd (which in the meantime had become Avocet Farms Ltd) to Orrdone Farms Ltd, which the Orrs, understandably, took as a slight and provocation.

[13] The secured loan fell into default. The defender issued calling up notices which were not complied with, which led to enforcement proceedings in Jedburgh Sheriff Court against Orrdone Farms Ltd (the defender by this time having learned of the disposition to it), resulting in the decree which the pursuers now seek to have reduced. That led to the defender seeking to enforce the decree by proposing to remove the pursuers from the farm on the strength of that decree. That in turn led to the present action.

Other litigation

[14] Apart from the action by the defender to enforce its security, this is not the first litigation arising out of the foregoing series of transactions, nor indeed is it the last. On 17 January 2020 HOL raised an action in this court seeking production and reduction of the disposition in favour of Orrdone Farms Ltd on the grounds that it had been granted fraudulently, and *interim* interdict was granted against Orrdone preventing it, or anyone on its behalf, from taking any action to obtain possession of Sunwick Farm. That action was subsequently sisted, apparently due to the moratorium on progressing legal action against a company in administration, as Orrdone Farms Ltd then was. On 13 February 2024, it was dismissed for want of insistence. Of significance for present purposes is that in that action, as Alexander Orr acknowledged in his evidence, it was averred that Sunwick Farmhouse was occupied by Andrew Orr and Aileen Orr under a licence to occupy granted between Sunwick Farm Ltd and HOL on or around 1 December 2015. That action was itself prompted by an action in Jedburgh Sheriff Court by Orrdone Farms Ltd against Andrew Orr, Aileen Orr and Alexander Orr, seeking to eject them from Sunwick Farm house; and the defences to that action, as Alexander Orr also acknowledged, made reference

to a licence to occupy in favour of Andrew Orr. Neither litigation made any reference to the lease now founded upon by the pursuers.

[15] Further, the standard security has itself been the subject of rectification proceedings in this court: see *UKALL* v *Hamilton Orr Ltd and Others* [2021] CSOH 54; [2021] CSIH 70. As drafted, the security bore to be in respect of an advance by the defender to HOL. The Lord Ordinary found that that did not accurately express the common intention of the parties that the borrower was to be Avocet Agriculture Ltd, and granted rectification pursuant to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 section 8. (A subsequent reclaiming motion (appeal) to the Inner House was refused.)

[16] Further still, the defender has raised actions for payment against Duncan Orr Senior, Duncan Orr Junior, Alexander Orr and John Orr, founding upon the guarantees granted by those individuals in respect of the loan to Avocet Agriculture Ltd. Those actions are all defended on the grounds that the guarantees were fraudulently obtained, and are presently due to proceed to proof in April 2025. With hindsight, it might have been better had the proofs in those actions been held concurrently with the proof in the present action, since much of the evidence which was given was directed towards the personal guarantees rather than the standard security; but the fact is, they were not.

Issue 1: have the pursuers proved a relevant ground for reduction of the sheriff court decree?

Introduction

[17] At the outset, it must be noted that much of the evidence which was led was inadmissible. While Mrs Orr clearly had mastery of her brief and proved adept at eliciting information from witnesses, particularly in cross-examination, virtually all of the

information elicited was entirely irrelevant to the issues in hand and seemed more aimed at satisfying the gaps in her knowledge as to what had happened than at proving any averments in the pleadings, to which it bore little relation. Most of the evidence was heard under reservation of its competency and relevancy although at times I had to remind Mrs Orr that we were not involved in a wide-ranging public inquiry, to which some of her questions would have been better suited. Some of the evidence bore upon the execution of the personal guarantees, not relevant to this action. No evidence whatsoever was led about the circumstances in which decree was granted by the sheriff at Jedburgh.

[18] In summary, much of this inadmissible evidence stemmed from the Orrs' palpable sense of injustice at the manner in which events have turned out, resulting in the probable sale of Sunwick Farm by the defender in order to meet a debt due not by it but by Orrdone Farms Ltd; and the evidence was directed more at a broad challenge to the entire history of events back to the Ilona Rose security, and to the validity of the guarantees, than at the more restricted challenge to the sheriff court decree permitted by the pleadings. Subject to that caveat, I will summarise the evidence led in relation to the loan transaction (which although not strictly relevant to the enforceability of the standard security, is relevant to the issue of Alexander Orr's good faith in relation to the lease, which I deal with later).

The evidence

[19] The narrative flow is easier if I take the evidence out of order, beginning with the evidence of three of the defender's witnesses.

Kenneth Cameron

[20] Mr Cameron was the solicitor who acted for HOL, (which, through directors Duncan Orr Senior and Alexander Orr, waived privilege before he gave evidence, allowing him to speak freely on all matters pertaining to the transaction). In particular, he acted in the transfer of Sunwick Farm to HOL from Sunwick Farms Ltd, and in the Ilona Rose and UKALL loans. His evidence was that many of the instructions came from Martin Frost but that the Orrs were aware of what was happening, including in relation to the Ilona Rose loan, and the loan from the defender. He had witnessed the standard securities over Sunwick and Harcarse Hill, signed by Andrew Orr and Duncan Orr Senior respectively on 17 November 2015. He did not specifically remember that occasion but he categorically would not sign as a witness unless he had seen the granter sign. It was Mr Frost who said that the Ilona Rose loan was to be refinanced by the UKALL one. On 23 August 2016, Mr Cameron sent an email to Mr Frost, copied to, among others, Alexander Orr. The email was headed "AVOCET LOAN SECURED ON LAND OWNED BY HAMILTION ORR" and stated, among other things, that a standard security was to be granted over "**HARSCARSE** *(sic)* **AND SUNWICK Farms"** (emphasis in original); that the amount required to repay the Ilona Rose loan was approximately £2.3 million; and that copies of any short assured tenancy agreements and any other lease or occupancy agreements affecting the farms had to be provided. There was then a meeting on 25 August 2016 attended by Duncan Orr Senior, Andrew Orr, Duncan Orr Junior, John Orr and Alexander Orr, Martin Frost and Janet Frost. Mr Frost explained why Sunwick Farm and Harcarse Hill were being put up as security. Mr Cameron explained in general terms what the purpose of each document was, and they were then signed in his presence. The Orrs, who were to grant personal guarantees, then went off to the office of another solicitor, Aileen Venables, whom Mr Cameron had arranged

would provide independent advice. The guarantees had been signed there (so he was told). The Orrs returned, and they all went for dinner together.

Mark Thompson

[21] Insofar as material, Mark Thompson's evidence was that he attended a meeting at the farm on 6 July 2016, at which various members of the Orr family were also in attendance, including Duncan Orr Senior, Duncan Orr Junior, Alexander Orr and Andrew Orr. The Orrs appeared very content with the relationship with Martin Frost and were quite open that they expected in due course to become very rich men. The amount of the loan (£3.25 million) was discussed at the meeting and had been specified in the facility letter; in addition, the solicitor acting for the Orrs, Kenneth Cameron, had copied Alexander Orr into email correspondence from which he would have known the terms of the facility letter; and also of the requirement that any lease agreements be disclosed. A further indicator that the Orrs were aware of the true extent of the loan was that they raised no objection upon the service of calling-up notices in June 2021 and May 2022, or upon the service of statutory demands in December 2022 (although I observe that the latter was only several months before the present proceedings were raised in 2023). The defender was unaware of the transfer of Sunwick Farm until 7 May 2019, when Mr Frost advised it of this fact. The defender was not asked to, and did not, consent to the transfer.

[22] In cross-examination Mr Thompson was (as was Mr Noble after him) asked a great deal by Mrs Orr about the defender's lending and underwriting practices. I allowed this line (as so much other evidence) under reservation of its relevancy and competency, but the defender's lending and underwriting practices, or whether they breached industry

standards, or were negligent, is simply not in issue in the present action and I therefore need not rehearse that evidence, to which I have had no regard as it is inadmissible.

Graham Noble

[23] Graham Noble's evidence was very similar to that of Mr Thompson and did not add a great deal. He did add that he visited Sunwick and Harcarse Hill Farms in 2017 to inspect the assets held as security. He met Andrew Orr and Alexander Orr. They discussed the terms of the loan and "their" ultimate plans for repayment (albeit the loan was not to HOL but to Orrdone). No suggestion was made by Alexander Orr that he believed the loan was only for £1.25 million, although Mr Noble accepted that the amount of the loan was not, at that time, a particular topic of conversation.

Duncan Stewart Orr Junior and John Raymond Orr

[24] The evidence of Duncan Stewart Orr Junior and John Raymond Orr was in very similar terms. Both said that they did not apply to the defender for any loan (which is not of itself of any significance since it is not a matter in dispute that the loan in question was made by the defender to Avocet Agriculture Ltd). They did not know the loan was for £3.25 million. They believed that the court was being misled by the defender and that the claim was fraudulent. They did not provide any detail to substantiate these broad claims.

Duncan Stewart Orr Senior

[25] Duncan Stewart Orr Senior is a director of various Orr family companies, including HOL. He said that he was unaware of how the Ilona Rose loan came to be, as HOL did not need a loan; he could not recollect either himself or Andrew Orr signing standard securities

over the farms; he was unaware of the grant of the standard security to the defender over Sunwick Farm in August 2016, or that a loan of £3.25 million was secured by it; he remembered only "signing a loan for £1million". He said that a fraud had been committed by Mr Frost.

Alexander Orr

[26] Insofar as Alexander Orr's evidence bore upon the lease, I discuss it more fully below when dealing with the lease, but I do need to touch on it for present purposes. Generally, his position was that he was unaware of the Ilona Rose loan until 2019. The farm had no need of a loan in 2015. It was free of debt with a million pounds of working capital, following the sale of land in August of that year. HOL had no bank account. At that time he was working overseas to expand his farming experience and to play rugby, returning in mid-2016. He did not meet Mark Thompson in July 2016 to discuss the terms of the loan, as Mr Thompson suggested. They simply met in passing. He thought in August 2016 that the loan from the defender was for only £1.2 million for the purchase of Harcarse Hill and that the only security being granted was over that farm, not over Sunwick, (a point which he made in his evidence at every opportunity). He did not know that he was a director of HOL until 2019. It would have been folly to have signed a security over Sunwick Farm. He initially said that he did not remember receiving the email of 23 August 2016 from Mr Cameron but later in his evidence said he had not received it. Either way, he said he had not read it. He was aware that he was being asked to sign a personal guarantee, but only for a loan of £1.2 million to purchase Harcarse Hill. He was initially unwilling to do so but after a heated argument with Mr Frost he was offered a lease as a sweetener. He subsequently signed the guarantee.

Aileen Orr

[27] Mrs Aileen Orr describes herself as a published author and political adviser in Europe, Westminster and the Scottish Parliament, mainly on rural affairs, who has also worked as a chartered banker. Unsurprisingly given that busy schedule, she stated that she had no involvement with the Orr family business until her husband, Andrew Orr, died in 2021. She freely accepted in cross-examination that at the time of the events complained of she knew only what she was told by her husband and the other Orrs, which was very little. As such, her evidence on many matters was of limited help, to the extent it was relevant at all. When her email of 5 June 2019 was put to her (see next paragraph) she said that the sentence in question had been written with the benefit of hindsight, and she had not meant to convey that the directors were aware of the transaction at the time it was entered into.

Emma Porter

[28] Emma Porter, the administrator of Orrdone Farms Ltd, had no first-hand knowledge of the transactions in question, nor whether the Orrs were defrauded by Mr Frost. However, she did draw attention to various pieces of correspondence written to and by various members of the Orr family, indicating that they did have, or must have had, an awareness of the loan from the defender to Avocet Agriculture Ltd and of its amount. Chief among these was an email by Mrs Orr to Mr Frost dated 5 June 2019 in which she wrote, in terms:

> "It was the Orr directors (Andrew, Duncan and Janet) who raised the £3.25 million loan to fund Avocet Agriculture Limited using Sunwick and Houndswood. You stated to shareholders Sunwick was bankrupt, yet they were able to find £3.25 million anyway."

Assessment and analysis of the foregoing evidence

[29] By way of preamble, Mrs Orr, before and during the proof, laid great stress on her assertion that all of the Orr family members who gave evidence (and Andrew Orr, her late husband), and to a lesser extent herself, were dyslexic and consequently were incapable of reading or understanding documents which were sent to them. However, no evidence was led in support of this assertion, nor were the witnesses themselves asked the extent to which their dyslexia impeded their ability to read and assimilate (for example) emails. I therefore do not accept that the Orrs were as naïve and lacking in literacy as Mrs Orr would have it. In this action, this issue is of most direct relevance in relation to Alexander Orr. The evidence showed that he attended university, conducts his own business and, crucially, that he is well accustomed to sending and receiving emails. He adopted his witness statement without difficulty. As noted above, he vacillated between saying that he did not remember having received the email of 23 August 2016, and that he did not receive it. He did not say that he had received it but was unable to read it because of dyslexia. That email set out in clear terms that the loan was to be secured over Sunwick Farm; and it also set out the extent of the Ilona Rose indebtedness. Further, I accept the evidence of Kenneth Cameron as to what happened at the meeting on 25 August, in particular that the nature of what was to be signed was being made clear at the outset. I also accept the evidence of Mr Thompson about a meeting on 6 July 2016 when the amount of the loan was discussed. In addition, Alexander Orr's acknowledgement that he was being granted a lease as a "sweetener" so that he would grant a personal guarantee does very much suggest that he entered the transaction with his eyes open and fully aware of what was happening. I therefore do not accept that Alexander Orr would not have read the email of 23 August 2016 or that he did not appreciate that a standard security was to be granted over Sunwick Farm, in respect of a

loan to Avocet Agriculture Ltd. Further, although Aileen Orr's email of 5 June 2019, above, does not refer to Alexander, it is hard to read the passage quoted, particularly the second sentence, as having been written with the benefit of hindsight: a more natural reading is that the Orrs *were* aware, at the time, that a £3.25 million loan was being raised on the security, *inter alia*, of Sunwick Farm.

[30] Beyond that, the evidence of the other Orr witnesses as to what they thought they were signing or what they thought the deal was, is fundamentally irrelevant. It does not matter for present purposes whether they were misled by Mr Frost or not, since none of them signed the standard security. However, for what it is worth, Mr Cameron's evidence, viewed as a whole, tended to give the lie to the Orrs's suggestion that they had been misled as to the nature of the transactions. However, I decline to make any express finding on the credibility and reliability of Duncan Orr Senior, Duncan Orr Junior or John Orr in advance of the proof in the personal guarantee action, not least as I will hear evidence in that action which was not led in the present one, including (I presume) from Aileen Venables, the solicitor who is said to have witnessed the signing of the guarantees and to have tendered independent advice thereon.

[31] As regards the evidence of Mr Noble, Mr Thompson and Ms Porter, although Mrs Orr in her submissions took issue with aspects of that evidence, and (under reference to documents and other matters which were not led in evidence) invited me not to accept it, I did find them to be credible and generally reliable.

The pursuers' pleaded case

[32] Having discussed the (mostly irrelevant) evidence which was led in support of a generalised complaint about the whole sequence of events stemming from the Ilona Rose

transaction, if not before, I will now consider what the pursuers have actually pleaded, and such evidence as related to it. The substance of the pursuers' pleaded case that a fraud has been perpetrated upon them, and the evidence in support of those averments, can be summarised as follows. First, it is averred that the only properly appointed directors of HOL were members of the Orr family, namely, Duncan Orr Senior and his brother, Andrew Orr (who were the original directors) and their sons, namely, Alexander Orr, Duncan Orr Junior and John Orr, who were appointed on 26 January 2016. It was not the shareholders' intention that Mr Frost and Janet Frost be appointed as directors, but it is "believed and averred" that Mr Frost instructed the company secretary, Eirlys Lloyd Company Services Ltd, to file the requisite form with Companies House, intimating (wrongly) that he had been appointed as a director. On what basis that belief was formed is unclear, nor was any evidence led at proof in support of it, beyond bald statements that that is what Mr Frost did, and I am unable to make any finding in fact that Mr Frost was not validly appointed as a director. There was some evidence, in particular from John Orr, that the Orrs did what Mr Frost wanted, which may well be so, but that falls a long way short of showing that Mr Frost committed fraud. The evidence is that to begin with at any rate, relations were cordial, not least as Mr Frost (whether the Orrs were or are happy with that situation or not) married into the family, albeit the relationship had deteriorated by 2019, as recorded above.

[33] Second, the pursuers aver (albeit in a roundabout way) that the purported signatures of Andrew Orr and Duncan Orr Senior on the Ilona Rose standard securities were forged, and that the Ilona Rose loan was not received by HOL, which in any event did not have a bank account. While I accept that HOL did not have a bank account, which Ms Porter appeared to agree (insofar as within her knowledge), there was insufficient evidence that the

Orr signatures were forged, beyond the *ipse dixit* of Mrs Orr based upon what her husband had told her, and Duncan Orr's inability to recollect having signed the standard security over Harcarse Hill. (Mrs Orr asserted in her submissions, although not her evidence, that Police Scotland is carrying out an investigation into these deeds, but that is not something to which I can have regard in this action.) As against that, Mr Cameron's evidence, which I have no reason not to accept, was that he had signed both deeds as a witness, and that his inviolate practice was not to do that other than in the presence of the party whose signature he was witnessing. I therefore cannot make any finding in fact that the signatures on the Ilona Rose loan documentation were forged (for whatever relevance that might have had).

[34] Third, it is averred that in July 2016, Mr Frost told the directors of HOL that more favourable loan terms could be obtained from the defender; and that the Orr family members (that is, all the directors other than Mr and Mrs Frost) understood that a loan of circa £1.25 million was to be obtained by HOL from the defender and secured only over Harcarse Hill. I have already narrated in brief the evidence given about the meeting on 25 August 2016. The pursuers aver that the Orr family members were tricked by Mr Frost into signing the deeds which were signed on that day.

[35] There are various difficulties with these averments, and the evidence relating thereto, at least in the context of this action. First, the pursuers do not offer to prove, and did not lead evidence about, any particular representations on the part of Mr Frost; they simply make general assertions that he defrauded them. Second, as I have pointed out elsewhere, the signing of the personal guarantees is irrelevant to the issues raised by this action. The respective beliefs of the personal guarantors as to what they thought they were signing, or what the transaction consisted of, are neither here nor there. However, on the basis of the evidence led in this action, I have accepted Mr Cameron's evidence that he explained the

nature of the transaction to those present at the meeting on 25 August 2016. Third, since it was Andrew Orr who signed the standard security in favour of the defender, even had it been relevant to inquire into his belief as to what he was signing, and how that belief was induced, none of that is pled, and there was no evidence directed towards those matters.

[36] Fourth, the pursuers aver that Mr Frost then engaged in further acts of deception, in particular that it was he who decided to transfer Sunwick Farm from HOL to Avocet Agriculture Ltd, and who "purported" to sign the disposition (although there is no dispute that he did so). That transaction was not agreed by the directors, as it ought to have been in terms of HOL's articles of association. The Orr family did not become aware of the disposition to Orrdone until January 2019.

[37] Of course, whether a fraud was committed *after* the standard security was granted to the defender would be entirely irrelevant to the question of whether that security should be reduced, still less so to reduction of the sheriff court decree. However, since it is pled, I will deal with this question briefly. It appeared from such evidence as there was that there was more to the transfer of Sunwick to Avocet Agriculture Ltd than meets the eye. Duncan Orr Senior said that Sunwick was intended for "the kids" and that it "wouldn't have been" transferred to Mr Frost for certain good and onerous causes as the disposition bears to show. However, he also appeared to agree that the family were given shares in Avocet, which chimed with Mr Cameron's evidence that there was some discussion at the meeting of 25 August 2016 that the farms would be sold to Avocet in exchange for shares, but this was rejected by the defender's solicitor (Russell Spinks) as coming too late in the day in the context of the security transaction (an affidavit by Russell Spinks which was lodged as a production (but was not strictly evidence in the case, having been prepared for the rectification proceedings referred to above) suggests that this "discussion" took place earlier,

by email, but nothing turns on this discrepancy for present purposes). The subsequent disposition to Avocet Agriculture Ltd was drafted by Mr Cameron (in circumstances which he did not explain), who said that HOL were given a substantial number of shares in that company by way of consideration.

[38] Turning to look at the disposition itself, and as counsel for the defender accepted, on any view it reads somewhat curiously, not to mention ungrammatically, in that the words "hereby dispone" appear twice; and the disposition states both that the disposition is for certain good and onerous causes (implying that no price was paid) and that the subjects have been sold (implying that a price was paid); further, the subjects being disponed are rather clumsily described as the "subjects comprising (1) known as Sunwick Farm..."; the date of entry is given as 16 October 2016 "notwithstanding the date", yet the testing clause is also in somewhat curious terms, stating first that the disposition was subscribed on HOL's behalf by Martin Frost at Edinburgh on 27 September 2017 in the presence of Kenneth Cameron, Solicitor; and then (in different typeface, in an apparent correction), that they were subscribed by Mr Frost in Mr Cameron's presence on 27 September 2016 (but if the latter date is correct, it is unclear why the words "notwithstanding the date" are included, since a more natural reading of those words is that the date of entry pre-dated the date of execution). Finally, the warrandice clause specifically excluded the standard security granted or about to be granted to the defender, which implies that the deed was first drafted at around the time of the standard security. None of this was explored, or explained. Frankly, I would have been prepared to accept that the deed had been drafted by a lay person, rather than by a solicitor, but for Mr Cameron's evidence. Finally, whatever the true date of the disposition, I accept the evidence of Mr Thompson that the defender first became aware of the transfer of title on 7 May 2019 when advised of it by Mr Frost.

[39] Taking the corrected testing clause at face value, it would appear that the disposition was proceeded with very soon after the standard security was entered into (in fact, a mere 2 days after that transaction completed), notwithstanding the defender's previous refusal to agree to that suggested change to the agreed structure; further, that neither Mr Frost nor Mr Cameron saw fit to advise the defender of that change, although they must have known that the security precluded any transfer without consent (and indeed that the defender's lawyer had expressly ruled out a transfer of ownership shortly before the security documentation was signed). There are therefore aspects of the transaction which raise suspicions (as does the subsequent name change of Avocet Agriculture Ltd to Orrdone Farms Ltd, signifying, as it does, that the Orrs have been "done"; but that in itself is an insufficient basis upon which to find that a fraud was committed - it may simply indicate that they agreed to a poor bargain). However, I am unable, on the evidence, to conclude that the transfer of the property to Avocet Agriculture Ltd was a fraud perpetrated on the Orrs by Mr Frost.

[40] The observant reader will note that nowhere in the foregoing averments is there any suggestion that the defender had knowledge of, let alone participated in, the alleged fraud. On the contrary, the pursuers accept that the defender had no knowledge of the disposition to Avocet Agriculture Ltd. There is an averment that Mr Frost was working with a "now disgraced farm financier", Desmond Phillips, and it is "believed and averred" that Mr Phillips proposed to Mr Frost that the Ilona Rose loan be obtained, secured against the assets of HOL. It is also averred that Mr Phillips and his daughter (a financial broker) were working with Mr Frost to arrange a loan transaction with the defender. However, (notwithstanding unsubstantiated allegations made by and on behalf of the pursuers at previous hearings in the action), it is unclear from the summons what the significance of

Mr or Ms Phillips' involvement is said to be (and Mr Noble effectively rebutted any suggestion that Mr Phillips might have been acting on behalf of the defender). At all events, there is no averment, express or implied, that the defender was involved in the fraud which the pursuers claim has been perpetrated on them, nor was there any evidence to that effect.

Decision on issue 1

Introduction

[41] This issue can be disposed of relatively quickly. None of the averments discussed above and none of the evidence led has any bearing whatsoever on the circumstances in which the sheriff court decree came to be granted. Remarkably in an action in which the primary remedy sought is reduction of that decree, no evidence whatsoever was led on that issue.

The applicable law

[42] Reduction is an equitable and discretionary remedy. There is no precise test for reducing a sheriff court undefended decree; rather, the whole circumstances must be looked at to determine what is required in order to do substantial justice: *Robertson's Executor* v *Robertson* 1995 SC 23; *Royal Bank of Scotland Plc* v *Matheson* 2013 SC 146. It follows that the factors which are important will vary from case to case, but the existence, or otherwise, of a substantive defence is likely to be a prominent, perhaps decisive, factor in many cases (as it was in the *Royal Bank of Scotland* case: see para [42]); as is the explanation for that defence not having been tendered in the undefended action leading to the decree. These two factors the defender's counsel referred to as the touchstones in determining what substantial justice requires.

[43] The present case is unusual inasmuch as it is normally the party against whom decree has been granted who seeks reduction of the decree, whereas here, not only were the pursuers not party to the sheriff court action, they do not aver that they ought to have been, nor even that HOL ought to have been, nor even that any of the pursuers or HOL ought to have had the action intimated to them; nor, indeed, even that there was a substantive defence available which was not advanced. It is simply their position, quoting from their first plea-in-law (which was, bear in mind, drafted by counsel), that the decree "having been obtained in circumstances where the sheriff was unaware of material considerations, production and reduction should be pronounced as concluded for".

[44] As to what those material considerations were, the pursuers' pleadings are, as the defender points out, sparse and proceed on a "believed and averred" formula. The defender submits that without any supporting primary averments of fact from which the asserted belief might properly be inferred the averments are strictly irrelevant: *Burnett* v *Menzies Dougal WS* 2006 SC 93. However, whether that is so or not, no evidence has in fact been led as to the circumstances in which the sheriff came to grant the decree in favour of the defender. The initial writ has not been produced, nor any of the interlocutors: not even a copy of the interlocutor granting the decree which the pursuers are looking to have reduced. Assuming that the decree was granted in absence (although not even that has been the subject of any evidence, despite counsel for the defender's valiant attempt to fill that gap in the course of his submissions), the sheriff would have had no requirement to inquire into the merits of the case and so it is perfectly possible, if the writ followed the usual style of such writs, that the sheriff was not informed of the then pending, though sisted, action against Orrdone Farms Ltd for reduction of the disposition to it, or of the alleged fraud or of the fact that the pursuers were in occupation of the farm. However, it is one thing to acknowledge

that that is perfectly possible; quite another to speculate, without any evidence whatsoever, that it was indeed the case. But the point is largely academic in any event, for the simple reason that none of the circumstances prayed in aid by the pursuers, including the averments that Mr Frost perpetrated a fraud (which the pursuers have not proved in any event), would have constituted a defence to the sheriff court action, or provided the sheriff with any reason not to grant decree. As the defender points out, reduction of the disposition in favour of Orrdone would simply have restored the farm to HOL; it would not have affected the validity of the defender's security since Orrdone took title subject to the prior security granted by HOL, so even if the action by HOL against Orrdone had succeeded, that would not have affected the defender's underlying right to enforce the security for repayment of the Avocet loan. Arguably, had the sheriff been aware of the Court of Session action to reduce the security, he might have ordered intimation of the action to HOL, although the defender cannot be criticised for not having alerted the sheriff to the existence of that action given that it is common ground that the action had not by that time been intimated to it, as it ought to have been. But even had that happened, HOL would have had no defence (or at least none which has been suggested) to the action to call up the security. Further, we now know, with the benefit of hindsight, that the action to reduce the disposition was not pursued by HOL and has been dismissed, so any right HOL might have had to enter the action has by now flown off in any event.

[45] It remains to deal with the slightly different point that the sheriff was unaware of the lease in favour of Alexander Orr and that he claimed to be in occupation of the farm by virtue of that lease. Although, again, no evidence of that has been led, in this instance I am prepared to infer that the sheriff was unaware of that fact given that the defender was not made aware of the existence of the lease until August 2022, after decree had been granted in

the sheriff court action. However, knowledge of the lease would not have afforded a defence to the calling up action. The lease raises an entirely different question, which is whether the decree which was granted against Orrdone Farms Ltd can be enforced against the pursuers. So, even had the sheriff known that the farm was occupied by a person or persons other than Orrdone Farms Ltd, that would not have been a reason for refusing to grant decree against Orrdone Farms Ltd. At best, it might have led to some refinement of the wording of the decree. However the pursuers have had the opportunity to litigate this very issue in the present action, and substantial justice does not require reduction of the sheriff court decree for the same issue to be ventilated.

[46] Accordingly, I am unable to find that there was a substantial defence to the defender's action which the pursuers in this action have been prevented from advancing. Even if that is wrong, the other "touchstone" founded upon by the defender is the pursuers' own delay in challenging Mr Frost's actions. Finality of litigation is an important public policy consideration. The pursuers first became aware of Mr Frost's wrongful attempt to remove the directors of HOL, and of the disposition to Avocet Agriculture Ltd in 2019. The action against Orrdone Farms Ltd, as Avocet then was, was raised in 2020 but not pursued. The calling-up action was not raised until 2022. I accept the defender's submission that this delay was entirely down to the Orrs and the pursuers in this action must take responsibility for it. They cannot now claim that by virtue of their own delay in pursuing the action of reduction, the sheriff court action was wrongly directed against Orrdone.

[47] All of the foregoing is sufficient to dispose of this ground of challenge: the fact is that the circumstances do not come close to establishing that substantial justice requires the sheriff court decree to be reduced; they point in the other direction - that justice requires the decree to remain intact and enforceable.

[48] For all these reasons, the pursuers have not established that the circumstances founded upon by them are such as to provide a good reason for reduction of the Jedburgh sheriff court decree. The first and second conclusions (respectively, for reduction of the decree, and for suspension of diligence following thereon) therefore fall to be refused, and the defender assoilzied in respect thereof.

Issue 2: the lease

The averments

[49] The pursuers aver that Alexander Orr is the lawful tenant of the subjects at Sunwick Farm pursuant to an *ex facie* valid lease dated 20 September 2016 granted by HOL (albeit signed by Mr Frost who, in a different context, the pursuers aver had no authority to bind HOL).

[50] In response, the defender's position, stated briefly, is that it did not consent to, nor was it made aware of, the lease; that the lease is a sham, created with a view to interfering with the defender's enforcement of its standard security; further, that it is anyway not a lease under Scots law; further still that the lease, if actually granted, was accepted by Alexander Orr in bad faith; and that for all these reasons, the lease ought to be reduced.

The terms of the lease

[51] The (purported) lease bears setting out in full:

> "**Lease for 10 years to Duncan Alexander Andrew Orr regarding the whole of Title BER2353 Sunwick Farm and Houndwood Farm (formally known as Greenwood).**
>
> I, Martin Frank Frost on behalf of the directors and shareholders of, and as director and Chairman of [HOL], grant Duncan Alexander Andrew Orr in accordance with previous agreements with the shareholders of [HOL], a lease for the occupation of

Sunwick Farm and Houndwood Farm. Sunwick Farm in its entirety to include the farmhouse, out buildings, land and machinery and livestock not accredited to any other company without agreement, with the exception of all **Sunwick Cottages and land belonging to Janet Orr Frost namely Title BER7040**. All land at Houndwood **with the exception of the forestry belt**.

This lease granted for the term of **10 years starting 20th September 2016** with the view that Duncan Alexander Andrew Orr will have the opportunity and ability to purchase both properties at the earliest. The farms thus after said term be returned to [HOL].

The conditions are:

1. That DAAO undertakes to make the farms profitable and agrees that he shares 50% of his profits with [HOL] within lease timescale.
2. That DAAO undertakes to purchase the farms at the earliest opportunity.
3. That DAAO undertakes to give annual reports of progress to the company secretary or any director of any [HOL] director (*sic*) or shareholder who wishes an update.
4. That DAAO undertakes to have no hold on Harcarse Hill Farm or its assets through the occupancy of this lease.
5. That DAAO undertakes to absent himself, or refuse to become involved, in any legal action against any director or employee of Avocet companies.

Signed:
Martin Frank Frost director and chairman of Hamilton Orr Limited
Dated: 20th September 2016

Signed:
Duncan Alexander Andrew Orr
Dated: 20th September 2016"

The evidence

Alexander Orr

[52] Alexander Orr said that in around July 2016, Mr Frost was bullying the other members of the Orr family, but he, Alexander, refused to be bullied. Mr Frost told him that he had to sign a loan for the purchase of Harcarse Hill because the existing loan was too expensive. Mr and Mrs Frost resided there. Mr Orr had not been aware of any loan for Harcarse Hill until then. He told Mr Frost that he would not be signing any personal

guarantee. Mr Frost subsequently asked him to go to Harcarse Hill for a discussion but to go alone, which he did. At that discussion, Mr Frost said that if Mr Orr signed a guarantee, he would give him a lease for 10 years over Sunwick Farm, which would allow him to farm in his own right; would give him a job and salary working for Avocet; and would give him assistance to purchase Sunwick from HOL within 10 years. A very basic lease had been prepared, which had already been signed by Mr Frost, which Mr Orr also signed. He went home and told his parents what had happened at the meeting with Mr Frost, in particular that he had been granted a lease. The other members of the Orr family "would all know anyway". Although he asked Mr Frost, he was never given a copy of the lease and did not see a copy until 2022, when he thought it had been found amongst paperwork. The lease was signed before the signing of the loan. In 2019, Mr Frost told Mr Orr that the lease had been "scrapped" because Mrs Orr had been "badmouthing" him and Avocet. Mr Orr "suspected" that the lease had not been disclosed to the defender.

[53] In cross-examination, Mr Orr was unable to explain why, in neither the Jedburgh sheriff court proceedings for ejection, nor the Court of Session action by HOL seeking reduction of the disposition to Orrdone Farms Ltd, no mention had been made of the lease, but different alleged agreements had been referred to. He accepted that in each action the averments had been made, at least in part, on his instruction. A photocopy of the document which HOL had lodged in its Court of Session action in support of its averments about a life tenancy was put to him. It was in manuscript, dated 1 December 2015 and bore to be signed by Andrew Orr and Duncan Orr Senior, both as directors of HOL and of Sunwick Farms Ltd, and by Alexander Orr as director of HOL (although he was not a director at that time), and it narrated that "As part of the agreement to sell to [HOL], Alexander and Aileen Orr will have life tenancy of Sunwick Farm House and Gardens." Mr Orr said that the

signatures all appeared to be genuine, but he could not recall signing it himself. He did not explain why he would have signed as a director of HOL in December 2015, when he was not appointed until January 2016, and claimed elsewhere in his evidence not to have been aware of that appointment until 2019.

[54] Mr Orr also agreed that from 2015 he had been employed by Avocet Farms Ltd to work on Sunwick Farm as farm foreman, and had pursued an Employment Tribunal claim against that company in 2019 for unpaid wages. His period of employment was from 1 June 2015 to 1 June 2019. His claim form had truthfully stated that the farm was run by Avocet Farms Ltd which had constantly undermined him. Among other things, he claimed in one part of the farm to have worked 48 hours per week in the employment of Avocet, and in another, 70 hours.

[55] Mr Orr was then challenged as to the precise date on which the lease was signed. His evidence on this vacillated somewhat (as it had in relation to the email of 23 August 2016) but he ultimately adhered to his witness statement, being adamant that the lease was signed before the personal guarantee was entered into, and therefore at least a month or so before the actual date on the lease, 20 September 2016. The lease was offered as a "sweetener" to sign a personal guarantee but only in respect of a loan "on Harcarse Hill". He had not had to enter occupation of the farm, as he was already there. Avocet was there too, but only in the sense that they had a few Piedmontese cattle, and installed hydroponics in a shed. As regards payment of rent, money had changed hands: the deal was that he would pay rent once he got his own business profitable enough to sustain that. They exchanged work for rent. A deduction was made from his wages in respect of rent. He had not made the farm profitable but that was not through lack of trying. There were no

accounts showing him as the tenant farmer of Sunwick. He had received payslips from Avocet but mostly these were not accompanied by any pay.

[56] Mr Orr was also asked why, if he had a 10 year lease, Martin Frost had emailed him on or about 14 May 2019 (which email Mr Orr had forwarded to his father) proposing a 3 year lease (with "some form of intermittent licence to occupy" until the lease was formulated); and why Mr Orr had not replied that he already had a 10 year lease. He said, somewhat unconvincingly, that it was hard to have a clear mind at that point, the situation with the farm was "pretty grave" and they were trying to find any solution possible. Further correspondence took place, then on 31 May 2019, Mr Frost had emailed him stating that he understood that he no longer wished to proceed with an option to lease over central Sunwick; to which Mr Orr had replied on that day saying "No idea where that is come from, I'm still pushing for the three year lease with the option to buy at the end."

Duncan Orr Senior

[57] The evidence of Duncan Orr Senior in relation to the lease was that he had heard "near the time", 2 or 3 days after it happened, that there had been a stand-up row between Alexander Orr and Martin Frost, that Alexander had been called back and that a lease had been provided to him. He was unable to give any detail as to when that was. None of the directors or shareholders of HOL had agreed a lease to Alexander. He felt some disquiet that Alexander had been favoured over his two sons, but he said in evidence, somewhat elliptically, that "we sorted that out because Martin said we'd be billionaires in 10 years' time." He could not remember precisely what he had said at the time. He found the lease in 2022, in a box, the precise date again being unclear.

Aileen Orr

[58] Although Mrs Orr had said in her witness statement that she became involved in Orr family business only on the death of her husband, she said in her oral evidence that the first she knew of the "whole situation" with Avocet was when Alexander came home and said he had signed something with Mr Frost - a lease, although he did not mention a period of 10 years. She was apoplectic at the time because he did not seem to know what he had signed. She confronted Mr Frost but got nowhere. This evidence was all volunteered after she had heard Alexander Orr say in his evidence that he had told her about the lease at the time, which lessens the weight that might otherwise have been attached to it. She also said that the fact that a lease had been granted to Alexander was contentious at the time within the Orr family.

Emma Porter

[59] Ms Porter was unaware of any lease until the solicitor acting for the third pursuer, DAO Farms Ltd (of which Alexander Orr is the sole director), forwarded a copy of it to her with an email of 24 August 2022, in the context of ongoing negotiations by DAO Farms Ltd to purchase the farm. The email stated that the solicitor himself had only just become aware of the lease. Before that, one of her first tasks as administrator had been to establish whether there were any leases over the farms. At a meeting on 24 January 2020 with Mrs Orr and Alexander Orr, who occupied Sunwick Farm at that time, they told her that there were no leases. The records of Orrdone Farms Ltd did not give any indication of any lease to Alexander Orr. However, the records *did* contain various emails in 2019 when Alexander Orr was seeking to negotiate a purchase and later a lease over Sunwick Farm, culminating in an email from him to Janet Orr dated 29 May 2019, which concluded with the

sentence "This is a brief outline of what I'm planning to do once I acquire the lease for Sunwick Farm." She also drew attention to the emails between Mr Frost and Alexander Orr in May 2019, which had been put to Mr Orr in cross-examination.

[60] Ms Porter further drew attention to the different documents founded upon in the other litigations, referred to above. She cast doubt upon the validity of the alleged life tenancy of Sunwick Farmhouse and gardens, which bore to have been granted by Sunwick Farm Ltd in favour of Andrew Orr and Aileen Orr on 1 December 2015. She also drew attention to correspondence between Aileen Orr and Mr Frost which made reference to a promised lifetime tenancy but not to any lease in favour of Alexander Orr.

[61] Finally, Ms Porter had reviewed the accounts for HOL for the years ending October 2016 through to October 2019, along with the papers she held for Orrdone Farms Ltd. There was no record in any of those of HOL having a bank account at the date of the lease; of any share of profit being paid; or any of the other conditions being complied with; nor any record of Alexander Orr insuring the farm as tenant.

Mark Thompson/Graham Noble

[62] I will deal with their evidence together because it was in similar terms and was that the defender was not made aware of any lease at the time the loan was advanced (despite it being made clear that the existence of any lease must be disclosed).

Assessment of the evidence/findings in fact

[63] I accept the evidence of Emma Porter, Mark Thompson and Graham Noble as credible and reliable. I partially accept the evidence of Alexander Orr. In particular, the wording of the lease is somewhat arcane, and contains an unusual condition (condition 5)

clearly intended to benefit Mr Frost, such that I do not consider that it is a document likely to have been drawn up by Mr Orr himself, or any other member of the Orr family, in an attempt to thwart the defender's repossession of the farm (put more simply, had the Orrs wished to invent a document to achieve that end, it is unlikely that this is the document they would have devised). I therefore find that Mr Orr did attend a meeting with Mr Frost, and that he was prevailed upon to sign the lease as an inducement to subsequently signing a personal guarantee. It therefore follows that notwithstanding the date on the lease, this meeting took place before 25 August 2016, the date of signature of the personal guarantee. Although it is not possible to precisely identify the date of signing, it is likely to have been not long before the meeting of 25 August, perhaps very close to it, if the prospective signing of the personal guarantees (and Mr Orr's refusal to sign one) were the topic of discussion.

[64] However, I cannot wholly accept Alexander Orr's evidence, which in other respects I found unsatisfactory. When pressed in relation to important issues, he appeared at times uncomfortable, and his evidence was prone to vacillate; it also lacked precision and was, on occasion, internally inconsistent (see, for example, the reference in para [53] to his evidence about the document of 1 December 2015). The information that he went home to tell his parents - which clearly was an important adminicle of evidence, if true - was however volunteered only for the first time in the course of the proof, appearing neither in Mr Orr's witness statement nor in Mrs Orr's. The subsequent acts (and omissions) of the Orrs, including the failure to mention the lease in the 2019/20 litigations, whether a copy of it existed or not, or to tell the administrator about it when she asked - are all more consistent with Andrew and Aileen Orr not knowing that there was a lease than with their having that knowledge. Likewise, it was unclear from Duncan Orr Senior's witness statement when he first learned of the lease, or why, when he did find out, he did not challenge Mr Frost for

having purported to grant Alexander a lease without the authority of the other directors or the shareholders, particularly since Alexander was being favoured over his own sons, which was entirely contrary to the succession planning exercise previously conceived whereby Sunwick was to be transferred to HOL for the benefit of all members of that generation, not simply Alexander; and his evidence was anyway vague as to how and when he found out about the lease. I therefore find that Alexander did not immediately disclose the lease to the other members of his family, which is consistent with his having been told to go to Harcarse Hill alone, implying some element of secrecy.

[65] As regards Alexander Orr's state of knowledge at the time of his signing the lease, referring back now to the evidence discussed in the context of the first issue, above, I find that at that time he was aware of the proposal that the defender advance a loan of £3.25 million to Avocet, secured on Sunwick Farm. Indeed his assertion that he was unaware of the nature of the transaction makes no sense in the context of his being offered a lease specifically in order that he grant a personal guarantee in relation to that very transaction. Even if Mr Frost had misrepresented the position by telling him that the loan was for only £1.2 million (or thereby) and was to be secured only over Harcarse Hill, as Mr Orr would now have the court accept, those misrepresentations would have been exposed as lies by Mr Cameron's email of 23 August; and yet Mr Orr did, and said, nothing upon receipt of that email. Further, from that same email, he became aware, if he did not already know, of the need to tell the defender (through the parties' respective solicitors) of any lease over the farm. However, neither he nor Mr Frost did so; nor did they tell Mr Cameron at the meeting on 25 August, by which date Mr Orr knew, of course, on his own admission, that by that date he had recently signed a lease which had not been disclosed.

[66] As to what happened next, I find that Alexander Orr was (or rather, continued to be) employed by one of the Avocet companies (which one was unclear as the company names were frequently changed and swapped, but it is of no moment) as farm foreman and that he worked at the farm in that capacity rather than as a tenant, as vouched by his employment tribunal claim against Avocet for unpaid wages. Whether or not he (or his company) also possessed the farm in the pursuit of his own (or his company's) business, he (or his company) did not have exclusive possession because the farm was also possessed by Avocet who installed hydroponics on it in connection with its own business and who kept an admittedly small number of cattle on it. The evidence that rent was paid by way of deduction from Mr Orr's wages, which was not vouched, I do not accept, and in any event that was not what the lease provided for by way of rent, nor was it averred in the summons. No accounts were ever produced, nor was the farm ever made profitable, nor was any rent ever paid. Not only was there no apparent sign to the outside world that Alexander Orr occupied the farm as tenant, nor did he make mention of the existence of the lease on several occasions when it would have been natural that he do so, specifically (a) as already mentioned, at the meeting of 25 August 2016 (b) in defence of the proceedings raised by Orrdone Farms Ltd for eviction from the farmhouse in 2019 (c) in pursuing the Court of Session action against Orrdone (d) in the context of discussions with Mr Frost in 2019 when he was being offered a 3 year lease and (e) when asked by the administrator if there were any leases.

[67] As to whether Andrew Orr had a lease of the farmhouse by virtue of an agreement between Sunwick Farm Ltd and HOL in the context of the transfer of the farm from the former to the latter, Alexander Orr's evidence about that was also somewhat unsatisfactory and vague, even as to whether or when he had signed it, and no explanation was provided

as to why he had purportedly signed as director when he was not. One explanation of course might be that that document was signed after the event, at a time when Alexander *was* a director, but other explanations may be available. However, I do not need to make any finding about that purported agreement, but simply observe that if there was a lease, that was a further impediment to Alexander being given, or taking, possession of the entire farm including the farmhouse.

Decision on issue 2

Introduction

[68] The starting point is to observe that Alexander Orr's entitlement to resist removal by the defender is dependent upon (a) the lease conferring upon him a real right, that is, in this context, a right which he is capable of vindicating in a question not only with HOL as granter of the lease (a personal right), but with a third party acquiring a real right from HOL, such as Orrdone Farms Ltd, as purchaser, or the defender as heritable creditor; and (b) upon his having entered into the lease in good faith, in other words, ignorant of HOL's inability to grant a valid lease without the consent of the defender. On this second point, it is the good faith of Mr Orr which is important, not that of HOL (or Mr Frost). If Mr Orr is able to show that the lease did confer upon him a real right in the sense I have described, and that he was in good faith when he entered into it, then the defender will be bound by the terms of the lease, as counsel for the defender was quick to acknowledge. On the other hand, if the lease merely confers a personal right on Mr Orr, it is not enforceable against singular successors, including the defender: *Wallace* v *Simmers* 1960 SC 255, LP Clyde at 259-260.

[69] Before considering those two issues, I should for completeness deal with the question of whether the lease was genuine or not, since it will be recalled that in its pleadings the defender avers that the lease is a sham and was created to interfere with the defender's enforcement of its standard security. In the previous section I have found as a fact that the lease is not a sham, in that the document in question was signed by Alexander Orr some time before 25 August 2016, which is consistent with the position adopted by counsel for the defender in the course of submissions, when he departed from the position on record; and argued, instead, that it was simply never intended to create a binding legal relationship; so the first question I will address is, was there a contract at all?

Was there a contract at all?

[70] Without any reference to authority, counsel for the defender submitted that all of the parties subsequent actings pointed to their never having intended that there should be a lease. These are listed above in para [66]. To these might be added the fact that Mr Frost did not give Mr Orr a copy of the lease, although Mr Orr's evidence was that he had asked for a copy.

[71] As to the need for there to be an intention to create a contractual relationship, there is a discussion of this thorny topic in McBryde, *The Law of Contract in Scotland*, (3rd Ed) at paragraphs 5.01 to 5.09. While I agree with counsel for the defender that the parties' actings subsequent to the signing of the lease would appear to indicate that they did not think that there was a lease, it is a well-established principle that contracts do not consist of what people think in their innermost minds but according to what they say (see, for example, *Muirhead & Turnbull* v *Dickson* (1905) 7 F 686, Lord Dunedin at 694). Further, having accepted Alexander Orr's evidence that the lease was a "sweetener" for entering into a

binding guarantee, it is likely that the parties did intend that the lease should have some contractual effect. In my view, the parties' subsequent actings are best analysed in considering the next question which is whether that relationship was that of landlord/lessee or some lesser form of agreement.

What is the status in law of the "lease"?

[72] This then is the first of the two questions identified above, which is whether the lease confers a real right on Alexander Orr: one which is enforceable against the defender as heritable creditor over the subjects of lease. As the defender submits, and as is non-controversial, there are five essential requirements for a lease to confer such a right on the tenant. Three of these are satisfied in the present case in that there are identifiable parties; identifiable subjects; and an identifiable ish (date of termination). However, the two remaining requirements are (i) that there be an identified rent: Rankine, *The Law of Leases in Scotland* (3rd Ed) 144-147; Rennie et al, *The Law of Leases in Scotland*, paragraph 5.10; and (ii) that the tenant should have exclusive possession of the subjects: Rankine pages 136-139; Rennie, paragraphs 2-12 and 5-08; *Chaplin* v *Assessor for Perth* 1947 SC 373 (Lord Keith at 377-378).

[73] As regards the first of these, the rent need not consist of money, but if it does, its amount must be fixed or ascertainable by reference to a formula: Rankine, page 144; Rennie, paragraph 5.10. Alternatively, the rent may consist of services: *ibid*. The rent may be nominal, but there must *be* a rent. The lease relied upon by the pursuer does not meet this requirement. I do not wholly accept the defender's argument, at least as expressed in its note of argument, that although the agreement provides for a sharing of profits, that admits of the possibility that there will be no profits and thus no rent. However, that could be said

of any lease in which the rent is expressed as being a proportion of turnover, profit or royalty based on the extraction of minerals, which is, in principle, permissible: see Rennie, paragraphs 1.21 and 12-03; so the reference to a share of profits does not of itself mean that that agreed stipulation cannot constitute rent. Of more difficulty for the pursuers is the lack of any mechanism for calculating "profit", particularly in the context of an obligation to make the farms profitable, leading to uncertainty as to the treatment of capital assets, improvements and the like. I accept the submission for the defender that the point may be tested by asking whether Orrdone, as singular successor of HOL (or, for that matter, the defender as heritable creditor in possession) could sue the first pursuer for payment of rent. It is immediately apparent that the lease contains no machinery by which any sum due could be fixed. The gaps are far beyond the power of the court to fill by means of implication of terms: *cf Crawford* v *Bruce* 1992 SLT 524 at 532. I therefore conclude that the agreement cannot be a lease enforceable against third parties, in that it does not provide for payment of a rent. (An alternative analysis, leading to the same result, is that the provision for rent is simply void for uncertainty.) This conclusion is reinforced by my finding, above, that no rent was as a matter of fact paid, whether by sharing of profit or otherwise.

[74] The second requirement where the pursuers face a difficulty is the requirement that the tenant have exclusive possession of the subjects: see *Millar* v *McRobbie* 1949 SC 1. The need for possession is explained in Rankine at page 137 as being the "only means whereby at common law a singular successor or creditor of the landlord...can become acquainted with the existence of a lease and be enabled to learn its stipulations." Having found as a fact that Alexander Orr did not have exclusive possession - see, again, para [66] - quite simply, the agreement could not be a lease, whatever else it was.

[75] Accordingly, the agreement was not a lease but conferred no more than a personal right on Mr Orr, exercisable only against HOL. He has no right not to be removed from the farm by the defender. That is sufficient to dispose of the action, since it follows that none of the pursuers has any right to remain in occupation of the farm; and that the defender is entitled to have the lease reduced and to remove all of the pursuers from the farm. However, lest I am wrong in reaching this conclusion it is also necessary to consider the issue of good faith.

Was the lease entered into in good faith?

[76] For Mr Orr to have been in bad faith it is not necessary that he had actual knowledge of the defender's interest, or potential interest, as heritable creditor, if the circumstances were such as to put him on inquiry as to the true position: *cf Rodger (Builders) Ltd* v *Fawdry and others* 1950 SC 483; *Gibson* v *Royal Bank of Scotland Plc* 2009 SLT 444 in which Lord Emslie comprehensively reviewed the authorities in this area, concluding (at paragraph 49) that the bad faith exception may be applied in a wide range of different circumstances.

[77] Mr Orr's state of knowledge is set out in paragraph [65] above. It is not necessary to say a great deal more. He was (as I have found) aware both of the proposed standard security and of the need to disclose any lease over the subjects, yet did not do so (even though the loan transaction did not complete until 22 September 2016, giving ample time for the lease to be disclosed before he (on the hypothesis that there was a lease) entered into possession of the farm as tenant on 20 September 2016. The subsequent secrecy about the lease simply adds to the whiff of bad faith surrounding the lease transaction.

[78] Even if that is wrong, at the very least, Mr Orr was in possession of sufficient information to be under a duty of inquiry. He was aware that there was to be a standard

security granted in favour of the defender. He was also aware (or is deemed to have been aware, since it was registered in the land register) of the existing Ilona Rose security, which was in force up to 20 September 2016, and which prohibited HOL from entering into any lease without the consent of Ilona Rose (which in itself is sufficient to merit a finding of bad faith, since he also knew that Ilona Rose had not consented to the lease). In a question with the defender, he ought to have been alive to the likelihood of HOL's inability to enter into a lease without the defender's consent, and to have made further inquiry, which he did not do.

[79] Had it been necessary to do so, I would, therefore, have found that the lease was not entered into in good faith, and would in that event have reduced it on that ground.

Disposal

[80] For the reasons given above, I will sustain the defender's second, third and seventh pleas-in-law in the principal action and repel the pursuers' pleas, assoilzieing the defender from the conclusions of the summons and reducing the lease *ope exceptionis*. I will sustain the defender's first and second pleas-in-law in the counterclaim again repelling the pursuers' pleas, and will grant decree as first and second concluded for in the counterclaim.

[81] As invited to do by both parties, I have reserved the question of expenses. I will assign a hearing to be addressed on that matter (although it is likely that they will follow success); and also to be addressed on a likely motion by the pursuers to supersede extract (delay the date by which the pursuers must remove). Mrs Orr indicated that in the event the pursuers were unsuccessful they would wish to stay on the farm until the police investigation was completed. That would not be appropriate but I will be sympathetic to a motion that the pursuers be afforded a reasonable period to make an orderly removal from

the farm and to make arrangements for their livestock to be moved elsewhere. If parties are able to reach agreement on expenses, and a suitable period of supersession, then the proposed hearing may be discharged and these matters dealt with administratively.