OUTER HOUSE, COURT OF SESSION

2020 CSOH 106

CA6/19

OPINION OF LADY WOLFFE

In the cause

THE ROYAL BANK OF SCOTLAND PUBLIC LIMITED COMPANY

Pursuer

against

(FIRST) MRS ALISON DONNELLY and (SECOND) ANTONIA McINTYRE

Defenders

Pursuer: McBrearty QC, David Welsh; Pinsent Masons LLP
Defenders: Webster QC, Upton; Blacklocks

16 December 2020

Background

Pursuer's action for reduction

[1] In this case, which is not the first litigation concerning the parties, the pursuer seeks reduction (in whole or in part, as afterwards noted) of *inter alia* the discharge of the first defender ("the debtor") following her grant of a trust deed ("the Trust Deed") and which became a protected trust deed. The second defender, who was the last trustee under the debtor's Trust Deed ("the trustee"), did not enter the process. No reduction is sought of the discharge of the trustee. The purpose of the reduction is to enable the pursuer to set-off its

now-admitted liability to compensate the debtor for mis-selling payment protection insurance ("PPI") in the past.

The debtor's principal lines of defence

[2] The debtor resists this action on a number of fronts.

1) In the first place, she argues that even if reduction were granted, there is no *concursus debiti et crediti*, meaning that the pursuer and debtor are not each a creditor and debtor (in its or her own right) in respect of the other; and which is a prerequisite for set off. The factual bases for this line of defence are that:

(i) notwithstanding the transfer of business under a ring-fenced transfer scheme, the pursuer is not a creditor of the debtor in respect of her pre-discharge debts;

(ii) separately, any right against the debtor in respect of her pre- discharge indebtedness was assigned to Max Recovery Limited ("MRL"); and

(iii) in any event, it was an entity other than the pursuer which had compromised the debtor's PPI claim. More specifically, the debtor's position is that it was Royal Bank of Scotland Group plc (company no SCO4551) ("Group")) who dealt with and ultimately compromised her PPI claim ("the agency issue"). This gives rise to several subsidiary issues, namely:

a) Whether Group was acting as an agent of RBS (said, by the pursuer, to be its predecessor in title *qua* creditor of the debtor);

b) Whether that agency was disclosed;

c) If not, what was the effect of the Group acting as an undisclosed agent of the pursuer (assuming agency was established)?

If the debtor succeeded on one or more of these lines, which are presented in the alternative and are not interdependent, then the pursuer had no title to sue and its action was irrelevant and academic.

2) The debtor also maintains that the pursuer has not pled a relevant ground of reduction. This was advanced on two broad fronts: a challenge to the ground of error (which was the pursuer's primary ground) and a challenge to the pursuer's reliance on a rule of English trust law derived from *In re Hastings-Bass* (deceased) [1975] Ch 25 at 41 ("*Hastings-Bass*"). In particular,

i) The debtor's challenge to the relevancy of error as a ground of reduction had a number of strands:

a) error *simpliciter* was not a ground of reduction;

b) this was not a case of unilateral error, but mutual error;

c) *esto* this were a case of mutual error, it was not gratuitous.

ii) Further, it was argued that the grounds of challenge to the act of a trustee were circumscribed, and doubly so, in respect of the acts of a trustee of an insolvency process. In respect of a trustee, the only ground of reduction was a want of deliberation, which the pursuer had not pled, and reduction of the discharge of a trustee of an insolvency process was exceptionally rare.

iii) As a further fall-back, it was contended that partial reduction of the discharge is incompetent

3) Even if the pursuer has title to sue and has pled a relevant ground of reduction, the debtor argued that the pursuer is precluded from maintaining its claim on the grounds of:

(i) personal bar;

(ii) waiver; or

(iii) *mora*, taciturnity and acquiescence;

4) Lastly, the debtor argued that even if a ground of reduction were established, in the whole circumstances of this case it was inequitable to grant reduction.

Distinguishing between the pursuer and the entity formerly known as "Royal Bank of Scotland plc"

[3] In light of the title to sue issue it is important to distinguish between the pursuer (with registered number SC083026) and its corporate predecessor, formerly known as "The Royal Bank of Scotland plc" and registered under company number SC090312 ("RBS"). The pursuer's position, which the debtor does not accept, is that it succeeded to the rights and liabilities of RBS (and to any pending action by or against RBS) by virtue of an arrangement in the form of a ring-fenced transfer scheme ("the RFTS") under Part VII of the Financial Services Markets Act 2000 ("the 2000 Act") sanctioned by this Court on 22 March 2018 ("the corporate successor issue"). The debtor does not advance a positive case that contradicts the documentation or court order giving effect to the RFTS on which the pursuer relies. The debtor's position is to put the pursuer to proof on the corporate successor issue. (I deal with this issue below.) There are other companies and brands within the RBS group of companies. I shall refer to these collectively as "the RBS Group". The ultimate parent company is Group.

The debtor's prior insolvency

[4] The debtor borrowed sums from RBS between 1997 and 2003. In due course, being unable to repay these sums, the debtor granted the Trust Deed on 29 August 2006. A trust deed is a form of personal insolvency first provided for in statutory form under Schedule 5 of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act", "Schedule 5" and the "Trust Deed process", as the context requires). While the 1985 Act was subsequently amended, the provisions as originally enacted applied to the debtor's Trust Deed. RBS made three claims in the Trust Deed process, totalling £31,992.84. The Trust Deed became a "protected" Trust Deed ("the PTD") on 24 October 2006. (One of the many issues is whether that Trust Deed was caught by an assignation by RBS of all accounts subject to protected trust deeds made between 8 November 2001 and 11 October 2006 in favour of MRL ("the assignation issue").)

[5] RBS was the only creditor who submitted a claim to the trustee in the Trust Deed process, a point that was not fully appreciated until the proof in this action. As will be seen, this may affect the scope of the reduction sought (in the belief that there were other creditors, the pursuer initially sought reduction of *inter alia* the discharge of the debtor, but "only in so far as it affects the interests of the" pursuer), and whether the reduction sought is (as the debtor contends) an impermissible recasting of the insolvency regime. The trustee granted the debtor's discharge on 11 December 2013 and she paid a first and final dividend on 31 December 2013, of approximately 20.8 p in the £. Accordingly, the dividend paid to RBS was £6,654.03. The amount unpaid, and in respect of which the debtor was discharged, was £25,343.81 ("the unpaid balance"). The effect of the debtor's discharge is not to extinguish the liability for the unpaid balance, but it does preclude the creditor (RBS and, if the successor issue is determined in favour of the pursuer, the pursuer) from asserting set off in respect of it.

The debtor's PPI claim

[6] Within 6 weeks of the payment of the final dividend, the debtor made a claim (through a claims company) that she had been mis-sold payment protection insurance by RBS ("the debtor's PPI claim"). (While each instance of mis-selling was treated as a separate claim, it is not necessary to distinguish between these.) After sundry correspondence with Group between February and April 2014 the debtor accepted an offer of compensation made by Group of £11,927.39 to settle her PPI claim ("the settlement sum"). The interposition of Group gives rise to the agency issue: the pursuer maintains that Group was acting as the agent of RBS, whereas the debtor disputes that proposition. It is in this context that the agency issue and corporate successor issues arise: at the time of compromising the debtor's PPI claim, was Group acting as the agent of RBS and did the pursuer succeed to RBS's rights *qua* creditor of the debtor transferred to it under the RFTS?

[7] It is important to note that the debtor's PPI claim arose out of dealings pre-dating her discharge. In other words, the debtor's PPI claim (made against "Royal Bank of Scotland"), was an asset that might have been ingathered in the Trust Deed process (eg by a claim against RBS). It is a matter of agreement that at no time during the currency of the Trust Deed process was the debtor aware she had claims for mis-selling of PPI. It was also common ground that following the debtor's discharge, she was free to pursue her PPI claim. It is implicit within that common position that the debtor's PPI claim was re-vested in her upon her discharge. I proceed on the basis that the debtor's PPI claims "re-vested" in her, but express no view on that assumption.

The payment action

[8] While a part-payment of £1,111.63 was made to the debtor in respect of the settlement of her PPI claim on 2 April 2014, no further payments were made. As a consequence, the debtor was obliged to raise an action against Group for payment of the balance of the settlement sum ("the outstanding settlement sum"), which she did in August 2014 ("the payment action"). The payment action has had a protracted history. After legal debate (heard in June 2015), the sheriff at first instance found against the pursuer in that action (whom I have defined as the debtor) in February 2016. However, the pursuer in that action successfully appealed to the Sheriff Appeal Court (which decided in her favour in January 2017). The subsequent appeal by the defender in that action (ie by Group) was refused by the Inner House in November 2019. The defender in the payment action applied for permission to appeal ("PTA") to the Supreme Court in early March 2020. As noted below (ar para [98]]), the PTA in the payment action was refused shortly before this opinion was advised.

[9] The Inner House in the payment action determined that the debtor had been discharged in respect of the unpaid balance and which sum, therefore, could not be set off against the outstanding settlement sum due by Group in respect of the PPI settlement. It will be noted that at that point in time, it was Group's position that it was the counterparty and principal obligant in respect of the settlement sum. The agency issue had not yet been advanced.

The pursuer's rationale in seeking reduction of the discharge in this action

[10] The pursuer's commercial rationale for seeking reduction in these proceedings of the debtor's discharge is to overcome the adverse decision of the Inner House in the payment

action. The pursuer's Senior Counsel, Mr McBrearty QC, acknowledged that the availability of set off (or of "balancing of accounts in bankruptcy", as it is described in Scots law) was only relatively lately appreciated and for which reduction of the debtor's discharge was now necessary, following the adverse decision of the Inner House in the payment action. Mr McBrearty was equally frank in acknowledging that the impetus for this action were the comments made by Lord Reed in the postscript to *Dooneen Ltd* v *Mond* issued by the Supreme Court on 31 October 2018 ((*Dooneen Ltd* v *Mond* [2018] UKSC 54, 2018 SLT 1255) ("*Dooneen*").

Dooneen

[11] The issues in *Dooneen* were regarded as sufficiently related to the issues in the payment action for the Inner House to sist the latter pending the Supreme Court's determination of the appeal in *Dooneen*. As in this case, the debtor in *Dooneen* made a claim for PPI mis-selling which related to events pre-dating her Trust Deed but which was not ingathered or otherwise resolved in the Trust Deed process. Lord Reed's postscript in *Dooneen* is as follows:

> "*Postscript*
> 22. This is scarcely a satisfactory outcome. An asset which vested in the trustee for the benefit of the creditors and ought to have been applied to payment of the debts due to them, will instead be paid to the debtor, merely because the trust was administered in ignorance of its existence. One might question whether the law is powerless to provide a remedy in this situation.
>
> 23. Prior to the hearing of the appeal, the court informed the parties that it would be assisted by discussion of the legal consequences of a mistake in this context: in particular, whether the relevant acts of the trustee might be reduced if they were the result of an error as to the extent of the trust estate. In posing that question, the court had it in mind that on the construction of the Trust Deed which it has now upheld, the acceding creditors effectively conferred on the trustee a power to extinguish their rights as against the debtor by determining that a dividend should be a final distribution; and that the determination in the present case had been made

> in ignorance of a relevant - indeed, critical - consideration. It also had it in mind that reduction is a discretionary remedy, which may be granted on terms, or withheld, where that is appropriate to protect the rights of third parties. The court drew the attention of the parties to the Scottish Law Commission Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law (2011) (No 148), Chapter 14, 'Error and other defects in trustees' exercise of discretionary powers', and the Scottish Law Commission Report on Trust Law (2014) (Scot Law Com No 239), Chapter 19, 'Defects in the exercise of trustees' powers', where relevant authorities are discussed. Those authorities include the decisions of the House of Lords in *Dundee General Hospitals Board of Management v Bell's Trustees* 1952 SC (HL) 78; [1952] 1 All ER 896 and *Hunter v Bradford Property Trust Ltd* 1970 SLT 173, to which one might add the case of *Whyte v Knox* (1858) 20 D 970. In the event, the parties declined to make submissions on these matters. In those circumstances, it would be inappropriate for the court to consider them further on this occasion." (Emphasis added.)

The issues in this action

[12] The background just noted gives rise to a number of issues. In addition to the standard pleas (as to the relevancy of the pursuer's case or of it being unfounded in fact), the debtor asserts that the pursuer has no title to sue (first plea); that the action is incompetent (second plea); that reduction is inequitable (eighth plea); that the deed or deeds under challenge were not granted under any relevant error or with any lack of due deliberation (ninth plea), and that the pursuer is otherwise precluded from maintaining this action (eg because barred by *mora*, taciturnity and acquiescence (fifth plea) or personal bar (sixth plea) or waiver (seventh plea)).

[13] Parties produced a joint statement of 13 issues. These may be condensed into four core issues, namely:

1. Whether there is the requisite *consursus debiti et crediti* between the pursuer and debtor (which is the essential basis of the debtor's plea of no title to sue) such as to enable the outstanding settlement sum to be retained by the pursuer and used to set off and extinguish the unpaid balance to that extent. This encompasses the

successor issue, the agency issue and the interpretation and effect of the RFTS. All of these issues must be determined in favour of the pursuer, for the purposes of its proposed set off of the outstanding settlement sum against the unpaid balance.

2. Whether error or ignorance of the trustee or creditors is a relevant ground for the reduction of the discharge of a debtor from the Trust Deed, and if that is the case in respect of error or ignorance in general, whether that applies where it is either (a) error about or ignorance of the existence of an obligation of the creditor who (or whose successor) seeks reduction, or (b) error or ignorance which the trustee owed the creditors a fiduciary duty to avoid.
3. Whether reduction is either competent or equitable.
4. Whether the pursuer is precluded from seeking reduction by *mora*, taciturnity and acquiescence, or whether it has waived any right to seek reduction. (The debtor's plea of personal bar was not maintained in submissions.)

The pursuer's amendment during the proof

[14] As noted above, it was assumed that RBS was one of several creditors in the Trust Deed process. It was for that reason that the pursuer sought partial reduction (in the terms set out in para [5], above). However, once it was appreciated that RBS was the only creditor who submitted a claim in the debtor's Trust Deed process, the pursuer moved to amend its summons to remove all references to creditors in the plural. The debtor resisted this, essentially on the bases (i) that it would introduce an inconsistency between the pursuer's position in this litigation and in the payment action, and, under reference to my comments in *Auctaric* v *Glasgow Stage Crew Ltd* [2019] CSOH 111, [2020] SLT 331, (ii) that so late an

amendment was not commensurate with the practice of the commercial court. In my view, it would be artificial in the extreme to hold a party to a certain factual position, now known to be incorrect, in circumstances where the factual matter, which was straightforward and easily verifiable, was on an ancillary matter. While the introduction of the correct factual position (that RBS was the only creditor) affected one of the debtor's arguments (that partial reduction of the discharge amounted to an impermissible refashioning of the insolvency regime to the detriment of other creditors), that was a relatively minor plank of the debtor's case. The debtor otherwise identified no prejudice flowing from the amendment. I allowed the amendment.

Key productions

[15] A number of documents were put to more than one witness and it is therefore convenient to note the terms of the key productions.

The debtor's Trust Deed

[16] The debtor signed the Trust Deed on 29 August 2006. Its declared purpose was "to transfer" to her trustee "as trustee for my creditors as at the date" of the signing of the Trust Deed, "the rights and assets which would have vested in a permanent trustee in terms of section 31, 32 and 33" of the 1985 Act (which was defined as the debtor's "Estate"). It is clear that the intention was a universal transfer of her whole estate for the behoof of her creditors. The trustee's powers under the Trust Deed included the usual powers to defend or bring any court action or other proceedings (power (v)) and to compromise claims enforceable by or against the trustee or the Estate (power (vi)). I find that in light of this language it would have been open to the trustee to advance the debtor's PPI claim with a view to recovering

sums for the benefit of her creditors. Parties also referred to the terms of the Trust Deed governing the debtor's discharge ("This Trust Deed is granted by me on condition that the creditors acceding to the Trust Deed shall discharge me of all my debts due to them on termination of this Trust Deed…") in the context of their competing submissions as to whether the grant of the debtor's discharge was a unilateral or gratuitous deed.

The trustee's correspondence with the AIB: Forms 11 and 5

[17] Under cover of her letter of 7 January 2014 the then trustee (who had succeeded the original trustee named in the Trust Deed, and who was called as the second defender in this action) submitted the Form 11 (statement of realisation and distribution of an estate under a protected trust deed), together with copies of the Minutes and Report of the final meeting of creditors and the scheme of division/summary of adjudication on creditors' claims ("the scheme of division"). The scheme of division recorded the three agreed or accepted claims the trustee accepted from RBS, and the dividend of 20.8p in the £ payable in respect of those claims. As noted above, RBS was the only creditor. A blank Form 5 (letter of discharge of debtor) under schedule 5 of the 1985 Act was also appended to that letter. The Accountant in Bankruptcy acknowledged this correspondence by return and noted that the trustee's discharge had been entered into the Register of Insolvencies.

Productions potentially relevant to the agency issue

The General Agency Agreement

[18] RBS, National Westminster Bank plc ("NatWest") and Group entered into an agreement dated 30 June 2000 ("the General Agency Agreement"). By this time NatWest and RBS were both wholly-owned subsidiaries of Group. The recitals narrated that RBS

wished to enable NatWest to carry out certain activities on behalf of it ("the RBS Activities"), that NatWest wished to enable RBS to carry out certain activities on behalf of it ("the NatWest Activities"), and that each of RBS and NatWest wished to arrange for Group to perform on their respective behalf "certain activities relating to the management, control and supervision of their respective businesses (collectively "the Group Activities"). (There is no further definition of "Group Activities".)

[19] The General Agency Agreement was divided into three parts consistent with the three grants of agency just described. It suffices to note that in Part III, each of RBS and NatWest appointed Group "as their agent to perform, in their respective names, the Group Activities on behalf of and for the account of… RBS": clause 3.1. Part III also provided for Group to enter into any form of commitment or undertaking on behalf of *inter alia* RBS in respect of any Group Activities (clause 3.3) and Group was obliged (by clause 3.4) "at all times to disclose to customers that it was acting as agent of… RBS prior to entering into any commitment in such capacity". The consequences of non-compliance with clause 34 are not provided for in the General Agency Agreement.

The Checklist

[20] The pursuer produced a *pro forma* checklist, described as a "Loanguard Checklist" dating from July 2002 ("the Checklist"), and which it was said would have been completed by the debtor. The pursuer's purpose is to rely on the statement printed at the foot, stating "Agency agreements exist between members of The Royal Bank of Scotland Group." It is a matter of agreement that the debtor has no recollection of completing a Checklist and no completed one by her has been produced.

The Notice of Assignation in favour of MRL

[21] Among the productions was a "To Whom it May Concern" letter dated 8 December 2006 on Group-headed notepaper ("the Notice of Assignation"). Under the heading, "Notice of Assignment/Assignation of Insolvent Accounts", it provided:

> "Please take notice that on 8 December 2006 The Royal Bank of Scotland plc ("RBS") sold and transferred to MRL ("Max") the following assets:
>
> 1. All known accounts which are subject to an existing Bankruptcy Order or Sequestration Order made between 8 November 2001 and 11 October 2006 where RBS is entitled to prove as a Creditor.
>
> 2. All known accounts which are subject to an existing interim order and/or approved Individual Voluntary Arrangement or Protected Trust Deed made between 8 November 2001 and 11 October 2006 where RBS is entitled to prove as a Creditor.
>
> Please note that due to the nature of the business and services provided by RBS they may be identified as a Creditor in respect of these accounts under various different corporate identities. Details of these identities are set out at the end of this letter.
>
> This document serves as a Note of Assignment/Assignation of the accounts to Max and where the Debtor is resident in England and Wales constitutes a notice of pursuant of Rule 11.11 of the Insolvency Rules 1986.
>
> Any future dividends and correspondence in respect of these accounts must therefore be sent to Max at MRL, PO Box 6302, Bournemouth, Dorset, BH1 9DY. Please note all dividend cheques should be made payable to MRL.
>
> In order to facilitate the process of assignment, we confirm that you are authorised to provide Eversheds LLP a full list of those accounts you are administering which meet the above criteria."

The RFTS

[22] The pursuer relies on the transfer to it of the relevant assets and liabilities of RBS and effected by the RFTS. In particular, the pursuer's position is that the debtor's obligation under the loans (owed to RBS) and RBS's liability to the debtor in respect of compensation

for PPI mis-selling were both transferred to it and, accordingly, there was the requisite *concursis crediti et debiti* to permit these counter-obligations to be set off against each other.

[23] The RFTS is a complex scheme. So far as material to the issues in this case, it suffices to note that it sought to transfer certain RBS assets and liabilities (defined as the "Adam Destination Business") to Adam & Company plc (company number SC083026) ("Adam & Co") as at the Effective Date (defined as 30 April 2018) and thereafter to rename Adam & Co as "the Royal Bank of Scotland plc". That entity is the pursuer in this action. The RFTS sought to effect a like transfer of certain non-retail banking activities of RBS (eg the Covered Bonds Business) to NatWest, but the dealings between RBS and the debtor fell outwith this kind of specialised commercial banking. For completeness, I note that RBS was to be renamed NatWest Markets Plc (see definition of "RBS plc") with effect from the Effective Time (defined as 00.01 hours on 30 April 2018).

[24] As provided for in the RFTS, on the Effective Date the personal and business banking carried on by RBS (including business carried on under certain brand names not here relevant) (defined as the "PBB Business" in Part F of the RFTS) was transferred to Adam & Co. The definition of PBB Business (in Part F) included "the provision to personal … Counterparties … of current accounts, loans…, arranging insurance…" and where the Assets and Liabilities "is, has been, or would be recorded or attributable to the PBB Segment". The PBB Segment is defined as including "UK Personal and Business Banking", as referred to in Group's 2016 Annual Accounts (see para [25], below). The operative provisions effecting the transfer (comprehensively defined as the "Adam Destination Business") are in Part B ("The Transfer"), clause 6.1 and 6.2.1 and 6.2.2. Clause 6.1 provided that:

> "'Each Transferring Business', the definition of which included the Adam Destination Business, '(including the Transferring Assets and the Transferring Liabilities in each Transferring Business) shall be transferred to and vested in each Relevant Transferee in accordance with, and subject to, the terms of this Scheme'."

The Transferring Liabilities included the liabilities of RBS in the conduct of the PBB Business (reading the definitions of "Transferring Liabilities", "Adam Destination Liabilities" and "Adam Destination Business" together). In my view, these provisions are habile to cover any RBS liability for PPI mis-selling to personal customers, ie such as the debtor's PPI claim. The Transferring Assets included the obligations of personal customers under *inter alia* loan agreements owed to RBS (again, reading together the definitions of "Transferring Assets", "Adam Destination Assets", "Adam Definition Arrangements" and "Adam Destination Business"). In my view, these provisions are habile to include any obligation owed by a personal customer of the RBS in respect of a loan or credit card debt, ie such as the indebtedness the debtor incurred to RBS. Clauses 6.2.1 and 6.2.2 provided for the transfer and vesting of the Adam Destination Assets and the Adam Destination Liabilities, respectively, with effect from the Effective Time, and that without further act or instrument; and that these assets and liabilities ceased to be those of RBS.

[25] The interlocutor of this Court giving effect to the RFTS was produced.

The 2016 Group Annual Accounts ("the 2016 Group Accounts")

[26] The Group's Annual Accounts for 2016 were lodged at the start of the proof, essentially for its definition, found in the body of the Directors' Report (at p 115), of "Personal & Business Banking" (ie "PBB") as comprising two reportable segments, of UK PBB and Ulster Bank.

Productions relating to the compromise of the debtor's PPI claim

[27] As noted above, the debtor was paid around £1,100 toward the settlement sum agreed in settlement of her PPI claim. Five cheques were produced, drawn on the pursuer (not Group) on an account described as "PPI Refunds Account". By contrast, the correspondence with the debtor and her then agents in respect of her PPI claim was on Group letter-headed paper, and had the sub-designation PPI Customer Concerns Team, Retail Products. There is no express statement in any of that correspondence that it is acting on behalf of RBS.

The proof

[28] I allowed the pursuer's motion for a proof, as this had the merit of resolving all issues in one hearing and its estimate was only a day longer than for the alternative proposal of a debate. The evidence comprised one day and submissions the remaining three days. Parties agreed certain matters in two Joint Minutes. I had the benefit of written submissions and a Joint Bundle and Supplementary Bundle of Authorities (totalling 71 cases and other texts) arranged by subject matter (title and interest to sue, general principles of set off, disclosure of agency/*concursus debiti et crediti*, general principles of reduction, grounds for reduction, trustee's duties and creditors' remedies against trustees, and on *mora*, personal bar and waiver). Consistent with commercial practice, written statements (and in some cases, supplementary statements) from each witness were lodged and adopted by witnesses as their evidence in chief. I have had regard to all these materials. I do not propose to repeat them.

The pursuer's proof

Beverley Crawley

[29] The pursuer's first witness was Beverley Crawley, who had been employed by the pursuer as a Senior Manager in Resilience Risk Oversight since November 2018. Prior to that time, she was employed as a Remediation Policy/Risk Manager with the pursuer from 2011 to 2017. Her evidence covered the processing by Group of PPI complaints, the use of Group letterhead in that context and whether it could have proactively identified if an insolvent borrower had a possible PPI claim against any entity in the RBS group. The latter topic was prompted by an argument advanced by the debtor, to the effect that the pursuer was the author of its own misfortune in failing to appreciate that the debtor might have had a claim against it for PPI mis-selling and, had the pursuer proactively elicited this, set off could have been effected during the Trust Deed process. This witness also spoke to the accumulation of indebtedness on the part of the debtor and the claims RBS submitted in the Trust Deed process (which was uncontroversial), and the statement contained in the footnote to a *pro forma* checklist ("Agency agreements exist between members of The Royal Bank of Scotland Group") the pursuer says would have been completed at the time (which was controversial). None of the original paperwork relating to the loans to the debtor (with which PPI would have been associated) was extant.

[30] The witness explained that complaints relating to PPI mis-selling were managed centrally by a dedicated team, whose numbers varied between 1,200 and 2,500 staff at any one time. A centralised approach was adopted because complaints were made in respect of a wide variety of companies or brands within the RBS Group (including RBS, Nat West, Mint Limited, Style Card, Direct Line, Trust House Forte and Churchill, among others), not all of which were extant. A centralised approach ensured the best means of training and

monitoring the team responding to PPI claims; it ensured consistency of treatment of all PPI complaints and it was more efficient when, as was often the case, a complaint was received which was not directed to a specific entity but simply against "the Royal Bank of Scotland" or against "any and all of the policies across any Group brand". She understood that Group was settling claims on behalf of RBS and other entities.

[31] The witness explained that Group letter-headed paper was used when communicating to PPI claimants, in part because some brands no longer existed and, operationally, it was simpler to send one letter (ie covering all brands or entities within the RBS Group) to each customer than one from each of these brands or entities. This approach had also been tested via customer feedback and was adopted with the knowledge of the regulator, the Financial Conduct Authority ("the FCA").

[32] In relation to proactive redress, as suggested by the debtor, this would have required a team about four times the size of the existing team. The effort involved would have been huge and disproportionate. These were some of the factors that led the regulator not to require this approach. In any event, sample testing of a proactive approach with a small number of potential claimants was shown not to be particularly effective. Multiple letters were often required to elicit a response; not all PPI policies were mis-sold and some customers who had a potential complaint nonetheless preferred to retain the cover the PPI policy afforded. Overall, the highest complaint percentage of those proactively approached was, at 55%, not significantly higher than the overall percentage of those who claimed (at 45%).

[33] To put this in perspective, the witness explained that the entities within the RBS Group sold approximately 7.2 million PPI policies. Some of these had been sold before records were computerised. Manual searches would therefore be required of all papers held

in branch basements or other archive facilities. Once a potentially relevant customer had been identified, it would then be necessary to ascertain if this customer had already made a claim; whether the customer remained a customer and (for the purposes of the debtor's argument) their insolvency status and, if insolvent, whether an insolvency practitioner could be identified. Of the 7.2 million policies referred to, there was no, or incomplete, details for around 70% of this cohort. At one point, she likened such a search to that of a "needle in a haystack". Even if an insolvent customer who had been sold a PPI policy was identified, a customer could not be forced to make a claim for PPI. At a later point in her evidence, she also confirmed that no investigation could be made into a customer's potential PPI claim without their consent, or even searches against their names and addresses, as this was impermissible for data protection reasons.

[34] In his cross-examination of this witness, the debtor's senior counsel, Mr Webster QC, asked her if sums paid out as compensation for PPI mis-selling were re-allocated among the Group's companies (she surmised that this might be the case for extant brands, but she couldn't speak to the details of this other than that this was dealt with by the finance department); from what point in time the debtor's loan documentation was missing (she rejected the suggestion that it had only been lost in the last year; it had been identified as missing by the point of the debtor's PPI claim back in 2014); and the average length to resolve a PPI claim (it could take between 6 to 12 weeks, but usually 8 weeks). These latter figures were on the footing that a customer and a related PPI policy could be identified. She was pressed to accept the proposition that it would have been feasible for Group to identify insolvent customers as a sub-group and then to investigate whether they might have potential PPI claims. While she acknowledged that in theory that might sound reasonable, she referred to the difficulties she had already referred to which precluded investigating

claims pro-actively. More fundamentally, the management of insolvent customers was undertaken by a completely separate department. The oversight of customers' insolvency process was a very specialised field. Even if the insolvency side could produce a list, or if insolvency practitioners could be persuaded to notify insolvencies to the Group for this purpose, that would not make it any easier for Group to identify if any of those individuals had PPI claims. She maintained that it would still be like looking for a needle in a haystack. Furthermore, the FCA did not require this approach of the banks. The witness could not comment on the proposition that the Group could put pressure on trustees to secure discharges of any liability of the Group to pay PPI compensation.

Carol Paton

[35] The pursuer's second witness was Carol Paton, Head of Litigation & Investigations at NatWest since 2018. Prior to that, she had been employed by the pursuer as Head of Litigation & Investigations (2016 to 2018), Head of Litigation, Personal & Business Banking (from 2015 to 2016) and Head of Litigation, Retail and Insurance (2010 to 2015) and in a variety of other roles in the Royal Bank's legal department (1997 to 2010). She spoke to the General Agency Agreement put in place in June 2000 (noted above, at para [17]), which she understood the pursuer, Group and NatWest to act on behalf of each other in the course of their respective businesses, and to the RFTS (noted above, at paras [21] to [23]). In relation to the RFTS, she confirmed that the debtor was undoubtedly a personal customer of the RBS and therefore fell within the definition of "Personal & Business Banking", as referred to in the 2016 Group Accounts.

[36] In cross-examination, Mr Webster explored with the witness her use of the word "understood" in the passage of her witness statement where she described Group (via the

PPI team) settling PPI complaints from customers of the different RBS group companies. She explained that this was done under the General Agency Agreement. She had worked closely with the PPI team since 2008; she remembered discussions with that team about how best to correspond with customers and, given the sheer range of products alongside which entities and brands within the RBS group sold PPI, the use of a single-branded letterhead (of Group) was agreed. She confirmed that the agency was on behalf of NatWest and RBS, as they were the two main subsidiaries and held banking licences. There were others for whom Group also acted.

[37] The witness was challenged that her understanding of the General Agency Agreement, to enable each party to it to act on behalf of another, was incorrect. She clarified her understanding: so far as she recalled, RBS and NatWest appointed each other as agents and that both appointed Group to act for them but she would need to check the terms of the General Agency Agreement. After its provisions were put to her, she confirmed her understanding (just noted). She accepted that under the General Agency Agreement Group did not appoint anyone as an agent on its behalf, but she observed that Group was the parent company of the RBS Group. The General Agency Agreement was, as she put it, an agreement that "went sideways and upwards". Group did not appoint any agency "downwards" under the General Agency Agreement, meaning that it did not appoint subsidiaries such as RBS or NatWest to act on its behalf.

[38] The topic of the degree of co-ordination required in settling the many claims was also explored. She agreed that, given the multiplicity of trading entities, a degree of coordination by the Group was required to make offers on behalf of others. This would be in terms of record-keeping and details of loans paid down. Most complaints related to wholly-owned subsidiaries that "sat within the Group" and the "vast majority of these were RBS loans".

When pressed for more details of the written instructions governing this, she explained that this level of detail was below her level of responsibility. She accepted that there would be some collation of customer details and that these would most likely be in writing.

[39] At this point Mr Webster took an objection to the evidence he had just elicited, as contrary to the "best evidence" rule. In particular, so far as I understood the objection, it was that the witness had confirmed that there was other documentation –specifically, written instructions within the RBS Group relative to the handling of PPI claims. He queried whether these documents might provide for Group to act in respect of PPI claims on behalf of RBS. In the absence of these documents her evidence was, he submitted, secondary and so fell to be excluded. The reply by Senior Counsel for the pursuer was that this witness' evidence was wholly consistent with that of Beverley Crawley – and which was wholly unchallenged – that Group settled claims as agent for RBS. All that this witness had done was to identify the document by which the legal agency was established, namely the General Agency Agreement. However, there had also already been parole evidence from this witness that Group acted on behalf of RBS in settlement of PPI claims and that this was based on the General Agency Agreement. That agreement predated the onset of PPI claims. The only question was one of interpretation of the General Agency Agreement. It was not a "best evidence" objection.

[40] In re-examination, Carol Paton confirmed that PPI was a significant episode for the RBS Group. However, the genesis of the General Agency Agreement had been RBS's earlier acquisition of NatWest and, rather than merge the two entities, it was simpler to have the General Agency Agreement so that each could act for the other and to facilitate customer engagement across the brands of the two main banks. She was asked, under objection, to give an example of the kind of activities that might fall within "management and control" by

Group on behalf of the subsidiaries. She surmised that this would include contact with the regulator. (The objection was not maintained in submissions.)

Michael Cooper

[41] The pursuer's final witness was Michael Cooper, the pursuer's Senior Legal Counsel since 2014. He spoke to the assignation of certain rights to MRL by virtue of the assignation (Notice of which was provided by the Notice of Assignation, quoted above, at paragraph [21]) of all protected trust deeds made between 8 November 2001 and 11 October 2006 where RBS were entitled to prove as a creditor. He noted that the debtor's Trust Deed did not become a protected trust deed until 24 October 2006. He explained that this issue had been raised in the context of the payment action in 2016 and he had undertaken investigations at that time. The package of debt sold to MRL comprised only accounts from the business of RBS known as "Direct Finance", which were consumer operations carried out by Churchill and Lombard Direct. The debtor did not hold any Direct Finance products and so her debts would not have formed part of the debt package sold to MRL. In any event, he found no evidence that the assignation had ever been intimated to the debtor or her agents or trustee. A colleague had also contacted MRL's solicitors at that time, who confirmed that there was no evidence that MRL acquired the debtor's debt and she was not recorded in their systems. In short, he had found nothing in the investigations in 2016, or since, to suggest that RBS had sold, assigned or otherwise transferred the debtor's account to MRL.

[42] In cross-examination, senior counsel explored what the witness had meant by the word "published" used in conjunction with the assignation. The witness revised his language to "issued". He was not sure how this was done. He was not surprised that it was

a "To Whom it may concern" letter, rather than individually addressed. He was not entirely sure to whom it would have been issued but, from the language (eg the references to the payment of dividends), he surmised it as sent to insolvency practitioners.

The debtor's proof

[43] At the close of his proof, Senior Counsel for the pursuer indicated that he had no need to cross-examine the debtor (the first defender). Accordingly, her witness statement was agreed to be her evidence in chief. The form of her witness statement is a little unsatisfactory in that it appears that certain questions or passages of documents were put to her, but these are often not noted. An answer is simply recorded which doesn't appear to relate to the preceding or following paragraph. So, for example, the sentence "I don't know anything about what is said here" is a free-standing paragraph and, to say the least, uninformative. Often, she is endeavouring to speak to events years ago (eg loans taken out more than twenty years ago). Understandably, given the passage of time, the debtor had no clear recall of the amounts of the loans, the Trust Deed process (except that it went on for a period of years while she paid a monthly figure of between £200 and £600), or how she acquired any PPI product. She could not recall ever being told of any agency arrangement or with whom she contracted. She was aware that Group had declined to pay the balance of the settlement sum (of c £10,000). She would not be able to repay the amount already paid to her (of c £1100) as she had spent this.

Discussion

The first core issue: title to sue

[44] The debtor's challenge to the pursuer's title to sue rested on three discrete bases:

(1) Whether the debtor's Trust Deed was transferred to MRL (which I defined as the assignation issue, at para [4], above);

(2) Whether the RFTS effected the transfer of the debtor's liability to RBS, to the pursuer (which I defined as the corporate successor issue, at para [3], above); and

(3) Whether the counterparty in the compromise of the debtor's PPI claim was Group, not the pursuer (which I have defined as the agency issue, at para [2(1)(iii)] above).

The first question involves consideration of the meaning of a "protected trust deed" in the context of the Notice of Assignation; the second question involves a consideration of the RFTS; and the third question involves a consideration of the several documents relied on by the pursuer to establish that Group entered into the compromise with the debtor as its agent.

Title to sue (1): the assignation issue

The Notice of Assignation

[45] It must first be noted that the only document produced was the Notice of Assignation and not the terms of the assignation itself. The Notice of Assignation refers to the transfer of insolvent accounts. Having regard to the references to "Bankruptcy Order", "sequestration", "Individual Voluntary Arrangements" and "Protected Trust Deeds", it is clear that the assignation concerned only those accounts subject to the specified insolvency procedures, and which correspond with the personal insolvency regimes in England and Scotland. The question in this case is whether the debtor's Trust Deed fell within the phrase "accounts … subject to … a **Protected** Trust Deed made between 8 November 2001 and 11 October 2006" (emphasis added). In considering the interpretation and application of

those words, it is necessary first to consider trust deeds as a form of personal insolvency in Scotland, and the creation of a statutory form of trust deed (including a "protected" trust deed) by Schedule 5 of the 1985 Act.

Common law trust deeds

[46] Prior to the 1985 Act, trust deeds were a voluntary non-statutory means by which an insolvent debtor (which could include a partnership) could settle the claims of the debtor's creditors. A debtor could do so by granting a trust deed for the behoof of his creditors, usually in the form of an irrevocable conveyance of his whole estate to his trustee for realisation and division among his creditors, and in return for which a debtor could expect a discharge of the creditors who acceded to the trust deed. The advantage was that if the trustee completed title or took possession of a debtor's estate this had the practical effect of excluding certain forms of diligence (eg arrestment was not competent in the hands of the trustee, because he held the insolvent's estate as agent for the creditors and for their benefit). A trust deed was, in effect, a mutual contract. However, as a voluntary deed, the trust deed only bound those creditors who acceded to it and a creditor who was unwilling to agree to its terms (a non-acceding creditor) could disregard it and either seek to constitute his claim in an action against the insolvent or his trustee, or he could sequestrate the insolvent (the effect of which would be to defeat the whole arrangement). A further disadvantage was that any discharge of the debtor extended only to the debts owed to the acceding creditors.

Statutory trust deeds and protected trust deeds under the 1985 Act

[47] The 1985 Act introduced a statutory form of trust deed (provided for in Schedule 5) which was intended to address the unsatisfactory aspects of common law trust deeds. It did

so by creating a "protected" trust deed (governed by paras 5 to 10 of Schedule 5), whose advantages were two-fold: (i) to create a means by which creditors could (absent actual consent) be deemed to consent to the trust deed, and thereby be bound by it; and (ii) to restrict the rights of non-acceding creditors (eg by precluding diligence or resort to sequestration during the currency of the protected trust deed): see paragraphs 6 and 7 of Schedule 5 to the 1985 Act and paras 24.32 and 24.33 of the 1982 *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* of the Scottish Law Commission (Scot. Law Comm. No. 68) ("the SLC Report"). (While these paragraphs in Schedule 5 of the 1985 Act have been repealed or replaced by other provisions consequent on the Bankruptcy and Diligence etc (Scotland) Act 2007 ("the 2007 Act"), the debtor's PTD fell within the provisions as originally enacted.) A trust deed becomes a protected trust deed only if (i) the trustee has not received written notification of objection from a specified number of creditors (a majority by number or not less than one-third in value) within five weeks from the date of publication of the *Gazette* notice of the grant of the trust deed and (ii) the trustee complies with the other procedural requirements (see para 5(1)(d) and (e) of Schedule 5). A trust deed that complies with paragraphs 6 and 7 of Schedule 5 is referred to as a "protected trust deed": paragraph 8 of Schedule 5.

[48] While I have not had the benefit of submissions on the terms of Schedule 5, it is clear that not all statutory trust deeds acquire the status of being a "protected" trust deed. That status is acquired only upon satisfaction of the statutory criteria just noted. The acquisition of the status of a protected trust deed is not a matter of form. It is only upon a trust deed becoming protected that the rights of non-acceding creditors are constrained. From a commercial perspective, the effect of a trust deed becoming "protected" brings a significant degree of certainty that the debtor's assets will be applied in an orderly fashion toward

repayment of the debts of creditors and, if the debtor's assets and liabilities are known, a reasonable estimate can be made of the likely realisation of the creditors' claims from the estate subject to the trust deed.

[49] There was nothing in the terms of Schedule 5 which applied to the debtor's Trust Deed to suggest that the effect of becoming protected was backdated to the date when the Trust Deed was first granted. The language of the provision suggests that the protective efforts of a trust deed are prospective: paragraph 6 provides that "[w]here the provisions of paragraph 5 of this Schedule have been fulfilled, *then* …" (emphasis added). See the careful and thorough analysis of the trust deed regime in chapter 22 of *Bankruptcy* by Donna McKenzie Skene (2018, Scottish Universities Law Institute Ltd).

[50] Returning to the language of the Notice (quoted at the end of para [45], above), the debtor's position was in effect that it was enough if the Trust Deed had been granted within the time-frame in the Notice, whereas the pursuer's position was that it had not become protected within that same time-frame. In my view, the debtor's approach does not respect the language of the Notice. The Notice of Assignation did not refer to the "grant" of a trust deed. It may be presumed that the use of the phrase "protected trust deeds" within the Notice was used as a term of art (ie as created by Schedule 5), and was intended to exclude any deed which had not acquired that status within the time-frame stipulated in that Notice. Considering those words in the commercial context, the potential uncertainties associated with unprotected trust deeds (ie where it was not yet known if, or when, they would become "protected") would be an obvious reason to exclude them from the assignation in favour of MRL. Applying the foregoing analysis to the language of the Notice of Assignation, a protected trust deed is "made" when it acquires that status, but not before. On the facts, I find that the debtor's PTD was "made" on 24 October 2006 and, for the purposes of the

Notice of Assignation, the debtor's PTD fell outwith the indicated time-frame. This conclusion is sufficient to dispose of the assignation issue.

[51] For completeness, I note that this conclusion is consistent with the evidence from the solicitors to the assignee, MRL, that they had nothing in their files to support the contention that the debtor's PTD had been assigned to MRL. Finally, even if the Notice of Assignation had been habile to include the debtor's PTD, there was no evidence to show that the debtor had notice of the assignation at the material time. Indeed, Mr Webster's cross-examination of Michael Cooper on the point of "publish" or "issue" tended to illustrate the contrary position.

Title to sue (2): the corporate successor issue and the RFTS

[52] I have set out the relative terms of the RFTS, above. In submissions, Mr McBrearty took the Court through these carefully and in detail. Mr Webster made no submission on the RFTS. Nor did he suggest that Mr McBrearty's submission was wrong in any respect. Having considered the operative terms (which are straightforward), as applied to the interlinking defined terms (which are complex, but not unduly so for a scheme such as this), and the terms of this Court's interlocutor, I am satisfied that the RFTS had the effect of transferring the debtor's obligations to RBS and RBS's correlative rights, to the pursuer.

Title to sue (3): the agency issue

[53] As noted above, the settlement of the debtor's PPI claim was negotiated ostensibly by Group (eg from the use of its letter-headed paper). The debtor takes the point that, as any indebtedness she had was to RBS (and not to Group), there can be no set-off by the pursuer (even assuming it is the successor to RBS as the debtor's creditor) because there is no

concursus crediti et debiti. In seeking to establish that Group acted as agent for RBS when settling the debtor's PPI claims, the pursuer relies principally on (i) the General Agency Agreement and (ii) the Checklist. It referred to other adminicles of evidence supportive of its position that RBS was the principal (eg the cheques paying the first tranche of the settlement sums were drawn on RBS, and the reference at the foot of the Checklist that agency agreements might exist). While I was advised that the agency issue has a long history, the debtor having first raised it in 2016, that is of no consequence. There has been no judicial determination of that issue.

The General Agency Agreement

[54] I consider first the General Agency Agreement, whose terms I have set out above. The General Agency Agreement is a general agency drawn in the broadest of terms to facilitate one member of a corporate group to act on behalf of another consistent with its terms. While in cross-examination of Carol Paton, Mr Webster laid stress on the words "certain activities" in the preambles, and that he noted this phrase was not otherwise defined, that phrase was simply a portmanteau phrase to cover those activities, among "all forms of banking business RBS carries out and which RBS wishes NatWest to perform on its behalf.". In relation to the grant of agency by RBS in favour of Group, the scope of the potential agency Group was to perform on behalf of *inter alia* RBS and for its account, was "certain activities relating to the management, control and supervision of their respective businesses" and which was defined as "the Group Activities".

[55] In considering the terms of the General Agency Agreement it is relevant to note, as stated in Preamble A, that RBS and NatWest are wholly-owned subsidiaries of Group. That is the context in which to construe the General Agency Agreement, which is to facilitate the

operations of the RBS Group, including conferring on Group authority to act as RBS's agent in respect of "certain activities". That phrase is qualified only by the stipulation that they relate "to the management, control and supervision" of RBS's business. It matters not, in my view, that the General Agency Agreement subsisted long before PPI claims emerged. In my view, the General Agency Agreement was sufficiently broad to cover Group's co-ordination and settlement of PPI claims across the RBS Group.

[56] While Mr Webster noted *en passant* the terms of clause 3.4 (requiring Group to disclose to customers at all times that it is acting for RBS), he did not develop his assertion that this was a condition precedent. Having considered the terms of the General Agency Agreement, there is in my view nothing in its terms to support that contention. There is no express provision which stipulates that this (or indeed any provision) is a condition precedent; nor is there any term that stipulates a penalty or a want of power if a specific provision is breached. Having regard to the terms of the General Agency Agreement, the Court should, in my view, be slow to read in restrictions that are inimical to the spirit of a commercial agreement drawn in broad enabling terms, among entities which are part of the same corporate family. Likewise, while Mr Webster made brief reference to the Company, Limited Liability Partnership & Business (Names & Trading Disclosures) Regulations 2015 (the 2015 Regulations"), this was a non-point, as it was not suggested that any non-compliance affected the capacity or power of a corporate entity in breach of the 2015 Regulations of affected the validity of any contract. I am persuaded that the General Agency Agreement is in sufficiently broad terms to cover the activities of Group in co-ordinating and resolving the many PPI claims made against the different companies within the RBS Group (including RBS) and its several brands.

The best evidence objection

[57] I next address Mr Webster's objection that the pursuer has failed to provide other documentation relative to the PPI claims (see para [39], above). In my view, that objection does not engage with the witness' evidence and it is misconceived. Carol Paton, who has been with RBS as well as other entities within the RBS Group since 1997, was well placed to speak to the General Agency Agreement. She remembered it being put in place. She had an intimate knowledge of the structure of the RBS Group and its operation, and, in her many senior legal positions, she had experience of the operation of the General Agency Agreement to activities of members of the RBS Group over the years. In relation to the management of the PPI claims, she spoke to the desire for a co-ordinated response across the RBS Group (the risk management reasons for which are obvious) as well as the practical necessity to do so (eg because some brands no longer existed). This evidence, and on which she was not challenged in chief or in cross, suffices to prove that Group had the authority to, and did act on behalf of, RBS in the settlement of PPI claims made against RBS. To the extent that she referred to other documentation which had not been produced, on a fair reading of her evidence, it was clear that she was referring to more specific protocols or arrangements but which related to matters below her level of responsibility. It is important to note that by the time of the objection Carol Paton had already given her evidence that the PPI claims were coordinated by Group. This evidence was elicited without challenge. So far as I understood Mr Webster's objection, it relates to the failure to produce that lower-level documentation.

[58] Leaving aside the doubts I have about the competency of counsel objecting to evidence he himself has elicited, and which questioning gave the impression of trying to generate a "best evidence" point (the questions were directed solely to the *existence* of protocols, not as to their scope or terms), this does not, with respect, appear to me raise a

question of the "best evidence". The critical question is whether the pursuer has proved that RBS appointed Group to coordinate and settle PPI claims against it. The evidence of Carol Paton and Beverley Crawley to that effect is unchallenged. It is difficult to see the relevance of more specific protocols carrying out that agency arrangement. More fundamentally, the pursuer is not seeking to prove the terms of those lower-level protocols. The mere fact that other documentation may exist does not bring the "best evidence" rule into play in respect of the anterior matter: namely, the agreement that Group act on behalf of the other entities within the RBS Group and to which Carol Paton (and Beverley Crawley) spoke. It was Carol Paton's understanding that the General Agency Agreement was the basis for that arrangement.

[59] In any event, in my view this objection is mis-conceived. The best evidence rule is, generally, that the best evidence of the *terms* of a document is the document itself: see Lord Drummond Young in *Peacock Group Plc* v *Railston Ltd* I [2006] CSOH 26; 2007 SC 269 at paragraph 10, citing Lord President Emslie in *Scottish Universal Newspapers Ltd* v *Ghersons's Trustees* 1987 SC 27 at p 47. I did not understand it to be any part of the pursuer's case to prove the detail or operation of the agency arrangement between Group and RBS at lower levels of implementation. In those circumstances, the best evidence rule has no operation and I repel the objection. I do so against the background where the debtor does not attempt to lead evidence to prove the contrary position. So, for example, there was no challenge to the fact that the settlement cheques were drawn on an RBS account and which was consistent with Carol Paton's (unchallenged) evidence that there was an accounting or adjustment of such payments across the RBS Group.

The Checklist

[60] As I have already determined the agency issue in favour of the pursuer, I need only observe that had the Checklist been the sole source of evidence of agency I would have been disinclined to find that this was sufficient- not least because it has not been proved that the pursuer ever completed such a document and because its terms do not obviously extend to Group's coordination of PPI claims. However, the sentence at the foot of the checklist does reinforce the evidence as to the operation of the General Agency Agreement.

Was Group acting as a disclosed or undisclosed principal of RBS?

[61] This was addressed principally in submissions, as apart perhaps from the Checklist, the pursuer did not rely on any other evidence to prove that Group acted as a disclosed principal in respect of settlement of the debtor's PPI claim. While I find that Group were acting as the agent of RBS in the settlement of the debtor's PPI claim, on the evidence, Group was acting as an undisclosed principal at the material time.

The debtor's reliance on the failure to disclose Group was acting as agent

[62] Even if the pursuer establishes that Group acted as the pursuer's agent, the debtor argues that the pursuer's intention to assert set-off, as an undisclosed principal, is impermissibly prejudicial to the debtor. Extensive reference was made to authority (not all of which I need record) to vouch the proposition that the disclosure and acts of a hitherto undisclosed principal may not prejudice the rights of the third party with whom an agent has contracted. In particular, in the debtor's submission:

> "where A ostensibly contracts with B as a principal, A ought not to be prejudiced by B's subsequent disclosure that it was actually acting as an agent for C, e.g. pleading

> of a set off of a debt owed by A to C as a defence to the enforcement of the rights which the contract ostensibly gave A against B".

In this example, A is the debtor and B and C are, respectively, the pursuer (as the successor to RBS, by virtue the RFTS) and Group. So, for example, the debtor cited *Greer* v *Downs Supply Co* [1927] 2KB 28 for the observation of Bankes LJ (at p 33) that disclosure of the agency should not defeat the rights of the third party (ie the agent's counterparty) against the agent. She quoted Bowstead & Reynolds, *Agency*, (21st ed) ("Bowstead") at para 8-069 to like effect ("a third party cannot be prevented by the intervention of the principal from exercising his rights against the agent"), and at para 9-012 for the proposition that "nothing must prejudice the right of the third party to sue the agent if he so wishes". Under reference to *Montgomerie* v *United Kingdom Mutual Steamship Association* [1891] 1 QB 370, *Siu Yin Kwan* v *Eastern Insurance Ltd* [1994] 2 AC 199 and Bowstead at para 8-098, it was submitted that the measure of the third party's rights is the contract made with the agent and which cannot be subsequently altered or prejudiced by the intervention or disclosure of the principal. Nor can the interests of the principal, once disclosed, "qualify or cut down" the rights of the third party: *Mooney v William* (1906) 3 CLR 1.

[63] In my view, what the pursuer is proposing to do does not contravene any rule derived from the cases cited by the debtor. The import of these cases is to protect the third party's *exercise* of a right, whether that be a right to payment (asserted against the agent or the principal) or a right of set off. In this case, there is no modification or loss of any right the debtor acquired from her compromise with Group of her PPI claim. She is not asserting a right of set off, but a right to payment. However, she has not been prevented from asserting her claim for payment against the agent (ie Group). Indeed, she has already *asserted* that claim against Group in the payment action. If the assertion of her right to payment of the

compensation were a sword, the debtor has wielded that sword. All that the pursuer seeks to do is to use set off as a shield to meet that claim. In my view, that is permissible. None of the cases the debtor cited precludes the exercise of a right of set off by the agent (here, Group) or by the principal (here, the pursuer), once its existence is disclosed, against a claim asserted by the third party (here, the debtor). This is also consistent with the very full and careful treatment of the subject by Prof Mcgregor in chapter 12 of *The Law of Agency in Scotland*, especially at paragraph 12-25.

The second core issue: The grounds for reduction

[64] It is common ground that the trustee was unaware of the debtor's PPI claim at the time she granted the debtor's discharge. I shall refer to this as "the trustee's mistake". (I consider below whether that constitutes an "error" in a relevant sense.) In those circumstances, the pursuer advanced two grounds for reduction:

1) the trustee's payment of the final dividend and grant of the discharge in ignorance of the existence of the debtor's PPI claims, which discharge is said to be gratuitous, was a unilateral error (which failing, a mutual error), and,
2) separately, the trustee's mistake fell within the English rule in *Hastings-Bass* and which the Court should assimilate as part of the law of Scotland.

Ground of reduction based on error: unilateral or mutual error

[65] The pursuer's primary position was that the trustee's mistake was an error and that the discharge was a gratuitous deed. Under reference to the observations of Lord Reid and Lord Keith of Avonholm in *Hunter* v *Bradford Property Trust Limited* 1970 SLT 173 ("*Hunter*"), at pages 186 and 191 respectively, the pursuer submitted that a gratuitous obligation entered

into in error on the part of the granter was itself sufficient to found reduction. While Mr McBrearty acknowledged that there was a difference between the grant of a gratuitous deed and the exercise of a power by a trustee, he submitted that the fiduciary nature of trustee's exercise of power simply strengthened the case for interference by the Court in the event of error.

[66] In the pursuer's submission, the trustee's mistake was a relevant error: the trustee had performed a voluntary act when deciding to pay a final dividend and, having done so, when granting the debtor's discharge. At that point in time the trustee had not appreciated that there was a further asset in the form of the debtor's PPI claim. Mr McBrearty acknowledged that, given that the trust deed was granted in the expectation that there would be a discharge (the relative term is quoted above, at para [16]), one would not normally characterise as "gratuitous" the grant of a discharge of a debtor under a trust deed. However, in the present case, the trustee's decision to pay a final dividend and to discharge the debtor was made in ignorance of the debtor's PPI claim, which was substantial. Accordingly, he argued, the effect of granting a discharge in these circumstances was to grant the debtor a valuable asset which she would not otherwise have obtained, in return for no consideration. In short, the trustee's mistake was a gratuitous error in the relevant sense.

[67] The debtor's position is that the pursuer has failed to plead or prove a relevant case of error, not least because the pursuer does not aver that any error was essential, induced by the debtor, to have been known or taken advantage of by the debtor or impetrated by fraud. Nor did the pursuer aver that the trustee had acted *ultra vires* or in breach of fiduciary duty. She submitted that bare error, which was all that the pursuer contended for, did not suffice.

[68] Separately, the debtor argued that the grounds for reduction of a discharge granted in the context of an insolvency process were extremely limited and exceptionally rare, the

most recent precedent being *Baillie* v *Young* (1837) 15 S 893 (report of the jury trial) ("*Baillie*") and (1837) 16 S 294 (the court's application of the jury's verdict) ("*Baillie No 2"*).

[69] The debtor focused on the character of the trust deed as a form of contract. This itself was uncontroversial: see *Dooneen* para 42, and Lord Trayner in *Kinmond Luke, & Co* v *James Finlay & Co*, (1904) 6 F 564, quoted with approval by the Inner House and Supreme Court in *Dooneen Ltd* v *Mond* at, respectively, [2016] CSIH 59, at para 18 and [2018] UKSC 54, *per* Lord Reed at para 10. She submitted that error as a ground of reduction generally arose in the creation of the contract. There was no such error in the formation of the Trust Deed alleged here and, in any event, a contract is not voidable on the ground of an error by one party which was not known to or taken advantage of by the other: *Scott* v *Craig* (1897) 24 R. 462 ("*Craig*"); *Angus* v *Bryden* 1992 S.L.T. 884 ("*Angus*"). *Angus* was authority for the proposition that even if there were an essential error in intention, this cannot found an action of reduction if not induced by the other party (*per* Lord Cameron at 437A-D, approving *Gloag on Contract* at p 440). Here, only the debtor could be the other party and it was submitted that there was no question of the trustee's error having been induced by the debtor. She submitted that necessary conditions for reduction should not be lower, if the error arises in the performance of a contract, rather than its formation.

[70] The debtor rejected the pursuer's fall-back characterisation of the error as "mutual": the discharge was not a mutual deed of the debtor and the trustee. It was the unilateral deed of the trustee. In any event, there has been no "error" of the debtor that could have rendered this a *mutual* error. The debtor had no rôle or involvement in the granting of the discharge and she played no part in the timing or decision to grant it. The debtor was not asked whether or when or in what terms, or by reference to what considerations, the discharge should be granted. It follows that the deed is not the result of any error by the

debtor. Further, the discharge could not be vitiated by any error of a person who was not a party to it. It mattered not that the debtor benefitted from the trustee's mistake; others did too, to the extent that they could count on the certainty the discharge afforded. Finally, the debtor rejected the pursuer's characterisation of the trustee's mistake as "going to the root and destroying the contract", or as akin to a "mistake as to the identity of the subject sold", as hyperbole.

[71] The debtor also challenged the pursuer's characterisation of the discharge as "gratuitous". This was a "gross error". She submitted that the pursuer's reliance on *Hunter* was misconceived and, being a case that concerned a unilateral error in the formation of a contract, was readily distinguishable. Nor was the discharge "voluntary", as the pursuer had submitted. The trustee acted in fulfilment of a fiduciary duty. Under reference to the observations of the Scottish Law Commission ("the SLC") in their Report (No 239) on Trust Law ("SLC Report on Trust Law"), at paras 19.23 and 19.24, the debtor submitted that the trustee's grant of a discharge was not the same as the grant of a unilateral deed. The trustee acts in fulfilment of a fiduciary duty or power granted by a third party (the truster). The debtor infers from the SLC's recommendation that there should be a statutory innovation, that there was at present no common law basis for challenging the deeds of trustees. Further, the discharge was part and parcel of the trust. The trust deed was granted in expectation of a discharge and in exchange for which the debtor had transferred her whole estate.

[72] The debtor also noted that in respect of an *intra vires* transactions of a trustee, the minimum required for reduction of the same was proof of breach of trust such as a proof of breach of fiduciary duty: *In re Beloved Wilkes's Charity*, (1851) 3 Mac & G 440, *per* Lord Truro

LC at 448; *Dundee General Hospitals*, *per* Lord Normand at pp 85 and 87-88; *Pitt* v *Holt* (2013) 2 AC 108, *per* Lord Walker at paras 73, 88 and 93. Error itself is not a ground of challenge.

[73] The debtor advances a further line of defence, arising from the peculiarity of an insolvency trust. In short, it was submitted that even if the pursuer could make out grounds of challenge that might be relevant in the context of trust law generally (which the debtor disputed), there is no justification in either precedent, principle or policy for then seeking to transpose such an approach to insolvency law and insolvency trusts. She referred to Goudy's enumeration of relevant grounds of challenge to insolvency trustee's deliverances.

Discussion of error as a ground of reduction

[74] The circumstances of this case appear unusual or are such as not frequently to occur in the reported cases. In this case, the pursuer seeks reduction of the debtor's discharge, the existence of the which otherwise precludes the pursuer's claim (*Whyte* v *Knox* (1858) 20 D 970; *Dooneen*, *cit supra*). It does so in order to set off the unpaid balance of the debtor's PPI claim against the unpaid balance of its own claim which it had submitted in the debtor's Trust Deed process. The kind of error at issue in this case does not fall within the categories identified by Prof McBryde (see para 15-01, *The Law of Contract in Scotland*, 3rd ed ("McBryde on *Contract*")). The pursuer does not argue that it was taken advantage of or that the error was induced by any party; nor does it rely on any misrepresentation or fraud. It does not argue that the error arose in the formation of a contract. It is not suggested that the discharge was *ultra vires* the trustee. The debtor's criticisms of the pursuer's failure to invoke one or more of these grounds is therefore without force. The pursuer's case is that the discharge was a gratuitous deed which is reducible on the grounds of error on the part of the granter.

The most authoritative and recent case the pursuer cited to the Court in support of its position was *Hunter*.

Error in relation to a gratuitous deed

[75] In *Hunter* the House of Lords affirmed the proposition that a gratuitous deed is reducible on the grounds of essential error on the part of the granter (*per* Lord Reid at p 186). Under reference to *McCaig's Trustees* v *the University Court of the University of Glasgow* (1904) 6 F 918, Lord Reid regarded it as reasonable and in accordance with Scots law that "a person should not be entitled to retain a gratuitous benefit given under essential error on the part of the person conferring the benefit" (*ibid*). Lord Keith also regarded that proposition as settled law and he figured as examples "essential error as to the nature of the obligation undertaken" and a "material error with regard to some extrinsic deed or circumstance" (*ibid* at p 191). Fairly construed, that passage does not suggest that those examples were exhaustive of the particular kinds of essential or material errors that might found a reduction; nor does it suggest any particular form of wording was required to plead such a case.

Exclusion of compromises as a class from gratuitous error as a ground of reduction

[76] In considering whether a case falls within the class of cases governed by *Hunter* it is necessary, in my view, to consider (i) the quality or nature of the error, and (ii) whether the deed was gratuitous. Given the debtor's reliance on *Scott* v *Craig* (1897) 24 R 462 ("*Scott*"), it is also appropriate to consider the nature of the deed under reduction. I begin with this latter factor. This is because, leaving aside potential grounds of reduction generally, the courts have consistently set their face against challenges which seek to open up

compromises or settlements of claims (see McBryde on *Contract* at para 15-24 and his reference to the policy considerations for this rule, at footnote 49), even in the case of unilateral or mutual error (*per Gloag On Contract* at 456) or fraud (*ibid* at 479-480). It respectfully seems to me that the case of *Scott*, cited by the debtor, falls within that class of case. In any event, the discussion of error in that case was *obiter*, as the ground of that decision was the want of title to sue by a single trustee. There was no suggestion in that the discharge under challenge in this case was of the character of a compromise. In my view, that is correct. Accordingly, cases relating to compromises, such as *Scott*, are of no relevance.

Consideration of the nature of the error

[77] I next consider the nature of the trustee's mistake. The debtor takes the point that the pursuer has not averred that the error was "essential". Beyond that observation, I did not have the benefit of submissions on the necessity of pleading "essential error" or what that phrase might encompass. I am bound to note that the meaning of "essential error" has been described in one of the leading text books as "one of the most complex, and confusing, areas of Scots common law" (*per* McBryde on *Contract* at para 15-04). In the next passage of that text, Professor McBryde regrets the uncertainty created by the use of phrases such as "essential error", "error in the essentials" or "substantial" error. He offered the view that, at least among the institutional writers,

> "the meaning of 'essential error' was not settled, <u>but it was probably no more than an attempt to distinguish between substantial and insubstantial errors</u>. No amount of semantic discussion will enable a definite line to be drawn between those two types of errors." (Emphasis added.)

I also note that Gloag considered that a discharge was reducible on the ground of mutual error and "taken under a *material* error as to the nature or extent of the right in question" (emphasis added): *On Contract* at p 454. I bear those comments in mind in my consideration of this issue. The starting point to note is that, if the debtor's PPI claim had been realised during the currency of the Trust Deed process, it would have increased the debtor's assets available for distribution by a third and would have yielded a similar uplift in the return to the pursuer as the debtor's sole creditor. In my view, the omission to ingather this asset may be described as a "substantial" or "material" error. On any view, it was not an insubstantial one in its effect.

[78] It is here convenient to deal with the debtor's argument that the absence of evidence from the trustee is fatal to the pursuer's case. I do not accept that submission. The trustee under the debtor's Trust Deed was under a fiduciary duty to ingather the debtor's estate. Given that, on the evidence, the debtor's PPI claim was a significant asset with low realisation costs, and given the relatively short timescale within which the pursuer received and compromised the debtor's PPI claims, it is difficult to envisage a scenario in which the trustee, had she known of the potential for PPI claims, would have declined to ingather this. Rather, those circumstances support the inference that, had the trustee known of the PPI claims she would have pursued them for the benefit of the debtor's creditors. In my view, the trustee's failure to ingather the PPI claims may be described as a "material" error, it is one capable of founding an action of reduction. Testing this another way, had the trustee known of the PPI claim, it is inconceivable that she would have granted the debtor's discharge until that claim was realised as an asset for the benefit of the debtor's creditors.

Was the discharge gratuitous?

[79] The next matter to consider is whether the grant of the discharge was "gratuitous". It is of course correct, as the debtor notes, that the grant of the Trust Deed is made in contemplation that at the conclusion of that process the debtor will be granted her discharge and, further, that it may be said that the trustee is under a "duty" to grant the discharge (as the debtor argued). However, in my view, those features do not determine whether the discharge was gratuitous, particularly if it transpires that the discharge was granted in error or at a material undervalue, as is the case here. Three cases were cited to me in which the Inner House considered whether a discharge was "gratuitous": *Ross* v *Mackenzie* (1842) 5 D 151 ("*Ross*") (Second Division), *Dickson* v *Halbert* (1854) 16 D 586 ("*Dickson*") (First Division) and *Macandrew* v *Gilhooley* 1911 SC 448 (Second Division).

[80] In *Ross*, the pursuer sought reduction of a discharge granted by the trustee under a trust deed granted by her husband for the behoof of his creditors, and which purported to discharge any claim for *legitim* she had against her brother (Thomas Mackenzie) as the executor of their father's estate. The deceased had granted a trust settlement which settled £3000 on each of his sons and settled £500 on the pursuer, in each case declaring that these provisions were in full payment and satisfaction of his children's claims for *legitim*. Upon their father's death the pursuer's two brothers accepted the testamentary provisions in their favour. The pursuer's husband became insolvent. In the belief that the pursuer was only entitled to one-half of the fund and that her brother, the executor, was entitled to the other one-half in satisfaction of their respective claims for *legitim*, the trustee granted the executor a discharge. However, having accepted the testamentary provision in his favour, the executor was not in fact entitled to retain one-half of the sum concerned. The pursuer rejected the testamentary provision in her favour and advanced a claim for *legitim*. She

sought reduction of the discharge of the trustee, on the footing that it was obtained by fraudulent misrepresentation or it had been executed under error *in substantialibus*, and an accounting from the executor, her brother, Thomas.

[81] Leaving aside the separate provision of £500 payable to the pursuer under her parents' marriage contract (and which the court held did not constitute a payment in respect of *legitim*), the court found that the executor was not entitled to the one-half sum he retained as *legitim* (pursuant to the settlement and discharge). The Lord Ordinary, Lord Moncrieff, found that the discharge had been granted on the footing that the pursuer had been entitled to only one-half of the sum, but that this was erroneous and she was entitled to the whole sum representing *legitim*. In analysing the nature of the error, he considered and rejected the application of the doctrine of *condictio indebiti* (the executor had not *paid* any sum in error; he had simply not paid enough). In his interlocutor, he recorded that the trustee who had granted the discharge (being the trustee of the pursuer's husband, on whom power of disposal of her property had devolved)

> "had not power, as trustee, to grant a discharge of any lawful and subsisting debt of the truster's [ie the pursuer's father, as administered by his executor, her brother], **either without value or on payment of half the sum due by law**; and that, in the circumstances of the case, the discharge so granted, while it professed to proceed not on any compromise of a doubtful claim, but for the full amount of the debt due, was, to the extent of one-half of the debt, **granted without any value whatever**, and was therefore, to that extent, altogether null and ineffectual." (Emphasis added).

Although Lord Moncrieff did not use the phrase, it is clear from the terms of his interlocutor that in his view the trustee's discharge had been granted *sine causa* in respect of the executor's purported retention of one-half of the sum to which, in law, the pursuer was entitled.

[82] In the case of *Dickson*, decided 12 years later, the Court again considered the grant of a discharge by a beneficiary under a testamentary provision "in full satisfaction of all sums

due or claims competent to me [under the testamentary provision]" but which, in truth, had been granted in error, without value and while the granter of the discharge was in ignorance of her rights. In terms of a mutual disposition and settlement between spouses, the siblings of the wife would in certain circumstances become entitled (collectively) to a sum equal to one-half of the sums received from the estate of the uncle of the wife and her siblings which (included the purser). Those circumstances came to pass. Notwithstanding that the pursuer was entitled to a one-half share from her uncle's estate, the pursuer called upon her brother-in-law, the survivor under the mutual disposition and settlement, to pay her a sum representing only a one-quarter share. He did so and she granted a discharge "in full satisfaction of all sums due". The pursuer's request at that time was based on a certain interpretation of the mutual disposition and settlement, but which was erroneous. On a proper interpretation, the pursuer was entitled to a further £600.

[83] Several years later, and after taking a different view as to the terms of the mutual disposition, the pursuer sued her brother-in-law for payment. He resisted that action and founded on the discharge she had granted. The pursuer thereafter raised an action for reduction of the discharge. While the Lord Ordinary found in her favour as to the proper interpretation of the mutual disposition (with the effect that she was due a further £600), he refused to grant reduction. He did so, essentially on the basis that the error was one of law and, as the law then stood, an error of law did not support the *condictio indebiti*. The First Division allowed the pursuer's reclaiming motion. In a careful and (for those times) full opinion, the Lord President, Lord McNeil, considered the cases, including those of the House of Lords which were said to preclude the *condictio indebiti* in cases arising from an error of law. Having reviewed the House of Lords cases referred to in the opinion of the Lord Ordinary and "searching our own authorities, so far as we have authority on the

subject" (at p 594), Lord President McNeil was not able to find it "finally decided, that in no case, and under no circumstances can an error in point of law be held as ground for a *condictio indebiti*". He continued: "But with these opinions on record, I should not certainly be disposed to counter them, *if* that had been the point here" (emphasis added). He explicitly declined to extend that tract of authority to the facts of the case before him:

> "But then I do not feel that I am at all bound to carry the doctrine any farther, and to hold that it excluded redress in the case of a party who has given a discharge, as if he had full satisfaction of all that in law he was entitled to, when it is admitted that he had not obtained satisfaction, and when his not obtaining it was not a mere error of law. I am not for pushing the doctrine so far. I can conceive cases in which error in law would not entitle the party to repetition. There are some errors in law that you cannot listen to a party pleading ignorance of, but there are other matters of a totally different kind. **In our institutional writers I find that the doctrine laid down is, that if a discharge be granted in ignorance of the legal rights of a party, it may be opened up. It is a principle with us, that if a discharge be granted *sine causa*, it may be reduced**; and however the reasoning may be extended, so as to embrace many views of the doctrine, yet it would be strong to make it a strict rule that a party cannot get redress against a discharge granted *sine causa*. I do not find any case in which the doctrine has been carried so far, and it cannot be; and it would not do to press as abstract law the doctrine laid down in the House of Lords, on a point which was not truly in the case then for decision." (Emphasis added.)

In the next passage, Lord President McNeil distinguished between a party making a payment and a party receiving payment that discharges a claim (see foot of p 595). In the latter instance, a part payment does not discharge the whole claim otherwise there would be no consideration *quoad* the element of the claim which was not paid.

[84] Lord President McNeil also drew a distinction with payments constituting a transaction, using that term in the sense of what would now be described as a "compromise":

> "Wherever there is a transaction, it is for settlement of a dispute for quiet and rest, and the prevention of farther question, and is final; and even in English law, where they are so strict about *condictio indebiti*, that doctrine is clearly admitted": at p 596.

Having again adverted to the position in English law ("When a party pays in ignorance of the law, he has no redress; but he will, if the other party receiving payment knew the law, and he did not"), Lord President McNeil observed (at p 596):

> "… it is **better to see whether, under the circumstances in which a party seeks redress, on the allegation of error of law, she had discharged her rights *sine causa*.** There is no abstract rule laid down in our law, therefore I do not enquire whether the other party knew or not. I presume he did not… It only comes to this: there is an error in accounting substantially; and therefore, in reviewing all these matters, I am very strongly impressed with the notion that it would be a very hazardous thing, and for which we have no authority, to enlist into the class of cases of discharge *sine causa* all of those views and considerations thrown out by the Lord Chancellor in these cases of *condictio indebiti* that have been referred to. **And if there be no absolute rule barring the party from redress, it is clear that every principle must lead to her obtaining it**". (Emphasis added.)

The other judges in the majority, Lord Ivory and Lord Rutherfurd agreed with the Lord President and also concurred in the conclusion that the pursuer was not meaning to comprise her future claim. Lord Ivory observed that the

> "discharge was not granted as the result of any communing between the parties as to their rights. It was on the understanding that on 'a fair accounting that was the balance due to her….'" (at p 597).

Lord Rutherfurd also stated that the discharge was not given as part of a compromise; it was not, as he put it (at 599), a "*transactio litis*".

[85] It should be noted that there was no suggestion of fraud, misrepresentation or any sort of circumvention on the part of the defender in that case. Indeed, the Lord Ordinary affirmed that there was no responsibility on the part of the defender to have ascertained the pursuer's rights. He had paid what she had requested and in return for which he received the discharge.

[86] I note that the discharges under reduction in *Ross* and *Dickson* were both granted by an executor or testamentary trustee. By contrast, in the third case, of "*Macandrew* v *Gilhooley* 1911 SC 448 ("*Macandrew*"), the document under reduction was a receipt and discharge

granted by a workman for compensation payments he had received from his employer, the defender. On the facts, the pursuer, described by the Court as illiterate, had received periodic payments but in due course he signed a receipt for sums received and which incorporated a discharge that purported to relieve the defender of all future liability in respect of the pursuer. The case is cited as an example of a gratuitous discharge. The Court noted that the receipt covered all past payments and that there had been no payment in respect of any future liability. It had no hesitation in concluding that the discharge was gratuitous. Lord Ardwall observed that there was "no consideration at all and that the discharge was purely gratuitous…. **the discharge was given for no consideration whatsoever – it is entirely *sine causa*…."** (p 453) (emphasis added).

[87] These authorities, which are binding on me, establish that a gratuitous deed may be reduced on the ground of an uninduced error which was causative of, or material to, the decision to grant the deed under challenge. This conclusion is also consistent with the statement in Menzies' *The Law of Scotland affecting Trustees* (3rd ed 1913) ("Menzies") at p 578, that a discharge of a trustee granted *sine causa* was reducible, and that on the ground of "mere error". I have no hesitation in holding that the discharge was gratuitous to the extent it purported to discharge the debtor in respect of the PPI claim she had against RBS. In the language of *Dickson* and *Macandrew*, the discharge was granted *sine causa*. Subject to the debtor's arguments regarding the special character of the granter as a trustee in an insolvency process, I find that the pursuer has established reduction on the ground of a substantial error in the grant of the discharge which was, *quoad* the debtor's PPI claim, granted *sine causa*.

Are deeds granted by trustees in a special category?

[88] Is the fact that the discharge in this case was granted by a trustee or one acting in the context of an insolvency regime relevant, or does it dictate a different result? The debtor argues that decisions of trustees, and particularly those involved in the administration of insolvent estates, enjoy a special deference and that, absent a want of due care or a breach of fiduciary duty, a trustee's decision was unchallengeable. In my view, this overstates the degree of circumspection the courts afford to the decisions of trustees. If this were correct, then the decisions in *Ross* and *Dickson,* in which the challenges to the discharges of the trustees were successful, would have been decided differently.

[89] It is of course correct that a trustee is a fiduciary and is subject to certain duties in that capacity. However, in my view, the characterisation of a trustee as a fiduciary is not conclusive of the grounds of review of a trustee's decisions. The scope, purpose and powers under which a trustee acts are likely to be relevant to this question. The cases disclose a degree of restraint by the Court to intervene, and the relatively limited grounds on which it will do so, where the trustee's decision involves the exercise of a discretion or the interpretation of a testator's intentions. In *Dickson*, the fact that the trust deed conferred on the trustees a "sole and absolute" discretion necessarily informed the limits of the Court's review in that case (on which, see Lord Normand at p 87 and Lord Reid at p 91). That case is not authority for a more general proposition that the grounds of review of a trustee's decision were limited to those canvassed in that case. It is in my view important to distinguish between distinct kinds of decisions and to which different approaches apply. On the cases cited, the courts generally adopt a degree of restraint in respect of challenges to discretionary decisions of trustees, as is illustrated by *Dundee General Hospital*, and to which, in England the rule said to derive from *Hastings-Bass* may apply. None of the authorities

cited to me would support so restricted an approach being applied to what are purely administrative or executory decisions of trustees, even if taken pursuant to a fiduciary duty. Accordingly, it is necessary to consider the nature of the discharge granted by the trustee.

Was the grant of the discharge a discretionary decision?

[90] In the event that there is no relevant ground of reduction available in Scots law, the pursuer's fall-back position is to rely on the English law rule of *Hastings Bass*, which enables courts to correct certain erroneous decisions of trustees. The debtor resists this, as an alien intrusion into Scots law. As noted above, the debtor contended for a very restricted scope for review by the Court, regardless of the character of the decision under challenge. In my view, the debtor's approach involves a conflation of discretionary and administrative decisions of trustees. The trustee's decision to grant the discharge did not involve any qualitative judgement or weighing of alternatives. Once she had ingathered the estate and had accepted the claim of the single creditor (RBS), she was involved in an essentially straightforward calculation of the dividend to be paid to that creditor. Having done so, she was bound to grant the debtor's discharge and to seek her own. These are in the nature of executory or administrative decisions, not evaluative ones in the exercise of a discretion. The grounds for reduction of such decisions are not restricted (as they are for discretionary decisions), but are those generally available in the common law. This conclusion means that in this case there is no need or basis to consider the application of *Hastings-Bass*. It follows that, interesting though parties' submissions were as to the possible incorporation of that rule into Scots law, that issue does not arise in this case, even if I had found against the pursuer on its primary ground of reduction.

The fourth core issue: exercise of the Court's discretion in consideration of the remedy of reduction

[91] The pursuer has succeeded on all the grounds necessary to enable partial reduction of the discharge to be granted. In general, it would follow that the remedy sought would be granted as a matter of course. However, this is an action of reduction. Both parties proceeded on the basis that, notwithstanding success on the merits, there remained as a discrete step the exercise by the Court of its discretion to grant or refuse the remedy of reduction. Both parties appealed to the Court's discretion. I record in the next two paragraphs the factors each party founded on as justifying the exercise of the Court's discretion in its or her favour, before turning to consider the scope of the discretion available to the Court and how it should be exercised in this case.

The factors the pursuer invokes

[92] The pursuer relied on the following factors as justifying the grant of reduction.

1. The pursuer noted that the relationship as between the debtor and RBS was one of debtor and creditor. Following the conclusion of the debtor's insolvency the unpaid balance remained.
2. After her discharge, the debtor sought compensation for her PPI claims. RBS settled these claims and agreed to the settlement sum. Part of that was paid; the remainder has been withheld.
3. Had the trustee known about the debtor's PPI claim, she would have had regard to it and its value would have been set off against RBS 's claim in the insolvency (the pursuer asserts that the trustee would have been obliged by law to do so).

4. The debtor can never have been under the impression that RBS did not intend to challenge the debtor's entitlement to be paid the outstanding settlement sum, for the purpose of set off, because (a) it was never paid and (b) that is the basis on which the sheriff court action was defended. Any obligation to pay the debtor's PPI claim compounded the loss RBS incurred from the inability to recover the unpaid balance in the debtor's Trust Deed process.

5. This action simply seeks to place the parties in the position they would have been in had the trust been administered without error. The pursuer's case puts parties in such a position. The pursuer submits that had the debtor's PPI claim been known during the course of the insolvency, the debtor would have had no arguable claim to it.

6. The debtor's stance results in the debtor having the benefit of the discharge but also retaining a "windfall" payment from the very party to whom she was unable to repay the sums that she borrowed.

7. The pursuer's case results in a manifestly fair outcome: the debtor remains discharged and the creditor is repaid to the extent that would have been possible if the trustee had not made an error (although still not repaid in full).

8. The debtor's case results in a manifestly unfair outcome: the debtor is discharged from repaying her loan to the creditor but the creditor is required nonetheless to make over further sums just shy of £11,000 to the debtor.

9. There is a manifest inequity in the case proffered by the debtor. Equitable

remedies such as reduction are available to the court in order to reach equitable outcomes. Lord Reed's postscript in *Dooneen* makes it clear that the result in that case was scarcely satisfactory. The pursuer has shown that it is open to the Court to find an effective remedy to rectify such an unfair outcome.

10. The debtor suggests that a relevant consideration is that RBS did not bring the PPI claim to the attention of the trustee. The pursuer relied on the evidence elicited from its witnesses to show that there was no obligation to search for such claims proactively. In any event, that suggestion does not change the equitable consideration that the debtor's stance results in a windfall payment to her.

11. The debtor also suggests that there is potentially a claim against the trustee. On the evidence before the Court, no such claim has been established. In any event, a claim against the trustee may very well result in a subrogated action by the trustee's indemnity insurer against the debtor to recover the sums.

12. In all the circumstances, reduction should be granted. Refusing to grant reduction would, in these circumstances, result in a significantly more material inequity than would be the case if reduction were to be granted.

The factors the debtor invokes

[93] For her part, the debtor invoked the following factors as relevant to the exercise of the Court's discretion:

1. When the discharge was granted, of the three parties (the pursuer's author,

the debtor and the trustee), the debtor had no knowledge of the PPI claims. She had no duty to investigate matters. She has done nothing wrong. Yet reduction, if granted, will, on the pursuer's case, deprive her of that which she is entitled in law to receive but for the reduction, namely payment of the outstanding settlement sum following the compromise of her PPI claim.

2. In contrast, the pursuer's author had acceded to the appointment of the trustee as a professional trustee to pursue and protect its interests. In implement of the trustee's fiduciary duties to do so, she either made relevant enquiries but did not act on them, or she made no relevant enquiries. The pursuer has an available remedy against the trustee.

3. When the discharge was granted, among the debtor, the trustee and the pursuer's author, only the latter had means of knowing that, subject only to a claim being made, it was liable to compensate the debtor for mis-selling PPI. It knew or ought to have known that it could protect its interests to draw to the attention of either insolvency trustees of the possibility of PPI claims, thus permitting the set off it now pursues, and so avoiding the result which its successor now seeks to characterise as inequitable: namely an insolvent customer having right to compensation against which set off cannot be pled. The pursuer accepts that at the material time, neither the debtor nor the trustee had any relevant knowledge. In contrast the pursuer's author had relevant knowledge. By its silence about the issue during the currency of the trust over the 7 years from 2006 to 2013, the pursuer's author is the author of the pursuer's claimed misfortune. It would be inequitable to visit a remedy

for that self-inflicted injury on a party whom the pursuer concedes was both legitimately ignorant and in good faith.

4. The debtor's plea to the irrelevance of Group's sole defence to the payment action in Glasgow Sheriff Commercial Court has been sustained. If PTA to the Supreme Court is granted and that is reversed, then this action will be superfluous. If instead PTA is refused - or is granted but the appeal is refused - then decree for payment must follow, unless Group is granted leave to amend its currently irrelevant defences. The only basis on which it could amend would be decree of reduction in this action, where the sole averred purpose of this action is to allow set off to be pled, which standing the judicially-declared irrelevance of those defences could only happen were Group permitted to amend. Group have had since December 2013 to challenge the discharge and have known since August 2014 that it was relied on by the first defender for her action against it. In these circumstances, there is no real prospect of Group not being held by the court seized of the payment action to have waived any right to challenge the reduction, long before this action was raised in February 2019 - having by then engaged in 4½ years' of litigation about the effect of the discharge while failing to state any challenge to its validity - which (if good) would have rendered those years of litigation unnecessary. Secondly, in any event, on established principles in commercial litigation there is no prospect of Group being granted leave to amend to plead a new basis for its defence after 6 years - as the Inner House acknowledged by refusing to sist the payment action pending this action. Thirdly, in its closing submissions the pursuer in this

action has expressly disavowed any need and hence intention to amend its irrelevant defences in the payment action, so decree against it in that action is inevitable. It is inequitable to grant a remedy for a purpose which must fail.

5. The pursuer submits that it seeks decree for purposes that are limited in terms which nevertheless are not stated in its conclusions. The pursuer has not made a fourth motion to amend its conclusions. In term of its conclusions, reduction would return the debtor to insolvency, and if reduction of the trustee's discharge were also granted, it would necessitate the re-appointment of the second defender or the appointment of another person as her trustee. The consequence for the debtor would be to expose her to the prejudice of insolvency, sequestration of her assets including *acquirenda*, the need for remuneration of a trustee, and the right of such a trustee to proceed against her assets for such remuneration, or repetition of the compensation which has been paid, or any other emergent creditors' claims. For 6½ years the debtor has reasonably relied in good faith on her discharge from her insolvency, and all persons dealing with her having been entitled also to do so. It would be inequitable to negate that reliance.

6. The pursuer concedes that absent *concursus debiti et crediti*, the sole purpose of this action could only be to allow the PPI compensation to be in-gathered from Group. That could only be done by a re-awakened insolvency trust, with onward distribution by way of a dividend to the pursuer. That would necessitate the return of the first defender to insolvency with the practical and inequitable consequences stated in the previous paragraph.

7. Reduction of the debtor's discharge for reasons (for which she bears no responsibility) does not justify the consequential loss of finality, and thus public certainty, that resides in a debtor's discharge under the law of insolvency. The trust deed is in standard terms, eg, identical to those in *Dooneen*. The pursuer's argument is that omission to in-gather or deal with any material asset, combined with absence of any evidence from the trustee, justifies the inference that there are relevant grounds for reduction: if that were correct, then the result for all trust deeds in materially similar terms would be that the validity of the debtor's discharge would be clouded by the same uncertainties the importance of avoiding which was identified by Lord Reed in *Dooneen* at paragraphs 13-14 as the ratio for the Supreme Court's judgment.

Consideration of the discretion available to the Court

[94] Parties were agreed that reduction is an equitable remedy. Given that characterisation, I understand them to acknowledge that the Court may have regard to other factors, apart from its determination of the factual and legal merits of the case presented. I was not referred to authorities describing the range of factors to which the Court may have regard or otherwise defining the scope of its discretion. It is appropriate that I consider the scope of the Court's discretion in the exercise of its ordinary jurisdiction in a case of reduction, before considering how to exercise that discretion in the circumstances of this case.

[95] Reduction is a form of corrective remedy. Among the institutional writers, Erskine, who described it as a "recissory" action, classified it as one of the "principal actions, which

subsist by themselves": *An Institute of the Law of Scotland*, IV.1.18. (The other three principal actions were declaratory, petitory and possessory actions.) Recissory actions are "those which our law established for voiding of deeds, services, decree, or other writings…" Stair, described actions of reduction as a means to declare legal rights "by reducing and annulling any pretended right": *Institutions*, IV.20.2. More modern treatment of the remedy of reduction distinguishes between reduction as a mode of review (ie of decrees) invoking the Court's supervisory jurisdiction, and reduction (eg of a deed) where only the ordinary jurisdiction of the Court is invoked: see, eg, "Judicial and Other Remedies", *Stair Memorial Encyclopaedia*, Vol 13 at paragraph 44 (examining the Court's ordinary jurisdiction) and paragraph 45 (examining the Court's supervisory jurisdiction). (That distinction was maintained in the Re-issue of this title (*sub. nom.* "Remedies").) A reduction invoking the Court's supervisory jurisdiction remains part of the Court of Session's exclusive jurisdiction, notwithstanding the extension by section 38 of the Courts Reform (Scotland) Act 2014 (asp 18) of the sheriff court's jurisdiction to include reduction. It is typically this first kind of reduction, invoking the supervisory jurisdiction, which has been described as an "exceptional" remedy: "it is a remedy which does not exist of right" but "must be most carefully applied" (*per* Viscount Dunedin in *Adair v David Colville & Sons Ltd* 1926 SC(HL) 51 at 55-56; cited with approval by the First Division in *Arthur v SMT Sales & Services Co Ltd (no 2)* 1999 SLT 783 ("*Arthur*") at 787A to B, *per* Lord Macfadyen giving the opinion of the Court).

[96] In this case, it is the Court's ordinary jurisdiction which is invoked. Even in the exercise of its ordinary jurisdiction, however, it would appear that the Court is vested with a degree of discretion. The best-known statement of the equitable discretion vested in the

Court is found in the speech of Lord Watson in *Grahame v Magistrates of Kirkcaldy* (1882) 9 R(HL) 91 ("*Grahame*") (at pp. 91 to 92):

> "It appears to me that a superior court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled to as a matter of course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights. There are, so far as I know, only three decided cases, in which the Court of Session, there being no facts sufficient to raise a plea in bar of the action, nevertheless denied to the pursuer the remedy to which, in strict law, he as entitled. These authorities seem to establish, if that were necessary, the proposition that the court has the power of declining, upon equitable grounds, to enforce an admittedly legal right; but they also shew that the power has been rarely exercised."

Lord President Rodger (as he then was) cited this passage with approval in *Highland and Universal Properties Ltd v Safeway Properties Ltd* 2000 SC 297 ("*Highland and Universal*") (at 299A-B), one of the "keep open" cases which affirmed the competency of a decree *ad factum praestandum* to compel a commercial tenant to adhere to its contractual obligation to keep the let premises open and trading during normal business hours. Lord Rodger observed:

> "These passages affirm the existence of a discretion in the court, in exceptional cases to deny to a party the remedy to which the party would otherwise be entitled. It is important to note, however, that the power is plainly regarded as being wholly exceptional and is to be invoked only where there is some 'very cogent reason' for doing so. Secondly, the very cogent reason must be one which would make it 'inconvenient and unjust' to grant specific implement. Finally, the power is analysed as being of the nature of a discretion. It must therefore be a discretion which the court exercises in order to prevent the party from whom performance would be required from suffering inconvenience and injustice. Since the exercise of the power is a matter of discretion, this court will be able to interfere with the Lord Ordinary's decision to grant or withhold specific implement only where he has erred in law or reached a decision which no reasonable Lord Ordinary could reach. Cf *Benson at pp 781 H-782 A per* Hefer JA."

In a case decided a year later, *William Grant & Sons Ltd v Glen Catrine Ltd* 2001 SC 901 ("*William Grant*"), concerning the grant of interdict in a case of passing off, Lord Rodger

again cited Lord Watson in *Grahame* to affirm the Court's discretion, observing (at 930D) that he

> "…did not attach any significance to the fact that the discretion to refuse the remedy to which the pursuer was entitle din strict law has been exercised only very rarely. A court will be called upon to exercise that discretion wherever the circumstances make it appropriate to do so, irrespective of whether such circumstances occur frequently or infrequently."

While *William Grant* and *Grahame* both concerned the remedy of interdict, and *Highland and Universal* concerned the remedy of specific implement, I can see no reason in principle why the observations in these cases do not apply to the remedy of reduction sought in the exercise of the Court's ordinary jurisdiction. Indeed, the first of the three cases discussed *Grahame* was a case in which reduction was refused "having regard to the great inconvenience that would result" if reduction were granted (Lord Watson's gloss in *Grahame* on the earlier case of *Macnair v Cathcart*, M. 12,832, at p 92). In *Arthur*, which concerned the withholding of the remedy of reduction to reduce an award of sequestration, and so in the exercise of the Court's supervisory jurisdiction, Lord Macfadyen, delivering the opinion of the First Division, observed (at p 787E-F) that "It is clearly established by the authorities …. that reduction is not a remedy to which a pursuer is entitled as of right on proof of some invalidity **in the deed** or decree under challenge" (emphasis added). The phrase "the deed or decree under challenge" is habile to cover both the ordinary and supervisory jurisdictions of reduction.

[97] It follows from the foregoing, that even if a party establishes a *ground* of reduction, that is not determinative of whether or not the *remedy* of reduction will be granted. On the authorities reviewed, a court's decision to withhold the remedy is wholly exceptional, and is to be done only where there is some "very cogent reason" for doing so (*per* Lord Rodger in *Highland and Universal*, *cit. supra*). Secondly, the very cogent reason must be one which

would make it "inconvenient and unjust" to grant reduction (*ibid*). Finally, the power is analysed as being of the nature of a discretion. It must therefore be a discretion which the Court exercises in order to prevent the party from whom performance would be required from suffering "inconvenience and injustice" (*ibid*).

Consideration of the factors informing the Court's discretion to grant or refuse reduction

[98] I have noted above the variety of factors parties relied on and said to inform the discretion available to the Court to grant or refuse the remedy of reduction. I propose to consider these under three broad categories, namely: (i) the conduct and responsibility of the parties for the omission of the debtor's PPI claim from the Trust Deed process and the availability of any alternative avenue of redress against the trustee, (ii) the history of the dealings and actions of the parties (or the pursuer's predecessor in title) in respect of the outstanding settlement sum, and (iii) the consequences for the parties if partial reduction of the discharge is granted.

(i) The conduct and responsibility of the parties

[99] In considering the equities in any case, the culpability or responsibility of one or other party for the state of affairs the Court is being asked to reverse is likely to be a relevant consideration. It is in this context that the debtor contends that the pursuer (or its predecessor in title as creditor of the debtor) is the author of its own misfortune. This is premised on the argument that RBS could have pro-actively investigated whether an insolvent customer might have any nascent PPI claim, which could then be set off in any ongoing insolvency process. In light of the evidence I have heard from the pursuer's witnesses, I accept that that was not a realistic or reasonable step RBS was required to take. I

decline to infer any fault on the part of RBS, as the debtor urged me to do. In relation to any responsibility on the part of the debtor, it is accepted that the debtor was in good faith and that at the time of her discharge she was unaware of the possibility of making a PPI claim against RBS. It follows that neither party is responsible for the omission of the trustee to realise the debtor's PPI claim as an asset in the Trust Deed process. While the debtor also suggests that the pursuer has an alternative avenue of redress in the form of an action against the trustee, I am not persuaded that grounds for recovery would be established. At the very least, as some of the arguments in this case disclose, the grounds of any action against the trustee may be problematic. In any event, on the evidence, the trustee was no more or less at fault than the debtor or RBS. Accordingly, in respect of the first factor, I find that neither the debtor nor RBS was responsible for the trustee's mistake; both acted in good faith. Their respective conduct is therefore a neutral factor.

[100] I turn to consider the history. There is a protracted course of dealing between the parties, or, more accurately, between the debtor and the pursuer's predecessor in title (and Group as its agent). Prior to the raising of this action, the debtor went through the Trust Deed process. This commenced in 2006. The debtor was only discharged from that process in December 2013. Her PPI claim was made in early 2014. Within a few months thereafter a compromise was reached and the amount of the settlement sum agreed. A small part of this was paid. However, the outstanding settlement sum has been withheld since that time. In order to secure payment of the outstanding settlement sum, the debtor was obliged to raise the payment action, which she did against Group in August 2014. I have set out the procedural history above (at paras [8] and [9]), but the pursuer succeeded at first instance in the payment action and at each level of appeal.

[101] A few days before this case was to be advised, the Court was informed that Group's PTA to the Supreme Court in the payment action had been refused. While the pursuer had expressed the hope that this case would have an impact on the payment action in the Supreme Court, the interrelationship between the payment action and the outcome of this case remains less than straightforward. For the reasons the pursuer explained, it raised the present action in 2020. With commendable frankness, the pursuer's senior counsel acknowledged that it was only relatively lately appreciated that the proper counterparty to the debtor's PPI claim was the pursuer, as the successor to RBS and, further, that Group acted as the undisclosed agent of RBS at the material time. Accordingly, even if reduction of the discharge were granted in this action, the pursuer would require to amend the payment action in order to reflect the position, first adopted in these proceedings, that the correct counterparty to the debtor is the pursuer (and not Group, the defender in the payment action). While the pursuer assumes that amendment would readily be granted in the payment action, I share the debtor's doubts as to whether the court seized of that issue would so readily grant that amendment, given the protracted procedure in the payment action and the impact of such an amendment at what can only be described as an exceptionally late stage in that case. Nor would I presume to trespass on the discretion available to the judge in the payment action in respect of any amendment.

(ii) The consequence of reduction for the parties

[102] In relation to the consequences for the parties if reduction is granted, in my view this is the most problematic factor for the pursuer. The pursuer made it clear that it would not seek to recover from the debtor any sum already paid toward her PPI claim. It restricts any set off it seeks to exercise against the outstanding settlement sum. In light of the pursuer's

stance, issues of reliance, prejudice, unjustified enrichment or repetition do not arise. However, the pursuer's approach seeks to elide the real practical and procedural difficulties that would arise as a consequence of partial reduction of the debtor's discharge. The pursuer has focused only on the effect of reduction on it. It underestimates the impact on the debtor. However, there are, in my view, two principal difficulties for the pursuer, even if partial reduction were granted. These concern the manner by which any balancing of accounts in bankruptcy is to be effected, and the impact of a partial discharge on the debtor. In relation to the balancing of accounts in bankruptcy, the pursuer's position appears to be premised on this being mandatory (see para [92(3)]), above) or without any formal mechanism to effect it. I turn to consider the correctness of that proposition.

(a) Compensation, set off, and balancing of accounts in bankruptcy

[103] In parties' submissions, the terms "compensation", "set off" and "balancing of accounts in bankruptcy" appeared, at times, to be used interchangeably. Care must be taken, however, as these terms embody distinct legal concepts. "Compensation" is statutory, governed by the Compensation Act of 1592 ("the 1592 Act"), and involves extinction of the debt set off (or "compensated"). The rules of "balancing of accounts in bankruptcy" (as Bell termed it in his *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, 7th McLaren ed, 1871, vol 2, p 118) are derived from the common law and represent, in effect, a permissible relaxation *by the Court* of the strict requirements of the 1592 Act in the exercise of an equitable discretion according to the circumstance of the case (see eg *Ross* v *Ross* (1895) 22 R 461 at 464-465 *per* Lord McLaren). In current practice, it is sometimes referred to as "insolvency set off". However described, it is "an equitable adjustment of mutual debts and credits, to avoid manifest injustice": *per* Lord Hope in

Heritable Bank plc v *Landsbanki Islands HF* [2013] UKSC 13; 2013 SC(HL) 201 at paragraph 39. "Set off" is not a term of art in Scots law (though it is in England, with its own rules), but appears to be used by the parties as shorthand covering both compensation and balancing accounts in bankruptcy. Reference should also made be to Lord Rodger's typically erudite and illuminating discussion of retention and "retention for the purposes of compensation" ("retention-compensation"), albeit that discussion was in a non-insolvency context: see *per* Lord Rodger in *Inveresk plc* v *Tullis Russell Paperwork Ltd* [2010] UKSC 19; 2010 SC(UKSC) 1056 at paragraphs 70 to 107. In that discussion, Lord Rodger distinguished between retention (as the withholding of performance) and retention-compensation (ie retention or withholding of payment with a view to preserving compensation or set off in order to extinguish the sum set off): see *ibid* at paragraph 78 and Goudy, *Law of Bankruptcy*, at pp 550-551. What the pursuer seeks to do is akin to the latter: to withhold payment of the outstanding settlement sum to enable this to be set off against (and thereby extinguish *pro tanto*) the unpaid balance, once the debtor's discharge from that liability is reduced and once the requisite amendment is made in the payment action.

[104] The pursuer's position was that the requirement "to plead" compensation was a requirement only when one was litigating directly about the two claims to be set off. It submitted that in this context, "pleading" a balancing of accounts in bankruptcy should be regarded as no more than a requirement that it "actively" be requested by the pursuer because it will not operate automatically. The pursuer submitted that in a standard insolvency setting there was no need to lodge formal "pleadings" with the insolvency practitioner but rather bring to his or her attention that there is a mutuality of debts and that set off ought to be applied. Here, the pursuer had sought a balancing of accounts since the discovery of the debtor's PPI claim.

[105] In relation to the alternative forum of the Trust Deed process, the pursuer accepted it was possible for a trustee to be appointed formally to carry out the setting off, but it is submitted that this is not required in this case. It submitted that there is no calculation to be carried out. The practical effect (indeed, it submitted the total effect) of the proposed set off would be to prevent the pursuer's losses, caused by the debtor's insolvency, from being compounded by requiring the pursuer to pay over further sums to the debtor by way of the outstanding settlement sum. The imposition of a trustee would serve only to increase the administration costs – the trustee would need to be paid – and thus would further reduce the sum that could be offset by the pursuer against its losses. The pursuer's intention is that the order to be granted by the Court will have the effect of reducing the discharge of the debtor to the extent necessary and bringing about a balancing of accounts. The pursuer's position was that nothing further is required.

(b) The consequences flowing from the requirement that compensation as a set off must be pleaded?

[106] I do not accept the pursuer's submissions on this point. It is a recognised feature of compensation, and appears implicit in the balancing of accounts in bankruptcy, that the plea of compensation (or the equivalent for a balancing of accounts) must be pled before it can be given effect to: see the discussion of compensation in Gloag, *On Contract* at p 644 under the rubric "Does not Operate *ipso jure*". That this is a requirement is at least implicit in the discussion of balancing of accounts in bankruptcy, and flows from the Court's equitable control over its application (on which, see *per* Lord Hodge in *Integrated Building Services Engineering Limited (t/a Operon)* v *Pihl UK Ltd* [2010] CSOH 80 at para 25). The Court exercises its control, either by sustaining plea of compensation (with the effect of extinguishing that liability) or permitting the balancing of the accounts in bankruptcy (and

for which the Court may permit a party to retain a liquid sum for that purpose, as it did in *Ross*, *ibid*). This is to be contrasted with the position in English law, where set off operates *de jure*. That is not the position in Scots law. If it is correct that any balancing of accounts must be pled, then there must be an extant forum in which it is possible to do so. In the circumstances of this case, this could either be in the payment action (assuming amendment is allowed to substitute the pursuer for Group as the defender and to include relative averments and a plea), or by a trustee in an insolvency process giving effect to this in adjudicating on a creditor's claim (including the creditor's assertion of a balancing of accounts). In respect of the debtor, that insolvency process is the Trust Deed process.

[107] While the pursuer's desire is to avoid further procedure, I do not accept that that is correct or competent as a matter of procedure to effect, or to enable the giving of effect, of the desired balancing of accounts simply by the pursuer "actively requesting" it. At the very least, RBS (or the pursuer, as the successor to RBS) would require to reformulate its claim in the Trust Deed process (ie by reducing it, after deduction of the outstanding settlement sum from the unpaid balance) or the outstanding settlement sum would form part of the assets in the Trust Deed process and which the trustee would apply in part-satisfaction of RBS's claim. On either scenario, the trustee would require to adjudicate on any reformulated claim by RBS (including its assertion of set off) or by setting off the unpaid balance (for which the debtor would have been rendered liable anew as a consequence of the partial reduction of the discharge) against RBS's original claim.

[108] However, in my view, a more fundamental difficulty presents itself. The pursuer has failed fully to address the consequences of even a partial reduction of the discharge on the debtor. It would place the debtor in a highly irregular position from which it would be difficult for her to extricate herself. While reduction of the discharge would not render the

debtor apparently insolvent (which would arise on the *granting* of a trust deed), she would nonetheless be returned to a state of insolvency as the undischarged granter of the Trust Deed. This may entail possible adverse consequences for her crediting rating and other financial commitments. Furthermore, as the effect of the partial reduction of discharge rendered her liable for the unpaid balance (as this is a necessary antecedent to any balancing of accounts), she would *remain* liable for the lesser amount of the unpaid balance remaining after set off of the outstanding settlement sum. This is because a discharge only relieves the debtor of liability; it does not extinguish the underlying debt. Even if the pursuer effected a balancing of accounts, meaning that it could apply the outstanding settlement sum to reduce the unpaid balance by a like amount, the debtor would remain undischarged in respect of the lesser amount of the unpaid balance. That liability is not insubstantial (being in excess of £15,000). Strictly speaking, any asset the debtor acquired after the grant of the Trust Deed could be applied as *acquirenda* to satisfy that sum. Critically, and in contrast with the position of a debtor in a sequestration, the debtor would not be able to rely on any automatic discharge. In the absence of reduction of the trustee's discharge, and the Trust Deed process being revived in some way, there would be no trustee appointed in respect of the debtor's estate who could grant her a discharge of new in respect of that part of the unpaid balance for which (as a consequence of the partial reduction) she remains liable.

[109] I have no doubt that, if the case merited it, a means could be found to overcome the procedural issues just noted. (Indeed, the pursuer might itself discharge the debtor from the lesser amount of the unpaid balance, after it was reduced (ie extinguished) *pro tanto* by the set off of the outstanding settlement sum.) The cases in which the Court has considered how to achieve *restitutio in integrum*, which is often a condition of the grant of reduction, are redolent of the Court exercising its discretion pragmatically and flexibly to fashion a remedy

to achieve a sufficiently restorative state of affairs: see, eg, cases such as *Spence v Crawford* 1969 SC (HL) 52, discussed in *Somerville v 1051 GWR Limited* [2019] CSOH 61 at paragraphs 33 to 37. However, in my view, this is not the case in which to do so.

[110] I stress that I do not determine this case as a question of competency. I do not accept the debtor's characterisation that what the pursuer seeks to do involves an impermissible refashioning of an insolvency regime. My decision in this case should not be construed as necessarily precluding the prospect in other cases, that it would be appropriate to reverse a debtor's discharge, even if there are other creditors. In other words, I do not believe that in circumstances such as have occurred in this case that "the law is powerless to grant a remedy" (*per* Lord Reed in *Dooneen*, quoted at para [11], above). In my view, there is nothing inherently incompetent in seeking reduction of a debtor's discharge in an insolvency process, so long as the discharge was given effect in a procedurally competent manner, was not prejudicial to the *bona fide* rights of third parties, that the parity of treatment of creditors in was preserved and the other rules governing reduction and *retitutio* (where it arose) could be applied.

[111] That said, I note that it has long been a feature of personal insolvency procedures in Scotland to discharge a debtor of her pre-insolvency debts and thereby enable her to rebuild her life free of them. (The history of that salutary development is traced in "Insolvency" by Prof Gibb in "The Introduction to Scottish Legal History", The Stair Society, volume 20.) I return to the question of the impact on the debtor if partial reduction is granted. The pursuer's contention is that partial reduction of the discharge would put the parties in the position they would have been but for the trustee's mistake (see para [92(3)], above). While on a superficial level that is correct, it fails to take into account the passage of time and the disruption to a settled state of affairs. A very considerable amount of time has passed since

the debtor was discharged, more than six years ago, from an insolvency procedure commenced 14 years ago, in respect of debts incurred more than 20 years ago. For most of the last 7 years she has been embroiled in the payment action which has been through two successive levels of appeal and in which the Supreme Court has recently refused to entertain it as a third-level appeal. If the pursuer succeeds in this action, further amendment in the payment action is proposed. The debtor's witness statement was eloquent of the misery caused by the effect of prolonged litigation has had on her. The pursuer's rationale in running this case was that it was a test case to obtain a ruling on the issue raised in Lord Reed's *coda* to *Dooneen*. It has achieved an answer to the issues it wished to litigate. The amount of the outstanding settlement sum is paltry from the pursuer's perspective and in proportion to the legal fees likely to have been incurred. This is not an insignificant sum for the debtor. There will be clear adverse impacts on her, and, on the pursuer's approach, no obvious means to alleviate them. Collectively, these factors provide "cogent reasons" to refuse the reduction sought. I would regard it as bearing unduly harshly on the debtor, or it being "unjust and inconvenient" in this case, to grant a partial reduction of her discharge. In the whole circumstances, and in the exercise of my discretion, I refuse the remedy sought.

The third core issue: Waiver, personal bar, and mora, taciturnity and acquiescence

[112] In light of my decision on the fourth core issue, I do not need to consider various pleas in bar invoked by the debtor. They were not pressed with any vigour. (The debtor did not maintain the plea of personal bar in submissions.) In any event, the debtor advanced these pleas by focusing on the absence of a challenge to the discharge until 2020. That may be so, but that is to ignore that the reduction of the discharge is simply a means to the pursuer's end, which is to withhold payment of the outstanding settlement sum in order to

set that off against the unpaid balance. The pursuer (and Group) have been unwavering in that purpose. Looking at those circumstances in the round, it cannot be said that the pursuer (or Group) have waived any right to do so (even if they have changed tack about the means to do so) or have been taciturn in its intention to do so. On the materials I have considered, I would not have found any of these pleas established.

Decision

[113] I advised parties of my decision at the By Order on 5 December. I was invited to reserve the question of expenses as well as question of the precise terms of the interlocutor.