OUTER HOUSE, COURT OF SESSION

[2021] CSOH 82

CA66/20
CA67/20

OPINION OF LADY WOLFFE

In the cause

WILLIAM LINDSAY

Pursuer

against

OUTLOOK FINANCE LIMITED

Defender

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WILLIAM LINDSAY

Pursuer

against

OUTLOOK FINANCE LIMITED

Defender

Pursuer: Thomson QC et MacDougall; Halliday Campbell WS
Defender: McIlvride QC et Kinnear; TLT LLP

12 August 2021

Introduction

The parties

[1] The pursuer in each of these two commercial actions is William Lindsay, who sues in his capacity as executor of the estate of his uncle, the late Euan Lindsay ("Euan Lindsay") of Harperfield Farm, Sandilands, Lanark ("Harperfield"). Euan Lindsay died on 3 June 2011, aged 59. Euan Lindsay was the grantor of the several deeds in favour of the defender in September and October 2009 which the pursuer seeks to challenge in these two actions, principally on the ground of facility, circumvention and lesion. The defender in each action is Outlook Finance Limited ("Outlook"), a company based in Stourport. It is a matter of agreement that at all material times Outlook's controlling mind, and one of its two directors, was Derek Fradgley. All dealings any member of the Lindsay family (collectively "the Lindsays") had with Outlook were conducted with Derek Fradgley.

Prior debate

[2] At an earlier debate, the defender challenged the relevancy of the pursuer's case based on facility, circumvention and lesion, its case based on unjustified enrichment and it challenged the competency of the second action, in which only a declarator is sought. After hearing that debate, I repelled the defender's challenges to the relevancy of the pursuer's two actions. The decision is reported at [2020] CSOH 90 ("the Debate Opinion").

[3] After sundry procedure, I heard a 9-day proof (not a proof before answer) in these two actions.

Outline of the parties' positions

The pursuer's two actions

[4] The pursuer challenges certain deeds on the ground that these were procured from Euan Lindsay when he was in a facile state, by the circumvention of Derek Fradgley, to Euan Lindsay's 'lesion' or loss. The deeds sought to be reduced in the first action ("the reduction action") are:

(1) an all-sums standard security granted by Euan Lindsay on 3 October 2009 over Harperfield in favour of Outlook ("the impugned standard security"). This replaced an earlier standard security Euan Lindsay granted in October 2008 restricted to the sum of £275,000 ("the first standard security"); and

(2) a loan facility agreement between Euan Lindsay and Outlook, dated 29 September 2009, for £1,335,000 ("Loan Agreement 1"). This contained a personal indemnity by Euan Lindsay in favour of Outlook in respect of the obligations in Loan Agreement 1 ("the Loan Agreement 1 indemnity").

The pursuer also concludes for payment of £182,217 by Outlook to the pursuer on the ground of unjustified enrichment.

[5] In the second action ("the action for declarator") the pursuer seeks declarator that a second loan agreement ("Loan Agreement 2"), also dated 29 September 2009 between Euan Lindsay and Outlook, was obtained by facility, circumvention and lesion. This also contained a personal indemnity by Euan Lindsay in favour of Outlook ("the Loan Agreement 2 indemnity" and referred to collectively with the Loan Agreement 1 indemnity, "the Loan Agreement indemnities"). Loan Agreement 2 related to the farm near Carlisle, known as Metal Bridge Farm ("Metal Bridge Farm"), where three members of the Lindsay family (as after-noted) conducted their farming businesses. A legal charge in English form

("the legal charge") had also been granted over Metal Bridge Farm in favour of Outlook. Some years later, though well before these two actions were raised, Outlook called up or realised the legal charge, Metal Bridge Farm was sold and its proceeds passed to Outlook.

The impugned deeds

[6] The deeds the pursuer seeks to challenge in these two actions are Loan Agreement 1 and Loan Agreement 2 (collectively, "the Loan Agreements") and the impugned standard security. As noted below, in certain other agreements Euan and James Lindsay entered into in late June 2008 prior to the Loan Agreements, they each had also granted personal indemnities in favour of Outlook which were unlimited in amount ("the first indemnities"). (I shall refer to the first indemnities and the Loan Agreement indemnities collectively as "the indemnities".) The purser moved for reduction of the indemnities *ope exceptiones*. I shall refer to the two Loan Agreements, the impugned standard security and the indemnities collectively as "the impugned deeds".

The misrepresentation and the ultimatum at the meeting on 26 August 2008 between Euan Lindsay and Derek Fradgley

[7] The pursuer's primary ground of challenge to the impugned deeds is on the ground of facility, circumvention and lesion. This is on the footing that by the time Euan Lindsay came to grant the impugned deeds he was suffering from very poor health. The dairy business conducted at Harperfield had always been conducted separately from the business activities carried on by the members of the Lindsay family near Carlisle. Until Euan Lindsay's grant of the first standard security, Harperfield (which had a value of c £1,000,000 to £2,000,000) had been unencumbered. While Euan Lindsay had granted the

first standard security in a restricted amount, the pursuer's case is that at a meeting between Euan Lindsay and Derek Fradgley at Harperfield on 26 August 2009, Euan Lindsay was prevailed upon to agree to grant the two Loan Agreements, the impugned standard security and the legal charge. He was importuned to do so, after Derek Fradgley represented that Euan Lindsay owed the sum of £2.6 million to Outlook (which the pursuer asserts was a misrepresentation) under certain prior agreements; and that Derek Fradgley presented Euan Lindsay with, in effect, an ultimatum, that the only way to prevent "the bank" (whom Derek Fradgley represented as standing behind and pressuring Outlook) from selling the cattle, equipment and Metal Bridge Farm, was for Euan Lindsay to grant the impugned deeds ("the ultimatum"). In fact, there was no bank involved or pressuring Outlook and it is accepted that Derek Fradgley's statements to the contrary were untrue. Derek Fradgley admitted as much in a witness statement dated 7 January 2014 he provided for a litigation in Birmingham High Court ("the Fradgley Witness Statement") by the Lindsays against Outlook (among others).

[8] Central to that allegation of circumvention is a settlement calculation Derek Fradgley produced at that meeting ("the Settlement Calculation"). As will be seen, the figures provided for finance agreements recorded in the Settlement Calculation were subjected to extended analysis by the parties' experts, neither of whom could justify the figures it contained.

[9] The pursuer's secondary ground of challenge is on the basis of fraudulent misrepresentation. The pursuer also avers that Derek Fradgley was a *de facto* director of Metal Bridge Limited ("MBL"), a company set up at the instigation of Derek Fradgley and which, from about mid-2008, became the vehicle through which the businesses at Metal

Bridge Farm traded. MBL was the debtor to Outlook and in respect of whose indebtedness Euan Lindsay was a guarantor.

[10] These cases are unusual, in at least two respects. First, neither Euan Lindsay nor Derek Fradgley, who were respectively the alleged representee and representor (or the alleged circumventee and circumventor), was available to give evidence. Derek Fradgley died in July 2017 and Euan Lindsay died in 2011. Secondly, there was, therefore, no direct witness to what Derek Fradgley said to Euan Lindsay at the meeting of 26 August 2009 or what representation was made at that time in respect of the Settlement Calculation. For that reason, the pursuer led family members to speak to Euan Lindsay's health and to what Euan Lindsay told them at the time about what Derek Fradgley told him at that meeting about the Settlement Calculation.

The defender's response

[11] Outlook denies the essentials of the pursuer's case. Its case is that Derek Fradgley and Outlook were financially supportive of the Lindsay businesses; that the Lindsay businesses conducted from Metal Bridge Farm were generally unprofitable, and they required repeatedly to be propped up by Outlook. This was generally done by refinancing, which took the form of replacing ongoing agreements with new agreements. This practice was variously referred to as "rolling up", "wrapping up", or consolidating, although it was not a matter of agreement as to how, precisely, any arrears in the ongoing were rolled up into the replacement agreements. The parties' expert accountants made different assumptions of how the rolling up operated.

[12] In relation to the impugned deeds, Outlook's position is that Euan Lindsay was actively involved in the affairs of MBL. It seeks to establish that the sums represented in the

Settlement Calculation were not incorrect. In any event, if there were any misrepresentation in the Settlement Calculation, that was corrected by Outlook's subsequent letter of 4 September 2009 ("the Outlook Letter"). It also contends that Euan Lindsay had legal advice; that he was motivated by a desire to assist the other members of his family (not as a consequence of any misrepresentation or pressure) and that, accordingly, there was neither facility nor circumvention. It also contends that, even if the pursuer establishes one of its grounds of challenge, he is not in a position to satisfy the requirement of *restitutio in integrum*, and reduction should therefore be refused.

[13] The proposition that Derek Fradgley was a *de facto* director of MBL was not strenuously resisted, though the point was not conceded.

[14] As with the pursuer, the person who would have been Outlook's principal witness, Derek Fradgley, is not available. It had no other direct witnesses to fact and, accordingly, it was critically reliant on the available documentation from Outlook's files.

The Fradgley Witness Statement and issues of credibility arising from Outlook's documentation

[15] This is not the first litigation between the parties. There have been litigations in England. One, at the instance of Outlook (and referred to in evidence as "the Manchester proceedings"), resulted *inter alia* in the realisation of the legal charge over Metal Bridge Farm. Another action was at the instance of the Lindsays. The pursuer relies on the Fradgley Witness Statement from one of the English proceedings. Mention was also made in the evidence to other proceedings in the sheriff court. I note the relevant paragraphs from the Fradgley Witness Statement below, but the pursuer founds on the passage in which Derek Fradgley admits that his representations that there was a bank behind him, or to

which Outlook was liable in respect of sums advanced by Outlook to its clients (including the Lindsays), were untrue. Derek Fradgley's justification for this was said to be that having "funders to blame for difficult decisions" made the relationship between Outlook and its customers easier. Mr Thomson QC, who appeared for the pursuer together with his junior Mr MacDougall, referred to this in submissions to justify taking a critical view of Derek Fradgley and any document he generated on behalf of Outlook.

[16] The relevant passages from the Fradgley Witness Statement, in which Derek Fradgley acknowledges the misrepresentations about having funders and his rationale for these, are as follows:

> "36. During disclosure in these proceedings the Claimant [the Lindsays] through correspondence has made requests for information about our funders. …..
> […]
> 37. In response to the Claimants enquiry [sic] it has been candidly admitted by me that although I have referred on a number of occasions in my dealings with the Lindsay to 'funders' implying that the monies Outlook loans [sic] have themselves been borrowed from third party funders and has made the 2009 loans from its own resources….
> […]
> 38. The reason for the reference to funders from time to time is simply that having 'funders' to blame for difficult decisions makes the relationship between Outlook and its customers easier."

[17] The pursuer's attack on Outlook's reliance in the documentation, and which was central to its defence for the reasons explained, went further. The pursuer's witnesses were sceptical of the contents of much of the documentation issuing from Outlook and they did not accept that what some of the documents purported to record (eg the conduct of board meetings of MBL or of Euan Lindsay's participation in those meetings) reflected the reality of how those meetings were conducted, or even that some documentation subsequently produced by Outlook was ever sent on the date it bore (eg the termination notices in August 2009). Accordingly, unusually for a commercial action, the accuracy or veracity

of the documentation underpinning Outlook's defence was a live issue and deployed as a means to reflect adversely on Derek Fradgley's credibility.

The Proof

Witnesses

The pursuer's witnesses

[18] The pursuer called the following members of the Lindsay family: Rodger Lindsay (the pursuer's brother, one of Euan Lindsay's nephews and the principal witness for the pursuer), James Lindsay (the sole surviving brother of Euan Lindsay), and the pursuer (another of Euan Lindsay's nephews). He also called as an expert, Peter Graham, a chartered accountant with Henderson Loggie. Mr Graham had prepared a report analysing the many agreements between Outlook and the businesses run by Rodger Lindsay, Kerr Lindsay and Helen Lindsay near Carlisle, and the later agreements (including the Loan Agreements, and the prior agreements rolled up into them) between MBL and Outlook, with a view to testing the figures in the Settlement Calculation. He spoke to the report he had produced ("the Henderson Loggie Report").

Outlook's witnesses

[19] Outlook called David Lingard and Mark Hodgson, its Scottish and English solicitors who had, respectively, prepared the impugned standard security and the legal charge on behalf of Outlook. Outlook also called Derek Fradgley's son in law, Paul Philips. He had no direct knowledge of the material events, having been appointed a director of Outlook only in 2017. Finally, Outlook also called an accountant as its expert witness, Stuart Preston of Grant Thornton, who, in his first report ("the first Grant Thornton Report") undertook a

similar analysis as Mr Graham had of the many finance agreements. He also produced a second report ("the second Grant Thornton Report"). The opinion evidence is set out from paras [159] to [199], after the part of the Opinion recording the evidence of the parties' witnesses to fact.

Documentation considered at proof

[20] Consistent with commercial practice, the evidence in chief of the parties' witnesses at proof was by affidavit, augmented to some extent by oral evidence, followed by cross-examination. In addition to their witnesses to fact, the parties led opinion evidence from their respective experts, who spoke to the Henderson Loggie Report and the two Grant Thornton Reports. The parties also produced a joint bundle of productions, a joint bundle of authorities (which the pursuer supplemented at the stage of submissions), notes of argument, a joint minute and a joint chronology. The defender also lodged additional documents in respect of its recall of Rodger Lindsay ("the recall productions"). After the close of evidence, parties were afforded several days in which to produce their written submissions, before their oral submissions were heard over 2 days. I have had regard to all of these materials. I do not propose to rehearse the contents of these documents or the oral submissions.

The Settlement Calculation

[21] One of the critical productions was the spreadsheet which parties understood Derek Fradgley had prepared and presented to Euan Lindsay at the meeting at Halltown on 26 August 2009, shortly before Euan Lindsay entered into the impugned deeds. It was referred as "the Settlement Calculation" (a usage adopted in this Opinion). It was the focus

of the parties' expert witnesses and their analyses in their expert reports. The Settlement Calculation is shown below:

Settlement calculations, Metal Bridge **Applicable August 2009, expires 15th September 2009**

Lease Number	Assets	Percentage Retention	Balance of Rentals	Arrears	Early Termination Discount 4%	Per Agreement Termination Amount	** Special Termination Amount
1596	Machinery	10	£420,120	£46,680	£16,805	£403,315	£328,043
1597	Cattle	10	£1,026,000	£54,000	£41,040	£984,960	£529,730
1619	Cattle	10	£93,000	£24,000	£3,720	£89,280	£77,278
Mortgage Number							
1569		N/A	£860,692	£11,475	N/A	£465,828	£465,828
Loan Number							
1598		N/A	£263,000	£0	N/A	£242,000	£223,000
			£2,662,812	£136,155	£61,565	£2,185,383	**£1,623,879**

** Special Termination amount based on all agreements being settled, not applicable to individual agreements

+ New Cattle 180 000
1.8m.

Hartfield 1.5m
Mat B 5m
2.m

9 7% = £11666 int p.a.

Parties proceeded on the footing that the Settlement Calculation purported to identify the outstanding debt owed by Metal Bridge Limited ("MBL") to Outlook as at 25 August 2009. (By this point in time Euan Lindsey had granted the impugned standard security and the first indemnities, as guarantor of MBL's indebtedness to Outlook.) It should immediately be noted that agreement number 1569 (recorded under the heading "Mortgage Number") included in the fourth line was not an agreement between MBL and Outlook. This was an agreement between Outlook and Lindsay's Dairy and was referred to as "the Chattels Mortgage" (and which I will refer to in this Opinion as "the Lindsay Mortgage", the better to distinguish it from Outlook's agreements with MBL). The four other agreements included,

being numbers 1596, 1597, 1598 and 1619 (the items in the first, second, fifth and third lines, above), were agreements entered into between Outlook and MBL in late June 2008 ("the first MBL agreements"). I shall refer to all five of the agreements included in the Settlement Calculation (the first MBL agreements and the Lindsay Mortgage) collectively as "the Settlement Calculation agreements"). The Settlement Calculation agreements were those in force immediately before, and were replaced by, the Loan Agreements.

Uncontroversial or unchallenged evidence

[22] In relation to the parole evidence, given the absence of any witness for Outlook having direct knowledge of the circumstances leading up to, and forming the context of, the impugned deeds, Mr McIlvride QC, Senior Counsel for Outlook, was constrained in his ability to cross-examine the pursuer's witnesses on certain chapters of their evidence. Furthermore, much of the evidence given by Rodger, James and William Lindsay (collectively "the Lindsay witnesses"), particularly as regards the ailing health of Euan Lindsay or the circumstances that led to the bankruptcies in England of Rodger Lindsay, Helen Lindsay and Kerr Lindsay in 2008, overlapped (as well as being unchallenged). Accordingly, I propose to summarise this uncontested or uncontroversial evidence in the next sections, and to do so without attributing every statement to an individual witness. I will also incorporate the matters agreed in the joint chronology and joint minute. Where appropriate, I will also include evidence that was not agreed, but which, in the end, was not challenged in cross examination or was not otherwise contradicted by other evidence I have accepted.

Euan Lindsay's health

[23] Euan Lindsay was one of five brothers, of whom only James Lindsay remains alive. The others died untimely deaths. Gordon died aged 35. Ronald, Euan Lindsay's older brother, died at the age of 63. He suffered a similar condition to Euan Lindsay and was a heavy smoker. Apart from James Lindsay, they were all bachelor farmers. Parties were agreed that from about 1975, Euan Lindsay suffered from a condition known as "farmer's lung". In or around 2000, as a result of his condition, Euan Lindsay stopped working at Harperfield and he moved down to Carlisle to live with James and Helen Lindsay at Halltown. Euan Lindsay took various medications to manage his condition. Over time his condition deteriorated and by 2008 he was on a permanent oxygen supply.

[24] Rodger Lindsay and William Lindsay spoke to the effect of Euan Lindsay's condition on his physical and mental health. For some time, Euan Lindsay had been on a waiting list for a lung transplant. However, on the first occasion when he was called to the hospital for a transplant, he was sent home as too poorly to undergo such an operation. On the second occasion, at the beginning of 2002, the donor organs were unsuitable. Rodger Lindsay described how Euan Lindsay often suffered from low mood and anxiety. He was on antidepressants. These caused side effects in the form of painful ulcers and nausea. Euan Lindsay was concerned that he had stomach cancer, which increased his anxiety. At times, this led Euan Lindsay to ring for an ambulance to attend. His levels of anxiety increased as he became more dependent on oxygen, and was described as being "petrified" of not being able to get his breath and of being very anxious lest he run out of oxygen or there was a power cut. Euan Lindsay was very susceptible to any type of infection and, as Rodger Lindsay explained, there was not a winter that Euan Lindsay was not hospitalised. This got worse over the years to the point where Euan Lindsay required a large mask "to

push the full amount of oxygen into him". In terms of mobility or other physical tasks, by 2008 Euan was tethered to an oxygen tank which rendered him effectively housebound, apart from the odd car journey to the cattle markets. By 2008 he no longer had the strength to carry the oxygen canister himself. He was by then in a very weakened state. This is how Rodger Lindsay described Euan Lindsay at that time:

> "He was heartbroken for us when we lost the bull case [ie the AI litigation] As cattle breeders, we were very passionate and met a lot of interesting stockman, and Euan appreciated that and it had an impact on him as much as us. By 2008, he was unable to do any work at all, couldn't leave the house or be away from his machine. We could take him in the car to the doctor with his oxygen canisters. We had to have them in house anyway in case the power supply went off. At first when he came to live with us, he could carry the oxygen canisters himself, but by end he couldn't. He didn't have strength to do that from well before 2008."

Going into the spring of 2009, Rodger Lindsay described Euan Lindsay physical and mental condition:

> "I remember Christmas dinner that year. A foreign chap who was working for us came up and had supper with us, and Euan was there at end of table. But by boxing day, he was very ill, and just couldn't breathe. An ambulance was called, can't remember who called it, and he was admitted to hospital. I was milking a day or two after that, it was still between Christmas and new year, and mother had got up and discovered a message from the hospital about 2 or 3, saying could someone come up to hospital, Euan was very very poorly. I went up. They had put him in an isolation room, and the nurse said I could see him, but the doctor wanted to speak to me. Euan was sitting up, he was more stable by then, he had been through the worst of it. The doctor told me it was at the point where Euan's heart and lungs were so bad, that if he had a seizure, they would not resuscitate him. His illness had reached that point. He tried to explain it to me, he was not saying that would just let him die, rather that resuscitation wouldn't work. That really shook me. He did pull through though, and he came back out in January 2009."

[25] By reason of his condition Euan Lindsay was described as fit for little else than sitting inside the house. He liked to sit in the room used as an office beside the fax machine and to read faxes received. In his evidence, Rodger Lindsay explained that Derek Fradgley

knew that Euan Lindsay sat by the fax machine in the office and, if Derek Fradgley wanted to upset Euan Lindsay, he would send a fax.

[26] None of this evidence was challenged. I deal separately, below, with the contentious evidence of the meeting between Euan Lindsay and Derek Fradgley in late August 2009 and the subsequent conduct of those persons.

The Lindsay family's separate businesses

The partnership of DM Lindsay run by Euan Lindsay and the pursuer from Harperfield

[27] The Lindsay family have been dairy farmers for many years. Some members of the family operated a dairy business from Harperfield from around 1946 trading under the name "DM Lindsay". Euan Lindsay became involved in that business in about 1968 and from about 1982, Euan Lindsay and the pursuer traded in partnership as "DM Lindsay" from Harperfield. Euan Lindsay's active involvement in DM Lindsay ceased in about 2000, when ill-health compelled him to move into Halltown with his brother, James and his sister-in-law Helen, the other branch of the Lindsay family, who lived and farmed near Carlisle.

[28] Prior to Euan Lindsay's involvement with Outlook, Harperfield was unencumbered with any borrowings or security.

The Lindsay's AI and Lindsay's Dairy partnerships run by Rodger Lindsay, Helen Lindsay and Kerr Lindsay near Carlisle

[29] Euan Lindsay had two other nephews, Rodger Lindsay and Alexander Kerr Lindsay, known as "Kerr" ("Kerr Lindsay") who are the sons of James Lindsay. Rodger Lindsay is a dairy farmer and cattle breeder.

[30] From about the mid-1990s Rodger Lindsay began a business known as "Lindsay's AI" (the "AI" stands for artificial insemination). This did not require much borrowing at the start, as Rodger Lindsay organised all of the insemination work himself and the overheads were low. The Lindsay family had a good history of stockmanship, having won prizes at the Highland Shows. The business grew and more staff were taken on. By 1999 the business was doing about 150 farm visits a day. It was decided to acquire their own bull stud and Lindsay's AI looked for finance to support its expansion plans. This was outwith the experience of High Street banks. Rodger Lindsay heard of Outlook from a fellow farmer.

The early agreements between the Lindsay businesses and Outlook: 2000 to 2005

[31] This led to the first involvement between Derek Fradgley and Rodger Lindsay from around this time, when various small finance agreements were entered into between Rodger Lindsay and Outlook. (In point of fact, some early agreements were with a company known as Outlook Financial Services Limited, but, as Outlook acquired the assets of that company, parties were content simply to refer to this, too, as Outlook.) These early agreements were generally to fund a specific need, eg the acquisition of equipment (Rodger Lindsay mentioned the purchase of a machine for £5,000 to put bull semen into storage vials called "straws") or to build the bull centre facilities (between 1998 and 2000).

[32] In about 2000 Rodger Lindsay set up another business in partnership with his mother and brother, Helen and Kerr Lindsay, known as "Lindsay's Dairy", which traded from Lynefoot Farm, Carlisle. Rodger described a typical working day as a dairy farmer. It began with the first milking round at around 4:00am. This was followed by feeding the young stock, attending to any dry cows and other stock that needed to be checked. Depending on the time of year, the cattle were taken to grazing pastures or fed. The fields needed tending

and machinery maintained. Other regular work entailed preparing animals for auction, meeting on site with the vet and the routine paperwork (eg bills and animal passports) required in the management of a dairy herd. The second milking began about 3.00pm and finished in the early evening. When the Lindsay's Dairy operations were carried on at Metal Bridge Farm, the business was managed more intensively, in that the cows were milked three times a day in order to increase the overall yield of the herd. That often entailed a finish around midnight. Dairy farming was a physically-demanding and a round-the-clock enterprise.

[33] Outlook also entered into a number of finance agreements with the partners of Lindsay's Dairy, typically involving the lease or hire of cattle for that business. The timing for establishing a dairy was unfortunate, as the foot and mouth epidemic of 2001 resulted in the destruction of the cattle. This effectively shut down the operation of Lindsay's Dairy for around a year. In about 2002, the business of Lindsay's Dairy resumed. The partners of Lindsay's Dairy entered into further finance agreements with the defender in 2002 and 2003 (used, in part, to restock cattle). By reason of the financial pressures of foot and mouth, they also used the services of a factoring firm. On occasion, if they needed additional sums to settle arrears or to refinance a set of agreements with Outlook, the factoring firm advanced them funds and then they would catch up in due course. Outlook provided further loans to, and entered into finance agreements with, Lindsay's Dairy from 2002 onwards. In around 2006, Lindsay's Dairy set up a dairy operation from Metal Bridge Farm using loans from, and finance agreements, with Outlook at that time.

[34] I now turn to the witnesses' evidence on the contested chapters of evidence.

The pursuer's witnesses

Rodger Lindsay

[35] I have recorded, above, Rodger Lindsay's evidence in relation to Euan Lindsay's health, the activities of the Lindsay businesses near Carlisle up to 2006, and his early dealings (in general terms) on behalf of those business with Derek Fradgley and Outlook.

[36] Rodger Lindsay described the early agreements with Outlook as being those to restock after foot and mouth or to fund specific purchases, such as a bulk tank for storing milk. The Lindsay businesses also had finance arrangement with a different finance company, Cumbria Leasing, but those were all paid off in 2005. Rodger described the Lindsay businesses as follows:

> "We were washing our faces, making steady progress, only survived because we were a family business pulling together and being bloody minded about it. The whole time we operated, never really lost money, but sometimes we made very little. The year after F&M [foot and mouth]was the only time we lost money, but that's how family and farming is."

[37] He explained that in the early days of dealing with Outlook, Derek Fradgley always came up to get documents signed personally with the Lindsay businesses. They were provided with copies, because their accountant needed them to reclaim VAT on leases. Derek Fradgley never used the post for original documents. While he faxed a lot, he always brought original agreements with him. The Lindsays never put this down to ulterior or sinister motives, and just assumed that Derek Fradgley was being thorough. Rodger Lindsay observed it was an 8-hour round trip, but Derek Fradgley would say he had arranged meetings with others. In these early, pre-MBL, dealings the Lindsays trusted Derek Fradgley absolutely. Rodger Lindsay said that he

> "always understood what we were doing, what the objective was and what we were paying. If we were consolidating to get lower payments, he would say 'we'll extend by x months and you'll pay y'. We wouldn't really read through the agreements, the

> payments were there on it and we knew what they were before we signed and how long for. We always knew what assets we were talking about, up until Metal Bridge Limited was formed. We would all three of us (me, mother and Kerr) sign the agreements…Derek Fradgley would never allow us to roll up arrears into any re-financing agreement. Any arrears always had to be cleared first of all."

Signing the agreements never took long. They knew they were paying more than if they went to a high street bank, but that was because they did not have much equity in the Lindsay businesses. Rodger Lindsay described Derek Fradgley as coming and wanting to do business with them in the early years of their dealings. The Lindsays believed in Derek Fradgley and trusted him.

Purchase of land at Metal Bridge Farm

[38] In around 2001 Rodger Lindsay bought bare farmland at Metal Bridge, near Carlisle, which was funded partly from cash and partly with a mortgage from a third party. Rodger Lindsay bought additional land at Metal Bridge in 2006. The partners of Lindsay's Dairy perceived this as an opportunity to establish new dairy operations at Metal Bridge Farm and, to that end, they entered into further finance agreements with Outlook in 2006.

Finance agreement no 1569 or "the Lindsay Mortgage"

[39] In November 2007, the Lindsays also entered into a finance agreement 1569 (ie the Lindsay Mortgage). It is not disputed that the Lindsay Mortgage had been entered into with Rodger Lindsay on behalf of Lindsay's Dairy in late 2007, and for which MBL had no responsibility. MBL was not incorporated until June 2008, well after that agreement was entered into. It is important to note this, because Derek Fradgley included this agreement in the Settlement Calculation as if it were a liability of MBL which Euan Lindsay was obliged to settle.

[40] Rodger Lindsay explained the genesis of the Lindsay Mortgage. In 2005, the monthly outgoings for Lindsay's Dairy were too high. Milk prices were low. It was decided to refinance with a view to reducing outgoings. To that end a new agreement, namely, the Lindsay Mortgage, was entered into between Outlook and Lindsay's Dairy for £410,000. The purpose was to develop the bare land at Metal Bridge Farm into a working dairy. The money advanced enabled all outstanding indebtedness with Outlook as well as with other third party providers of credit (Cumbria Leasing, Oak Finance and others) to be repaid. Rodger Lindsay explained that Derek Fradgley insisted that any outstanding arrears with Outlook were always repaid. No arrears ever rolled up into a new agreement. The Lindsay Mortgage was secured over Metal Bridge Farm. As part of that arrangement, monthly payments of £7,150 were mandated to be paid directly from First Milk to Outlook from the monthly "milk cheque" that First Milk paid to Lindsay's Dairy. So far as Rodger Lindsay could recall, no payments were ever missed under the Lindsay Mortgage.

The outbreak of TB in February 2008

[41] Further bad luck befell Lindsay's Dairy when TB struck the herd in February 2008, resulting in the lock down of the business and the cull of 80 cattle. The compensation of £38,000 eventually received for the cull was paid by Lindsay's Dairy to Outlook, although Rodger Lindsay noted that this payment was never accounted for anywhere by Outlook, nor traced by the parties' accountants (a matter on which he was not challenged). The new farm buildings were nonetheless completed over the winter of 2007 to 2008 and dairy production commenced in May 2008.

The AI litigation

[42] The Lindsay's Dairy business was not the only one of the Lindsay businesses beset by misfortune. The mis-labelling of "stems" (or small vials in which bull semen is stored) held on behalf of a customer led to an action ("the AI litigation") and judgement against the partners of Lindsay's Dairy in May 2008, with the consequence that, shortly thereafter, bankruptcy orders in England were pronounced against Rodger Lindsay and Kerr Lindsay in August 2008.

Agreement number 1595 for the Pottinger machine

[43] Meantime, the operations at Metal Bridge Farm were up and running by about May 2008. This was just before the judgements against the Lindsays in the AI litigation were pronounced. At that time, Lindsay's Dairy had agreed to buy a Pottinger machine, which was used for cutting grass and taking it into the cows. This was the subject of finance agreement no 1595, with the Lindsays paying a £5,000 deposit and Outlook paying the balance of around £40,000 to 45,000.

Derek Fradgley's return to get a second agreement signed for the Pottinger

[44] By May 2008 the Lindsays, as well as Derek Fradgley, were all aware that Lindsays AI was going to lose the litigation. Rodger Lindsay described Derek Fradgley coming up and wanting another agreement signed for the Pottinger:

> "He [Derek Fradgley] went round the farm and listed the serial numbers of everything he could find, wee piddly things like shear grabs, attachments for tractors, anything at all, and he put it all into a second agreement 1595. No further sums were lent to us, he just added more security."

Rodger Lindsay described how everything was "spinning". Lindsay's Dairy had lost a lot of good cattle in February 2008, due to the TB outbreak. They had lost the AI litigation and bankruptcy was imminent. He described Derek Fradgley as

> "jumping up and down, **making out he was exposed to the bank, he was upset about all of the money he owed.** The machinery and cattle and farm couldn't have been sold at that time due to the TB restrictions. **In June 2008, if we had packed up and left, he couldn't have sold to anyone else - the value of his assets had diminished, and he was in a very bad way**. The cattle left were worthless, only slaughter value less costs for that. I don't remember when the cull market came back out, might just have been burner value of £200 for each, instead of £800 each." (Emphasis added.)

These events all took their toll on Rodger Lindsay, who described being "punch drunk, worn out, broken and stressed by it all." The litigation had been very bitter and Lindsay's AI never recovered. The dairy business was doing better and the Lindsays wished to continue it.

Derek Fradgley's removal of the loan documentation after the bankruptcies

[45] When Rodger Lindsay and Kerr Lindsay were made bankrupt (Helen Lindsay's own bankruptcy was in February 2009), Derek Fradgley came and took away all of the original agreements between Outlook and the Lindsay businesses. Rodger Lindsay said that Derek Fradgley told him that "he [Derek Fradgley] would speak to our trustee and explain them". Rodger Lindsay did not keep copies. (It is for that reason that, for the purposes of this action, the Lindsays have had to piece things together retrospectively from a box of papers Derek Fradgley delivered to them after MBL was dissolved, and from disclosures obtained in some of the court cases.)

The discussions between Rodger Lindsay and Euan Lindsay regarding the future at Metal Bridge Farm

[46] Following the litigation against Lindsay's AI, it was apparent that the partners of Lindsay's AI and Lindsay's Dairy were to be made bankrupt. Discussions ensued between Rodger Lindsay and Derek Fradgley, and also between Rodger Lindsay and Euan Lindsay, as to how to keep the dairy business going at Metal Bridge Farm. Rodger Lindsay described how it came about that Euan Lindsay offered to assist, essentially by providing a security over Harperfield to secure the release of £200,000 for working capital.

> "46. It was in around June 2008 during the period of coming to terms with losing the court case and the impending bankruptcy, when my conversation with Euan happened.
> 47. This was after we knew we had lost court case for sure and it had sunk in. There was nothing planned about it, Euan was in the room (the office) on his oxygen machine. The stress was all out of the situation, and I was resigned to the position. Euan asked 'what happens now?'. I said 'We'll be bankrupted'. 'What happens to Metal Bridge?' I explained everything would be sold, Metal bridge, the cows, everything. Euan said 'Maybe speak to Bill (the Pursuer) and see if DM Lindsay can buy everything then, we can speak to the bank'. I said fine. It was embarrassing what had happened to us. I didn't know the implications or practicalities of how DM Lindsay could buy everything, I hadn't thought it through. I remember Euan specifically saying 'better speak to Bill'. Euan was not man of business. He said it would have to be done with Bill, I remember that clearly. The conversation ended there, as something to talk about later, I had things to do and had to go."

(The reference to "Bill" are to William Lindsay, the pursuer. It was understood that William Lindsay would inherit Harperfield.)

How Derek Fradgley became aware of Harperfield

[47] As Rodger Lindsay described it in his evidence (and which was not subject to challenge in cross-examination), it was around this time that Derek Fradgley became aware of the existence of Harperfield and that it was unencumbered. Euan Lindsay had never had any connection with the Lindsay businesses. Euan Lindsay owned Harperfield but, as

Rodger Lindsay described him, Euan Lindsay never took on any debt. Up to this point, all that Derek Fradgley would have known was that Euan Lindsay lived at Halltown and spent his day sitting in the office there. Rodger Lindsay explained that it was in this context that Derek Fradgley first became aware of Euan Lindsay's ownership of Harperfield and that it was unencumbered:

> "48. Derek Fradgley was on the phone to me most days at that point. We weren't bankrupt at that point, we were just getting advice about criteria to do it yourself, we were still deciding. When Derek Fradgley phoned me that afternoon, really to get him off phone I think, I said, 'We're going to speak to Willie, Euan's suggested DM Lindsay could maybe buy the assets. We're bankrupt, we can't do anything else, maybe they'll buy the assets.' Derek Fradgley asked how DM Lindsay were going to pay for them. I said 'They'll just use Harperfield, there is nothing owed on it.' Euan hadn't specifically said that to me, but I had worked that out. My uncles Ronald and Euan never spent any money beyond what they had in the bank. They wouldn't take on debt. They were very reserved that way, particularly Ronald, they were very frightened of borrowing money. Derek Fradgley said 'no need to do that, far easier if set up a limited company, and the agreements can carry on. If Euan is prepared to put legal charge on property, I'll get working capital for it'. We then had a family discussion at Halltown. We didn't know implications of how it could work, but we thought it wasn't a bad idea. We thought things would carry on as they were, with just us and a significant amount of working capital in bank**. I didn't know anything about the rules of limited companies. I had no idea about limited companies. I had never been involved in one. I was always in a partnership, and always on the line for everything**." (Emphasis added.)

As I record below, the defender sought to recall Rodger Lindsay in order to cross-examine him on the passage highlighted in bold. Rodger Lindsay explained that it was his understanding that the formation of a limited company, as Derek Fradgley proposed, would not affect the operation of the dairy business at Metal Bridge Farm and that he would remain in charge of it:

> "49. I thought I would have a management role in the new company. I thought Kerr and I would be running it. Ownership or the concept of shareholder didn't occur to me at all. I thought it would be our company and that was it. In that conversation on the phone with Derek Fradgley, I said 'we don't know anything about limited companies' and he said it was all very simple, it is all laid out for you in the laws, I'll do all that, not a problem, I know that backwards in my sleep. He made it out to be such a simple task. He wasn't talking about managing the

company, just filling in forms. I thought once the forms were filed, that was it - Derek Fradgley would be doing a one off job.
50. After I went back and spoke to Euan, father, mother and Kerr, Euan then had conversation with Willie. I knew he was going to speak to him. Euan wasn't going to commit or do anything without Willie. Euan wasn't a big confident investor, he was a fish out of water. There was more than one conversation between them, I think, but the conclusion was, there had to be a limit, and couldn't be more than £200k. If it went wrong, the business of DM Lindsay could cope with that amount. I didn't speak to Willie about it.
51. After I came back from milking, Euan said 'Willie has been on. You can have £200k working capital, but that is maximum it is be, limited to that.' I spoke to Derek Fradgley and told him that, on the phone. I was very clear, and Derek Fradgley said that was grand, he was the big joy happy man again. 'I'll get it all sorted and I'll be up.'"

[48] Once it became clear that Euan Lindsay would grant the first standard security over Harperfield, albeit in a restricted amount, Rodger Lindsay described events as moving very quickly:

> "52. I can't remember talking about the name of the company or anything like that. I've always said, it seemed to me as soon as I said 'Yes, we'll go on that basis', it seemed like Derek Fradgley was at the door in 5 minutes, sign this and that. **It was maybe in reality a day or 2 days later, but it was ferocious, very very fast. He turned up, having travelled for about 3.5/4 hours by car from his office, with all these papers to be signed.** It was at that point that he pushed me and Kerr to the side and explained that the law didn't allow us to be directors. He said the director would have to be someone who wasn't bankrupt**. I know from papers I have seen since that the company was already incorporated at that point though, so we must have had a conversation about father being a director before that. I don't know how he would have got father's details otherwise.** I don't remember whose idea the name of the company was, it must have been his. I was burnt out and I didn't give a monkeys what it was called. I do recall it wasn't just all done in one day.
> Derek Fradgley was back up two or three times in the June 2008 to get papers signed. There was never any discussions about him having a management role of any kind - no discussion or agreement at all. I don't remember any discussion about Euan being director. **As far as I was concerned, Euan's only involvement was providing the security on Harperfield. It only came to light in the following few months that Euan was a director (to me anyway).** The first Metal Bridge Ltd agreements with Outlook are dated 27 June 2008. **Derek Fradgley never mentioned in the discussions I had with him anything about indemnities either. All that was agreed was the security on Harperfield Farm.** (Emphasis added.)

[49] Rodger Lindsay had initially expected to be involved in the same way as he had in running the Lindsay businesses. Of all of the members of the Lindsay family, he was the one

who was regarded by them as taking a lead on decisions concerning the Lindsay businesses. He was the spokesman for the Lindsay family. This is borne out by Paul Philip's evidence, that Derek Fradgley regarded Rodger Lindsay as the Lindsay family's "man of business". He was the one who dealt with Outlook on behalf of the Lindsay businesses. However, he did not become a director of MBL, as he explained:

> "24. Derek Fradgley told us we couldn't be caught anywhere near the company or they would lock us up and throw the key away. It's a minefield, he said, they'll crawl all over this company. We weren't bankrupt at that point. We didn't become bankrupt until August 2008. Derek Fradgley had all these documents, and we were pushed away out the room**. He had everything in a briefcase, be got everything signed by James and Euan, he never left anything to look at. We thought Euan was only there for the security. We had been told that the Lindsay's Dairy and Lindsay's AI agreements would continue just as they had done. I didn't know at the time that Derek Fradgley had prepared new agreements and had them signed**." (Emphasis added.)

It was Rodger Lindsay's evidence that Euan Lindsay rarely met Derek Fradgley. Euan Lindsay got upset and found dealings with him and MBL all very stressful. Rodger Lindsay described Derek Fradgley coming up to Halltown but Euan Lindsay saying he "wasn't well" and would not come to any meeting. Derek Fradgley was pressing Euan Lindsay to grant an all-sums standard security over Harperfield in June 2008. Euan Lindsay wanted any standard security to be restricted to £200,000. Rodger Lindsay described Derek Fradgley going through to Euan Lindsay, Euan Lindsay asking if it was restricted and Derek Fradgley confirming that it was. Euan Lindsay agreed to sign it. Rodger Lindsay explained that Euan "wasn't a big confident investor, he was a fish out of water",

The formation of Metal Bridge Limited

[50] Metal Bridge Limited ("MBL") was incorporated on 24 June 2008. Derek Fradgley was responsible for all aspects of the incorporation of MBL. The registered office of MBL

was the same as Outlook's. He also selected his own agents and accountants to be those of MBL. Each of Rodger Lindsay and William Lindsay gave unchallenged evidence that Derek Fradgley was the sole signatory on MBL's bank account and that bank statements were sent directly to Outlook. The Lindsays had no say in any of these decisions. Euan Lindsay and James Lindsay were appointed as the directors of MBL. However, Euan Lindsay was a director only from 1 July until 1 October 2008. James Lindsay was a director and Derek Fradgley was the company secretary for the duration of MBL's existence. Euan Lindsay and Derek Fradgley each held 50% of the shares in MBL. (In a later document Derek Fradgley represented that he was the sole shareholder, but there is no evidence as to how that came about.) MBL was dissolved on 1 February 2011. (The pursuer founds on this evidence to establish that Derek Fradgley was a *de facto* director of MBL.)

The first MBL agreements and the inclusion of the first indemnities

[51] The documentation discloses that 3 days after the incorporation of MBL, it entered into three new agreements with Outlook, namely agreement 1596 (for machinery), agreement 1597 (for cattle), and agreement 1598 (a loan) all dated 27 June 2008. These agreements (which Rodger Lindsay referred to as "leases") contained personal indemnities, unrestricted in amount, from Euan Lindsay and James Lindsay in favour of Outlook (ie the first indemnities).

[52] However, there is a significant divergence between the documentation comprising the first MBL agreements and Rodger Lindsay's evidence. He was clear that the agreement with Derek Fradgley was that the original agreements with the Lindsay businesses would continue as they were. No specific or new terms were ever discussed. Neither he nor any member of the Lindsay family was aware of the first MBL agreements at the material time.

It was only when they were produced in these actions that he saw the first MBL agreements or the ones under challenge. Until then he had not been aware that this was the means purportedly to transfer the loans and leases the Lindsay businesses had with Outlook to MBL. He also disputed that Outlook sent termination notices in June 2008 of the existing agreements Outlook had with the Lindsay businesses, which were first produced in Outlook's enforcement actions against them in 2012 or 2013.

[53] Furthermore, it was also Rodger Lindsay's firm evidence that neither he nor any other member of the Lindsay family was aware of the first indemnities contained in those agreements. No copies of any documents the Lindsays entered into with Outlook were ever left with them. The Lindsays had not seen these agreements. He believed Derek Fradgley's assurance that everything would continue as before, meaning that the existing agreements with the Lindsay businesses would continue. A fourth agreement was entered into between MBL and Outlook (agreement number 1619) and it, too, contained personal indemnities from James Lindsay and Euan Lindsay in favour of Outlook in respect of MBL's obligations. These agreements were subsequently rolled up into the Loan Agreements under challenge.

[54] Roger Lindsay's specific comments on these agreements were as follows:

1) *agreement 1596*: This appeared to have rolled up leases 1595 and 1570. This purported to be for a term of 60 months. That was not known to or agreed by him. He agreed with Peter Graham's assessment that the balancing figure of £25,921 included had already been included in a settlement figure for lease 1570.

2) *agreement 1597*: This purported to be for a 10-year term. A 10-year lease for cattle was a nonsense (he explained that the productive life of a dairy cow was around 4 years), and he would never have agreed to this.

3) *agreement 1598*: This appeared to relate to the £200,000 of working capital Euan had provided. He had not seen this at the time, but knew about it. Rodger Lindsay explained that some years later, they had been able to secure MBL's bank statements from NatWest once James Lindsay provided a mandate. These disclosed that Outlook did not credit MBL with the £200,000 advance secured by the grant of the first standard security. The sum credited had only been £101,000;

4) *agreement 1619*: Rodger Lindsay had been aware of this agreement, entered into in January 2009, but again there was no mention of the indemnities this agreement contained and signed by Euan and James. He described Euan as being very ill at that time, and in and out of hospital. This agreement related to getting more cows to get the milking shed up to capacity. Rodger Lindsay described having spent a good part of the year (from MBL's formation) arguing for this. Outlook sold the Pottinger (which had been subject to lease 1596) to a Mr Hughes in order to fund this. However, he explained that Outlook took the money received from the sale of the Pottinger, but did not credit this to lease 1596. It put the cattle purchased under agreement 1619. Outlook also purported to sell the Pottinger to Euan, and for which it invoiced him.

[55] The first bankruptcy order pronounced against a member of the Lindsay family was made on 14 August 2008.

[56] Both parties instructed expert reports to try to trace the progress of all of the various loans and finance agreements. In the Henderson Loggie Report, Peter Graham went so far as to produce a "family tree", endeavouring to show how the agreements were rolled over from time to time until they were eventually rolled over into the first MBL finance

agreements. As will be noted more fully below in the discussion of the accountants' evidence, the inadequacy of Outlook's records made it difficult for them to trace with any certainty or completeness the sums properly rolled up into the Loan Agreements under challenge.

The manner in which Derek Fradgley secured signatures for any MBL documentation

[57] I have already noted Rodger Lindsay's evidence, above (at para [37]), about the straightforward and open manner in which documents were signed on behalf of the Lindsay businesses with Outlook. Rodger Lindsay contrasted this with the how Derek Fradgley secured signatures to the MBL documentation. He explained that when Derek Fradgley came to get the documents signed to set up MBL he told Rodger Lindsay and Kerr

> "that **the authorities would lock us up and throw away the key if we were caught near the management or decision making. He said it was a minefield. He spoke about government departments having the power to intervene….It would blight the rest of your life if they investigate, he said**. It was all emotive. He said it was all for our great benefit that we didn't know what was happening with the money. It was a funny feeling, because we were vulnerable and in a weak place after everything that had happened to us, but on the other hand, there was nothing not to trust him about at that time. When he wanted to be charming, he could be. ….I felt pushed out…I thought Euan taking the steps he had agreed with Willie was the best option, there would be £200,000 of capital there, it would all be sorted in a day and everything could carry on, but I was not completely comfortable with it….." (Emphasis added.)

[58] Once MBL was incorporated, when signatures were required these were generally obtained at the end of a meeting. Derek Fradgley never sent by post a document to be signed. He attended in person. He never afforded the Lindsays a chance to read through any document before signing it. Rodger Lindsay and James Lindsay each described Derek Fradgley becoming more heated or aggressive about this. As Rodger Lindsay described it, Derek Fradgley would present whatever the document was to be signed as a

formality, and he would turn over the signature page of whatever document had to be signed. Copies were not left. While prior to the formation of MBL the documents to be signed were relatively few (being the various agreements), after the formation of MBL there were more documents to be signed.

The manner in which Derek Fradgley took control of MBL

[59] Rodger Lindsay described the change in how Derek Fradgley conducted himself, and how he involved himself in operational decisions about the business, once MBL was incorporated. He controlled everything. Rodger Lindsay spoke, with some feeling, of an incident shortly after MBL was formed, when Derek Fradgley called a meeting with Rodger Lindsay and a supplier, and how, at that meeting, he slapped Rodger Lindsay down for having spoken directly to the supplier about payment. Derek Fradgley told him he was never to do that. Derek Fradgley said "That's my job, you don't make any decisions about who gets paid. It's my credit rating, my standing". Rodger Lindsay described feeling humiliated. It felt as Derek Fradgley was the boss and the Lindsays were all working for him.

Derek Fradgley's control of the business and of all financial documentation

[60] From the outset Derek Fradgley was in control of MBL. He made all of the decisions. Rodger Lindsay described wanting to buy more cows, because the milking shed had capacity for 400 cows but they only had a herd of 300, but Derek Fradgley refused, saying that the money was required to pay bills and leases to Outlook. Derek Fradgley set up MBL's registered office at Outlook's premises. He insisted that all documents relating to MBL be kept there; nothing was to be at Halltown. Everything was sent to Outlook.

Rodger Lindsay said he never saw a bill. He only received delivery notes from suppliers. There had been no discussion about Derek Fradgley having any formal role in MBL. At that time, Rodger Lindsay did not know what a "shareholder" was, but Derek Fradgley never said he would be anything. Rodger Lindsay said:

> "The agreement I thought [we] had made with him, was that he would keep us right with annual accounts and make sure all was done in time. I was surprised when I realised all the bills etc were to go to him. After the day he gave me a dressing down at the very beginning, I was frightened….I had just wanted to farm and get by."

He explained that James Lindsay and Euan had had nothing to do with the Lindsay businesses, and that remained the case in respect of MBL. Rodger Lindsay also described Derek Fradgley saying that MBL "was about to go bust", even shortly after MBL began trading. Rodger Lindsay described Derek Fradgley pressuring them about money, saying that there was not enough money to pay the Lindsays until the milk cheque came in. There was at least 1 month when Derek Fradgley did not pay them anything. By the third monthly board meeting, in August or September 2008, Derek Fradgley made out that MBL had no money left, and that MBL was

> "on life support. I didn't believe him, but I had no proof. He [Derek Fradgley] **had the bank account and was in control of everything, including paying the bills. He was always putting high, high pressure on us, but the bills all got paid as far as I know**. I was never refused deliveries anytime, no suppliers ever said anything to make me think there were any problems. I would have known if things weren't getting paid. Derek Fradgley had been away on holiday just before this meeting, and he had just come back. He was obnoxious, arrogant and bad tempered. I genuinely thought was all going to melt down at that point. He said there was no money left. We tried to ask how? He never answered, he just told us we had all these bills, and we were spending this and that." (Emphasis added.)

Rodger Lindsay could not understand how MBL was not profitable, given the capital injection of £200,000 supported by Euan's grant of the first standard security in favour of Outlook. As he described it in his supplementary statement:

> "Our businesses [ie the Lindsay businesses] only failed because of an operational mistake with the labelling of AI straws, not because of the non-payment of [Outlook]. [Outlook] was always paid by us. Once [Derek Fradgley] took over and set up MBL, I had no knowledge or control over what was or wasn't being paid, but I would question why we were always able to pay [Outlook] up until MBL was formed, and them why MBL, with a supposed capital injection of £200,000, suddenly couldn't afford to pay [Outlook] anymore. That doesn't make sense to me."

Looking back, he believed MBL was nothing more than a vehicle for Derek Fradgley to try to get signatures to get a charge on Harperfield. He described how Derek Fradgley told him that the bank insisted that the cattle passports be kept in the bank's vaults, which Rodger Lindsay thought was nonsense.

Rodger Lindsay's comments on the board minutes Derek Fradgley prepared for MBL

[61] In his parole evidence, Rodger Lindsay augmented the description in his affidavit about how board meetings of MBL were actually run. Rodger Lindsay had had experience from sitting on other committees or boards of how there would be an agenda to be followed, and with an opportunity for those present to speak. The minutes would reflect the discussions and decisions of the meeting. By contrast, at the meetings for MBL, Derek Fradgley essentially presented the Lindsays with his instructions as to what was to be done. No prior minutes were reviewed. There was no interaction; no discussion. He did not provide any financial information relative to MBL. The reality was that Derek Fradgley came and told the Lindsays what was to be done and by whom. They felt like they were just employees of Derek Fradgley, who was "the big boss".

[62] Rodger Lindsay also said that what the board minutes purported to record bore no relation what was actually discussed at the meetings. They purported to record matters that in truth were never discussed. Derek Fradgley did send board minutes by email but

Rodger Lindsay did not read these at the time, given the amount of physical work he was engaged in. He gave examples of entries which he disputed:

1) While some board minutes stated that budgets and profit and loss accounts would be produced, this was not the case (eg as in the first minutes, dated 11 July 2008, the minutes of 11 November 2008, or those of 13 May 2009)). Other minutes purported to record that financial statements "were reviewed and explained" (eg the minutes of 11 November 2008 or 8 January 2009), or that Rodger Lindsay had "prepared budgets", or budgets for 3 years (as suggested in the minutes of 11 November 2008), or that the directors had seen and "accepted" the financial statements (minutes of 11 November 2008). None of these statements was true. Derek Fradgley never put any such financial information before the Lindsays in respect of MBL. Rodger Lindsay did not prepare budgets.

2) In the minute (of 11 July 2008), in respect of the "authorisation" of Rodger Lindsay to negotiate contracts on behalf of the MBL, this did not happen. Derek Fradgley controlled MBL;

3) Any suggestion that Derek Fradgley was "detached from the operational side" of MBL (eg as stated in the Memorandum of 13 September 2008), was strenuously disputed by Rodger Lindsay. Derek Fradgley ran MBL. He was the boss telling the Lindsays what to do;

4) In respect of any figures Derek Fradgley quoted, Rodger Lindsay was sceptical. He gave as an example a memorandum dated 13 May 2009. It recorded that Outlook's current investment in MBL was stated to be £151,000. He could not understand this as £200,000 of new cash had been provided at the start, in late

June 2008, but only £100,000 had been put in the bank. Rodger Lindsay could not understand how there could be arrears, as Derek Fradgley insisted. When he ran the dairy business as Lindsay's Dairy, it was profitable, it did not make a lot, but it was profitable. When it started, MBL did not have any creditors other than Outlook and it had the new capital supported by Euan Lindsay's grant of the first standard security. Rodger Lindsay could not understand where £200,000 had gone between August 2008 and May 2009. By around December 2008 dairy production had doubled and the milk cheques were up to about £50,000 to 60,000 a month, a sum Rodger Lindsay described as "colossal" for a single farm. At around the same time, finance agreement 1619 was entered into to enable the purchase of a whole herd from a fellow farmer. Derek Fradgley never put financial information before them and so the Lindsays could not test what was stated. DL always went on about arrears;

5) Any entry suggesting that Euan Lindsay was actively involved in any way was a fiction. Rodger Lindsay described the suggestion that Euan Lindsay or Rodger Lindsay could have prepared forecasts as "ludicrous". The Lindsays simply had no financial information to do so: no bank accounts, no sales ledgers, nothing. Rodger Lindsay explained that when he was running Lindsay's Dairy, they had always used accountants to produce any budgets for lenders. They used professionals. In respect of the entry that Euan Lindsay had undertaken a stock check or a count of the AI stems (as suggested in the minutes to 13 May 2009) was also ludicrous, given his poor health and the physical demands entailed in those tasks.

[63] There were other matters recorded in the MBL documentation that Rodger Lindsay discovered later and which caused him concern. These included the following:

(1) that Outlook was charging rent to MBL;

(2) that agreements 1568, 1587 and 1570 Lindsay's Dairy had with Outlook were to be carried over have the same terms as any agreement with MBL, but this had not been the case;

(3) that Derek Fradgley maintained that the monies had to be repaid quickly, but some agreements were in fact for 10 years;

(4) that Outlook were also charging MBL for the cattle;

(5) that, in the course of Derek Fradgleys enforcement actions against the Lindsays in 2012 and 2013, Derek Fradgley produced a letter, purportedly dated June 2008, terminating all of the agreements with the Lindsay businesses. Rodger Lindsay was adamant that no such termination letter had been received at the time;

(6) the bank accounts disclosed never showed MBL in debt at the material time; and

(7) that there was no bank standing behind Derek Fradgley or to whom Outlook owed money. This was the case, notwithstanding Derek Fradgley's frequent references to "the bank", or being pressured by "the bank", or "the bank" requiring the cattle passports.

The events leading up to 26 August 2009

[64] Rodger Lindsay described Derek Fradgley's increasingly fraught behaviour from late 2008 into the spring and summer of 2009. Throughout that period, Derek Fradgley was

representing that MBL was in dire financial straits. By reason of MBL's bank statements going directly to Outlook, none of the Lindsays was in a position to question Derek Fradgley's presentation of MBL's affairs. Rodger Lindsay contrasted Derek Fradgley's statements of MBL's position with his (Rodger Lindsay's) own dealings with MBL's suppliers, who did not raise any issues of non-payment. Derek Fradgley was always saying that everything "had to be paid back so quickly", and it was only later that Rodger Lindsay learned that the first MBL agreements (which he had not seen at the time) were for 10 years. He explained that it got to the point where he was the only one of the family interacting with Derek Fradgley, as everyone else was "fed up". Rodger Lindsay described himself as trying to hold it together and being "frightened for the family".

[65] Matters came to a head in August 2009. Derek Fradgley sent a fax on 19 August claiming that MBL was in trouble and that another £200,000 was needed from Euan Lindsay. Rodger Lindsay understood that it was a deliberate act on the part of Derek Fradgley to do this by fax, given that he knew Euan Lindsay sat beside the fax machine. Rodger Lindsay described Euan Lindsay becoming very upset, but insisting that Derek Fradgley would get no more money.

> "81. After the August 2009 Board Meeting, something important happened. On 19 August 2009, Derek Fradgley sent a fax to Euan and me [Core Bundle Production No. 25, page 296]. **He had sent a fax because he knew Euan would read it - the fax machine was next to where Euan sat. The fax had some gobbledegook about creditors, and it concluded with him saying that the only solution to the problem would be for Euan to produce another £200,000 security over Harperfield.** [Derek Fradgley] said be must have confirmation of this by Friday at the latest.
>
> 82. I remember I was in the office with Euan that morning when the fax came through. Euan said, we can't do that, Bill will go daft as well! We spoke with father too, and he said, well what does he need it for? Father said, we've never had any money, where has the last £200,000 gone?! Euan got awfully upset. **So I said, well, we'll just tell him that he can't have it. So I phoned him back and I said 'No, that was the maximum that would be done Derek, you can't get any more.'** I got a rant

> from him, but I can't remember the exact words of what he said. I had heard him worse though." (Emphasis added.)

The Little Chef meeting between Derek Fradgley and Rodger Lindsay on 23 August 2009

[66] The next thing Rodger Lindsay knew, Derek Fradgley summoned Rodger Lindsay down to a meeting at a Little Chef restaurant, somewhere in the Midlands, on Sunday 23 August 2009. Rodger Lindsay described Derek Fradgley shouting at him and carrying on about MBL's dire financial position (as Derek Fradgley presented it), and that "the bank" was after him [Derek Fradgley] because of all of the outstanding loans. Derek Fradgley said, "The bank only had to sign a form" to go to court to make MBL insolvent. Rodger Lindsay felt under pressure. Derek Fradgley was saying that MBL was insolvent and that everything had to be sold - the cattle, the farm and the machinery - and that this all had to be done immediately. There was no mention then of any indemnities. Derek Fradgley was really angry and said he was "finished" with them. Rodger Lindsay described becoming embarrassed by Derek Fradgley's behaviour in a public place. Rodger Lindsay was pressed several times in cross-examination, but he confirmed that he had not mentioned to Derek Fradgley at the Little Chef meeting any intention on the part of the Lindsays to buy out the assets of MBL. That proposal only arose after the meeting at the Little Chef.

The Lindsay family discussion to buy out the assets of MBL

[67] Rodger Lindsay described going back that evening to Halltown to discuss matters with the family. (Given that Euan Lindsay was living in the same household with Rodger Lindsay, there is no doubt that Euan Lindsay and the other Lindsays would learn of the tenor of Rodger Lindsay's discussions with Derek Fradgley at the Little Chef meeting.) The outcome of that discussion was that they felt they were back where they were

the year before, and the only solution was to try to buy the assets from Outlook. Rodger Lindsay estimated that they would require just over £1 million to buy the farm, stock and machinery and would need an additional £200,000 to settle the legal charge. In the days that followed, Rodger Lindsay explored financing with a third party, Agricultural Mortgage Corporation. The plan was to obtain a bridging loan for a few years in order to settle the business and establish a track record. They could then secure refinancing at a lower rate on a long-term loan. The Lindsay businesses had worked well in the past with a different specialist bridging finance company when they had purchased Metal Bridge Farm in 2002. He also explored having MBL's assets valued, as he wanted to pay a fair price for them.

Derek Fradgley's unexpected arrival at Halltown and his journey with Rodger Lindsay to see Harperfield

[68] When, a few days later, Rodger Lindsay called Derek Fradgley and told him of the Lindsay family plan to buy the assets of MBL, he described Derek Fradgley "being fine" with this. Rodger Lindsay then described what happened shortly after that call:

> "86. Shortly after that call while I was milking at Metal Bridge I received a call from [Derek Fradgley] out of the blue, saying he was needing to see me immediately and would be there shortly, the bank had to be resolved today. When he arrived he put me in the car and said that **unless he got new agreements in place today Euan would be sued for over £2,000,000, he had managed to convince the bank to make available funds to settle the Metal Bridge Ltd loans with new mortgages on Harperfield and Metal Bridge.** I was shocked and spinning and I said it's £200k Euan owes, that's all he is liable for, the discussion got very heated, he pointed his finger at me and raised his voice 'he signed the leases and is liable for them as well, look either we get this sorted today **or the bank will make Outlook sue him for all the money Metal Bridge owes Outlook**... .' and unless he has got £2 million in his hip pocket he will be bankrupt and he won't even have Harperfield, and **I have had to write off all the money I have put into Metal Bridge to get the bank to do this**

> **deal**, I'll never see that again. I was spinning and he was not interested in any discussion about it, **he said he had been through it with Euan and he had signed the agreement**, he needed me to take him to see Harperfield so that he could **report back to the bank** that he had seen it and I had to go with him now and show him it, so he could get back to them that afternoon. On the journey he told me that the deal would allow us to get the cows I had told him we were going to buy on the last call we had, and he said he would set up a new company to run it all and just manage things within Outlook until he got that done. When we got near Harperfield he asked me just to point it out and so we looked at it from the main road and just returned back to Carlisle where he dropped me off." (Emphasis added.)

Halltown, where Euan Lindsay then lived, is 3 miles from Metal Bridge Farm.

Rodger Lindsay had been milking at Metal Bridge Farm when Derek Fradgley unexpectedly turned up to make him accompany him two Harperfield (a 2-hour drive away) so Derek Fradgley could view it. Rodger Lindsay had not been present at the meeting between Derek Fradgley and Euan Lindsay at Halltown which had just taken place. (In submissions, the pursuer submitted it was significant that Rodger Lindsay had not been included in that meeting, notwithstanding his status as the Lindsay family's spokesman and man of business.) Rodger Lindsay described Euan's state when Rodger Lindsay arrived back at Halltown:

> "87. When I got back to the house at Halltown and saw Euan and father they were at the kitchen table, **Euan was in some distress and trying to use his inhaler**. I said how do we owe all that to [Outlook] **Euan was shaking and he said that was what it said on his bit of paper, I had to sign it, he was going to sue me, he was going to make me bankrupt, he was very upset,** father said he had said he would sue him for £2.6 million." (Emphasis added.)

It should be noted that in the Settlement Calculation the figure of £2,662,812 appears under the heading "Balance of Rentals".

The nature of the document Euan Lindsay signed at his meeting with Derek Fradgley

[69] One of the unanswered questions in these cases is what, in fact, was the document Euan Lindsay is reported as saying he had signed at the unplanned meeting with Derek Fradgley. Rodger Lindsay's evidence was as follows:

> "Euan did have solicitors acting for him in the conveyancing that was required after his meeting with Derek Fradgley in or around 26 August 2009, but **they were instructed after** that meeting, **and neither firm gave Euan any advice on the loan agreement itself**. As far as I understood at that time, from speaking to Euan and father, and my conversation with [Derek Fradgley] in the car immediately afterwards, Euan had signed the mortgage papers that day at the meeting with [Derek Fradgley]. [Derek Fradgley] **told Euan he had to, to avoid being made bankrupt by NatWest bank**. [Derek Fradgley] made out to me that he was to be thanked for getting such a great deal for Euan, and getting a discount and so on. So, as far as we all understood, the deal was all done that day. All that remained to be done was the conveyancing aspects, which the solicitors had to do." (Emphasis added.)

Rodger Lindsay explained Derek Fradgley's conduct in the immediate aftermath of the meeting on 26 August 2009:

> "[Derek Fradgley] was always calling me and putting pressure on me to get everything completed quickly after that meeting. He wanted the conveyancing completed by 1st October – he said to me that he didn't want a "fiasco" like the last time, when Euan agreed to the £200,000 security. It was always me [Derek Fradgley] called, not Euan. I didn't know the ins and outs of what was to happen, but [Derek Fradgley] told me that I had to get Euan to instruct a solicitor to act in the transfer of Metal Bridge farm to him. I contacted Baines Wilson solicitors at some time in the second half of September 2009, and they then got in touch with Euan, about the conveyancing of Metal Bridge farm. [Derek Fradgley] also asked me a few times to get Euan to contact his Scottish solicitors, to deal with the legal charge over Harperfield. I asked Euan to contact Gebbie & Wilson solicitors, and he told me he did that. **Euan was very upset and withdrawn after that meeting with [Derek Fradgley], so communication with him was fraught**, and we didn't speak about the conveyancing at all, other than when Derek Fradgley put pressure on me to ask Euan to get solicitors instructed, and then to hurry them up.
>
> I did not at the time know anything about [Derek Fradgley] coming back to Halltown and getting Euan to sign any further copies of loan letters after that meeting. I have seen from OFL's solicitors' files that Derek Fradgley brought further loan papers to Halltown to be signed by Euan on a Sunday. I would have been at church from 9am until 3 or 4pm on a Sunday, so I wouldn't have been there, and **Euan would not necessarily have told me, given how withdrawn he was at that time**."

[70] Rodger Lindsay also spoke to the enquiries he made in 2012 of the English and Scottish agents (Gebbie & Wilson and Baines Wilson, respectively) who had prepared the security documentation for Euan Lindsay in September 2009. Those enquiries disclosed that the only loan facility letter on file with Gebbie & Wilson was the letter the Outlook Letter (of 4 September 2009), being the letter attached to the impugned standard security Euan had signed. There was no sign of either of the Loan Agreements in either solicitors' files. Rodger Lindsay also observed that from Mr Lingard's affidavit it was apparent that neither of the Loan Agreements was on his file, either. It was clear to Rodger Lindsay that neither the English nor the Scottish solicitors had given Euan legal advice in respect of the Loan Agreements or the impugned standard security. Rodger Lindsay was not cross-examined on any of this evidence.

The "by hand" termination notices dated 25 August 2009

[71] Rodger Lindsay cast doubt on the veracity of some of the documentation Outlook founds upon in these actions. Two examples are the termination notices dated 25 August 2009. One of the differences in approach between the parties' experts is whether the termination provisions of the agreements were operated (being the premise on which Outlook's expert proceeds), or whether these were never sent at the time (the Lindsay's position and one of the reasons why the pursuer's expert's report is prepared without regard to any contractual terms). I therefore note Rodger Lindsay's evidence on these two documents.

[72] There are two termination letters dated from about the same time as the meeting between Euan Lindsay and Derek Fradgley (collectively, "the 'by hand' termination notices"). Both were dated 25 August 2009 (though both refer to Outlook having terminated

the agreements on 23 August.) The one addressed to Euan Lindsay, and declared to be 'by hand' (no address is provided), was in the following terms:

> "I am writing to you regarding the indemnity and security you provided to us in respect of three lease agreements and a loan agreement between Outlook Finance Limited and Metal Bridge Limited.
>
> As you know, payments have not been made on these agreements for some time, and they are substantially in arrears. Because of the arrears and because there is no prospect of the customer, Metal Bridge Limited being able to pay rentals for August, the hiring of the assets under the three lease agreements was terminated on 23rd August.
>
> The net position in respect of the three leases is that the balance outstanding is £1539120, and for immediate settlement of them in total, we will require £935051. The loan agreement immediate settlement figure is £223000, meaning that the total amount due to us from you, as the indemnifier, is £1158051. We offer the leased assets to you as indemnifier for £935105 for immediate purchase.
>
> **I understand that you propose to address this matter by forming a new company**, Harperfield Farms Limited, and **consolidating your existing business with the assets that are currently the subject of our leases and increasing the herd numbers by 150 additional cows**. To do this, you wish to purchase also the land and buildings at Metal Bridge where we are moving to become mortgagee in possession. **You have made an offer of £465000 for this property**, which we are minded to accept. For the purpose of record, you know that the proprietors of this land are in bankruptcy and that Outlook must deal with the administrator of the bankruptcy before any sale can take place. Should we not be in a position to time the purchase contemporaneously, we will provide and expect irrevocable undertakings to and from you.
>
> Without prejudice to our rights, and subject to contract, we will be prepared to accept £623051 for the various assets above. You will be responsible for all legal and professional expenses, stamp duty and VAT.
>
> To assist you in the purchase, we will, subject to contract and subject to our being able, arrange funding of £1.8m which will be secured on your current farm land at Harperfield and on the land and buildings at Metal Bridge by way of a first legal charge. **I have seen your projections for the business** that indicate a net income of £68902 in the first year, rising to £202814 by the end of year two. On the basis of these projections, we would consider a funding arrangement based on the payment of interest only for two years at 7% pa fixed rate. After two years, we will require capital payments that will ensure the completion of the loan including interest within 20 years. The rate of interest that we will charge after the fixed rate period will be linked to base rates, with a minimum rate of 7% pa.

> Under the proposed transaction, Harperfield Farms Limited will be the owner of the assets that are currently leased by us to Metal Bridge Limited. Neither I nor Outlook Finance will have involvement in the ownership or administration of the business, but will require regular financial information to ensure that the business is working to plan an able to service the loan debt." (Emphasis added.)

[73] The second of these 'by hand' termination notices was addressed to James Lindsay. It did not have an addressee's address and it also bore to be "by hand". Derek Fradgley wrote in his capacity as the company secretary and sole shareholder, explaining that he had "dealt with the paperwork for you since the business started, and left the day to day running of the operation to you…" The termination notice was longer than the notice to Euan, as it also dwelt on James Lindsay's responsibilities as a director, and how he would be acting in contravention of company law if he continued to trade. It declared that Outlook "has now (23rd August) terminated the hire of the assets leased to Metal Bridge Limited and will be take possession of them immediately." It stated that these would be sold. Its penultimate paragraph stated:

> "I understand that **Euan has suggested an alternative scheme of amalgamating the Metal Bridge and Harperfield enterprises, and settling the debts of Outlook off through the re-mortgaging of both properties.** I have not seen full estimates of this proposed scheme, and it is not my concern, but I advise you that the amount required to settle off all of the debt to Outlook in accordance with the agreements is currently £2.185m. I have calculated a special figure based on Outlook writing off all future charges, and this would amount to £1.623m today, exclusive of any VAT. I have some concern as to the ability to raise the amount of money required at the current time, but you should be aware of the figures above if you wish to consider this option for the future." (Emphasis added.)

[74] Rodger Lindsay's evidence was that these were not received at the time.

> "98. I have seen versions of the By Hand letters dated 25 August 2009. These don't make sense to me. I never saw these until 2013. They mention 'Harperfield Farms Ltd'. That makes no sense, that was never a proposal at any point. My proposal was that the owners would be DM Lindsay, not a limited company. Derek Fradgley was obsessed with limited companies. **I don't think these letters were contemporaneous nor delivered at the time. Looking back now, with the benefit of hindsight and documents that have been disclosed in the various litigations, I think the real reason Derek Fradgley wanted to end Metal Bridge Limited, was because our**

> **trustee, Dodds & Co, had raised a dispute with him, and were raising queries and wanting money. The timing seems to coincide with when he got panicky.** That was when he moved to shut it down, in August 2008. He made out that the bank was on his back and the company was insolvent, but what we know now is that Dodds had started demanding big amounts, £70-£80k, from Metal Bridge Ltd." (Emphasis added.)

(I note parenthetically, that the reference in the penultimate sentence to "2008" must be mistaken, as he is referring to letters dated 25 August 2009.) In his parole evidence, Rodger Lindsay queried why Derek Fradgley would send these to Euan or James, given that he was running MBL himself. Outlook had made no demand to return machinery or cattle. He as adamant that that had never happened. He did not know who the agents were, who were to receive the cattle. The address was a garage forecourt in the middle of England. He also noted that the dates of termination referred to in Outlook's documentation kept changing: this notice referred to 23 August, other documents said 28 August.

Rodger Lindsay's comments on the profitability of the Lindsay businesses in contrast to MBL's position and other dealings by Derek Fradgley

[75] In his second affidavit, Rodger Lindsay commented on the proposition in the Outlook statements that the Lindsay businesses were unprofitable and required support from Outlook:

> "Our family businesses, before Metal Bridge Limited ("MBL") was formed, were always modestly profitable. We were good customers of Outlook Finance Limited ("OFL"), and Derek Fradgley ("Derek Fradgley") said so in a sworn statement to Carlisle County Court in April 2008. He also confirmed we were up to date with all payments…. OFL made a lot of money from the various lease agreements they had with us over the years. Our businesses only failed because of an operational mistake with the labelling of AI straws, not because of the non-payment of OFL. OFL was always paid by us. **Once Derek Fradgley took over and set up MBL, I had no knowledge or control over what was or wasn't being paid, but I would question why we were always able to pay OFL up until MBL was formed, and then why MBL, with a supposed capital injection of £200,000, suddenly couldn't afford to pay OFL anymore. That doesn't make sense to me**." (Emphasis added.)

[76] Rodger Lindsay also gave evidence about Outlook taking rent in respect of Metal Bridge Farm in the aftermath of the Lindsays' bankruptcies, but doing so without their knowledge or agreement, and the inconsistent ways that Derek Fradgley presented this to different parties at that time.

> "I have seen from MBL bank statements, that [Derek Fradgley] was taking £3,825.30 per month from MBL and paying it to OFL for "rent" for Metal Bridge farm, between August 2008 onwards. There was no written lease, certainly not one I have seen, and there was never anydiscussion about rent payments nor a lease. Kerr, mother and I originally owned Metal Bridge farm and had a mortgage over it with OFL …., but we had been made bankrupt by the time these payments were being made. Metal Bridge farm vested in our trustee at that point, as far as I understand [Derek Fradgley] said he would speak to our trustee on our behalf about everything, so at the time, we were not really aware of what was going on. I have seen from documents later though, that OFL did not take steps to take possession of Metal Bridge farm from our trustee until October 2009, so I do not understand why OFL were entitled to take rental payments for the farm from MBL. I think those payments should have been made to our trustee. I have also since seen a letter that Derek Fradgley's solicitors, Talbots, sent our trustee in October 2009, saying that the mortgage payments due for Metal Bridge farm had not been paid since May 2008…. OFL had in fact been taking these "rent" payments (which were equal to the mortgage payment amounts) out of MBL's bank account since August 2008. [Derek Fradgley] said in para 31 of his Witness Statement … in the Manchester action that all rent paid by MBL had been credited to loan number 1569, which is contradictory to what is said in the letter Talbots sent to our trustee."

[77] Rodger Lindsay commented on the terns of the first MBL agreements. In respect of agreement number 1619, he was aware that this was being entered into in January 2009. This was at a time when Euan was very ill, and in and out of hospital. There had been no mention of there being any indemnity from Euan. The purpose of this agreement was to purchase more cattle. However, Rodger Lindsay noted some irregularities in Outlook's dealing with this agreement. The Lindsays understood that Outlook sold the Pottinger in order to fund the purchase of cattle. While Outlook took these proceeds, it did not credit this to the agreement (number 1596) which had included the Pottinger. Moreover, the same

Pottinger was purportedly sold to MBL under one of the Loan Agreements and invoiced MBL. (The invoice was produced in process.) He was not cross-examined on this evidence.

The valuation of the assets of the Lindsay businesses sold to MBL

[78] As part of the overall transaction reflected in the Loan Agreements, Outlook sold the assets it held under first MBL agreements to MBL. The figures attributed to these assets, which are included in the second Grant Thornton Report, were £635,000 for the cattle and £300,000 plus VAT for the machinery. Rodger Lindsay believed that these valuations were grossly overstated. He instructed retrospective valuations, which brought out figures of £161,266 and £59,000, respectively, for the cattle and the machinery - in other words, a global figure that was £714,734 lower than the Outlook figures. Again, this evidence was not subject to cross-examination.

The sums paid to Outlook

[79] Rodger Lindsay also explained the sums paid to Outlook under the impugned deeds. Outlook received payments totalling £380,690 from Euan (and from his estate, after his death). These payments are also recorded in Outlook's payment schedule lodged in the Manchester proceedings. Rodger Lindsay provided a breakdown of the different ways in which these sums were paid. Outlook also received £599,000 from the sale of Metal Bridge Farm after that was repossessed. (Outlook's statutory demand associated with this was produced and it was one of the documents agreed by the parties' Joint Minute.) Finally, Outlook retained about £110,000 for agreement number 1540. The rationale was that this was to pay for more cattle but it was never applied for that purpose nor credit ever given by Outlook. As Mr Preston did not deduct this from his final calculation, this would need to be

done from his figures. The total of these figures is £1,089,690. None of this evidence was subject to cross-examination.

Cross-examination of Rodger Lindsay

[80] Rodger Lindsay's cross-examination lasted for a full court day, extending over 2 days. The first, and extended, passage of cross-examination explored the premise of whether the Lindsay businesses had traded profitably. For a large part of this, Mr McIlvride and the witness were at cross purposes. Rodger Lindsay acknowledged that there might be "arrears", in the sense of not paying a creditor when a sum fell due, but he was adamant that creditors were eventually paid; whereas Mr McIlvride assumed that this meant a default (ie a failure to pay at all). Rodger Lindsay's position was that, while they could not always pay creditors when they liked, they paid their creditors. The Lindsays had grown the business from the mid-1990s to 2007. Rodger Lindsay maintained that if these businesses were as financially parlous as was now being suggested, Derek Fradgley would not have become involved with them. Rodger Lindsay strongly denied the suggestion, derived from the first Grant Thornton Reports, that Lindsay's Dairy had missed 13 payments in a row under agreement number 1309. Derek Fradgley would never have permitted that. Rodger Lindsay readily acknowledged that he and the other partners had been made bankrupt. There had been mistakes by a government agency (DEFRA) which had affected cash flow. The Lindsay businesses had faced and lost a serious litigation (the AI litigation). The trade creditors were around £300,000 and the judgement debt was £168,000. That, and the cost of funding their defence to the AI litigation, had been too much.

[81] When pressed on the detail of some of the earlier agreements, Rodger Lindsay explained that there were some agreements that they did not recognise and they had no record of them. He referred to a disclosure by Derek Fradgley in one of the early litigations. Derek Fradgley had produced copies. When further copies were lodged, they had been altered from those earlier copies. The Lindsays tried to get the originals. In respect of agreement 1499, they simply did not recognise this. It did not correlate to anything they had.

[82] Rodger Lindsay was also questioned under reference to the accounts of MBL to the year 30 June 2009, but Rodger Lindsay explained they had never seen these at the time. They had only become aware of them when Derek Fradgley enforced the legal charge against Metal Bridge Farm. The loss for the period of £341,682 covered by the accounts was put to him, but Rodger Lindsay maintained that he was not a director and had nothing to do with MBL's finances. Derek Fradgley was in charge and these accounts had been prepared by him. He described the numbers as colossal. He could not understand it; they had 200 cows, 200 calves and 200 acres of corn and silage. He asked, where did these accounts show the £200,000 advanced by Outlook? Rodger Lindsay rejected the proposition that he or the Lindsays had been kept updated with MBL's financial records. Nothing like this was ever discussed. Derek Fradgley was running MBL; the figures were his figures. The Lindsays knew absolutely nothing at that time.

[83] In respect of the board minutes, Rodger Lindsay readily acknowledged that board minutes were emailed to him, although not to his personal address. They did not print these out or make files. He did not read them. He could not say that he had not seen them. They were sent but he was busy farming. He really only knew of, or became aware of the contents of, the minutes in 2012 (when the litigations started). He could not comment on

their accuracy, at least in matters outwith his knowledge, as he did not have the financial information. The entry from the first minute, dated 1 July 2008 was put to him, which noted that MBL had entered into two lease agreements with Outlook and that both had been "indemnified" by Euan Lindsay and James Lindsay. It was suggested to him that someone reading this might ask: "what's an indemnity?". Rodger Lindsay replied that at that time, the Lindsays had trusted Derek Fradgley. They had been dealing with Derek Fradgley for 12 years. He had never asked for, and Rodger Lindsay had never signed, a personal guarantee or indemnity. The word "indemnity" meant nothing to him at the time. Derek Fradgley could have written those words knowing that the Lindsays would not know what an indemnity was and that they would not understand it.

[84] Rodger Lindsay was firm that Derek Fradgley had never mentioned the indemnities or explained them. Any signing of their agreements was done briefly. The so-called board meetings at Halltown really involved Derek Fradgley doing all of the talking, which was mostly about operational matters. Rodger Lindsay contrasted how Derek Fradgley conducted those meetings with how he, Rodger Lindsay, had seen them conducted at other meetings, where there was a proper chair and minutes and these were signed off and approved. Derek Fradgley simply came with a brown folder and talked about "this and that". A particular source of tension was about Lindsays getting invoices raised. The Lindsays had had a simple system that had worked well - they had used it with their factors - but Derek Fradgley was insisting that all invoices be sent to him, and this led to duplication of effort. What they had not known at the time was that Derek Fradgley was charging them fees for all of this.

[85] He was questioned about attachments of financial statements to some of the later minutes. Rodger Lindsay was adamant that Derek Fradgley never produced or went

through these materials at the meetings with the Lindsays. They were not "board" meetings; they were just meetings. Nor did Derek Fradgley provide "updates", as the minutes stated.

[86] Other entries from the minutes were put suggesting that Euan Lindsay had been in attendance. Rodger Lindsay did not accept these were correct. Euan Lindsay did not like the meetings. They caused him anxiety. He was also adamant that Euan Lindsay did not provide stock figures for the cattle or the AI stems, as the minutes purported to record. Euan Lindsay did not have the physical stamina to do any of this. Checking the AI stems required climbing a ladder to the top of the tanks, where the semen was stored in liquid nitrogen at -140^{0}. Once the tank was opened, the vapour had to clear. The effect was to draw the oxygen out of the air. It was a dangerous and tricky job, even for a healthy person. It was a "total nonsense" that Euan Lindsay could have done this. Nor was it correct, as the minutes sought to portray, that Euan Lindsay was involved in other ways with the paperwork. Rodger Lindsay did all of that. At most, Euan Lindsay might fax some documents down. That was all that he was capable of doing. He rejected as "utter nonsense" senior counsel's proposition that Derek Fradgley might infer that Euan Lindsay was involved in the preparation of the paperwork. Rodger Lindsay had always done this. He could place no faith in anything that Derek Fradgley produced, given the alterations Derek Fradgley had made to documents and which had come to light in other litigations.

[87] In relation to references to Rodger Lindsay "preparing budgets", Derek Fradgley had never asked him to produce budgets or cash flow forecasts. When running Lindsay's Dairy, Rodger Lindsay had always instructed accountants to do that kind of work. He was a farmer not an accountant. Any statement that the budgets appended to some of the minutes were prepared by Rodger Lindsay or any other member of the Lindsay family, as was

recorded in the minutes, was false. Nothing like that ever took place with MBL. Derek Fradgley ran it.

[88] Rodger Lindsay was challenged on his statement that Derek Fradgley had assured them at the time MBL was set up, that the agreements with the Lindsay businesses would continue as before. He maintained his position that his understanding was that the company would be set up but that the Lindsays would carry on in the same way. He was unaware of the first MBL agreements at that time. There were no termination letters sent to the Lindsays at that time in respect of the extant agreements with the Lindsays. The Lindsays first saw these termination notices was when Derek Fradgley produced them in a litigation in 2012 or 2013. There would have been "some stushie" if Derek Fradgley had produced them on the date they bore (being June 2008), because the leases and numbers they contained bore no relation to the agreements in place at that time.

[89] The circumstances leading up to Derek Fradgley's meeting with Euan Lindsay on 26 August 2009 were explored. Rodger Lindsay confirmed in cross-examination that there was no intention on the part of the Lindsays to take any more funding from Derek Fradgley or Outlook. He was adamant on this point. At the Little Chef meeting a week or so before, Derek Fradgley had expressed his displeasure with the Lindsays and he made Rodger Lindsay "feel like a small or low type person because we had left him with all this debt". Derek Fradgley had been "really angry" at the Little Chef meeting and had made it clear that he "never wanted anything to do with us". Derek Fradgley had been fed up with the Lindsays and he had stated that MBL was insolvent and finished. He was not present when Derek Fradgley turned up and met with Euan Lindsay. Derek Fradgley had not left any paperwork behind.

[90] He was asked about the document Euan Lindsay had mentioned signing at the meeting he had had with Derek Fradgley (see para [68], above), but Rodger Lindsay had not been there and had not seen any document. Rodger Lindsay described it all happening very quickly. Derek Fradgley had sent a fax on 19 August 2009, demanding another £200,000. He knew that Euan Lindsay would see it. Euan Lindsay had refused. Derek Fradgley had summoned Rodger Lindsay down to the Little Chef on the following Sunday. This was when Derek Fradgley was ranting loudly and saying things like, "MBL was insolvent," "everything had to be sold", and that all "the bank" needed to do was sign a piece of paper. After that, Rodger Lindsay had discussed with the others what to do. They had resolved to buy out the assets and had begun to explore this with other funders. At some point, Rodger Lindsay phoned Derek Fradgley to apprise him of their intentions to buy out the assets, and this had led Derek Fradgley to turn up very quickly after that. Rodger Lindsay accepted that any buy out would involve another standard security over Harperfield as the means to raise funds, but this would be with another lender, not Outlook.

[91] Rodger Lindsay was challenged to explain what had become of the piece of paper Euan Lindsay said he had signed. Rodger Lindsay could not say, he had not been at the meeting between Euan Lindsay and Derek Fradgley. He had not seen the paper Euan Lindsay had said he had signed. All he could speak to was of Euan Lindsay being in such a state, because Derek Fradgley had told him that "the bank had to be sorted today or [Derek Fradgley] will have to sue him [ie Euan Lindsay]" unless he had £2 million. Euan Lindsay believed that Harperfield would be lost. Rodger Lindsay was pressed about his recollection of the date of the meeting between Euan Lindsay and Derek Fradgley. Rodger Lindsay could not recall the exact date, but he was clear in his recollection about the sequence of events which he had described.

The 'by hand' termination notices of 25 August 2009

[92] Termination notices dated 25 August 2009 were put to Rodger Lindsay. The 'by hand' termination notices purported to terminate the agreements and demanded delivery of the cattle or machinery concerned. Rodger Lindsay was pressed on this, and that these had been sent and received, but he maintained that no termination notices had never been received at the time. (In re-examination, he confirmed that he was not just speaking for himself. Had any of the others received such notices, he would have been bound to know.) These 'by hand' termination notices only came to light when Derek Fradgley sought to enforce the mortgage years later. There was never any demand for return of the equipment or other items, as these stated. That had never happened. He was adamant on this point. The discussion among the Lindsays had been to get the assets valued and then buy them from Outlook. When Rodger Lindsay called Derek Fradgley, he said this was fine, but the next day Derek Fradgley arrived, demanding all these debts be paid and insisting that MBL was insolvent. These 'by hand' termination notices had never been received at Halltown. In support of his position on this point, Rodger Lindsay referred back to his earlier evidence about the disclosures that Outlook had made in the Manchester proceedings, an examination of which revealed that Derek Fradgley had altered some agreements between the time of his first lodging them in that litigation and the versions subsequently lodged in the same proceedings. He gave a further example of an agreement that Derek Fradgley produced, purporting to date from 2003, but listing cattle that had not yet been borne.

The Outlook Letter to Euan Lindsay

[93] Rodger Lindsay was also questioned under reference to the Outlook Letter (being the letter dated 4 September 2009 from Outlook to Euan Lindsay), in which figures were

provided of sums said to be due by him to Outlook and asserting that the sum for which Euan Lindsay was liable as indemnifier was £1,158,051, and offering to sell him the leased assets at £935,105 plus VAT. That letter, addressed only to Euan Lindsay, stated:

> "I am writing to you regarding the indemnity and security you provided to us in respect three lease agreements and a loan agreement between Outlook Finance and Metal Bridge Limited.
>
> As you know, payments have not been made on these agreements for some time, and they are substantially in arrears. Because of the arrears and because there is no prospect of the customer, Metal Bridge Limited being able to pay rentals for August, the hiring of the assets under the three lease agreements **was terminated on 28th August.**
>
> The net position in respect of the three leases is that the balance outstanding is £1539120, and for immediate settlement of them in total, we require £935051. The loan agreement immediate settlement figure is £223,000, meaning that the total amount due to us from you, as the indemnifier, is £1,158,051. We offer the leased assets to you as indemnifier for £935105 plus VAT for immediate purchase."
>
> (Emphasis added. Note that the figures underlined do not appear in the Settlement Calculation.)

Rodger Lindsay's evidence was that he had not seen this letter at the time. He disputed the figures stated. His understanding from MBL's bank statements (which he had no access to at that time) showed that between 25 and 28 August 2009 Derek Fradgley had transferred £54,000 out of MBL's bank account into Outlook's own account. The rental amount due to Outlook was only around £16,000 *per* month and he simply did not accept that what was asserted in the Outlook Letter was true. In his view, Derek Fradgley was trying to get a legal charge to property he was not entitled to.

[94] The Outlook Letter also purported to record Euan Lindsay's intention to form a new company ("I understand you propose to address this matter by forming a new company, Metal Dairy Bridge Farm Limited …"), and his offer to purchase Metal Bridge Farm for £465,000. It then stated:

> "Without prejudice to our rights we will be prepared to accept £1,623,051 for the various assets above. You will be responsible for all legal and professional expenses,

> stamp duty and any VAT. Once you have accepted this offer, you will be bound to pay the legal and other costs incurred by us, whether the transactions proceed to completion or not.
>
> To assist you in the purchase, we will, subject to contract and subject to our being able, arrange funding of £1,800,000 which will be secured on your current farm land at Harperfield and on the land and buildings at Metal Bridge by way of a first legal charge. I have seen your projections for the business that indicate a net income of £68,902 in the first year, rising to £202814 by the end of the year two. On the basis of these projections, we would consider a funding arrangement based on the payment of interest only for two years at 7% pa fixed rate. After two years, we will require that loan to be settled either by placing the arrangements with another funder, or by or by arranging a new loan with us where capital payments will ensure the completion of the loan including interest within 20 years. The rate of interest that we will charge after the fixed rate period will be linked to base rates, with a minimum rate of 7% pa.
>
> Under the proposed transaction, you will be the owner of the assets that are currently leased by us to Metal Bridge Limited. Neither I nor Outlook Finance will have involvement in the ownership or administration of the business, but will require regular financial information to ensure that the business is working to plan and able to service the loan debt."

Rodger Lindsay could not understand this. There was no company called Metal Bridge Dairy Farm Limited.

[95] Rodger Lindsay was also questioned on his statement that if Derek Fradgley wanted to upset Euan Lindsay, he would fax. Rodger Lindsay explained that Derek Fradgley could always email, but he knew that Euan Lindsay liked to sit by the fax machine in the office. Derek Fradgley faxed so as to upset Euan. He knew how unwell Euan was. He did it to put pressure on the Lindsays.

[96] Rodger Lindsay was also cross-examined under reference to the one of the experts' reports, in particular the passage noting that there was an agreement that had been in arrears for 13 months. Rodger Lindsay did not accept that sums due under an agreement were unpaid, or were in arrears for that length of time. Derek Fradgley would not have permitted that. There were arrears in 2004 and 2005, because of the problems the Lindsay

businesses had faced at that time, as he had explained. Any arrears were always paid when agreements were consolidated into new ones. The Lindsays did not default on the agreements. The accountants could only go on what was written down by Derek Fradgley. Rodger Lindsay also rejected the proposition that the Lindsay businesses were only able to stay afloat because of Outlook's support. This was not true. There had been a difficult patch in 2004 and 2005. Outlook always got paid. The Lindsays did not need to do business with him; Derek Fradgley came looking for the business.

Recall of Rodger Lindsay

[97] After the close of the pursuer's case and before the start of the defender's, Mr McIlride QC, who appeared on behalf of Outlook, moved for the recall of Rodger Lindsay. The passages from Rodger Lindsay's affidavit which Outlook wished to challenge were Rodger Lindsay's statement that:

> "… I didn't know anything about the rules of limited companies. I had no idea about limited companies. I had never been involved in one. I was always in a partnership, and always on the line for everything."

The allegation was that, contrary to that statement, Rodger Lindsay had experience as a director, having been on the board of First Milk, and that he had concealed this in his evidence. I heard argument on that matter, and continued consideration of that motion to the end of the day to enable the scheduled witnesses to be heard. I granted the motion and Rodger Lindsay was recalled two days' later.

[98] I comment below on the defender's asserted basis for that motion, but it is here relevant to note the evidence elicited. This is because the purpose of the recall was to challenge Rodger Lindsay's statement that he had never been a director and was unaware of how companies operated (quoted in the preceding paragraph, and which is set out more

fully at para [47] above). In advance of his recall, Rodger Lindsay produced a short supplementary statement ("the recall statement") and the defender lodged the documents in its eighth and ninth inventories under which it wished further to cross-examine him. The additional documentation included First Milk's Annual Returns and Financial Reports covering the period when Rodger Lindsay was a farmer director.

First Milk Limited

[99] The documentation produced in relation to First Milk Limited ("First Milk") discloses that it is not a limited company under the Companies Acts. Nor is it registered in Companies House. The extract from the Mutuals Public Register, maintained under the auspices of the Financial Conduct Authority, records that First Milk was registered under the Co-operative and Community Benefit Society Act 2014. It is in the nature of a co-operative society whose objects are to promote the interests of its members.

[100] Rodger Lindsay explained that as he understands it, First Milk is a farmers' co-operative or friendly society comprised of approximately 2000 dairy farmers across the whole of the UK. It is a non-statutory successor to the old Milk Marketing Board and its equivalent in England. The purpose of the co-operative is to gather milk producers together to market their milk and to maximise the price of milk they can obtain. In terms of its governance, First Milk had a main board comprised of executive directors and six farmers as non-executive directors. The executive directors ran First Milk. They were career directors, not farmers, drawn from industry and big business. Its chairman was a professional chairman, having previously been a director of Unilever. The secretary was a qualified solicitor. Sitting beside the main board were six farmers. They were elected on a rotational basis from the 30 farmers serving at regional level.

[101] Rodger Lindsay became involved in First Milk in around 2003. He had two roles in First Milk. One was as a representative at regional level. A position he enjoyed because he got to meet with other dairy producers. He was meeting a lot of farmers visiting them as customers of AI. The other producers were also small family firms. He liked dealing with them. It was interesting work. He described it as "a bit like a sewing bee - all dairy farmers tend to be breeders too, and we knew them all, and it was good to talk about cattle and stockmanship with them." He mentioned receiving "something like" a £1,000 a quarter as an honorarium. He was requested by an area manager to become the "local director" for First Milk. He was elected for two 3-year periods, from 2003 to 2006 and 2006 to 2009, as a farmer director to the main board. He did not like this as much, but felt it was his duty to do so when he was asked. However, he resigned in 2008, as Derek Fradgley told he had to do, due to his bankruptcy.

[102] When he sat on the main board, he went to monthly board meetings. The chairman had an agenda, the executives would update the others (ie the farmer directors) on items on the agenda, such as budgets or decisions to be discussed. He gave as an example the contemplated purchase of a creamery by First Milk, so as to maximise the milk price. In his experience, this was all conducted by the executive directors and the farmer representatives such as himself just went to the meeting and

> "got told what they were talking about. We were looking after how things were being done and then brought the information back to the farmers in our region."

Every committee of First Milk had to have a farmer director and Rodger Lindsay sat for a time on the audit committee. That committee had an executive director. All of the auditing was done by professionals, such as KPMG, who would explain the accounts prepared. He could not recall ever making an intervention. The farmer representatives just took the

recommendations. As he put it, "I had nothing to do with saying whether the numbers were right or not". It was the secretary who took the minutes and either gave a view on the law or sought professional advice when needed.

[103] Derek Fradgley was well aware of Rodger Lindsay's role in First Milk. It had had also been discussed in the Manchester litigation. Outlook's other director at the time, Derek Fradgley's daughter, Alice, and Outlook's solicitors, Derek Simmonds of Gunner Cooke, all knew of Rodger Lindsay's involvement in First Milk. He referred to his principal evidence, when he had described his experience of First Milk's board meetings, albeit he had not named First Milk (see para [61], above), and which he had contrasted with his experience of how Derek Fradgley conducted MBL's meetings. He also explained that he had mentioned his involvement in First Milk twice in the original draft of his precognition, but that this had been removed at the suggestion of junior counsel as not relevant.

William Lindsay

[104] William Lindsay is the pursuer, the nephew of Euan and his sole beneficiary. He was 17 when he first came to work at Harperfield, which belonged to his uncles, Euan and Ronald Lindsey. They ran it in partnership as DM Lindsay. In due course, William was made a partner, too. After Ronald died, it was always understood that Harperfield would pass to William. It was for that reason that Euan sought his permission before he agreed to grant the first standard security.

[105] In respect of Euan's heath, his evidence echoed that of Rodger Lindsay. From 2000 Euan was on an oxygen machine for 24 hours a day, which restricted him a lot. He described Euan as suffering really badly from depression. William did not live at Halltown, but he spoke to Euan a couple of times a week on the phone. In around 2008, Euan

Lindsay's health went downhill again. When he spoke to him on the phone, he could hear the stress in Euan's voice. His breathing problems worsened, he was having problems with his digestive system and he believed something else was wrong. He went down mentally at the same time and was less and less like himself. He lost interest in things and he lost his sense of humour.

[106] He explained that Euan was not a businessman. He knew the value of a cow, but that was it. He needed help with simple things, like getting new chequebooks when Ronald died. Ronald had dealt with all of the business aspects of DM Lindsay. William took over that role after Ronald's death. Euan knew what a standard security was. He did not know if Euan would have known what a personal guarantee or indemnity was. William himself only came to know what this was from being involved in the court actions with Outlook. He could say "for certain …that Euan never discussed or even mentioned personal guarantees nor indemnities to me in our discussions, ever". He explained Euan's pride in Harperfield. It was everything to him. It had been in the family since the 1930s. There was never any debt on Harperfield in William's life-time. The family did not like debt and did not want it over the family home. In his family, "you earned the pound before you spent it". The DM Lindsay overdraft was always kept separate from the family home. Harperfield was unencumbered, a word whose meaning he had learned by his involvement in the court actions. Euan shared this dislike of debts. He had no debts at all.

[107] William first met Derek Fradgley in 2011, after Euan's death. However, he was aware who he was from discussions in the family. He knew that Euan had no dealings with Derek Fradgley at all until 2008. It was around then that Euan called him and told that it looked like the family down there (meaning at Halltown) were going to lose a court action (ie the AI litigation) and would lose the business. Euan had discussed things with Rodger

and the rest of the family there, and Euan wanted to give them £200,000 to put capital into their business. To do that he was going to borrow the money and secure it over Harperfield. He asked William's permission. It was agreed that any standard security Euan granted would be restricted to £200,000. Euan used Gebbie & Wilson to act for him in the preparation of the standard security.

[108] In respect of Euan's involvement in MBL, Euan mentioned to him in the summer of 2008 that he had been made a director of MBL and was being asked to sign things. He felt really uncomfortable about that. William was puzzled by this, because Euan was just providing security for a loan. William told him if he did not want to do it, he should tell Derek Fradgley and Rodger that. He never knew at the time if Euan remained a director or was moved, as Euan did not mention it.

[109] Euan called him about a year later, stating that Derek Fradgley wanted another £200,000 to go into the business. William said his reaction was to ask "how am I going to pay that back if it goes wrong? It's not on!". It was obvious to him that Euan did not want to do that either. He explained that neither he nor Euan was willing to agree. So far as he knew, Euan had refused. William never heard any more about it after that. William never knew if Euan ever did grant another security. Euan did not mention it to him.

[110] In cross-examination, the following matters were put to him:

1) When asked if he only saw Euan at Christmas or cattle shows, William did not accept what was being inferred. He knew Euan well. He spoke by phone with Euan quite often;

2) He soundly rejected the suggestion that Euan was helping out with the dairy farming. Euan was at death's door when he moved down to Halltown in 2000.

William had not expected him to last as long as he did. He was in and out of hospital. It was "absurd" to suggest that Euan could do any work. He was not capable of drawing up stock lists and the like;

3) As for Euan being a director, he described it as "farcical" that Euan could be a director of any company. Had he been able to do this, he would have done so in respect of his own business. He understood that it had been Derek Fradgley who had made Euan a director. He rejected the suggestion that Euan had been appointed a director at Rodger's instigation or following any discussion with Euan;

4) In response to a series of questions about MBL, he confirmed that he knew nothing about its business or financial position, other than when Euan was asked to provide £200,000 in June 2008 to support it;

5) In relation to the first MBL agreements, entered into between June and August 2008, he did not know about these because Euan had nothing to do with any of that as far as he knew. If Euan had been involved, he would have told him.

[111] On the issue of indemnities, it was put to him that Euan might have signed an indemnity and never mentioned it to him. William rejected this. If Euan had signed an indemnity, he simply would not have understood what that was. He was prepared to sign a security restricted to £200,000. But if he had been told what was involved with an indemnity, meaning one in unrestricted terms, he would never have signed it. The terms of one of the indemnities was put to him (from agreement 1596), but he repeated his evidence: Euan would have needed a dictionary to look up the word and he would not have understood what it was. He himself didn't know what an indemnity was until it had been

explained to him. It was put to him that it warned the grantor "to take legal advice", but William was firm that no legal advice had been taken. Gebbie & Wilson said they knew nothing about this. They had nothing in their files about this. When pressed, William expanded on his answer: he had told Euan he was prepared to let Euan grant the first standard security as long as it was capped at £200,000. Euan agreed with that and he instructed Gebbie & Wilson to that effect. But they received an agreement for an all-money charge and also a continuing indemnity. Euan had signed and returned the deeds to Gebbie & Wilson. They rejected these and advised Euan not to sign a standard security until it was restricted. (This explains the length of time between the date of the first MBL agreements and the date of the first standard security.) William had recalled a business meeting at around that time, and the person he was dealing with had advised him to make sure it was a restricted security.

The Gebbie & Wilson Letter of 29 September 2009

[112] The terms of Gebbie & Wilson's letter of 29 September 2009 ("the Gebbie & Wilson Letter"), sent by one of its partners, Russel Patterson, to Euan, was put to him. This stated:

> "I have today received the letter from Outlook Finance Ltd to you of 4th September 2009. As advised on the telephone I am concerned at the proposed level of indebtedness to Outlook Finance Ltd and the timescale involved (see letter from Leonards attached). Can you please let me know what stage has been reached regarding the asset acquisition and also in relation to the security over the land and buildings at Metal Bridge. **I would stress that I am not advising you in connection with any part of the asset acquisition or in relation to securities over property in England.** Nor am I advising you regarding the time scale for the various aspects of the transaction.
>
> As regards the first paragraph of said letter of 4th September 2009, **I am unclear as to the 'indemnity' to which they refer**. Further, according to my file the standard security over Harperfield Farm is limited to £275,000 (plus charges costs, expenses etc).

> Whilst I appreciate that you wish to proceed with the 'new security' in order to assist your relatives, **as stated above I am seriously concerned at the level of indebtedness (£1.8 million).** In addition the security they are asking you to give is an 'all sums due or to become due' type which means It is not limited to said amount and can cover further indebtedness. If you default in payment for whatever reason 'Outlook Finance' will no doubt repossess and sell the whole property for the best price they can achieve. You may not have the chance to sell off part to repay the debt. I am not sure if the sale price achievable in any event would pay off the debt in full and if it does not then they could pursue you for any outstanding balance. Is it not the case that you have a relative currently living in Harperfield Farm and working the land?
>
> As you appear to be determined to proceed with the transaction I enclose the Standard Security as prepared by Leonards on behalf of Outlook Finance Ltd. This deed should be signed by you where indicated by your pencilled initials, before and independent witness who should sign to the left of your signature adding the word 'witness' after his/her name." (Emphasis added.)

The first underlined passage was put to William Lindsay, with the suggestion that its terms made it clear that what Euan was being asked to sign was an "all sums" security. William repeated that he knew nothing after Euan had been asked for the extra £200,000. He saw the spreadsheets of what Derek Fradgley had told Euan at a meeting, and it was for a lot more than the figure mentioned. Euan was having pressure put on him to sign. He accepted that the letter warned about the effect of an "all sums" security. The Outlook Letter of 4 September 2009 had offered a 20-year loan, but this had been removed. Russell Paterson (of Gebbie & Wilson) did not have the full context. In his view, Euan was being pressured to sign away his farm to a greedy man. Euan's solicitors, Gebbie & Wilson, were in the dark. If Euan had been healthy and sound he was sure this would not have happened. William rejected the proposition that Euan had been motivated to save the Lindsay businesses at Halltown. There was nothing in it for Euan or the Lindsays. If Euan had had advice before he signed it never would have happened. It did not help the Lindsay business to continue if it meant Harperfield was lost. Derek Fradgley had browbeaten Euan. William accepted that he had never seen a conversation between Derek Fradgley and Euan. He rejected the

proposition that Derek Fradgley was trying to help the family in circumstances where he was saying that Euan owed Outlook some £1.8 million in the space of 12 or so months. Euan did not sign the impugned standard security freely. He signed it because Derek Fradgley had told him that otherwise "the bank" would sell everything and he would lose Harperfield.

[113] In re-examination, under reference to the second paragraph of the Gebbie & Wilson Letter, where it stated "I am unclear as to the 'indemnity' to which they refer", he was asked what he understood it referred to. William Lindsay explained that it referred back to the standard security for the £200,000. The only indemnity Gebbie & Wilson would have seen was the continuing indemnity which they had rejected. In relation to his description of Derek Fradgley browbeating him, he accepted that he had not seen any conversation between Derek Fradgley and Euan, but he was aware of this because his father, James Lindsay, had told him what had happened on that day and about the spreadsheet (meaning the Settlement Calculation) that Derek Fradgley presented to Euan, and used to support the level of debt Euan was told he owed. Speaking of the occasion when Derek Fradgley called in at Halltown on 26 August 2009, James had said that Derek Fradgley "came into the house and told Euan that he owed him a lot of money and unless he signed the agreement today the bank was going to take Harperfield off him". James had told him this in 2011; up to then he had not known that Harperfield had been signed away. He confirmed that what he meant by the spreadsheet was the document where Derek Fradgley had lumped everything together and said Euan was responsible for all of it. He confirmed that the spreadsheet he was referring to was the same as the Settlement Calculation.

James Lindsay

[114] James Lindsay is Euan's brother and the father of Rodger and William Lindsay. He did general farm labouring and milking of cows, but was now long retired. He confirmed what Rodger and William had said about Euan's poor health, about Euan being tethered to an oxygen cylinder and about his being of anxious disposition. He was aware who Derek Fradgley was, though he had never had anything to do with him until MBL was set up. He knew nothing about running companies. He had never drawn up plans or projections or anything like that. He was aware he had been appointed as a director of MBL. This was because Derek Fradgley had told him that three people were needed for a company and the members of the family who had been bankrupted could not be directors. As Derek Fradgley explained to him:

> "…there was really nothing I had to do as a director - he would take care of everything. I don't remember the specific date of this, but that was when Metal Bridge was first formed. He told me I was just a name, to get the company registered. He didn't tell me I would need to sign anything at all, he said he would take care of everything.
>
> In the end, I signed a lot of bits of paper, but don't ask me what they were. I never got to see what they were. Derek Fradgley would hand things across to sign and you just signed them and gathered them up and put them in his briefcase and you never saw them again. He never left a copy of anything.…."

He could not recall Euan being asked to be a director, but Derek Fradgley treated him and Euan the same and they were both asked to sign bits of paper. He remembers being told by Derek Fradgley at a meeting that Euan would cease to be a director the next month. James Lindsay explained that Derek Fradgley had made it clear that they weren't to handle any money or sign any cheques from First Milk, as Derek Fradgley was in sole charge of all of that. It was arranged for the milk cheques from First Milk to be paid directly to Outlook. These were paid monthly in arrears, but ranged between £40,000 and £60,000 a month.

[115] In relation to his signature in finance agreements 1596 to 1598, and 1619, this looked like his signature but he did not know what he was signing. Derek Fradgley never explained anything. He just said "I need you to sign this, and this". James Lindsay did not ask what they were. He did not worry because he trusted Derek Fradgley. In relation to his signature on the annual accounts for MBL for the year 2008 to 2009, it could be his signature, but "it would be a bad signature of mine". He had never seen the annual accounts before. He did not recall ever being asked to sign accounts or being sent anything in the post by accountants. These might have been one of the documents he was just asked to sign.

[116] He explained that he did not know what an indemnity was. Derek Fradgley never explained the nature of any of the documents that he and Euan were asked to sign. Derek Fradgley had never used the words "guarantee" or "indemnity". He explained that Euan was more inquisitive than he was and if Derek Fradgley had mentioned either of these words, Euan would have wanted to know what they were. Derek Fradgley never sent anything by post, nor did he ever hand-deliver any documents. As soon as he got documents signed, he would pack these back up his briefcase and would leave immediately. He had got what he came for.

[117] In respect of the monthly board minutes, he said at the first few meetings everything was rosy. He attended all the meetings, but Derek Fradgley did all the talking. They never went over the minutes of the last meeting. At the beginning, Derek Fradgley suggested that all was going well: there was still £170,000 of Euan's £200,000 in the bank account and the milk cheques were coming in. After he returned from a holiday, however, it was all changed and the business was suddenly "going down the pan". James queried where all of the money went, but Derek Fradgley just told him it had been spent. All the meetings after that were how bad the company was doing and the need to sell up.

[118] As for the conduct of the board meetings, James explained that "you couldn't disagree with Derek Fradgley". He would shut you down. "Everything was to be done his way, and that was that". He explained that Euan got fed up. At times he would tell him, "I can't go through and talk to that man".

[119] James Lindsay never took any legal advice about any document he signed. As he explained:

> "It was definitely never suggested to me by Fradgley. In fact, Derek Fradgley never appreciated anyone saying they needed to take legal advice, he always had an excuse. 'Haven't time because funders have to have these back' was one I remember."

He was aware that Euan had taken legal advice at one point. This was to do with the £200,000 loan at the beginning. The security over Harperfield was to be no more than £200,000. He described Euan getting angry when Derek Fradgley wanted it to be against the whole of Harperfield. He knew that Euan said no to that, as he did when Derek Fradgley asked for a further £200,000.

[120] James Lindsay was the only witness who could speak to the meeting between Euan and Derek Fradgley at which he presented the Settlement Calculation and represented that the sum of £2.6 million was owed by Euan. He described how the circumstances in which that meeting took place:

> "I remember one day that Fradgley came to the house [at Halltown] to see Euan very well. I don't remember the date, but it was near the end of Metal Bridge Ltd. It was a nice sunny day, I think it was maybe late summer. That day, I was in the kitchen and I looked out the window and saw Fradgley's car drive in. It was about 3 pm, or maybe a bit later, 3:30 pm or 4 pm. I shouted through to Euan that Fradgley had just turned up. Euan shouted something back like 'what the hell is he wanting?'. Fradgley usually came once a month for Board Meetings, **but this was completely unplanned and unexpected. He was also usually always at the house early in the morning, around 9 am, so it was very unusual for him to turn up like that at this time.** It was a long drive from his office to our house maybe three hours. I also think he charged the business £360 every time he made a visit to us. He said 'is Euan there?' and I said, 'He's through in the room'. Fradgley went through to the room

> with Euan and I carried on doing what I was doing in the kitchen. I heard Fradgley's voice getting louder and louder, so I thought I'd better go through. **Euan said 'I never knew we owed all of this' Fradgley said 'You are going to have to sign it Euan, or the bank will make you bankrupt'.** I was really worried, **because the atmosphere was awful and completely alien. Fradgley was being downright nasty I said 'he can't sign that without getting advice' That made Fradgley explode even worse. He said 'He hasn't got time, they'll make him bankrupt in two or three days!'. Euan was saying 'All it should be is £200,000**!'. Fradgley said something like 'This is the way things turn out'. He was dogmatic about it. **The thought of bankruptcy frightened Euan to death. It was a dirty word to Euan, something shameful. He had seen family members made bankrupt. He didn't want to lose the family business. I found out later that Fradgley told him he owed something like £2.6 million**, but could discount it to £1.6 million, and that he wanted the security of Harerfield for it, but I didn't hear him say the amounts to Euan myself. ….Fradgley was very unpleasant, it was the worst I have ever seen him. He was hell bent on getting Euan to sign, and he got his signature. I was standing back and didn't see what was actually signed. Fradgley then just turned and left, he didn't even say goodbye**. Euan was very, very upset. Not angry, but upset. That night, Euan couldn't eat, and he kept repeating over and over to Helen my wife that he had no idea he** owed that amount. He was in shock. He was absolutely ill for a while after that. I'd say that was the start of the end, in terms of Euan's health." (Emphasis added.)

[121] In his statement, James Lindsay noted one document from Outlook's papers that had really annoyed him. He returned to this in his parole evidence. It was a purported minute of a General Meeting said to have been held in 24 June 2008 at Outlook's premises in Stourport. The minute, which concerned an amendment to the Memorandum and Articles of MBL, recorded James Lindsay and Euan Lindsay as being "present". He described this as "totally fiction! Neither Euan nor I ever went to Fradgley's offices".

[122] In cross-examination, it was put to James Lindsay that if Euan had said 'no' to the second demand for £200,000 then Euan was able to "stand up" for himself. James Lindsay said Euan could work out what Derek Fradgley was up to. In relation to signing documents, he was pressed that he could have taken the time to read them, and that where the word 'indemnity was used it was prominent. James Lindsay was adamant that Derek Fradgley did not permit this. The documents to be signed always came at the end of a meeting, when

Derek Fradgley was ready to go. Derek Fradgley would just say, "here, you need to sign this" and that was that. James Lindsay illustrated the way that Derek Fradgley would present a document across the table, obscuring the text or the nature of the deed to be signed with his forearm, apart from the place where a signature was required. James Lindsay rejected the proposition that he had "chosen" not to read the documents Derek Fradgley asked him to sign. James Lindsay was adamant: he never got the chance; the piece of paper would come over to him and he would sign. This was against a background where Derek Fradgley had said at the beginning that James Lindsay would not need to sign anything, not a single thing. James Lindsay explained that Derek Fradgley had a very good way of doing it. Derek Fradgley would be sat at the far end of the table. He handed over the paper so he could only see the bottom half of the paper. He demonstrated this in his parole evidence, showing how Derek Fradgley's arm would be positioned over the document to achieve this. The top half of the page was hidden. That was how Derek Fradgley did it every time. That was how he always conducted business.
Mr McIlvride put the terms of several documents to him (eg some of the agreements), to suggest that certain things stated were "obvious", but James Lindsay said Derek Fradgley never gave him a chance to read it. He rejected the proposition that James Lindsay could have taken time to read the document; that was not how Derek Fradgley conducted the meetings. Things to be signed were always sprung at the end and then Derek Fradgley was away. This was how James Lindsay signed all of the documents Derek Fradgley placed before him. He had never seen the terms of any of these. When pressed to accept that he had "chosen" not to read the documents, the witness' evidence became firmer: not once did Derek Fradgley ever explain what James was asked to sign. Derek Fradgley would rant, and

say "sign that" and then he would take all of the documents away. No one was given time to read anything. Derek Fradgley "didn't like you to cross him on anything".

[123] In respect of Derek Fradgley's visit to Halltown on the afternoon when he met just with Euan, this meeting was completely unplanned. He adhered to his description of the meeting (quoted above, at para [120]). He acknowledged that he had not heard the specific figures mentioned. He could not say what the piece of paper was that Derek Fradgley got Euan to sign. Once Derek Fradgley had that, he just turned on his heels and went out of the house. It was a fair comment to describe Derek Fradgley as "nasty" that day.

[124] James Lindsay rejected the proposition that he had got together with other members of the Lindsay family to concoct a story about Derek Fradgley, to paint him as a terrible individual. James Lindsay denied this. He had described Derek Fradgley as he had come across to James Lindsay. James Lindsay's signature at the foot of the minute of the general meeting in Stourport was put to him. James Lindsay's evidence was that this was a pure forgery.

[125] In re-examination, James Lindsay confirmed that Derek Fradgley always kept hold of the document being signed. Derek Fradgley had used the same method of securing signatures from Rodger Lindsay and Euan.

[126] James Lindsay confirmed that he left school when he was 14 or 15. He was able to read, but he could not write. Euan had left school at about the same age.

The defender's factual witnesses

Paul Philips

[127] Mr Philips is one of two current directors of the defender. He was appointed in 2017, the same year in which his father in law, Derek Fradgley, fell ill and died. He only really

become involved in the defender's business after Derek Fradgley's death (which was in July 2017). While he stated that he "knew about the business" of Outlook from Derek Fradgley, this was only in the most general sense. Derek Fradgley had worked for 30 years with a firm called General Guarantee, before branching out on his own and setting up Outlook. It specialised in sub-prime asset-based lending. To the extent he had any awareness of the Lindsays as customers of Outlook, again this was only in the most general sense, gleaned from casual conversations with Derek Fradgley on family occasions.

[128] He understood from Derek Fradgley that Rodger Lindsay was the Lindsay family's spokesman and "man of business". Derek Fradgley might have met other members of the Lindsay family, but he invariably met with Rodger Lindsay. He accepted that the allegations now made by the Lindsays in these proceedings had been made before, during Derek Fradgley's lifetime (in the English proceedings), and when he had a chance to respond to them and defend his reputation.

[129] He referred to Derek Fradgley and Rodger Lindsay having meetings about the "failure of MBL" and whether there was a way for the Lindsays to continue farming at Metal Bridge Farm. He stated that Rodger Lindsay had proposed that:

> "Euan Lindsay settled the debts of MBL by raising finance using Harperfield as security. Derek understood from Rodger that this had been discussed by the family and that Euan Lindsay had agreed to it".

He stated that he was aware from Derek Fradgley at the time of these events, because it was a big deal for Derek Fradgley to go up to Scotland. Derek Fradgley was going up to discuss more funding proposals and the property that Euan Lindsay owned (ie Harperfield). He was not aware of any meetings between Derek Fradgley and Euan Lindsay other than that Derek Fradgley had mentioned that Euan Lindsay was on oxygen and had farmer's lung, when Derek Fradgley "had a meeting with the whole family "- or what he (Mr Philips)

presumed to have been the whole family. He had never witnessed any meeting between Euan Lindsay and Derek Fradgley or between Rodger Lindsay and Derek Fradgley. Nor had he been present to see how Derek Fradgley got the Lindsays to sign documents. He had no knowledge of anything that Derek Fradgley might have said in conversation with any of the Lindsays.

[130] He was challenged on the following statements in his witness statement:

1) He stated that he had "spent a great deal of time looking over [Outlook's] books and records" and that Outlook "did not have any other problem customers". However, in his parole evidence he immediately had to qualify this, acknowledging that other customers of Outlook were in default; it was the fact of the litigations with the Lindsays that made them "problem" clients.

2) He asserted that Derek Fradgley had provided a "huge amount of support" to the Lindsay businesses, but that these never generated the income they hoped for. He was pressed to explain what "books and records" he had reviewed. The only records he could confirm having actually reviewed were bank statements. He had not seen any documentation about the income of the Lindsay businesses. When pressed further, he said his references were from the English proceedings. He could not actually give any evidence about Outlook. His statement was just a "generalisation" based on what Derek Fradgley might have mentioned. He maintained that he "must have" seen documents, but he could not say what documents he had seen.

3) In terms of his statement about the MBL's lack of profitability, he accepted that he was wholly reliant on MBL's board minutes for that information. He had not interrogated these or checked them to test if they were true or accurate. He

was challenged as to the basis for his statement that, from "payment records" relating to Outlook, "very few of the monthly rentals were ever paid". He accepted that the only records he had seen were spreadsheets of default payments and an overall summary of the agreements Derek Fradgley had prepared for the English proceedings.

4) He was also challenged on his statement that Euan Lindsay "was involved in the day to day running" of MBL. He accepted that that was the sole basis for his statement was Derek Fradgley sending faxes and that Euan Lindsay liked to fax documents. He could not contradict other evidence to the effect that Euan Lindsay did not have day to day involvement in MBL. When he stated that Derek Fradgley "was satisfied Euan understood what he was getting into", he accepted that Derek Fradgley had not stated this to him. It was "probably a surmise" on his part. He was pressed as to whether Derek Fradgley had said this to him. He could not say, he just presumed so. It was quite a long time ago. Derek Fradgley never said Euan Lindsay was incapacitated. Mr Phillips assumed that Euan Lindsay was capable, because Derek Fradgley had never mentioned otherwise. He himself had never met with Euan Lindsay.

5) In respect of his statement that he knew from Outlook's records that Derek Fradgley "met with Euan Lindsay on or around 26 August 2009", in his parole evidence he "presumed" that this was one of the board minutes. He had no direct knowledge of this. He knew Derek Fradgley was going up to Scotland for a further meeting; that Derek Fradgley had meet with Euan Lindsay and that he then carried on with Rodger to look at the land and buildings at Harperfield.

[131] He accepted that he could not explain Outlook's lending to the Lindsays. He had been made a director of Outlook specifically to deal with the solicitors and the ongoing litigation. The Settlement Calculation was put to him but he was unable to explain what this showed or how the sums were set out. He did not "personally" know if the figures or sums were correct. He could not vouch its accuracy in any way. His preparation for giving evidence had amounted to reading a folder relating to the English proceedings. He could not assist with any question about MBL's accounts for 2008 to 2009. He had never seen them. He could not comment on the financial regulations governing the business of Outlook. He did not work in the finance business and did not know how it worked.

David Lingard

[132] David Lingard, a director of the firm of Leonards for many years, was the Scottish Solicitor who acted on behalf of Outlook in respect of Euan's grant of the first standard security in September 2008, and the impugned standard security for all sums in October 2009. He was called as a witness to fact to speak to those transactions. He had produced each transaction file (included in the Joint Bundle). He candidly accepted that he had no present recall of matters recorded in his file notes. In respect of the first standard security, he opened a file for this matter on 29 July 2008; received the title deeds from Gebbie & Wilson under their letter of 5 August 2008; and produced a draft for "all sums". This was not progressed but a second draft, restricting the security to £275,000 was ultimately produced and signed by Euan on 24 October 2008. He was instructed on behalf of Outlook in September 2009 in respect of the impugned standard security. A new all-sums security was required because the first standard security had been restricted in amount. Mr McIlvride sought to explore with Mr Lingard what was meant by the comment in his file

note dated 30 September 2008 that "[Euan Lindsay] was apparently a working director in the business". Mr Lingard had no recall or direct knowledge, he presumed he had been told this and that Euan was physically involved in the business.

[133] In cross-examination, Mr Thomson drew out the following points:

1) That the first file note relating to Mr Lingard's involvement in the preparation of the impugned standard security was on 7 September 2009;

2) That he spoke with Euan Lindsay's Scottish solicitor, Mr Patterson, on 22 September, the file note for which records that he [Mr Lingard] "gave him an outline of the transaction";

3) That there were a number of versions for the loan offer (the earliest he had on his file was one from 2 September 2009), but Euan Lindsay had signed the offer on 4 September 2009; in other words about 2 weeks before this was emailed to Mr Lingard (on 22 September 2009) and before Mr Lingard was outlined matters to Euan Lindsay's solicitor, Gebbie & Wilson, on 22 or 23 September 2009); and

4) That what Mr Lindsay was doing was advising Outlook on the grant of the impugned standard security, which was the same task in which Mr Patterson was engaged.

[134] There was one passage in Mr Lingard's affidavit that Mr Thomson explored with him in detail. This was Mr Lingard's comment that he had presumed Mr Patterson "had discussed the proposed facilities" with Euan Lindsay. This came at the end of the following paragraph:

> "15. I received an email chain from Talbots on 24 September 2009 which included draft facility letters. I prepared a draft standard security and discharge of the 2008 Security, which I emailed to Gebbie & Wilson the same day along with

> a copy of the draft facility letter in relation to the loan to be secured over Harperfield Farm (page 763 of the joint bundle). I note that I had received on 24 September 2009 a letter from Gebbie & Wilson dated 23 September 2009 (page 750 of the joint bundle) confirming they had been instructed by Mr Lindsay to proceed with the re-financing package. I would take from that Mr Paterson had discussed the proposed facilities with his client. It would be very surprising if he hadn't."

Mr Thomson pressed him: Having accepted that Mr Patterson had been engaged in the same task as Mr Lingard, which was simply advising their respective clients on the standard security, how could he presume that Mr Patterson did more? Mr Lingard provided a long answer in which he explained his practice when acting for a borrower granting a security over property, which was to ask to see the terms of the loan, as part of the commercial loan package. He accepted that he was not privy to any discussion between Euan Lindsay and Mr Patterson. But he volunteered that it was good practice when acting for a borrower to ask to see the loan to look at the rate of interest, any early repayment provision or penalties and the like. Mr Thomson queried how this could operate where, as here, Euan Lindsay had already signed the loan agreement associated with the impugned standard security. Mr Lindsay maintained that it was good professional practice to do this. He accepted that the scope of the duty was confined to looking at things like interests rates and so on. In re-examination he confirmed that he had done a number of transactions with Mr Patterson over the years and regarded him as a good solicitor.

Mark Hodgson

[135] He was the English solicitor who acted for Outlook in respect of the legal charge granted over Metal Bridge Farm. He no longer had access to the files. He confirmed the communications he had had with Mr Lingard and the terms of the offer. The proposal was for Euan Lindsay to buy the farm, cattle and machinery at Metal Bridge Farm, to be funded

by a loan from Outlook for £1.8 million. Metal Bridge Farm was to be purchased for £465,000. There was no cross-examination of Mr Hodgson.

Comment on credibility and reliability of the fact witnesses, and on the Outlook documentation

[136] Before considering the opinion evidence, it is convenient to comment on the credibility and reliability of the factual witnesses. Mr McIlvride challenged the credibility and reliability of the Lindsays who gave evidence, particularly Rodger Lindsay. He went so far as to suggest that the three Lindsays had colluded to concoct a story about Derek Fradgley and to cast him in the worst light. In submissions, Mr McIlvride invited me to disregard their evidence. Mr Thomson's position was that little of the evidence given by the Outlook's fact witnesses was relevant.

The credibility and reliability of the pursuer's witnesses to fact

Rodger Lindsay

[137] I have already noted that Rodger Lindsay was recalled on the opposed motion of the defender. This purpose of recalling Rodger Lindsay was to challenge his statement that he knew nothing about limited companies, and to cross-examine him under reference to documents from First Milk coinciding with his involvement in it. Dealing first with the matter of First Milk, Mr McIlvride submitted that Rodger Lindsay's account was partial and misleading. I reject that submission. First, I accept Rodger Lindsay's explanation that he had mentioned First Milk in his draft affidavit but that this had been excised by his legal representation as not relevant. In his parole evidence, Rodger Lindsay made repeated references to First Milk. It is clear, in the light of his recalled evidence, that when he had

referred to the experience he had of sitting on the committees, and which he had contrasted with Derek Fradgley's conduct of MBL's meetings, this was to First Milk, even if not then by name (see [61], above). When recalled, Rodger Lindsay himself referred back to that earlier passage of evidence. Further, Rodger Lindsay was correct in his understanding that First Milk is not a company. It is a form of mutual society or co-operative. There is no inconsistency or concealment in the statement Mr McIlvride sought to challenge. Moreover, his role was as a "farmer director". I accept his evidence that this was, in effect, very much a watching brief on behalf of the farmers - in his words, he was their "eyes and ears" on the board. This non-executive role was contrasted with the executive directors (a distinction that is maintained in the records of First Milk), whom Rodger Lindsay described as very experienced and supported by professionals. Mr McIlvride's submission ignored that distinction. Having regard to these distinct roles, it is meaningless to refer to First Milk's turnover to present Rodger Lindsay as a captain of industry whose efforts had generated that turnover. Mr McIlvride sought to make something of the fact that Rodger Lindsay sat on the audit committee. However, Rodger Lindsay explained that each committee had a farmer director appointed to it. He was diffident in that role and relied on the executive directors and the professionals. In other evidence, Rodger Lindsay had made it clear that for his own businesses, he had always instructed professionals to do the accounts. In his words, "he was a farmer, not an accountant". On accountancy matters he deferred to the professionals.

[138] Mr McIlvride sought to make something of the difference in the figures for remuneration Rodger Lindsay had mentioned in his recall witness statement, and that noted in the First Milk documentation. The figure that Rodger Lindsay mentioned in his recall statement, which was a few £1000s, related to his initial role at local level.

Rodger Lindsay pointed out that he had volunteered this information in his recall statement and could have omitted it. He had not been asked about remuneration. Nor do I accept that there was any concealment or downplaying by Rodger Lindsay of his role in First Milk. The First Milk accounts disclose remuneration as a farm director £35,000. I accept Rodger Lindsay's explanation that he had forgotten this. He was being questioned in respect of matters that were 12 or more years ago. More importantly, the ground of recall and challenge was to his experience as a director, not his level of remuneration. The overall impact of the evidence Rodger Lindsay gave when recalled reinforced his credibility.

[139] Mr McIlvride went further and submitted that the presentation of the Lindsays as

> "financial ingenues (*sic*) was a clear fabrication to mislead the court for the purpose of creating the impression that he and other members of the Lindsay family were easily deceived and exploited by a devious and sophisticated banker".

This is a serious charge. To the extent that this was directed against Rodger Lindsay's evidence, I have dealt with, and rejected, the principal basis for the defender's challenge that Rodger Lindsay sought to mislead the Court. While Paul Philips said that Derek Fradgley regarded him as the Lindsay's man of business, on Rodger Lindsay's evidence he was not confident with understanding or organising financial data. Mr McIlvride's submission also fails to take into account unchallenged evidence about the other members of the Lindsay family. On James Lindsay's own evidence he had left school at 14 able to read, but not able to write. He had been a farm labourer most of his working life. His brother Euan had left school when he was about the same age. On William Lindsay's evidence, Euan Lindsay did not take any role in the management of the business carried on at Harperfield. This was left to Ronald and, after his death, taken over by William. Indeed, Euan Lindsay needed help with the most basic exercise of securing a new chequebook from the bank after Ronald's death. While Euan Lindsay's financial *nous* or lack of it is a central issue, given the charge of

collusion, it is pertinent to note other evidence of financial naivety among the Lindsays. The first is their own lack of understanding that James Lindsay's status as a director would have entitled him to get copies of MBL's bank statements, a step that was only taken long after the disputed events. The second is their lack of any understanding as to what an indemnity was or what kind of liability it might expose them to. This is entirely consistent with the ethos of the older generation of Lindsays, especially Ronald and Euan, of not carrying any debt: "you had to earn the pound before you spent it"; and which was put into practice in that Harperfield was unencumbered (another word the Lindsays came to know only as a consequence of the litigations). Rodger Lindsay's evidence was also consistent with this and the way he had run the Lindsay businesses explains his lack of familiarity with the concept of indemnity or of standing guarantor. He spoke of having a bank overdraft for the Lindsay businesses. He was never asked for an indemnity. In commercial terms that is explicable because, as a partner in a partnership, he was already (in his words) "on the line". The Lindsays' lack of sophistication in financial matters is also reflected in the fact that Euan Lindsay did not take legal advice and that the Lindsay's were quiescent in the face of Derek Fradgley's exclusive control over the books, records and business of MBL.

[140] Rodger Lindsay gave evidence for 2 days, the majority of which was under cross-examination, and he was recalled to give further evidence specifically to challenge the veracity of some of his evidence. Throughout his evidence, he presented as straightforward, sincere and honest. While his business activities were beset with misfortune, in the form of foot and mouth, TB, errors with DEFRA, as well as the labelling errors that resulted in the AI litigation, he conducted himself with considerable fortitude in the face of those many challenges. He had to revisit some of these events in his evidence. It was apparent that at times he found the experience of giving evidence difficult. He

nonetheless did not flinch or minimise chapters of evidence that might have cast him in a bad light (eg the bankruptcies or the episode where Derek Fradgley humiliated him in front of a supplier). In the course of cross-examination when he was recalled, he strove to be courteous even under the extreme provocation of the nature of the questions and their imputation on his character and truthfulness. It is not surprising that, given the passage of time, he was not always certain in his recollection of dates. When he was not sure, he said so. What he said about remembering the sequence of events rings true. His narrative of the sequence was consistent in his affidavit and parole evidence. It is also consistent with such documentation as exists. I have no hesitation in accepting him as a fundamentally honest and credible witness, and reliable in the essentials of his evidence. I reject the submission that he committed perjury, which had been the basis for his recall.

William Lindsay

[141] William Lindsay, whose evidence was in short compass, gave his evidence in a straightforward and unvarnished manner. He did not endeavour to speak to matters outwith his knowledge. He spoke simply about matters he had observed. I do not accept that there is any foundation for the defender's submission to accord his evidence little weight.

James Lindsay

[142] James Lindsay also presented as an honest and plain-speaking witness. In particular, his account of Derek Fradgley's unexpected visit on 26 August 2009 to see Euan Lindsay at Halltown is vivid in its details in a way that is eloquent of it being a strong memory. He could not recall the date, but knew it was in late summer, on a sunny day, and that

Derek Fradgley's arrival was out of the ordinary in the ways he described (just turning up and at an odd time of day). The fact that he described himself as going back to what he was doing in the kitchen - taking him out of the room of the very meeting so critical to the pursuer's case, where Euan Lindsay and Derek Fradgley were speaking, and only returning when he heard raised voices - has the absolute ring of truth. All he could speak to, and all he endeavoured to speak to, was the manner of Derek Fradgley's departure, what Euan Lindsay told him in the immediate aftermath, and the effect all of this had on Euan Lindsay. He readily acknowledged that he did not know what the piece of paper was that Euan Lindsay said he had signed. That kind of loose end is consistent with someone telling the messy truth, rather than a tidy lie. I have no hesitation in accepting his evidence as credible and reliable in its essentials.

Paul Philips

[143] Mr Philips's evidence was troubling. While he blandly stated in his statement that he had reviewed all of Outlook's books and records, it quickly became apparent that he had done no such thing. Time and again, as I have recorded above, when he was interrogated as to the basis of a categoric statement in his affidavit, it was revealed to be manifestly without any basis or, at most, was no more than an impression garnered from his father-in-law years before and of which he had no direct knowledge. There is an air of improbability in his being able to recall the specific details he said he did from a casual conversation years before and long before the litigations made the Lindsays "problem" clients. He was neither candid nor credible. Notwithstanding his appointment as a director of Outlook in 2017, he did not have even a nodding acquaintance with basic matters, such as MBL's annual accounts for the critical year of 2008 to 2009, or the kind of authorisation Outlook had had from financial

regulators. He sought to explain his inability to answer questions as being made a director, just to deal with the litigations. Nonetheless, he made assertions in categorical unqualified terms in his witness statement, but which he was compelled to retract in his parole evidence. Given those features of his evidence, and the guardedness of some of his answers, he did not present as a witness trying to do his best to assist the court, even in respect of the documentation which is so critical to the Outlook's case. He had scant relevant evidence to give. In any event, I find his evidence to be wholly unreliable and I place no weight on it.

[144] Equally troubling is the narrative he provided to Outlook's senior counsel in support of the recall of Rodger Lindsay. His discovery of Rodger Lindsay's involvement was all said to have come to light as he reviewed the notes of evidence, especially of the cross-examination of Derek Fradgley, in the Manchester proceedings, the night before he was due to give his own evidence in this case. Mr Thomson's observation was that it was indeed very odd that *a propos* of nothing Mr Philips volunteered that Rodger Lindsay was a director of First Milk. Given that the pursuer's witness statements have been available several months before the proof, that the papers are full of references to First Milk and that Rodger Lindsay never sought to hide his involvement with First Milk (which was known to Derek Fradgley), and that Mr Philip has been a director of Outlook since 2017 with specific responsibility for the conduct of the litigations, his explanation borders on the disingenuous.

David Lingard and Mark Hodgson

[145] Most of Mr Lingard's evidence was formal, speaking to some of the exchanges which preceded the production of the first standard security and the impugned standard security. In respect of the statement recorded in his file note, that Euan Lindsay was a "working director", Mr Lingard readily acknowledged that he had no present recall of what was

stated and could only presume that he had been told this. Mr Hodgon's evidence was confined in scope and had little relevance to the issues in these cases.

Comment on the veracity of the documentation and what may be inferred about Derek Fradgley

[146] For the reasons already explained, the defender in this case is critically dependent on the Outlook documentation. Some of that documentation gives cause for serious concerns about its veracity or of Derek Fradgley's *bona fides*. The first of these concerns arises from Derek Fradgley's repeated misrepresentations that there was a bank behind or pressuring Outlook.

Derek Fradgley's repeated misrepresentations that there was a bank behind or funding Outlook

[147] As noted at the outset, before his death Derek Fradgley had admitted that his references to funders or "the bank" were untrue. (See paras [15] to [16], above.) The documentation produced in this proof is replete with those misrepresentations. So, for example, in a fax to Rodger Lindsay dated 17 April 2009, Derek Fradgley stated "I've just had a very unsatisfactory meeting with the bank". In a further communication, dated 5 May 2009, to Rodger Lindsay and Euan Lindsay, Derek Fradgley was chasing up details of the cattle. He wrote:

> "We need to nail down these final queries, and perhaps it would help you to know **why they are being raised by the bank**. **Outlook**, when it purchases stock, or enters into a new agreement, **has to borrow money. The bank lens** [*sic*] **us the money**, but have ownership of the assets, and so, when they see several animals are not accounted for, **they say to me, pay us back what you borrowed**. Therefore, **unless I can tell the bank** what has happened to the missing animals, they will expect to repay me the loans." (Emphasis added.)

This misrepresentation that there was a bank was also used to exert control, even to bizarre extremes - eg needing to hold the cattle passports, or precluding time to get legal advice about the documents (because of the funders' imminent demands (eg as referred to by James Lindsay, at para [119], above).

[148] Mr Thomson's submission is well made that, contrary to this being used to take the heat out of difficult conversations (the rationale provided in the Fradgley Witness Statement), it was used in this case as an instrument of oppression. This was eloquently spoken to by Rodger Lindsay in his evidence. It was an effective instrument of oppression, because it led the Lindsays to believe that Outlook or Derek Fradgley had no leeway and that Outlook was powerless in the face of a third party bank pressing it for repayment. This was particularly so when used as a threat, that the bank was about to force a sale of Metal Bridge Farm and its cattle and equipment. That threat was made, and repeated, at the critical points to enable Derek Fradgle to secure an advantage for himself or Outlook, in the form of the first standard security in June 2008 and, at the Little Chef meeting on 23 August 2009 (see para [66], above) and the meeting between Euan Lindsay and Derek Fradgley on 26 August 2009 (see James' Lindsay's evidence at para [120], above) in the period leading up to the grant of the impugned deeds.

Untrue statements and other false matters disclosed in the Outlook documentation

[149] I note other troubling matters disclosed in the Outlook documentation:

1) There is the statement that Euan Lindsay and James Lindsay had attended a general meeting in Stourport for the purposes of an MBL general meeting. I accept James Lindsay's evidence that neither he nor Euan Lindsay ever attended Outlook's premises, the location of the purported general meeting. I

also accept his evidence that his signature (and by implication, Euan's) was forged. This is very troubling, all the more so that it seems to have been done so casually and simply for the sake of a minute of a general meeting.

2) There are the references in MBL's board minutes to many matters that, on other evidence I have accepted, are patently untrue: that James Lindsay would be in a position to produce budget reports or forecasts, that Euan Lindsay was undertaking stock checks or auditing the stems, or that Euan Lindsay was preparing budgets and was proposing the formation of yet another company in August or September 2009. On William Lindsay's evidence of Euan's lack of experience in financial matters, which I accept, the statements that Euan prepared accounts, budgets or forecasts as recorded in the minutes; and also asserted in the 'by hand' termination notice addressed to Euan and the Outlook Letter (see the text emphasised in paras [72] and [94], respectively, above), are false. All of these entries were contrived to give an impression which did not accord with the reality, and to protect Derek Fradgley's interests - if his dealings ever came under scrutiny;

3) I accept the Lindsays' evidence that some Outlook documents produced in these proceedings were not produced to them on the dates those documents bore. Two examples of that are the purported termination notices of June 2008 and the 'by hand' termination notices dated 25 August 2009. All of these purported to demand the return of machinery and cattle. Given the Lindsays' strong desire to keep the dairy operations at Metal Bridge Farm intact, I accept Rodger Lindsay's evidence that had those been received on the dates they bore, there would have been an explosive reaction on the part of the Lindsays.

Further, those documents are fundamentally inconsistent with other evidence, namely, of the continuity of Outlook's involvement with the Lindsays (even if using the vehicle of MBL). Moreover, there are internal inconsistencies between the asserted date of termination (of 23 August) in the 'by hand' termination notices (dated 25 August 2009), and the date (of 28 August 2009) stated in the Outlook Letter of 4 September 2009. These documents do not tie up with other evidence I have accepted. If Outlook really had terminated the agreements with the Lindsay business on 23 August 2009, why didn't Derek Fradgley advise Rodger Lindsay of this at their meeting at the Little Chef meeting on that same date? Outlook did not attempt to address questions like these to which the documentation gave rise.

4) More significant than the individual untrue or misleading entries in the Minutes was their cumulative effect amounting to an elaborate contrivance to give the appearance that the Lindsays were in control of MBL, and that Derek Fradgley was at arms' length - when the reverse was true. Added to this is the effect of Derek Fradgley having sole control over (and no possible scrutiny by the Lindsays of) the bank statements, and his keeping them in the dark on other financial matters such as invoices. All of these were defensive measures adopted in the event of external scrutiny, and calculated to give a wholly false impression of Derek Fradgley being remote from MBL's affairs. They also served to mask instances where Derek Fradgley preferred his own (or Outlook's) interests to those of the Lindsays'.

Other steps Derek Fradgley took to avoid external scrutiny

[150] The documentation contains other instances of irregular steps Derek Fradgley took to protect his dealings with the Lindsays and with MBL from external scrutiny. These include the removal of all of the agreements then in the hands of the Lindsays on the eve of their bankruptcies, and the production of a second agreement for the Pottinger, and the inclusion of additional movables covered in that agreement but without providing any fresh advance. (The latter is redolent of the kind of conduct creditors engage in when their debtor is verging on insolvency (as the Lindsays were in May and June 2008) and which may amount to an unfair preference.) A further instance is found in MBL's first set of accounts, which the Lindsays did not see at the time. These record that MBL's accountants (based in nearby Stourbridge) were directed to prepare only as unaudited accounts. On the evidence, it may reasonably be inferred that Derek Fradgley gave that instruction. That meant that neither the claimed administrative expenses of £79,441, nor the related party transactions (in note 6 to the accounts) between MBL and a company under the control of Derek Fradgley needed to be vouched, as they would have had to have been, had the accounts had been audited.

Instances of financial irregularity or a failure to account or give full value to the Lindsays

[151] In his evidence, Rodger Lindsay stated that Outlook failed to credit MBL's account with the full advance of £200,000 at the start of its trading in July or August 2008. In particular, Rodger Lindsay's evidence that the amount deposited was about £100,000 short was not challenged and it is consistent with the relative bank statements. As will be seen, the experts also found round-figure and "balancing figures" added to agreements, or there were sums stated that simply could not be vouched from the Outlook documentation. There

were instances where they were unable to establish that a credit balance due to the Lindsays was in fact ever paid or credited to them.

Derek Fradgley as a de facto director

[152] It is here convenient to consider whether Derek Fradgley was a *de facto* director of MBL applying the classic *dicta* from *Secretary of State for Trade and Industry* v *Hollier* [2006] EWHC 1804 (Ch), paragraph 61, *per* Etherton J; *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, 183A-C; *Secretary of State for Trade and Industry* v *Tjolle* [1998] 1 BCLC 333, 343-344. On the evidence, MBL had complete and exclusive control over the financial affairs of MBL. Derek Fradgley ensured that he, and he alone, had access to MBL's financial information, in the form of its bank statements and invoices. These were directed to Outlook's own premises. He selected its bankers and its accountants. He was the sole signatory on its bank account. None of this evidence was challenged. There is also Rodger Lindsay's evidence that he, and other family members, felt like employees of Derek Fradgley and that Derek Fradgley made clear in no uncertain terms that Rodger Lindsay and Kerr Lindsay could not have anything to do with the running of MBL. The inescapable conclusion from this evidence, is that Derek Fradgley was a *de facto* director of MBL. That status gave rise to duties he owed to MBL and which put him into a position of conflict of interest in respect of MBL's dealings with Outlook.

[153] However, there are other adminicles of evidence, in the form of statements Derek Fradgley made in other documentation to third parties which reinforces the evidence that he was the driver in setting up MBL for his own purposes and thereafter controlling its affairs. The context, spoken to by Roger Lindsay, is the realisation after the Lindsays lost the AI litigation that their bankruptcies would soon follow. This evidence, which was not

challenged, provides a specific motivation for Derek Fradgley's actings thereafter, and his rush to incorporate MBL in late June 2008 and to create new agreements a few days later as the means to transfer the Lindsay's personal indebtedness and obligations to it. In doing so, Outlook would not have to pursue any claims in the Lindsays' bankruptcy proceedings or incur any loss arising from the shortfall in the asset cover for the Lindsays' indebtedness. By that means, too, Outlook could avoid scrutiny of any documentation it would have had to produce to vouch its claims. Furthermore, the issue of whether Outlook had obtained an unfair preference for itself (eg, in relation to adding new items to an existing finance agreement, as described by Rodger Lindsay) or otherwise fell foul of any other rules by which transactions with a debtor shortly before his insolvency may be struck down (eg such as unfair preferences or substituting of different terms), would not be subject to scrutiny by any third party.

[154] That this was a concern to Derek Fradgley may be inferred from a lengthy email he wrote to his adviser (Butcher Wood), on 15 February 2009, seeking advice following the receipt of correspondence from Dodds, the firm overseeing the Lindsays' bankruptcies. Derek Fradgley opened the email in the following terms:

> "Dear Rod, I would appreciate your professional opinion in respect of developments prior to and following the bankruptcies of Rodger and Kerr Lindsay. I am concerned that **I** (Metal Bridge Limited) have received the attached letter from Dodd and Co following the provision of information that they requested." (Emphasis added.)

Derek Fradgley then set out the background. After referring to the AI litigation (and another court case against the Lindsays), the bankruptcies of Rodger Lindsay and Kerr Lindsay, and the impending bankruptcy of Helen Lindsay, he described the situation as at 1 July 2008 from Outlook's perspective.

> "3. At the end of June 2008 **I** formed metal bridge Limited and **appointed** Rodger's father, James as a director with me a Co. Sec. James' brother Euan was also a director for a short period, but is no longer.
> 4. On 1st July 2008, all of the lease and mortgage agreements were in arrears and we Outlook Finance Ltd) [*sic*] terminated them in accordance with the contracts. On the same date we agreed to enter into new lease agreements with Metal Bridge Limited on identical terms in respect of the entire herd of cattle and the entire stock of machinery that was the subject of the terminated agreements with the Lindsays.
> 5. The mortgage agreement between the Lindsays and Outlook in respect of the dairy unit was terminated, but the premises have not been transferred to MBL…" (Emphasis added.)

Derek Fradgley then detailed his response to Dodd's query that the sale of the straws to MBL had been at an undervalue, and might be a void disposition. (Dodd's concern arose from the price of £0.75 *per* stem versus a market price of £1, and from the fact that the invoice referred to 25,802 stems but more than 29,000 had been transferred.) Derek Fradgley closed this passage, with the curious sentence "I feel I may have been a little too honest there", the implication being, perhaps, that he was prepared to be less honest if this suited the circumstances.

[155] Derek Fradgley's email invites comment. First, as noted in the opening paragraph (and repeated in the third paragraph), he was clearly equating himself with MBL, which supports the position that he was a *de facto* director given that MBL was established at his instance and the degree of control he exercised. Further, the statement (in numbered paragraph 3) that the new agreements (ie the first MBL agreements) were "on identical terms" is demonstrably untrue (not least, because of the inclusion of the first indemnities), but this would have deflected any enquiry as to whether any new terms, if more onerous, breached any rules against unfair preferences and the like that applied to dealings between creditors and their debtors shortly before their insolvencies. The second untrue statement is that Outlook terminated these agreements in June 2008. (Rodger Lindsay's unchallenged evidence was that no termination notices were ever received.) Finally, as will be seen when

the Settlement Calculation is considered, Derek Fradgley's assertion that he had terminated the mortgage agreement (agreement 1569 or the Lindsay Mortgage), is inconsistent with Derek Fradgley's inclusion of it within the Settlement Calculation 7 months later.

[156] The finding that Derek Fradgley was a *de facto* director of MBL is significant in two respects. First, it placed him under certain duties to act in the best interests of MBL and not to place himself in a position of conflict of interest. On the evidence, these duties – owed as they were to MBL- were breached. However, his status as a *de facto* director is not simply a matter of technical company law. The greater significance of that finding is that, viewed in the context of the whole evidence, it was one of the ways in which Derek Fradgley excluded the Lindsays, and kept them from any position of actual power or authority in MBL. Putting it another way, Derek Fradgley was the driver to form MBL and to have it assume the Lindsay businesses' indebtedness to Outlook on the eve of their bankruptcies. This was all to Outlook's benefit. It would limit Outlook's financial exposure, while acquiring additional security (in the form of the first standard security) and it would avoid any external scrutiny of the dealings between the Lindsay business and Outlook.

[157] For the foregoing reasons, it is unsafe to place reliance on the Outlook documentation. Where this a conflict between what is stated in an Outlook document (or the date it bore or whether it was sent) and the evidence of the Lindsays', I prefer the evidence of the Lindsays.

[158] Having dealt with the witnesses to fact, I turn to consider the opinion evidence parties elicited at the proof.

The opinion evidence

The experts and their reports

[159] The pursuer instructed Paul Graham ("Mr Graham") of Henderson Loggie who produced the Henderson Loggie Report. In undertaking his calculations to establish what capital sum was due under the Settlement Calculation agreements he applied the Statement of Standard Accounting Practice Accounting for leases and hire purchase contracts" ("SSAP 21"). The defender instructed Stuart Preston ("Mr Preston") of Grant Thornton. He produced two reports: the first ("the first Grant Thornton Report") carried out essentially the same exercise as Mr Graham did in the Henderson Loggie Report, including the SSAP 21 calculation. Mr Preston produced a second report in which he looked at the terms of the agreements, rather than undertake any SSAP 21 calculation ("the second Grant Thornton Report").

The experts' focus on the Settlement Calculation

[160] It is a matter of agreement that Derek Fradgley presented the Settlement Calculation to Euan Lindsay at the critical meeting of 26 August 2009, as representing the total sum due by Euan Lindsay in respect of MBL's indebtedness to Outlook. The Settlement Calculation contained Derek Fradgley's calculation of the amounts due under the five agreements contained in the Settlement Calculation, namely the first MBL agreements and the Lindsay Mortgage. Accordingly, in order to assess whether there was any lesion to Euan Lindsay by entering into the impugned deeds in the amounts they stated, one has to compare these to the amounts due under the immediately preceding agreements (being the ones contained in the Settlement Calculation), after making an allowance for the purchase of the MBL assets. It is for that reason that, in this case, the purpose of the opinion evidence was to establish

whether the figures in the Settlement Calculation could be supported from Outlook's papers. This was also reflected in parties' approach to the opinion evidence generally. While the Henderson Loggie Report and the first Grant Thornton Report undertook detailed analyses of each prior agreement, neither Senior Counsel sought to prove or challenge the individual calculations for each agreement. Their cross-examination focused on the higher level methodological differences in approach (outlined below) with some probing as this applied to specific agreements.

The settlement calculation

[161] The Settlement Calculation is reproduced below:

Settlement calculations, Metal Bridge **Applicable August 2009, expires 15th September 2009**

Lease Number	Assets	Percentage Retention	Balance of Rentals	Arrears	Early Termination Discount 4%	Per Agreement Termination Amount	** Special Termination Amount
1596	Machinery	10	£420,120	£46,680	£16,805	£403,315	£328,043
1597	Cattle	10	£1,026,000	£54,000	£41,040	£984,960	£529,730
1619	Cattle	10	£93,000	£24,000	£3,720	£89,280	£77,278
Mortgage Number							
1569		N/A	£860,692	£11,475	N/A	£465,828	£465,828
Loan Number							
1598		N/A	£263,000	£0	N/A	£242,000	£223,000
			£2,662,812	£136,155	£61,565	£2,185,383	**£1,623,879**

** Special Termination amount based on all agreements being settled, not applicable to individual agreements

+ new cattle 180,000 / 1.8m.

Hereford 1.5m
Mat B 5m
2.m

9 7% = £1666 int p.a.

[162] As the rows are unnumbered, I shall refer to the rows with the numbered agreements as the first to fifth rows – so, for example, the fourth row is to that detailing agreement 1569

– and the sixth row is the one with totals under each of the headings, culminating in the figure of £1,623,879 under the right-most heading.

Preliminary observations

No expert could support the figures in the Settlement Calculation

[163] The Settlement Calculation contained Outlook's figures for five agreements, namely the first MBL agreements and the Lindsay Mortgage. The several columns within the Settlement Calculation contain totals (in row 6) under several headings, including

1) The "Balance of Rentals" was stated as £2,662,812,

2) The "Per Agreement Termination Amount" was stated as £2,185,383, and

3) The "**Special Termination Amount" was stated as £1,623,879.

Underneath the last total, of £1,623,879, there is a manuscript note of "+ new catt 180,000" and, below that, the notation "1.8 m.". Parties are agreed that the manuscript notations are those of Derek Fradgley and that the effect of those notations was that the so-called "special termination amount" Outlook was offering was £1,800,000, including the new cattle.

Which figures in the Settlement Calculation are relevant?

[164] While the Settlement Calculation detailed the five agreements Outlook had in place as at August 2009, Mr Thomson takes the point that one of these agreements was with Rodger Lindsay (number 1569 or the Lindsay Mortgage), not MBL. The sum due thereunder (the "special termination amount" for which was stated to be £465,828) was not owed by MBL and, therefore, was not covered by the terms of Euan Lindsay's indemnities (assuming these were valid). Mr McIlvride did not challenge that analysis and, indeed, the second Grant Thornton Report omitted it from its scope.

The totals of the first MBL agreements under the several headings

[165] Mr Thomson takes the further point that the proper analysis of Euan Lindsay's indebtedness under the first MBL agreements is to ascertain what was due *without* consideration of the extra amount added in for the purchase of the assets. The Settlement Calculation does not itself contain the totals for just the first MBL agreements. As these totals were referred to in the evidence, and some of these figures are contained in the 4 September 2009 Letter, it is convenient here to note those (using the headings from the Settlement Calculation):

1) the total under the "Balance of Rentals" for only the first MBL agreements would have been £1,802,120;

2) the total under the "Per Agreement Termination Amount" would have been £1,719,555; and

3) the total under "**Special Termination Amount" would have been £1,158,051.

Mr McIlvride relies on the Outlook Letter of 4 September 2009 (quoted above, at paras [93] and [94]) as correcting any misunderstanding (as Outlook would have it) or misrepresentation (as the pursuer contends) in the Settlement Calculation. Mr Thomson's response is that the figures in the Settlement Calculation reflect those in the Outlook Letter. His submission was that therefore that letter could not be relied on as "correcting" the earlier representation made by Derek Fradgley to Euan Lindsay under reference to the Settlement Calculation.

The experts' aggregate figures for the total indebtedness of MBL and the Lindsays

[166] It must be noted that neither expert could support Outlook's figures in the Settlement Calculation. In respect of the amount due under the five Settlement Calculation

agreements, the Henderson Loggie Report brought out a figure of £909,613 (including the minor adjustment of £2,050 agreed by the experts). In other words, the figure brought out in the Henderson Loggie Report for the Settlement Calculation agreements is 56% of the Outlook figure (again, its "Special Termination Amount") of £1,623,879.

[167] The figures in the first Grant Thornton Report for the Settlement Calculation agreements was £1,344, 479, which is 83% of the Outlook's comparable figures (using the "Special Termination Amount") in the Settlement Calculation.

The experts' aggregate figures for MBLs indebtedness under the first MBL agreements

[168] In respect of the amount due under the first MBL agreements, the Henderson Loggie Report brought out a figure of £537,011, which is 46% of the comparable Outlook "Special Termination Amount" figures in the Settlement Calculation of £1,623,879.

[169] The figures in the first Grant Thornton Report for the first MBL agreements was £928,399, which is 80% of the Outlook's comparable figures (using the "Special Termination Amount") in the Settlement Calculation. The total identified in the second Grant Thornton Report, adopting a different methodology, for the first MBL agreements was £827,065 or 71% of the comparable Outlook figures in the Settlement Calculation.

[170] On any of the experts' figures, the figures in the Settlement Calculation were overstated, the difference between them being the extent of the overstatement.

The defender's critical reliance on the documentation

[171] My comments on the veracity of the documentation, above, are relevant to the expert evidence. This is because of the different approaches the experts adopted to that documentation. As will be seen, Mr Graham was generally unwilling to accept a figure

stated in an Outlook document unless it was also vouched (eg showing that Outlook paid for the asset or that it gave credit in the amount stated) or it was traceable to an earlier agreement (and not wholly settled by that earlier agreement). Mr Graham referred to this in his parole evidence as "professional scepticism". By contrast, Mr Preston was generally prepared to accept what was stated in the Outlook documentation at face value, even if vouching could not be found. On occasion, he sought to vouch these by resorting to other materials, such as entries in Outlook's sales ledger, in its cash book or bank statements, or which could be justified as in accordance with what was said to be the "practice" of Outlook (of carrying arrears into its sales ledger). On other occasions, he assumed the sums stated for "assets" was correct, even when he was unable to identify from Outlook's papers what those "assets" actually were.

The pursuer's objection to passages of Mr Preston's evidence

[172] Mr Thomson objected to those passages in the Grant Thornton Reports which relied on these extraneous materials (such as Outlook's sales ledger or cash book). Furthermore, there was no evidence led from any witness to fact to speak to the "practice" Mr Preston referred to, of carrying arrears into Outlook's sales ledger. I accept this objection as well-founded. It is a fundamental that the data or other materials on which an expert's opinion is based is produced to enable this to be tested by others. This is both a question of admissibility but also fairness. In the first Grant Thornton Report Mr Preston refers repeatedly to additional documentation or sources which have not been produced, including Outlook's sales ledger, cash book and the "practice" of posting arrears to the sales ledger- of which Mr Phillips (the relevant witness to fact) made no mention.

SSAP 21

[173] Both experts undertook an SSAP 21 calculation. This seeks to identify *inter alia* the amount of capital still unpaid by the borrower at any point during the currency of an agreement. It does so using the "sum of the digits" method to allocate income over the notional period of the agreement and having regard to the number of payments to be made. The rationale underlying an SSAP 21 calculation is that the gross earnings of the lessor (or creditor) should normally be allocated to accounting periods to give a constant periodic rate of return on the lessor's (or creditor's) net cash investment in the lease (or agreement) in each period. Accordingly, the sum of the digits (which is based on the total number of payments to be made) is used to allocate income across the duration of the agreement. Having done so, one can then work out the capital repayment, and hence any outstanding capital balance, at any point in time. Mr Graham and Mr Preston undertook SSAP 21 calculations because they found evidence in Outlook's papers that Derek Fradgley had done so in respect of agreements being rolled up. It should be noted that the figure brought out in an SSAP 21 calculation is not the same as the number for the total rentals due to be paid and which would include future income not yet taken (which the experts referred to as "unearned income")). "Unearned income" was also the term used to describe the element of interest that was due, but unpaid, when arrears accrued under the agreements. As noted below, one of the differences between the experts was their treatment of this particular unearned income. Mr Graham excluded it from his calculations. Mr Preston included it. SSAP 21 itself provides no guidance as to the treatment of unearned income.

Points of agreement between the experts

[174] Before turning to the substance of their evidence, I note the areas of common ground between the experts, or at least between the Henderson Loggie Report and the first Grant Thornton Report (which adopted the same methodology). These included:

1) *The "family tree" of the agreements*: In appendix 4 to the Henderson Loggie Report, Mr Graham included a "family tree" endeavouring to trace how the earlier agreements were (to the extent not paid in full) rolled up into later agreements and ultimately into the five agreements which featured in the Settlement Calculation. This was necessary because of how Outlook rolled up the amount due under existing agreements into new agreements including, critically to this case, the roll up of the sums due by MBL (under the first MBL agreements) and the sum due by Rodger Lindsay (the Lindsay Mortgage) into the Loan Agreements under challenge. The experts' analysis, while not complicated, was convoluted as it involved identifying and allocating payments under earlier agreements, undertaking the SSAP 21 calculation, and endeavouring to trace where outstanding capital was rolled over into one or more agreements. The family tree records 42 agreements, of which 11 were said to have been settled in full. Accordingly, there were 26 prior agreements that were ultimately rolled up into the five agreements contained in the Settlement Calculation. The experts were agreed that the inadequacy of the Outlook records made this a less straightforward task. The relationship between agreements rolled up into others was not always clear and not all amounts stated could be supported. Mr Preston essentially agreed with Mr Graham's presentation of the likely antecedent agreements rolled up into each of the five Settlement Calculation agreements.

2) *The application of SSAP 21*: Both experts were agreed that an SSAP 21 calculation was appropriate and that Derek Fradgley had used this method. Mr Preston produced the second Grant Thornton Report which does not use the SSAP21 calculation. I address that report separately.

3) *Minor adjustment upward of the capital sum due*: At the meeting of the experts, Mr Preston produced an invoice to vouch the purchase of cattle in the amount of £2,050, which Mr Graham accepted. In his parole evidence he modified the totals contained in the tables in the Henderson Loggie Report. However, given the modest level of that adjustment, I will not endeavour to change the tables in the Henderson Loggie Report. (I do take this into account when considering the issue of lesion.)

The principle differences between the Henderson Loggie Report and the first Grant Thornton Report

[175] The principal methodological differences between the experts' respective approaches in the Henderson Loggie Report and the first Grant Thornton Report are as follows:

1) In undertaking the SSAP 21 calculation, Mr Graham disregarded the terms of the agreements. He distinguished between a termination (which *might* trigger a penalty or other payment under the terms of the agreements) and refinancing (which, essentially, was the parties' agreement of new loan figures, interest rates and payment periods). What Outlook did in rolling up was refinancing. In any event, he did not have regard to any termination provisions in the agreement considered because he found no termination notices in Outlook's paper. This is consistent with Rodger Lindsay's evidence that the Lindsays had never received termination notices.

(I have noted the 'by hand' termination notices relied on by Outlook as having been issued in late August 2009: see para [92], above.)

2) The SSAP 21 calculation is silent on the question of how to treat interest on arrears that may have accrued up to the point of termination. If there were arrears at the point of termination, Mr Graham excluded these, as they were unearned income and therefore, in his view, irrelevant to an SSAP 21 calculation. The focus on the *capital* due is because it is the balance of any capital outstanding which was rolled into a new lease agreement. Accordingly, his SSAP 21 calculation was taken at the point when the last payment was actually made (and not the later point when an agreement was refinanced or rolled over). If these arrears fell to be included, that was a contract issue and so outwith his expertise. By contrast, Mr Preston continued to take income on the amounts unpaid between any last payment and the date of refinancing or consolidation. The different approaches on the issue of unearned income led to a £51,602 difference between the experts' figures. However, the effect of the differences between the experts in their calculation of the capital due under the earlier agreements was compounded as they carried forward their figures into their calculations of the later agreements. The effect of this compounding was variously described as a "gush" or an "upward cascade".

3) Further, as noted more fully below, Mr Preston was much more willing to take Outlook's figures at face value, even if unvouched. This led to significant differences in their respective totals.

These methodological differences generated large variations between the experts' respective totals. So, for example, Mr Preston's inclusion of unearned income and his resort to extraneous materials produced a difference of £105,591 for agreement 1596 (*per* the first

Grant Thornton Report table 2.3 (reproduced at para [189]) and paragraph 2.9 of the first Grant Thornton Report), and a difference of £113,450 for agreement 1619 (*ibid*).

[176] I now turn to consider the experts' evidence in detail.

The Henderson Loggie Report and Mr Graham's evidence

[177] I have already noted Mr Graham's production of a family tree of the agreements and the purpose of an SSAP 21 calculation if a finance agreement is terminated before its full term has run. Mr Graham undertook the SSAP 21 calculations because he had seen similar workings by Derek Fradgley for some of the earlier agreements. The reason why he did not follow Mr Preston's approach, and add in arrears (or the unearned income on arrears), is because he had not seen any termination notices.

[178] I do not propose to record his individual calculations on each of the agreements. It suffices to note some of these to illustrate the differences between his and Mr Preston's approach.

Illustrations of Mr Graham's differences from the Outlook figures

[179] In a significant number of Mr Graham's analyses of the sums payable under the individual agreements, he declined to accept the Outlook figures. The reasons included the following:

1) If the "assets" said to be covered by a new agreement could not be identified or vouched, for example, by invoices or supporting documentation contained in the brown folder, Mr Graham omitted such entries. An example of this was agreement number 1399, or the unsupported figure of £44,347 comprising part of agreement 1569. In one instance, he excluded from an agreement an asset which had

been purchased and invoiced *after* the date of the agreement which purported to include it;

2) If the sum purported to be rolled up in the agreement being analysed had already been rolled up in another agreement. An example of this double-counting (if not stripped out) was agreement number 1404;

3) There were errors in Derek Fradgley's SSAP 21 calculations. In agreement number 1404, for example, Derek Fradgley appeared to include VAT on the last rental (of £10,400 plus VAT) whereas the correct SSAP 21 figure was £9,900. In respect of this agreement, Mr Graham believed that the balance of £19,402 should have been repaid to the Lindsay, although he records that Rodger Lindsay does not recall any monies ever being repaid;

4) In some cases Derek Fradgley included figures for unearned income (eg agreement 1501), which would not be included in a SSAP 21 calculation. This appeared to be done in the some of the first MBL agreements, including agreements 1596 and 1597, in which the sums of unearned income of £89,020.80 and £165,223.43, respectively, were claimed;

5) The only time Outlook purported to include penalty figures was in relation to the first MBL agreements. In each instance, these were substantial figures. Mr Graham's approach was to do an SSAP 21 calculation without reference to the terms of the agreements, because he had not seen penalties levied in earlier agreements;

6) In respect of some agreements, the paper trail was inadequate or difficult to follow. This was the case for agreement 1540. Having tried to follow the trail, Mr Graham was unable to find any entry to show that a credit balance of £110,000

retained by Outlook was ever allocated to other indebtedness of the Lindsays. There is a similar inability to demonstrate any subsequent credit given for a retention of £15,140 under agreement 1595;

7) In some cases, Outlook claimed round figures (eg arrears of £15,000) or a sum is stated to have been taken from the sales ledger (eg of £37,034) – both examples are taken from agreement 1499 – but there is no breakdown or vouching of either figure. Agreements number 1456 and 1596 are further examples where Mr Graham excluded an unsupported sales ledger balance (in the latter, the sum of £25,921 was claimed. Mr Graham's approach was to attribute a nil value until some evidence was provided to demonstrate what these sums related to;

8) In some cases, an adjustment of an earlier agreement (eg number 1417) has an impact on the correct figure rolled up in a later agreement (eg agreement 1456).

[180] An illustration of how Mr Graham's approach informed his analysis may be found in his treatment of agreement number 1426. Mr Graham's table ("the Henderson Loggie Report 1426 table") is reproduced below:

Breakdown of the Net Advance Figure as Shown on File for Lease # 1426

	Per Brown Folder File £	My suggested Number £	Reason
Last payment for Lease # 1402 including VAT	12,220	Nil	Already wrapped up in lease # 1404
Last payment for Lease # 1407 including VAT	2,818	2,308	This is my estimate of the SSAP 21 figure
Last payment for Lease # 1414 including VAT	4,010	3,279	This is my estimate of the SSAP 21 figure
Last payment for Lease # 1417 including VAT	2,261	1,844	This is my estimate of the SSAP 21 figure
Amounts to settle payments on lease # 1404 and lease # 1407	3,844	0	Given that Lease #1407 is already included this cannot be correct
Cheque to Lindsays	35,886	0	
Shortfall (this is the balancing number to total £64,021)	2,982	0	
Total	64,021	7,431	

He explained that the analysis for Outlook's total of £64,021 "is not clear on the file" and he attempted a good faith calculation. He also surmised that this agreement was being used as a large scale settling of other leases by adding the last payments due and adding VAT. The adjustments in the second to fourth lines of this table are to substitute the correct SSAP 21 figure. The reason for the "nil" entry in the first line is because Mr Graham had identified that this was already rolled up in a different lease. The fifth line adjustment arises for similar reasons: Derek Fradgley's figure would involve double-counting if included, because the agreement has already been accommodated. Finally, he noted that the Lindsays dispute ever receiving a cheque for £35,886. Indeed, they dispute that this agreement is even genuine. While he noted that this appeared to be rolled up into agreement number 1456, that had been settled in the amount of £69,448, which cannot be the SSAP 21 figure. At most, he can support only £7,431 of the £64,021 claimed.

[181] As this agreement is said to have been rolled up in agreement 1456, then the adjustment Mr Graham made must also be reflected in the calculation of the appropriate amount. This is illustrated by the second line of the following ("the Henderson Loggie Report 1456 table"):

Breakdown of the Net Advance Figure as Shown on File for Lease # 1456

	Per Brown Folder File	My suggested Number	Reason
	£	£	
Clearance of old sales ledge balance	10,912	0	
Settlement of SSAP 21 for Lease # 1426	69,448	7,431	This is my estimate of the SSAP 21 figure
Total	80,360	7,431	

One sees the impact of Mr Graham's adjustment of the earlier figure (for agreement 1426) reflected in the capital sum rolled up in the later agreement (number 1456). Although not reflected in the above table, Mr Graham noted that the Outlook calculation failed to take into

account that payments scheduled to be paid over 15 instalments were in fact paid in two, and that there has been an overpayment of £3,925. Similarly, a like adjustment was made to the sums rolled up in later agreements (eg numbers 1479 and 1480), the effect of which is to convert a capital sum Outlook said was due into an overpayment by the Lindsays.

[182] Having given examples of the kinds of errors or deficiencies Mr Graham identified, or of how his methodology informed his assessment of individual agreements, I note Mr Graham's conclusions on the five agreements included in the Settlement Calculation, as follows:-

Breakdown of the Outstanding Leases as Shown on Appendix 3

	Per Settlement Calculation Schedule £	My Estimate of the SSAP 21 figures £	
Lease # 1596	328,043	158,772	Paragraph 4.2.151
Lease # 1597	529,730	113,777	Paragraph 4.2.156
Lease # 1619	77,278	64,462	Paragraph 4.2.162
Lease # 1598	223,000	200,000	Paragraph 4.2.159
Sub-total – of above leases with Metal Bridge Ltd	1,158,051	537,011	
Lease # 1569	465,828	370,552	
Total of leases on Appendix 3	1,623,879	907,563	

Mr Graham's total for the capital actually due under the five Settlement Calculation agreements was £907,563 (and adjusted up by £2,050, to £909,613 to reflect the late invoice). The total The Henderson Loggie Report figures for the MBL Settlement Calculation agreements is only 46% of the aggregate of Outlook's figures in the Settlement Calculation. On any view, that is a material difference. In submissions, Mr McIlvride did not seek to suggest otherwise.

Cross-examination

[183] The following points were put to Mr Graham in cross-examination:

1) Mr Graham readily acknowledged that he did not take into account the contractual terms of the agreements or of the Loan Agreements. While Mr Preston had taken into account default provisions, Mr Graham had not done so because, as far as he could see, Outlook had not done so. When an agreement terminated, Derek Fradgley performed an SSAP 21 calculation. Mr Graham elaborated on his understanding of SSAP 21. There was a need to give proper regard to the fact that after an agreement was brought to an end, the lessor was not entitled to the full amount. The lessor was only entitled to the balance of capital due. If the arrears were rolled over, that was generally by refinancing. There was therefore no justification for adding arrears in the way that Mr Preston did in the first Grant Thornton Report. Refinancing gave the lessor the opportunity to extend the period for repayments, to lend more funds or to increase the interest rate. In his opinion, this was not a "missed opportunity" or an instance where the lessee got out of paying interest. He confirmed that he had not taken into account any default provisions. When pressed, Mr Graham defended his approach. This was because when Outlook rolled over leases, it undertook a SSAP 21 calculation, it did not operate default provisions.

2) He also accepted that SSAP 21 did not represent guidance about how to calculate sums actually due by a borrower under a particular contract. That would be a matter of contract interpretation, which was outwith his expertise.

3) In relation to his exclusion of unidentified assets from agreement 1399, which had simply been described as "assets from previous lease", Mr Graham maintained that it was not possible to justify from Outlook's papers the figure Outlook attributed to those assets. There was no prior identifiable agreement from which these could be

rolled up. He offered to reconsider his position if another lease was placed before him to vouch this, but none was. He simply could not ascribe any asset value. Furthermore, he saw no cheque or invoice going out to support these.

4) It was put to Mr Graham that Mr Preston had adopted Outlook's accounting practice of putting arrears into the sales balance. Mr Graham could not comment on this practice. He had had no opportunity to discuss this with Outlook's accountants. In any event, the sales ledger would include VAT but it was not appropriate to levy this for arrears.

5) Mr Graham maintained his position that it was irrelevant to take into account arrears up to the date of termination, as Mr Preston had done. He noted that Mr Preston had not referred to any provision in the agreements which supported this. He invited Mr McIlvride to place before him a "payments not received clause" in the agreements, but that invitation was not taken up. He did not accept that it was "reasonable" to include arrears. Mr Preston's inclusion of these amounts found no support in SSAP 21, in accounting practice, or in any applicable contractual provision. Mr Graham's position had been to identify the amounts actually lent.

[184] In re-examination, he was asked to comment on how differences between the experts on earlier agreements affected their figures for later agreements. In Mr Graham's words, this did not just bleed through, it was a "gush". This was because, latterly, the credit charges were so huge.

The Grant Thornton Reports

[185] Outlook's expert, Mr Preston, produced two reports. The first report also undertook SSAP 21 calculations, although there were differences of opinion as to the treatment of

arrears. The second Grant Thornton Report was quite different, in that it undertook an analysis looking only at the contractual termination provisions, but without undertaking any SSAP 21 calculation.

The first Grant Thornton Report

[186] Mr Preston described two steps in his SSAP 21 calculation:

1) His first step was to calculate the total outstanding loan payment ("capital plus interest") at the point of consolidation; and

2) Calculate the unearned income at the point of consolidation and deduct this from the sum found under step one. He defined unearned income as the interest charge that would have accrued after the date of consolidation.

By focusing on the date of consolidation, as opposed to date of the last payment (as Mr Graham had done) the amount being identified under his SSAP 21 calculation included the interest on arrears. Mr Preston's rationale for doing so, notwithstanding that SSAP 21 is silent on this, is that this is reasonable to do. In his view, just because a lease payment was not paid, this should not stop income accruing.

[187] Mr Preston summarised in table 2.1 ("the first Grant Thornton Report table 2.1") the amount he calculated as due, and also those "per Outlook" and those stated in the Henderson Loggie Report:

(£)	My calculation	Per Outlook	Per Henderson Loggie report
Agreements rolled up into the £1,335,000 loan			
Balance from Agreement 1596 (Table 5.51)	264,362	328,043	158,771
Balance from Agreement 1597 (Table 5.66)	364,978	529,730	113,777
Balance from Agreement 1598 (Table 5.67)	223,000	223,000	200,000
Balance from Agreement 1619 (Table 5.70)	76,059	77,278	64,462
Balance from Agreement 1597/1619 (loan agreement)	-	27,992	-
Sub-total	**928,399**	**1,186,043**	**537,010**
Other sums advanced			
Arrangement fee	4,000	4,000	-
Stamp duty for Metal Bridge acquisition	13,950	13,950	-
Balance in cash	113,450	113,450	-
Other (cannot trace)	-	17,557	-
Total | £1,335,000 loan	**1,059,799**	**1,335,000**	**537,010**
Agreements rolled up into the £465,000 loan			
Balance from Agreement 1569 (Table 6.8)	416,071	465,828	370,552
Adjustment	-	(828)	-
Total | £465,000 loan	416,071	465,000	370,552
Overall total	**1,475,870**	**1,800,000**	**907,562**

Difference between Mr Preston's figures and Outlook's figures in the Settlement Calculation

[188] Mr Preston's total figure, of £1,475,870, is lower than Outlook's figure. Mr Preston explained that there were a number of instances where he was not able to find support for the amounts advanced. These related to six earlier agreements and the total of the unsupported entries was £130,082 (*per* Table 2.2 of the first Grant Thornton Report). The

errors he found included the wrongful inclusion of VAT (£23,750) or of a profit figure on settlement (£10,860), double-counting (£9,349), invoicing for assets (cows) that had in fact been returned to the seller (£23,746), or sums said to have been advanced but which could not be traced through the manual cash book (£35,886). By reason of the effect of compounding as agreements were repeatedly rolled up, it would not suffice to deduct the figure of £130,082 from the Outlook figure in the Settlement Calculation. Mr Preston calculated that the effect of this compounding by August 2009 was £324,130 (*ibid*). This is the difference between his figure and Outlook's.

The difference between Mr Preston's totals and Mr Graham's totals

[189] Mr Preston's total figure, of £1,475,870, is materially higher than that in the Henderson Loggie Report, of £907,562. The differences were represented in the following table ("the first Grant Thornton Report table 2.3"):

Table 2.3: Differences between my calculation of sums advanced and Henderson Loggie

Agreement	Description	**Amount (£)**
Various	Difference in calculation of income/charges	51,604
Evidence found to support amounts unsubstantiated per the Henderson Loggie report		
1399	Additional assets and part exchange of milk tank	6,295
1426	March payment on 1404 and extended hiatus on 1426	5,434
1456	Arrears on sales ledger	10,913
1499	Arrears and rent arrears	52,034
1569	Invoice for two cows	847
1569	Cattle from lease 1568 and cheque	7,647
1570	Pressure washer and generator	12,000
1596	New assets ex Oak finance	25,900
1619	Invoice for one cow	2,050
		174,724
Impact on Agreements once consolidated		
Results in difference in Agreement 1569 when changes rolled up		45,519
Results in difference in Agreement 1596 when changes rolled up		105,591
Results in difference in Agreement 1597 when changes rolled up		251,201
Results in difference in Agreement 1598 when changes rolled up		23,000
Results in difference in Agreement 1619 when changes rolled up		11,597
		438,908
Other charges in Loan not included by Henderson Loggie		131,408
Total difference		**568,308**

Source: my calculations and Agreement files

Mr Preston explained that the principal differences between his approach and Mr Graham's arose as follows:

1) The effect of the differences in their treatment of unearned income in their respective SSAP 21 calculations was £51,606 (stated in the first line of the table), which Mr Preston included as due;

2) There were a number of agreements where there was no supporting documentation in the brown folders, but where Mr Preston sought to vouch this from other sources, such as an examination of the cash book;

3) Mr Preston also included figures described as "arrears on sales ledger", as he had been told that it was Outlook's practice to carry arrears into its sale ledger;

4) In one agreement, three new assets were listed but had no specific value ascribed, so in Mr Preston "assumed the [Outlook] assessment of value to be accurate", and included its figure.

The total of these initial adjustments was £174,724 (the subtotal of the first ten items, half-way down the table). However, by reason of the compounding effect as agreements were repeatedly rolled up, Mr Preston estimated that the figure which correctly reflected the differences between his and Mr Graham's approach was £568,308.

[190] In his examination in chief, he was taken through his calculation of a number of the agreements, essentially to illustrate the different outcomes arising from his approach to SSAP 21 and that of Mr Graham, taken together with the compounding effect of initial adjustments by which initial differences were magnified as they were repeatedly rolled over.

The second Grant Thornton Report

[191] The purpose of the second Grant Thornton Report was to calculate the liability payable on termination of the first MBL agreements (namely, agreements 1596, 1597, 1598 and 1619). This did not involve an SSAP 21 calculation, but was based on the contractual

wording of the agreements. On this approach, he stated the total termination liability as £827,605. If one added Outlook's figure of the value of the assets sold to Euan Lindsay, which was £935,000, then the total he identified as due by Euan Lindsay was £1,762,605. This was Mr Preston's "approach 1", in the top half of the table ("the second Grant Thornton Report table 2.1"):

Agreement Number £	1596		1597 and 1619	1598	Total
Approach 1					
Arrears of rental	54,460	9,000	24,000	242,000	329,460
Compensation due - discounted termination	362,918	1,001,745	68,483	-	1,433,145
Sale Proceeds	(300,000)		(635,000)	-	**(935,000)**
Liability at termination	117,378		468,228	242,000	**827,605**
Asset value of machinery sold to Euan Lindsay	300,000		635,000	-	935,000
Total due by Euan Lindsay	**417,378**		**1,103,228**	**242,000**	**1,762,605**
Approach 2					
Arrears of rental	54,460	9,000	24,000	242,000	**329,460**
Compensation due - discounted termination	362,918	1,001,745	68,483	-	1,433,145
Sale Proceeds	(59,000)		(161,266)	-	(221,166)
Liability at termination	357,478		941,962	242,000	**1,541,439**
Asset value of machinery sold to Euan Lindsay	59,900		161,266	-	221,166
Total due by Euan Lindsay	**417,378**		**1,103,228**	**242,000**	**1,762,605**

[192] Mr Preston had also produced "approach 2", which was the same exercise to produce the termination figure, but using William Lindsay's figure for the value of the assets sold to Euan Lindsay. However, because that figure is first deducted (at line 3) and added back in (at line 5), the same figure is brought out under both approaches.

Cross-examination

[193] The Settlement Calculation was put to Mr Preston. He was not sure if he had seen it, but he did recall the figure of £1.6 million. He acknowledged this was defined as the "special termination amount" (stated as £1.63 million). It was noted that in the first Grant Thornton Report table 2.1 Mr Preston had used the figure of £1.3 million as Outlook's figure, not the figure of £1.6 million from the Settlement Calculation. Mr Preston explained that the figure of £1.3 million was from Loan Agreement 1, the sum Euan Lindsay borrowed. Mr Preston acknowledged that he had started with this figure, and not any figure in the Settlement Calculation. He accepted that, without any "discount", the sum Derek Fradgley appeared to identify as the total due as the "Per Agreement Termination Amount" was £2.185 million.

[194] Mr Preston was challenged for basing his conclusions on sources of information which had not been produced to the Court. These included, for example, his resort to the cashbook and the sales ledger to support several figures or an additional invoice he had found. Mr Preston acknowledged that he had not produced these materials. (The figures arising from his reliance on the extraneous materials are the first ten figures in the table in para [189], above.) He accepted that it was reasonable for Mr Graham to be sceptical and to exclude entries or figures in Outlook's documentation for which there was no vouching.

[195] Mr Preston was challenged that, given the discrepancies that emerged between some of his figures and those in the Outlook documentation in the earlier agreements, he should have adopted an independent and curious scepticism in respect of the Outlook documentation or any unvouched figures within it. Examples of earlier discrepancies included:

1) His analysis of agreement number 1426 (set out in his table 5.16), produced a figure of £13,090 against Outlook's settlement figure of £64,031. (Mr Graham's figure was £7,432.) Mr Preston accepted that the figures of either expert were "nowhere near" that claimed by Outlook. The same point was put to him under reference to agreement 1568, in which Outlook's figure was £240,800 in comparison to Mr Preston's figure of £134,417. (Mr Graham's figure was lower still, at £7,500.).

2) Mr Preston was also challenged where he made uncritical assumptions that entries which were simply referred to "assets" without further description "must" have some value, and which led him simply to accept the Outlook figures. This was illustrated under in respect of the following:

(a) Agreement 1399, in which Mr Preston stated that he was unable to identify the lease being rolled over but, he assumed that there must be some value for the assets listed, and so he used Outlook's unvouched figure; and

(b) Agreement 1596, in which "new assets ex Oak Finance" were listed at £25,900 but not otherwise identifiable or traceable.

Mr Preston acknowledged the fairness of the point being put to him.

[196] In relation to second Grant Thornton Report, Mr Preston was asked about how it came about that the line entry for Euan Lindsay's purchase of the assets came to be included in his report, given that its stated purpose was to identify the termination amounts calculated by reference to the contract wording. The narrative preceding the second Grant Thornton Report table 2.1 was as follows:

> "2.1 I have been instructed to quantify, based on the information available to me, the liability on termination for four specific agreements between Metal Bridge and Outlook, namely agreements numbered 1596, 1597, 1598 and 1619.

> 2.2 My assessment of the liability at termination for the four agreements reviewed ranges from £827,605 to £1,541,439 depending on the approach adopted.
>
> 2.3 For completeness I have also included the value of the assets transferred to Euan Lindsay and funded by the Loan Agreement to assess the total amount due by Euan Lindsay.
>
> 2.4 When the value of the assets acquired by Euan Lindsay under the Lease Agreement is taken into account the amount due by Euan Lindsay is £1,762,605 under both approaches."

The question was prompted because paragraph 2.3 in this passage is a *non sequitur*. Mr Preston explained that he had been asked to include the assets sold to Euan Lindsay. The two approaches simply reflected the parties' different views on valuation. It was put to him that the purpose of the Settlement Calculation had been to identify MBL's indebtedness under the first MBL agreements. He accepted that the correct figure for comparative purposes was the figure of £827,605 he had identified as the liability at termination of the first MBL agreements, and not his asset-inclusive figure of £1,762, 605. He also accepted that his approach two (using the Lindsay figures for the assets), had not been Derek Fradgley's view in August 2009.

[197] In relation to SSAP 21, Mr Preston accepted that the difference between him and Mr Graham was a difference of opinion between accountants about the application of SSAP 21.

Discussion of the opinion evidence

Comment on the experts

[198] There were three principal drivers to the different totals reached by Mr Graham and Mr Preston. These were:

1) The treatment of unearned income (£51,606),

2) The inclusion of amounts Mr Preston sought to vouch by resort to extraneous materials (£123,120, being £174,724 less £51,606), and

3) The consequential or compounding effect of these different approaches as agreements were rolled up (£436,908). (All figures are derived from the first Grant Thornton Report table 2.3, above, at para [189].)

Cumulatively, this led to a difference of £568,308.

[199] In considering the evidence of the parties' experts, I note that both have impressive professional qualifications as chartered accountants, both hold senior positions within highly reputable firms and both have ample professional experience. On that last matter, Mr Graham has the advantage of longer experience in professional practice (by about a decade) than Mr Preston. No party suggested that there was any issues of credibility. Both were plainly doing their best to assist the Court in the application of their expertise. What distinguished them were their divergent approaches to unearned income as part of the SSAP 21 calculation, and the more intangible quality of their interrogation or acceptance of the Outlook documentation- a matter that was ultimately a question of professional judgement.

[200] Having carefully considered their reports and their evidence, together with parties' submissions thereon, I have no hesitation in preferring the evidence and report of the pursuer's expert, Mr Graham, for the following reasons.

Mr Graham

[201] Mr Graham was an impressive witness and exhibited all of the requisite qualities of an expert. He was patently careful and maintained the necessary detachment from the interests of the party instructing him. In the substance and content of his report, and in the

manner in which he gave his parole evidence –including the manner in which he answered questions in examination from senior counsel and from the Court– he was at all times giving his independent opinion evidence. This was always well supported by cogent reasons as to why he differed from the approach or conclusions in the Grant Thornton Reports.

[202] Mr Graham was demonstrably sceptical and independent. That was amply demonstrated in the passages in his report where he declined to include figures in the absence of adequate vouching in Outlook's records (insofar as he had access to these), and also at the meeting of experts, where he was prepared to depart from his position if proper vouching was provided to him (as it was for the additional invoice of £2,050).

[203] Mr Graham accepted that there was little by way of actual disagreement between the experts on many issues. Both agreed that SSAP 21 applied and there were many instances in the respective reports where the same figures were arrived at.

Mr Preston

[204] An expert must always maintain his independence and bring to bear a robust professional scepticism. This was particularly important in a case such as this, where there are questions as to the veracity of some of the documentation –and which was known in advance (there are repeated references in the witness statements casting doubt on the Outlook documentation). Even if Mr Preston was unaware of that particular challenge at the outset of his analysis, the repeated instances of his inability wholly to support Outlook's figures as he worked through the earlier agreements should have led to a more critical interrogative approach rather than uncritical adoption of Outlook's figures. Mr Preston fairly acknowledged the force of that observation in cross-examination and, accordingly, he could not wholly maintain the figures stated in the first Grant Thornton Report.

The experts' different approaches to SSAP 21

[205] Turning to the differences arising from their treatment of unearned income and SSAP 21, I accept Mr Graham's evidence that SSAP 21 was silent on the question of unearned income and to include it would result in double charging. On this matter, I prefer the professional judgement of Mr Graham to that of Mr Preston.

The second Grant Thornton Report

[206] In relation to the second Grant Thornton Report, this was an essentially irrelevant exercise, as it was wholly at odds with the evidence of what the parties actually did when entering into agreements. The rolling up of agreements was effectively a refinancing exercise, and to which the contractual terms of the rolled up agreement were not applied. Other than the reference in one of the headings of the Settlement Calculation (the "Per Agreement Termination Amount"), there was no evidence that Derek Fradgley invoked or applied the termination provisions of the agreements. Even in respect of the "Per Agreement Termination Amount" figures contained in the Settlement Calculation, his reliance on the "Special Terminating Amount" – in the same document – clearly departed from the only instance in which Outlook purported to rely on termination provisions. In any event, to the extent that Outlook sought to justify the amounts in the Loan Agreements or the figures in the Settlement Calculation on the basis of any termination notices of the Settlement Calculation agreements, I accept Rodger Lindsay's evidence that they never received these at the time. For these reasons I place little weight on the second Grant Thornton Report, as it did not reflect the approach generally taken by Outlook when it rolled up prior agreements into new ones. In respect of the inclusion of the asset figures in the second Grant Thornton Report, Mr Preston included these because he was told to do so.

This led to two changes in the second Grant Thornton Report. The first change was the introduction of the "first" and "second" approaches (illustrated in the tables). The second change was materially to increase the total brought out in the second Grant Thornton Report, which was more favourable to the position Outlook adopted in its defence to these actions. Whatever the relevance or otherwise of the inclusion of the MBL assets in a report concerned with the calculation of sums due under the Settlement Calculation agreements on the application of the contractual wording, Mr Preston should have explained in the second Grant Thornton Report how that information came to be included and why it was relevant.

Conclusion on figures spoken to in the opinion evidence

[207] It follows that I accept the pursuer's expert's figures and find that the sums due under all of the Settlement Calculation agreements were no more than £909,612 (being the £907,562 noted in the pursuer's report together with the £2,050 for the late invoice). I also find that the lesser sum for the total of the first MBL agreements, which was the proper measure of Euan Lindsay's liability, was £537,011 (see above, at para [168]).

[208] I now turn to consider the legal grounds of the pursuer's case as applied to the evidence that I have accepted.

Discussion

Introduction

[209] Parties produced written submissions and bundles of authorities. I also heard submissions over two days. I have considered all of these materials and do not propose to rehearse them in this Opinion.

[210] I have already addressed the pursuer's objection to passages of Mr Preston's evidence and analysed the opinion evidence (which was directed principally to the element of lesion). I will consider the several grounds on which the pursuer challenges the impugned deeds before considering the issue of *restitutio in integrum*.

Facility, circumvention and lesion

[211] The pursuer's principal ground of challenge to the impugned deeds is on the ground of facility, circumvention and lesion. As noted at the beginning of this Opinion, I have already dealt with Outlook's challenge to the relevancy of the pursuer's pleadings and have considered the case law on this ground of challenge in the Debate Opinion. I need only summarise the relevant propositions for the purposes of this Opinion. In order for the pursuer to succeed it must show (1) weakness and facility, (2) circumvention, and (3) lesion. On the case law, these three elements are all treated as interrelated and they invite a single question: whether the total effect of the evidence on these discrete elements is to suggest an invalidity of consent to the deed in question. (See *Mackay v Campbell* 1966 SC *237 per* Lord Justice Clerk (Grant) at 249). The pursuer is under necessity of seeking reduction because a contract obtained through facility and circumvention is voidable, not void. It is valid until it is reduced. I propose to consider the evidence in respect of these three discrete elements, but always bearing in mind that that assessment is a unitary one encompassing all three elements.

Facility

[212] Facility is the term used to describe a mental frailty which calls into question the capacity of the granter to consent to the deed in question. It is not possible to state the

degree of facility which is required to invalidate a deed. This is because facility is one of three factors which founds a challenge based on facility and circumvention. On the case law, there is an inverse relationship between the degree of facility and the degree of circumvention: the greater the one, the lower the standard required of the other (*Munro* v *Strain* (1874) 1 R. 1039 ("*Munro*") *per* Lord Benholme at 1047).

[213] Facility usually arises from some weakness of the faculties caused by age or illness. However, proof of facility does not require the pursuer to demonstrate any form of mental senility. This is the import of Lord Benholme's observations in *Munro* (at p 1047) that

> "…the weakness and facility necessary to be established may be of a varied character, and may arise from a variety of different causes; that it may arise from the natural disposition of the individual, or from the decay and prostration of his mental and bodily powers consequent upon advanced age or severe affliction, or many other agencies."

In the same case, Lord Ormidale noted (at p 1044) that part of the relevant context to consider facility may be the existence of a professional relationship or one of trust by the person said to be facile in the person said to be the circumventor:

> "…the weakness and facility forming the earlier part of such an issue may take its character and its nature from the fraud or circumvention with which it is combined; and that if…in reference to the defender, Paterson was subject to weakness and facility, **arising** from over confidence, or **from professional relations which led the one to exercise and the other to submit to a certain intellectual dominion** which would not have occurred had that relation not subsisted, I am satisfied that sufficient…[to form the basis for a finding if facility]" (Emphasis added.)

The pursuer relies on that passage and contends that Derek Fradgley stood in a position of trust or in a professional relationship to the Lindsays. On the evidence, I find that submission well-founded. More than once the Lindsay witnesses stated that they had trusted Derek Fradgley. The sense of hurt and betrayal Rodger Lindsay displayed when giving his evidence is eloquent of its truthfulness.

Has the pursuer proved Euan Lindsay's facility?

[214] The question of facility is addressed by considering Euan Lindsay's state of health and mind at the time of signing the Loan Agreements and the impugned standard security. Euan Lindsay was diagnosed as having "farmer's lung", a condition which rendered Euan Lindsay incapable of work by 2000. The condition was progressive in its effects on Euan Lindsay, who in his last years became weak, housebound and on a permanent oxygen supply. He died of this condition only two years after signing the Loan Agreements. All of the Lindsay witnesses spoke to how Euan Lindsay's mental and physical state deteriorated, and to his resultant low mood and anxiety. He was in and out of hospital in his later years, causing him to become more distant and withdrawn. None of this evidence was challenged.

[215] Focusing on the period preceding the signing of the Loan Agreements, Euan Lindsay was poorly through much of the winter from 2008 to 2009. On Rodger Lindsay's evidence, Euan Lindsay's involvement with MBL was reluctant, at best, and caused his mood to worsen further. He had provided the £200,000 working capital to allow members of his family to continue in business. Prior to providing that money, he had had no involvement with either of Lindsay's AI or Lyndsay's Dairy. When he became aware that further monies were being demanded, in August 2009, his mood dropped further. On the evidence I have accepted, which was not challenged, I find that Euan Lindsay was in a frail physical condition and weak mental state when he signed the Loan Agreements and the impugned standard security. He was in the same condition when he was induced to sign the first indemnities in the first MBL agreements between Metal Bridge Limited and Outlook.

[216] Mr McIlvride submitted that there was no evidence to show that Euan Lindsay was susceptible to having his will overcome by Derek Fradgley. He went further and submitted that Euan Lindsay was "perfectly capable" of resisting proposals put to him, such as the first

draft of the first standard security as one for all sums, and in his refusal to extend a further £200,000 when Derek Fradgley wanted this in August 2009. Mr McIlvride also referred to the phrasing in the Gebbie & Wilson Letter that Euan Lindsay was "determined" to proceed. I do not accept that that phrasing supports his submission. There is no evidence that Euan Lindsay ever met with the author of the Gebbie & Wilson letter. The submission in relation to the first standard security is inconsistent with William Lindsay's evidence that Euan Lindsay had actually signed and returned the first draft of the first standard security (which was for all sums) to his agents, and that it was his solicitor who, on receipt, would not allow the first standard security to be granted in those terms: see para [111], above. In relation to Euan Lindsay's refusal to grant a further £200,000, on Rodger Lindsay's evidence it was he – that is, Rodger Lindsay – who decided that Euan should refuse when he saw how upset Euan became, and it was Rodger Lindsay who communicated that decision to Derek Fradgley: see para [65], above (the passaged emphasised in bold). More fundamentally, Euan's disinclination to grant a further £200,000 is the very stance which – if the remaining elements of the pursuer's case are established – was circumvented by Derek Fradgley. Indeed, the firmness of Euan Lindsay's resolve at that time to protect Harperfield is a benchmark against which to assess how that resolve was overcome. In any event, that evidence must be placed in the wider context which included the continuing effect of the ultimatum and the fact that Derek Fradgley had prevailed upon Euan Lindsay to encumber Harperfield.

[217] On the evidence, Euan Lindsay was a quiet man who kept to himself. He had had limited education and was not comfortable even in basic financial matters. William Lindsay's evidence was that his uncle needed help to obtain a new cheque book and that he had had played no part on the financial side or in the management of DM Lindsay at

Harperfield. There was some evidence that, even though Euan Lindsay was very uncomfortable about having been made a director, he was diffident in expressing that, having done so to William, who advised him to speak to Rodger. He was also a private man. William did not know that Euan Lindsay had in fact been removed as a director, although that would have been at most within a few weeks or months of their conversation. There is the further evidence of Rodger Lindsay, which I accept, that Euan Lindsay would not attend the MBL meetings after the initial meetings. It was his evidence that Euan Lindsay became very stressed about it and found these meetings difficult to attend. Euan Lindsay was removed as a director on 1 October 2008 at around the time the first standard security was granted.

[218] Mr McIlvride did not seek to address the additional factor founded on by the pursuer, that Derek Fradgley was regarded by the Lindsay family as a trusted adviser. I accept the Lindsays' evidence that he did indeed have that status, given the long history of dealings between Derek Fradgley, on behalf of Outlook, and the Lindsays. That was reflected in other ways: the straightforward nature of the early agreements and Rodger Lindsay's evidence that he felt he understood what a particular agreement was for and that it did not take long to sign these; his willingness for Derek Fradgley to take away all of the copies of the agreements on the eve of Rodger Lindsay's bankruptcy, and his acceptance of Derek Fradgley's assurances that he would explain things to the trustee.

[219] The force of Derek Fradgley's personality (in contrast to Euan Lindsay's) may be tested in his dealings with Rodger Lindsay at the time of the formation of MBL. Rodger Lindsay was the Lindsay's man of business. Notwithstanding that, what Derek Fradgley had said about the consequences for Rodger Lindsay if he were found near MBL had terrified Rodger Lindsay and was effective to exclude him. The reality was that

there was no other member of the Lindsay family who could replace Rodger Lindsay in that role, when it came to the Lindsays' involvement in MBL, or who could stand up to Derek Fradgley. If Rodger Lindsay could not do so, as a younger and fitter man with experience of running the Lindsay businesses, there was little prospect for someone with Euan Lindsay's attributes being able to do so.

[220] On no view could Euan Lindsay be described as having a forceful personality. By contrast, Derek Fradgley was persistent, domineering and, at times, aggressive in order to get his way. The grant of the first standard security illustrates Derek Fradgley's intellectual domination. The family ethos was of financial prudence: "you earned the pound before you spent it". At this point in time Derek Fradgley had no leverage over Euan Lindsay. (That may be contrasted with the circumstances in which Euan Lindsay was prevailed upon to sign the impugned standard security.) Euan Lindsay was terrified of debt and had kept Harperfield free of any form of security. Euan Lindsay's timidity when faced with formal financial deeds may be seen in the fact that he signed the earlier draft of the first standard security for all sums, notwithstanding his clearly expressed intention that it should be capped at £200,000. The more disturbing aspect of that chapter of evidence is that, notwithstanding that Derek Fradgley knew that that was Euan Lindsay's position from the outset, he had his own agents send a deed framed as an all-sums security. That is verging on duplicitous. One of the puzzles of the case is how, in any event, the first standard security was for £275,000, as the Lindsay witnesses who spoke to Euan Lindsay's insistence that it be capped consistently mentioned the figure of £200,000.

[221] On the whole evidence, I accept that the pursuer has established that Euan Lindsay was facile to a very high degree at the material time.

Circumvention

[222] Circumvention is the term used to describe an unlawful advantage being taken of a given situation and an individual's facility. It is distinct from fraud. It is not necessary that there should be deceit. It is enough that there should be solicitation, pressure, importunity and, even in some cases, suggestion. The degree of circumvention depends on the degree of facility (*Gibson's Exr* v *Anderson* 1925 SC 774, *per* Lord Blackburn at 788).

The wider factual context

[223] The critical meeting was that between Euan Lindsay and Derek Fradgley on 26 August 2009. However, it is important to place the evidence about that in a wider context. Much of the evidence led by the pursuer was unchallenged. This included the evidence of the Lindsay witnesses regarding Euan Lindsay's weakened physical and mental state, the complete trust they reposed in Derek Fradgley, the difficulties they faced as a consequence of foot and mouth, TB and the loss of the AI litigation, the bankruptcies and the limited basis of financial support Euan Lindsay was prepared to offer in the summer of 2008, how MBL came to be established, the way in which Derek Fradgley assumed control over the business once MBL was established and Derek Fradgley's domination of the Lindsays.

[224] In submissions, Mr McIlvride derided the pursuer's portrayal of Derek Fradgley as undergoing a Jekyll and Hyde transformation when MBL was formed. However, that is to ignore Outlook's significant exposure in the event of the Lindsays' bankruptcies. Outlook was the principal creditor of the Lindsay businesses. Rodger Lindsay's view was that at that time the value of their assets was significantly depressed. The then-current TB outbreak meant that the cattle could not be sold. Accordingly, had MBL not been set up and assumed

the liabilities of the Lindsay businesses, Outlook would have borne a significant loss. That this was apparent to Derek Fradgley is clear from the steps he took to increase the asset cover, in what *prima facie* was an unfair preference, in the episode where he turned up and added additional items to an agreement. By this point there were other features of Derek Fradgley's conduct that at least raised questions of his *bona fides* in his dealing with the Lindsays. There was the curious episode where he compelled Rodger Lindsay to enter into a second agreement (and one of the experts had found some evidence of duplication in the agreement numbers), and the more curious episode when he attended at Halltown shortly before the first of the Lindsays' bankruptcies and removed all of the agreements. His explanation was so he could explain matters to their trustees whereas it is more likely that this was to avoid scrutiny by an independent third party. (Rodger Lindsay gave another example when Derek Fradgley gave certain assurances about sorting the mortgage over Metal Bridge Farm, but Rodger Lindsay later discovered that not only had Derek Fradgley not done so, he had charged MBL rent without the Lindsays' knowledge or MBL's agreement.)

[225] While Derek Fradgley portrayed the setting up of MBL as a formality which would leave the businesses to be run by the Lindsays and on the same terms they had had with Outlook, he had much more to gain from establishing MBL. In doing so, he substituted a new solvent debtor in the form of MBL for the Lindsays, who were days or weeks away from bankruptcy and, further, he had also obtained enhanced protection in the form of the first standard security in the amount of £275,000 in respect of Outlook's new debtor.

[226] The extent to which Derek Fradgley and Outlook benefited from the new arrangements to the detriment of the Lindsays may also be demonstrated by considering the counterfactual. Had MBL not been formed (and Outlook's indebtedness been assumed by

it), Outlook would have borne a substantial loss. Mr McIlvride accepted in submissions that the loss to Outlook would have been many thousands of pounds. The Lindsays would have been discharged of that indebtedness and, while the assets of the Lindsay businesses might have been sold, the Lindsays would at least have had the opportunity to buy them, and to do so at a fair market value. That, after all, had been the Lindsay family proposal in June 2008, but which Derek Fradgley had deflected by promoting the creation of MBL.

[227] Another relevant feature of the wider context is how Derek Fradgley assumed total control of all of MBL's finances in the manner described by Rodger Lindsay. All of MBL's bank statements and invoices were sent to Outlook's address. Derek Fradgley also effectively excluded any oversight by the Lindsays, by warning Rodger Lindsay off any involvement under threat of dire consequences, and otherwise kept the Lindsays in the dark as to MBL's financial state. There was no prospect that either Euan Lindsay or James Lindsay had the inclination or financial *nous* effectively to query any statement or decision of Derek Fradgley's in relation to MBL. In any event, the lack of any financial information precluded their having any basis to do so, even if they had been so inclined. The Lindsays' description of how Derek Fradgley ran the MBL meetings is revealing of his domination: as James Lindsay explained, Derek Fradgley did not like to be challenged on anything; it all had to be done his way. There is also the matter by which Derek Fradgley secured signatures on documents and which precluded the Lindsay from being able to read or consider the deed and, of course, no copies were ever left. In light of all of that evidence, which I accept, Rodger Lindsay's description of feeling like the Lindsays were just employees and Derek Fradgley was the "big boss" accurately portrays the realities of the imbalance of power between Derek Fradgley and the Lindsays. As Rodger Lindsay described it, he "felt totally out of control….and [he] was sick of it".

[228] I return to Derek Fradgley's protestations that MBL was in a dire financial state and how his threats of what "the bank" might do was used to put further pressure on the Lindsays. The starting point is to consider the Lindsay businesses as they operated before MBL was formed. Rodger Lindsay's evidence was that, prior to the insolvencies brought about by the loss of the AI litigation, the Lindsay businesses had been modestly profitable. Rodger Lindsay acknowledged that there were lean times, especially in the aftermath of foot and mouth and of TB. He also acknowledged that there might be arrears from time to time, but that the Lindsays paid their debts. They entered into finance agreements, but these were generally to fund an acquisitions with a view to expanding the business (eg to buy more cattle or to build a milking shed with a greater capacity). Rodger Lindsay estimated that the milk cheque MBL was receiving was about £30,000 to £40,000 per month. After the acquisition of additional cattle to increase milk production, which Derek Fradgley only agreed to after the turn of the year (in early 2009), the milk cheque increased to £50,000 to £60,000 per month. This was a substantially greater sum than the monthly payments due under the first MBL agreements. I accept Rodger Lindsay's evidence regarding the Lindsay's business and that Derek Fradgley came looking for the business. It is improbable that Derek Fradgley or Outlook would have continued to enter agreements with the Lindsays, if their businesses were as Outlook now seeks to portray them. Moreover, as Mr Thomson correctly pointed out, there was no objective evidence to support Derek Fradgley's repeated assertions from early spring 2009 onwards that MBL was in a parlous financial state. It was against the backdrop of those assertions that the series of further events took place and which Derek Fradgley brought to a head in August 2009.

[229] I am satisfied that the financial position of MBL was not as Derek Fradgley sought to portray it between January and August 2009. In the first place, the bank statements disclose

that Derek Fradgley did not give full credit for the £200,000 Euan Lindsay had advanced. Only about £110,000 was credited to MBL's account at that time. So far as the available bank statements disclose, MBL always had a credit balance on its account. What prompted Derek Fradgley to increase the pressure and present MBL's finance in apocalyptic terms? Rodger Lindsay referred to the fact that the trustees on the Lindsay insolvencies were chasing Outlook or challenging some of MBL's early transactions: see para [74], above. That Derek Fradgley had concerns was apparent from the email he sent in February 2009 to his own advisers, Butcher Woods (see para [154], above).

The events immediately preceding the 26 August meeting between Derek Fradgley and Euan Lindsay

[230] After MBL's board meeting in August 2009, Derek Fradgley sent a fax on 19 August stating that "the only chance of solving [MBL's asserted financial difficulty] is if Euan is willing to provide security for a further £200,000 loan". Accepting Rodger Lindsay's evidence that Derek Fradgley would fax when he wanted Euan Lindsay to see a communication, it may be inferred that this was calculated to put pressure on Euan Lindsay. However, Euan Lindsay refused to give security for a further £200,000. In the wider family context, it was understood that William Lindsay would inherit Harperfield. That is why Euan Lindsay is recorded as needing to speak to him before Euan could agree to grant the first standard security. This is also consistent with James Lindsay's evidence that Euan Lindsay would not do anything to harm the other branch of the family (meaning the Lindsays at Harperfield).

[231] Euan Lindsay's refusal, which Rodger Lindsay communicated to Derek Fradgley, led to the extraordinary demand that Rodger Lindsay meet Derek Fradgley 2 or 3 days later at a Little Chef in the Midlands on 23 August 2009. It was there that Derek Fradgley advised

Rodger Lindsay that MBL was insolvent; that "the bank" only had to sign a form to go to court and everything would be sold. This is a telling example of Derek Fradgley's use of "the bank" as a threat to powerful effect. It was, of course, a lie: Outlook owned the assets which were let to the Lindsays under the first MBL agreements. Whether these were sold or not was within Derek Fradgley's sole control, as there was no bank standing behind Outlook. However, the Lindsays did not know this at the time. Their understanding, fostered by Derek Fradgley's repeated misrepresentations about "the bank", was that the bank was dictating how Outlook could respond.

[232] After the Little Chef meeting Rodger Lindsay explored other avenues of support, as he described in his evidence, in order to enable the Lindsays to buy back the assets of Outlook. On the information then known to the Lindsays, this was a feasible step. At this point in time Rodger Lindsay was not aware of the indemnities. In his then state of knowledge, the financial exposure of the Lindsays was limited to the extent of the first standard security. It was in those circumstances that the Lindsay family advised Derek Fradgley that they would try and buy the assets themselves. Had the Lindsays been able to do so, it is likely that MBL would have been wound up with very little cash to pay its creditors. That would mean its main creditor, Outlook, would receive little or nothing beyond the £200,000 (or £275,000) secured on Harperfield. These factors provided a powerful incentive for Derek Fradgley again to deflect the Lindsay family proposal to obtain external finance in order to buy back the assets, and instead to retain control of MBL and increase Outlook's security cover.

[233] Further, had the Lindsays been able to secure a buyout of MBL's assets, a number of matters were likely to have come to light and which would have reflected adversely on Derek Fradgley. These would have included the indemnities and the different and more

onerous terms of the first MBL agreements. That, in turn, might have prompted the Lindsay's to obtain an independent review of Derek Fradgley's conduct of MBL's affairs. Derek Fradgley's elaborate and prolonged artifice of drafting board minutes which minimised his involvement and provided untrue descriptions of the active involvement of Euan and James Lindsay, and the other fictions disclosed in the papers, such as Euan and James Lindsay travelling down to Stourport for an MBL general meeting, may have been a defensive strategy adopted by Derek Fradgley to deflect just such an enquiry.

The meeting at Halltown between Euan Lindsay and Derek Fradgley

[234] It is at this critical juncture that the meeting on 26 August 2009 between Derek Fradgley and Euan Lindsay occurred. Many features from the evidence point to how irregular this meeting was. Rodger Lindsay was the Lindsay's point of contact with Outlook and he attended all meetings with Derek Fradgley. However, on this occasion, Derek Fradgley turned up without warning. Instead of coming in the morning which, on Rodger Lindsay's description of a normal day, would be at the morning break after the first milking round was completed, Derek Fradgley arrived mid-afternoon. This coincided with the second milking round, when Rodger Lindsay would have been at Metal Bridge Farm a few miles down the road from Halltown. On James Lindsay's narrative, Derek Fradgley came into the house looking for Euan (not Rodger Lindsay). From all of these features it may be inferred that Derek Fradgley wished to engineer a meeting with Euan without Rodger Lindsay being present. From that circumstance, coupled with the significance of what was to be discussed (especially from Outlook's perspective), it may also be inferred that Derek Fradgley knew Euan was likely to be at his most vulnerable without Rodger Lindsay.

[235] The meeting James Lindsay described was intense: Derek Fradgley was aggressive and dogmatic; the atmosphere was "awful and completely alien"; Derek Fradgley was being nasty, very unpleasant and he was "the worst" that James Lindsay had seen him. Derek Fradgley was "hell bent on getting Euan to sign". James Lindsay spoke to Derek Fradgley deploying the threat that either Euan signed or "the bank will make you bankrupt". All of these aspects of that meeting, and the highly unusual circumstances by which it came about, lead to the conclusion that Derek Fradgley engineered this meeting with the specific intention of overcoming Euan Lindsay's refusal a week earlier to extend the security by a further £200,000. Mr Thomson was right to describe Derek Fradgley's resort to "the bank" as a tool of oppression. I also accept his characterisation of Derek Fradgley's conduct in this regard as "deceit". On the evidence I have accepted, there is no doubt that Euan's conduct thereafter was driven by the fear of losing Harperfield and that he entered into the Loan Agreements and the impugned standard security to avoid that outcome. I accept Mr Thomson's submission as well-founded, that that meeting began the chain of events which resulted in the documents now sought to be reduced being signed.

[236] Before turning to consider the Settlement Calculation, the position between parties may be summarised as follows: Derek Fradgley had effective and exclusive control of MBL. He was also in complete control of its main creditor, namely, Outlook. Derek Fradgley stood in a fiduciary position towards MBL. The Lindsays reposed complete trust in him at that time. On the evidence I have accepted, Derek Fradgley manifestly preferred his own interests, and those of Outlook, to the interests of Euan Lindsay, the Lindsays and MBL. In doing so, he presented a false narrative of "bank pressure" and grossly misrepresented the position to Euan Lindsay and the Lindsays in respect of MBL's financial position.

The Settlement Calculation

[237] It was at this meeting, which took place in the circumstances Derek Fradgley contrived to bring about, that Derek Fradgley produced the Settlement Calculation. This stated that the balance of rentals was £2,662,812 (the figure is consistent with James Lindsay's evidence that afterwards the figure Euan Lindsay mentioned was of "£2.6 million"). It stated that the "Per Agreement Termination Amount" was £2,185,383. The "**Special Termination Amount", offered for a time-limited period, was £1,623,879 and, with the inclusion of the new cattle, totalled £1,800,000. It was under reference to these figures that Derek Fradgley had issued what was, in effect, an ultimatum: either Euan Lindsay bought Metal Bridge Farm and all of the cattle and machinery for £1,800,000, or the debt would be called up, Euan Lindsay would be held personally liable and this would lead to the forced sale of Harperfield. This ultimatum tapped into Euan's fear, spoken to by the Lindsay witnesses, of losing Harperfield. The following month Euan Lindsay entered into the Loan Agreements and he granted the impugned standard security. James Lindsay and Rodger Lindsay both spoke to Euan's state immediate after that meeting, of being in "some distress", "shaking", "very upset", and "in shock". What they describe reinforces the other evidence that Euan had been prevailed upon to do the very thing he was loathe to do: to imperil Harperfield by agreeing to further burdening it. This evidence also rebuts any inference that Euan Lindsay was his own man, as Mr McIlvride sought to portray him, or had freely consented to what Derek Fradgley had proposed.

[238] Euan Lindsay is reported to have said at the meeting that "all it should be was £200,000" and James Lindsay described him that evening repeating over and over "that he had no idea he owed that much". It is perhaps a further indication of the trust the Lindsays

then reposed in Derek Fradgley that, notwithstanding the huge disparity between the figure of £200,000 mentioned by Euan Lindsay and the sum of between £1.6 and £2.6 million Outlook demanded, none of the Lindsays thought to challenge Outlook's figures at that time, but instead the Loan Agreements reflecting Outlook's figures were entered into.

[239] Mr McIlvride took the point that there was no evidence for what was said specifically by Derek Fradgley to Euan Lindsay under reference to the Settlement Calculation and no evidence of what document Euan signed. (Mr McIlvride's criticism on that latter point is to misunderstand the pursuer's case; no case is based on the document Euan Lindsay was prevailed upon to sign at that meeting and whose contents are unknown to this day.) Mr McIlvride submitted that, if Euan had focused on the figure of £2.6 million, then he plainly "misunderstood" the document. He submitted that the correct figure was £1,719,555. Mr McIlvride arrived at this figure by deducting from the total of the "Per Agreement Termination Amount" of all of the agreements (a figure of £2,185,383), the amount of the Lindsay Mortgage (£465,828). There are three difficulties with that submission. First, the figure of £1,719,555 appears nowhere on the Settlement Calculation. Having regard to the tenor of the meeting, as James Lindsay described it, and Derek Fradgley's objective of securing *Outlook*'s exposure, it is improbable that Derek Fradgley would have taken the time to break down the figures in the way Mr McIlvride now suggests, in order to strip out the Lindsay liability (not MBL's) under the Mortgage. It is all the more unlikely that Euan Lindsay would have been able to carry out that calculation himself, much less to do so in the intensely pressured and wholly unexpected face-to-face meeting with Derek Fradgley. Secondly, the realisation that, if the Settlement Calculation purported to portray Euan Lindsay's liability for *MBL's* indebtedness, it had erroneously included the Lindsay liability under the Mortgage, appears

to have come late. The first Grant Thornton Report and the Henderson Loggie Report both analysed the Settlement Calculation without stripping out the Lindsay Mortgage. That was only done in the second Grant Thornton Report, in December 2020. Thirdly, the submission fails to reflect the evidence of the only figures from the Settlement Calculation referred to by the single contemporaneous witness, James Lindsay, of Euan Lindsay's understanding of the Settlement Calculation: that £2.6 million was owed, but that Derek Fradgley would "discount" this to £1.6 million. And indeed, subject to the addition of the figure for cattle to bring the figure up to £1.8 million, the total of the sums of the Loan Agreements reflect that number.

The Outlook Letter

[240] Turning to the Outlook Letter (of 4 September 2009), Outlook placed considerable reliance on this as correcting any misrepresentation or error in the Settlement Calculation. He did so under reference to the discussion of misrepresentation in Gloag, *The Law of Contract*, 2nd ed at p 468, including the reference to Lord Chancellor Brougham's observation in *Irvine v Kirkpatrick* (1850 Bell's App. 186 at 237, to the effect that if the representee discovers the truth, any misrepresentation ceases to operate. (This was to meet Mr Thomson's submission that there was a continuing duty on the representor to correct a misrepresentation.) Outlook's position was that the Outlook Letter corrected any misrepresentation that may have been made under reference to the Settlement Calculation.

[241] Leaving aside whether Euan would have understood the word "indemnifier", this letter was unlikely to have improved Euan Lindsay's understanding, as three of the figures it mentioned do not appear in the Settlement Calculation (these are the figures underlined in the text quoted at para [94], above). In any event, Mr Thomson's submission is well-made

that the Outlook Letter *relied on*, rather than "corrected", the figures in the Settlement Calculation. I accept that submission. While the subtotal of the three agreements stated in the Outlook Letter was £935,051, that figure does not appear in the Settlement Calculation. It appears to be based on the first three figures in the final column of the Settlement Calculation. Similarly, the amount "as indemnifier" is stated to be £1,158,051, which is derived from the first three and the fifth figures in the final column of the Settlement Calculation. While it is correct that the Lindsay Mortgage liability has been stripped out from the figure of £1,158,051, I accept the evidence William and Rodger Lindsay that the word "indemnity" or" indemnifier" would have been meaningless to Euan Lindsay. Having stripped out the Lindsay Mortgage to arrive at the total figure representing Euan Lindsay's liability of £1,158,051 in respect of the first MBL agreements, the sum due under the Lindsay Mortgage was immediately added back in, in the next paragraph – under the guise that Euan Lindsay "intended" to form a new company ("Metal Bridge Dairy Farm Limited") and had "offered" to purchase Metal Bridge Farm for £465,000. Leaving aside those patently untrue statements, Euan Lindsay was unlikely to be able to discern from this letter that *his* liability in respect of the first MBL agreements might be less than either of the headline figures of £2.6 million or £1.6 million. Rather, the overall presentation of the Outlook Letter reinforced its position that Euan Lindsay's total liability was £1.8 million, as had been represented at the critical meeting on 26 August 2009.

The Gebbie & Wilson Letter

[242] That leaves the Gebbie & Wilson Letter of 29 September 2009. I have already found on the evidence that Euan Lindsay did not take legal advice. There is no evidence that Euan Lindsay met personally with his solicitor and Rodger Lindsay's evidence, having

reviewed the agents' files, reinforces the other evidence that Euan Lindsay had not done so. Mr McIlvride noted that the Gebbie & Wilson Letter contained the figures stated in the Outlook Letter. That may be so but Gebbie & Wilson had never seen the underlying Loan Agreements. They stated in terms that they were not offering any advice. Further, they were not aware of any personal indemnities. So far as they would have been aware, Euan Lindsay's liability was capped at the amount of the first standard security. In that state of ignorance, Gebbie & Wilson could have not appreciated that the figure of £1,158,051 was "correcting" any figure in the Settlement Calculation- a document they never saw. Furthermore, as is apparent from Mr Lindgard's file entries (see para [134(3), above]), Euan Lindsay had signed Outlook's offer on 4 September 2009, more than 3 weeks before the Gebbie & Wilson Letter.

[243] In any event, the terms of the Gebbie & Wilson Letter were unlikely to divert Euan Lindsay from the course his meeting with Derek Fradgley had set him on. On the evidence I have accepted, I do not accept Mr McIlvride's submission that Euan Lindsay was motivated to help his family. I also accept William Lindsay's evidence that there was no way Euan Lindsay would help some family members at the cost of others.

[244] In meeting the pursuer's case on circumvention, in submissions, Mr McIlvride relied on the evidence that Euan Lindsay had sufficient force of personality to refuse to grant the unrestricted standard security Derek Fradgley sought in June 2008 and to have himself removed as a director from MBL by October 2009. He submitted that in this case the Lindsays had contrived to present Euan Lindsay as a financial *ingénu* which was misleading. In any event, Mr McIlvride's submission was that, had there been any circumvention or misrepresentation in the Settlement Calculation, this was corrected by the time of the 4 September Outlook Letter. This submission does not accord with the evidence I have

accepted about Euan Lindsay's ceasing to be a director which, at best, was equivocal. The overall impression from this chapter of the evidence is of Euan Lindsay's diffidence. He mentioned his discomfort to William, who advised him to discuss this with Rodger Lindsay. Given Euan Lindsay's personality, his mental and physical state at that time, and his unwillingness to attend meetings at which Derek Fradgley was present, it is unlikely that Euan Lindsay asked Derek Fradgley to have him removed as a director of MBL. Contrary to the inference Mr McIlvride seeks to infer of Euan's agency, such evidence as there is on this matter reinforces Euan Lindsay's timidity and lack of agency.

[245] I find on the whole evidence that Euan Lindsay was impelled by the ultimatum Derek Fradgley had issued under reference to the Settlement Calculation at the critical meeting of 26 August 2009. In contrast to the position when Euan Lindsay granted the first standard security, Derek Fradgley's leverage in August 2009 was significant. It is in this context that Derek Fradgley deployed the threat of "the bank" repossessing "everything" and coming after Harperfield, coupled with his ultimatum that Euan Lindsay had to buy off this threat in order to prevent the bank stepping in. In the whole circumstances, this was a powerful ultimatum that Euan Lindsay was unable to resist and which continued to impel him when he entered into the Loan Agreements and to grant the impugned standard security.

[246] I have already dealt with the Outlook Letter. On the evidence I have accepted nothing in the terms of the Gebbie & Wilson letter which would have relieved Euan Lindsay of the ultimatum Derek Fradgley had issued, and which led him to grant the Loan Agreements and the impugned standard security. Rather, I find that Euan Lindsay only agreed to provide the further security (in the form of the impugned standard security) and to enter the Loan Agreements, because Derek Fradgley had persuaded him he was

personally liable and he had falsely misrepresented at their meeting that "the bank" was going to call up the debt, liquidate MBL and then come after Euan Lindsay to take Harperfield.

Has the pursuer proved circumvention?

[247] In considering whether the pursuer has proved the element of circumvention, I note that circumvention does not require there to be fraud or even deceit. This is clear from Lord Blackburn's articulation of the modern meaning of circumvention in *Gibson's Executors* v *Anderson* (at p 788):

> "…It is not necessary that there should be deceit. It is enough that there should be solicitation, pressure, importunity, even in some cases suggestion. The degree of circumvention would depend upon the degree of facility…"

I accept Mr Thomson's submission, made under reference to these observations, that in the present case there was deceit, solicitation and pressure effected by Derek Fradgley and that the deceit took many forms. It included: obtaining the personal indemnities; falsely representing the level of debt owed to Outlook; and falsely claiming that "the bank" was compelling him to take action. I also accept as amply supported by the evidence his submission that the pressure Derek Fradgley applied at the material time could not have been much greater. Derek Fradgley told Euan Lindsay he would be held personally liable for the debts of MBL if he did not sign. The inescapable outcome of that would be losing Harperfield. All of this was done at a time when there was a high degree of facility.

[248] On the whole evidence I find that the pursuer has established circumvention of Euan Lindsay by Derek Fradgley on behalf of Outlook. From the evidence I have accepted, Derek Fradgley was adroit at manipulating all of the Lindsays, not just Euan Lindsay, in order to advance his own interests by illegitimate means. Those means included his

complete control of the affairs and finances of MBL, to the exclusion of the Lindsays; the means by which he secured the Lindsays' signatures to any document that suited Derek Fradgley or Outlook; his misrepresentations of the amounts due by MBL (which, from Outlook's own records, he could not but know to be false); the repeated false representations about "the bank", and which was deployed with devastating effect at critical junctures; and the production of board minutes and other documents containing fictional entries to disguise the degree of control he was exerting. By contrast with a one-off misrepresentation made on a single occasion, the circumvention Derek Fradgley achieved in these case was a prolonged and elaborate circumvention to a very high degree.

Lesion

[249] Lesion is the term used to describe the injury suffered by one who does not receive a full equivalent for what he gives in a contract. To put it another way, it requires the individual to have suffered some form of loss. (This element of facility, circumvention and lesion will also be relevant to the issues of restitution and unjust enrichment.) Lesion on its own is never a basis to invalidate a contract. However, when combined with the other factors of facility and circumvention, they can combine to invalidate consent.

Lesion

[250] In reliance on Mr Graham's evidence, Mr Thomson submitted that Euan Lindsay suffered loss as a result of signing the Loan Agreements and the impugned standard security.

[251] It is undoubtedly the case that a consequence of the transaction Outlook's position was material improved to the detriment of Euan Lindsay. Prior to the impugned deeds,

Outlook had the first standard security, which was restricted in amount, and the first indemnities which were susceptible to challenge. As a consequence of the Loan Agreements and the impugned standard security, Outlook had acquired valuable real security over the whole of Harperfield, and it need not rely on the indemnities.

[252] Mr McIlvride accepted in submissions that in entering Loan Agreement 1, Euan Lindsay had undertaken liability for new debts in addition to those due under the pre-existing indemnities, and that he had granted an unlimited or all-sums standard security in place of the restricted terms of the first standard security. On that concession, there is *prima facie* lesion. Nonetheless, Mr McIlvride submitted that the effect of those transactions could be equated with an individual who buys a house with a mortgage and thereby secures "a substantial benefit" in the form of the house. In my opinion, that analogy is unpersuasive. It is highly unlikely that a person compelled to buy house s/he does not want and to imperil an unencumbered asset by the grant of an unrestricted standard security in order to purchase the unwanted house, would regard this as "a benefit" in the real world. Moreover, this submission also ignores the degree of compulsion under which Euan Lindsay acted. Mr McIlvride also seeks to justify the benefit to Euan Lindsay, by noting what would happened if Outlook had instead taken steps to sell Metal Bridge Farm and repossess the cattle and machinery. I have already considered the counterfactual and do not accept it would be as Mr McIlvride sought to portray it. At the very least, the Lindsays would have been able to buy the assets at their true value which – on an extrapolation from the retrospective valuations Rodger Lindsay spoke to – would have been materially lower than the sum of more than £900,000 that Outlook demanded and received. (As noted above, at para [78], the Outlook figures for the assets may have been overstated by more than £700,000.)

[253] What is surprising is Mr McIlvride's abandonment in submissions of any reliance by Outlook on the first Grant Thornton Report. In respect of the first Grant Thornton Report, Mr McIlvride's position in submissions was that both experts had erred in undertaking the SSAP 21 calculation. The experts had been wrong to focus on identifying the capital due; they should have applied the termination provisions of the agreements they had analysed. A debtor's liability should be determined by the terms of the new agreement. In his submission, only the second Grant Thornton Report adopted the correct approach. Under reference to the Settlement Calculation Mr McIlvride sought to argue that, in fact, that was not intended to identify the whole figure Euan Lindsay would need in order to buy the assets and pay off the liabilities to Outlook. The figures of £2.6 million and £2.185 million were both wrong. The correct figure – although nowhere stated on the Settlement Calculation – was £1.7 million, which was the "correcting" figure stated in the Outlook Letter. This submission prompted Mr Thomson to intervene. What was *now* being said in respect of the Settlement Calculation was a complete departure from the parties' agreement in the Joint Minute of what that document sought to portray, which was MBL's indebtedness to Outlook at the material time. There is force in Mr Thomson's observation that this is an impermissible departure from the terms of the parties' Joint Minute. I note that in making his submission, Mr McIlvride took the Court – for the first time – to the termination provisions in the first MBL agreements. Neither these terms, nor the argument Mr McIlvride now seeks to advance, was put to any witness to fact. More fundamentally, this argument was wholly at odds with the evidence in two respects. First, Mr Graham had noted that Derek Fradgley never applied termination provisions when rolling over earlier agreements into later ones. Rather, Derek Fradgley undertook an SSAP 21 calculation. Both experts had found evidence that this is what Derek Fradgley had done. Secondly,

notwithstanding the inclusion of "termination amounts" in the Settlement Calculation, even Derek Fradgley departed from the figures brought out in the fifth column (and stating to be the "Per Agreement Termination Amounts") at the very latest by the time he wrote the Outlook Letter. Accordingly, the argument now advanced as the basis to disregard the Henderson Loggie Report and the first Grant Thornton Report, in order to prefer the second Grant Thornton Report, has no foundation in the evidence. Finally, Mr McIlvride's general submission, that a debtor's liability is assessed by the terms of the agreement, is beside the point. What the Settlement Calculation sought to portray – as parties agreed – was to identify MBL's liabilities under the first MBL agreements. On the evidence, that was done by the kind of SSAP 21 calculation Mr McIlvride now seeks to discredit. I find that that approach is misconceived, for the reasons provided.

[254] Turning to the question of what was the likely indebtedness of MBL or under the Lindsay Mortgage at the material time, I have already noted my conclusions on the opinion evidence, and my acceptance of Mr Graham's evidence in preference to that of Mr Preston. I have noted the sums above, but neither expert could support the "**Special Termination Amount" of £1,623,879 in the Settlement Calculation, much less the "Per Agreement Termination Amount" £2,185,383. Nothing like as much as those sums was actually due. The pursuer's expert valued MBL's indebtedness under the Settlement Calculation agreements as £909,613 (as adjusted); the defender's expert's figure in the first Grant Thornton Report was £1,475,870 and in the second Grant Thornton Report (applying the contractual provisions) was £827,605 (after deducting the figure for the assets he had been instructed to add in).

[255] For present purposes, it matters not which expert's total figure is accepted. On any of their assessments, Euan Lindsay did not receive the full value of the £1.8 million that

Outlook received upon the execution of the Loan Agreements and Euan Lindsay's grant of the impugned standard security. One Mr Graham's assessment, *looking solely at the figures in the Settlement Calculation*, the loss to Euan Lindsay was more than £700,000 (ie taking the *lowest* total from the Settlement Calculation, of £1,623,879, less £909,613 and producing an overstatement of £714,266).

[256] However, there were two other detriments to Euan Lindsay. The first was the grant of the impugned standard security over Harperfield for an unrestricted amount. The second detriment was the inflated value of the machinery and cattle MBL acquired. While there was little evidence on this latter point, it may be inferred from Rodger Lindsay's unchallenged evidence of the retrospective valuations he obtained that Outlook's figures were grossly overstated. This is not surprising, as there is no evidence that Outlook allowed for depreciation and, against that, there is Rodger Lindsay's evidence that dairy cows have a relatively short productive life.

[257] Accordingly, on the whole evidence, I find that Euan Lindsay incurred an immediate and substantial loss when he entered into the Loan Agreements and granted the impugned standard security over Harperfield. The lesion proved in these cases was very substantial.

Conclusion on the pursuer's case based on facility, circumvention and lesion

[258] For the foregoing reasons, I find that the pursuer has established each of the three elements of facility, circumvention and lesion, and that the evidence in these cases in support of each element was strong. Returning to the unitary assessment that falls to be made, having regard to the evidence of each of these three factors, I find that the pursuer has amply established on the evidence that there was a want of consent by Euan Lindsay to the

impugned deeds on the basis of his facility and the circumvention of Derek Fradgley on behalf of Outlook, all to Euan Lindsay's loss.

Alternative grounds for reduction: Fraudulent misrepresentation and bad faith

[259] The pursuer's alternative grounds for reduction were fraudulent misrepresentation and bad faith. The latter ground was directed to all of the indemnities Euan Lindsay granted. In the grant of the indemnities, Euan Lindsay was acting as guarantor or cautioner of MBL's liabilities. Outlook, as the creditor benefitting from indemnities, owed certain duties to Euan Lindsay *qua* cautioner. In this context, a creditor (such as Outlook) owes a general duty of good faith to a potential cautioner (Euan Lindsay). That duty requires all representations to a potential cautioner to be done in a full and fair manner. The creditor must not mislead the cautioner. If the creditor misleads the cautioner either by his silence of some positive representation he will be acting in bad faith and may lose the right to enforce a contract: see *Smith v Bank of Scotland* 1997 SC (HL) 111 per Lord Clyde at 118C. The pursuer also invokes a separate proposition, to the effect that a party who acts in breach of contract will lose the right to enforce against the other party the contractual obligations incumbent upon the other party which are the counterpart of those breached by the first party: *Macari* v *Celtic Football and Athletic Co Ltd* 1999 SC 628 per LP Rodger at 640G.

Did Outlook breach the duties it owed to Euan Lindsay qua cautioner in his grant of the indemnities?

[260] Mr Thomson submitted that neither James nor Euan Lindsay would have appreciated the legal significance of signing an indemnity. I have already noted the evidence of the family members to that effect. Each confirmed that he did not know what an indemnity was prior to these actions. Mr Thomson also submitted that to the Lindsays it

was a foreign word, let alone a legal term of art. I accept that submission is amply supported by the evidence. It is entirely consistent with other evidence that I have accepted: that Euan Lindsay, together with some of the other family members in the same generation, such as James Lindsay, left school at 14; Euan's lack of experience or sophistication in financial matters, coupled with his horror of debt and the perception that "bankruptcy" was a dirty word; and the family ethos that enjoined financial prudence. This is also consistent with Rodger Lindsay's feelings of shame in being made bankrupt.

[261] Mr Thomson points to a body of circumstantial evidence to support the proposition that neither Euan Lindsay nor James Lindsay would have understood what an indemnity was.

1) Euan Lindsay was always clear that his contribution and liability was to be capped at £200,000. The original security drafted by Outlook sought an "all-monies" security. That was specifically negotiated out by Euan Lindsay's solicitor. That capped security (ie the first standard security) was not signed until 4 October 2008. However, the first indemnities were signed before that, in July 2008. If Euan Lindsay had understood and accepted the extent of his personal liability under the indemnities there would have been no point in restricting the first standard security.

2) The letter dated 29 September 2009 from Gebbie & Wilson to Euan Lindsay's solicitor to Euan Lindsay provides further support. That letter was from the same solicitor who dealt with the first standard security. The solicitor noted that he was "unclear" as to the indemnity being referred to by Outlook. The proposition that Mr Thomson advanced was that if Euan Lindsay had been aware of and understood the indemnity prior to signing the first standard

security, he would have told his solicitor about it at the time. The fact that Euan Lindsay's solicitor appears to have known nothing about the indemnities over a year later was, Mr Thomson submitted, compelling.

[262] Mr Thomson posed the question: if Outlook had valid and enforceable personal indemnities, why would Derek Fradgley need to pressure the Lindsays for more funds? Mr Thomson submitted that the only credible explanation was that the first indemnities would not have stood up to scrutiny – and, indeed, he moved for reduction of the indemnities *ope exceptionis*. Had Derek Fradgley sought to enforce the alleged indemnities at that time, Euan Lindsay was still alive and could have given evidence that he had not understood what he was signing and the fact of legal advice not having been taken. In those circumstances, Derek Fradgley instead obtained the Loan Agreements, which were secured by an all monies charge and the impugned standard security which was unrestricted in amount. I accept that the circumstantial evidence Mr Thomson identifies supports the inferences he invites me to draw.

[263] There are two other features of the evidence that support the pursuer's challenge to the indemnities. The first was the manner in which signatures were obtained, giving the granter no opportunity to read and consider the deed to be signed, and the fact that from the time MBL was incorporated, copies of documents signed by the Lindsays were not provided to them but retained by Derek Fradgley. The second feature from the evidence, not yet noted, arises from the statements at the end of the Loan Agreements, to the effect that Euan Lindsay was of "high net worth". The purpose of these statements was to remove the protections and remedies available under the Consumer Credit Act 1974 that would otherwise have applied to the Loan Agreements. Give the manner in which Derek Fradgley obtained signatures and his push for the Loan Agreements to be completed as soon as

possible, it may be inferred that the import of signing these declarations were not explained to him nor understood by him. I note, too, that Mr McIlvride accepted in submissions that there was no evidence that the author of the deed certifying that Euan Lindsay was a high net worth individual had ever met Euan Lindsay.

[264] I am persuaded on the whole evidence, that Outlook's representations to Euan as a potential cautioner had not been done in a full and fair manner and that Outlook breached the duties it owed to Euan Lindsay *qua* cautioner.

[265] Finally, in relation to pursuer's case based on fraudulent misrepresentation, the evidence I have accepted demonstrates a pattern of deceit culminating in the Settlement Calculation and that, in its representation of figures for liability, Derek Fradgley could not but have known these figures to have been grossly overstated and untrue as a representation of MBL's liabilities (and hence Euan Lindsay's). The pursuer's alternative case of fraudulent misrepresentation is made out.

[266] In meeting the pursuer's alternative grounds, Outlook relied on the same evidence it had identified in meeting the pursuer's principal ground of challenge. However, so far as I understand it, it also contended that there was no evidence to entitle the Court to find what sums were due to Outlook under the Lindsay Mortgage at the time Euan Lindsay entered into Loan Agreement 2 and, therefore, there was no basis to say if any sum Derek Fradgley attributed to the Lindsay Mortgage was a misrepresentation. This submission misunderstands the pursuer's case: the misrepresentation was that Euan Lindsay was liable for the sums claimed as indemnifier of MBL, whereas this was a liability of Rodger Lindsay wrongly included in the Settlement Calculation. In the context, the value attributed to the Lindsay Mortgage was not material. Moreover, as is amply demonstrated by the Settlement Calculation, Outlook's own approach was to combine *all* of the extant agreements – the first

MBL agreements and the Lindsay Mortgage – in stating the global liability Euan Lindsay was induced to accept when he entered into the Loan Agreements and the impugned standard security. There is no merit in this argument.

[267] Accordingly, in light of the whole evidence I have accepted, the pursuer has established each ground of challenge he advanced. I therefore turn to consider the remedies he seeks

The remedies the pursuer seeks

[268] The pursuer seeks to free Euan Lindsay's estate from any liability to Outlook under the Loan Agreements and to free Harperfield, the principal asset in Euan Lindsay's estate, from the impugned standard security. The primary remedy is the production and reduction of one of the Loan Agreements and the impugned security and reduction *ope exceptionis* of the indemnities. The declarator in respect of Loan Agreement 2 in the second action is advanced on the same grounds. I have already concluded that the pursuer has established all of the grounds for reduction he advanced. However, it is a distinct requirement of the remedy of reduction that the pursuer must be able to offer *restitutio in integrum*. On this matter, the pursuer maintains that, not only has it satisfied this procedural requirement, it has also established that Outlook has been unjustly enriched at the pursuer's expense. This is the subject of his third conclusion, for payment. Before considering that issue of unjustified enrichment, I consider the issue of *restitutio* and Outlook's arguments that that requirement cannot be satisfied in this case.

Restitutio in integrum and unjustified enrichment

Restitutio in integrum

[269] By reduction, the pursuer seeks to have a deed rendered of no legal effect. However, the prerequisite to the grant of that remedy is the obligation, of *restitutio in integrum*, that the other party to the deed under reduction be restored to the position in which s/he was in before the contract was made. If *restitutio* cannot be achieved then reduction, which is fundamentally an equitable remedy, is precluded. In the case of a defender who has been guilty of fraudulent misrepresentation, the requirement for *restitutio* may be modified, at least to the extent that the fraudulent person is not entitled to found on dealings which s/he has enabled by his or her fraud to be carried out (*Spence* v *Crawford* 1939 SC (HL) 52 per Lord Thankerton at 71).

[270] Outlook contends that *restitutio* is impossible. As Mr McIlvride put it in submissions, the obligation on the pursuer is to "restore the other party to **precisely** the same position….before the contract was entered into" (emphasis added), but that the pursuer is not in a position to return to the defender "the cattle and equipment which Euan Lindsay obtained under Loan Agreement 1". Accordingly, he submitted that the pursuer was "unable to offer substantial restitution" and that the Court's equitable powers "do not extend to fashioning a remedy which simply involves any cash payments being treated as a substitute for the cattle and equipment". This is a surprising submission in two respects. First, the party who contends that *restitutio* is impossible bears the onus of proving that contention. However, in this case Outlook led no evidence at all on this issue. This is also a surprising submission, given that this is the same argument advanced at the Debate and which I rejected and it was for that reason this is a proof, and not a proof before answer. I refer to paras [35] to [38] of the Debate Opinion.

[271] Dealing with the submission, in my opinion the inflexible formalism underpinning Outlook's submission is wrong in law. The purpose of *restitutio* is to achieve a state of affairs, broadly restorative of, if not always precisely achieving, the parties' position prior to their entry into the now-impugned deed. Scots law has long recognized, in a case of the highest authority, the use of a compensatory payment where strict *restitutio* could not be achieved: see Lord Thankerton's analysis in *Spence* v *Crawford* 1939 SC (HL) 52 from pp 69 to 72, and especially his discussion of the "modifications" to the requirement of *restitutio*, which was not a doctrine "to be applied too literally"; and see the cases analysed at paras [33] to [35] in *Somerville v 1051 GWR Ltd* [2019] CSOH 61. There might have been some force in Outlook's argument (assuming it had been supported by relevant evidence) if the thing incapable of restoration had some distinctive quality important to Outlook, and use or enjoyment of which would be lost because *restitutio* is not possible. That is not the case here. Outlook never possessed, used or enjoyed the assets at issue (which do not include Metal Bridge Farm). It acquired ownership of the cattle and machinery, without ever having possession, purely as a form of security, consistent with the asset-backed financing it offered. The only value of the assets to Outlook was their *monetary* value in security of its claim. It is a truism that reduction is an equitable remedy. In my view, the equitable jurisdiction the Court exercises is not confined to the power to reduce; it must necessarily extend to its oversight to ensure that there has been sufficient *restitutio* which is a prerequisite of its grant of reduction. Had this been a live issue, I would have held, that in the circumstances of this case, the payment by the pursuer of any balance due to Outlook (if that had arisen) would have satisfied the requirement of *restitutio.*

[272] The pursuer's position is that in this case, perhaps unusually, the requirement of *restitutio* does not arise. The pursuer's position is that the payments Outlook received

exceeded the amount owed by the Lindsays to Outlook at the time the Loan Agreements were entered into. The evidence on this chapter was in relatively short compass. In relation to the sums Outlook received since the date of entering into the Loan Agreements, these were as follows:

1) payments under the Loan Agreements from totalling £380,690 (*per* the schedule at pp 354 to 364 of the joint core bundle);
2) the sum of £599,000 realised upon a repossession of Metal Bridge Farm (*per* Outlook's statutory demand served on the pursuer in July 2014); and
3) the sum of £110,000 Outlook retained on agreement number 1540.

These total £1,089,690. Rodger Lindsay spoke to all of these figures and to the supporting documents in his principal affidavit (at paragraphs 114 – 116). None of this evidence was subject to cross-examination.

[273] In submissions, Mr McIlvride took issue with two of these figures. In relation to (2), he contended that Mr Graham "does not confirm" that £110,000 had been retained by Outlook and that, in relation to (3), the sum truly due from the sale was, on Mr Preston's investigation, only £460,252.

[274] Outlook faces several difficulties on this branch of its case. First, if a party intends in submissions to challenge the evidence of a witness or to invite the Court to disregard it, fairness requires that the basis of challenge be put to the witness so s/he may respond. That was not done. Rodger Lindsay was not cross-examined on any of the figures he spoke to. Secondly, Mr Preston's evidence about his investigations to trace the proceeds, which he endeavoured to do via Outlook's cashbook, falls within the scope of the pursuer's objection and I therefore exclude that evidence. In any event, there was no challenge to the figure of £599,999 – the figure stated by Outlook in its *own* statutory demand. Even had I not

excluded Mr Preston's evidence on this point, I would have preferred, and held Outlook to, the figure it stated in the statutory demand - a formal legal document whose very purpose was to state the true level of its claim – relied on by the pursuer. The aggregate of those two sums is £1,060,255, which (if the pursuer's evidence is accepted) is more than the sum due to Outlook. For completeness, I note that Mr McIlvride's submission on item (3) appears to be based on a misreading of Mr Graham's report. What Mr Graham actually wrote was that:

> "4.2.98 …..At the foot of the invoice for £130,800 is a note that the balance of £110,000 was to be used to settle an outstanding cattle lease.
> 4.2.99 It is not clear from the documentation that I have seen **where the £110,000 retained by [Outlook]** has been allocated to other debts owed to [Outlook]". (Emphasis added.)

The tenor of that passage is that while Mr Graham had found that the sum of £110,000 had been retained (the text in bold), he was unable to find that it had been allocated or set off against other debts due to Lindsay (the text underlined); in other words, he was unable to find that any credit had been given to the Lindsays for the sum retained. *Pace* Mr McIlvride's reading, I find that this passage supports the evidence given by Rodger Lindsay. The final, and insurmountable, difficulty is that Outlook bears the onus of showing that *restitutio* is not possible. It led no evidence of its own that this was so. I accept the pursuer's evidence and its analysis of the amounts paid to Outlook. I turn to consider the other side of the equation, being the sums owed to Outlook at the material time.

[275] The expert evidence was led to determine the sums truly due to Outlook at the point the Loan Agreements were entered into. As noted above, Mr McIlvride eschewed reliance on the first Grant Thornton Report. In any event, as also noted above, I have preferred the evidence of Mr Graham. On his calculation, £909,612 was the total sum owed to Outlook at the material time (this is his original figure of £907,563 with the addition of £2,050 for the invoice he accepted at the meeting of the experts). Deducting the sum paid to Outlook

(£1,089,690) from the sum that was properly due to it (£909,612), produces an overpayment by the Lindsays of £180,077.

[276] It follows that I accept the pursuer's submission that, in all the circumstances, the requirement of *restitutio* does not arise; and that he has made out his case for the remedy of reduction. I next deal with the pursuer's third conclusion for payment, the ground for which is unjustified enrichment.

Unjustified enrichment

[277] The evidence just noted, that on balance Outlook received payments amounting to more than was due to it, is relevant to the issue of unjustified enrichment. In the Debate Opinion I held that the pursuer had pled a relevant case. The authoritative statement of the law on unjustified enrichment is, of course, Lord Rodger in *Shilliday* v *Smith* 1998 SC 725, at 727 D to E. It is common ground that a person may be said to be unjustly enriched at another's expense when s/he has obtained a benefit from the other's actings or expenditure without there being a legal ground which would justify retention of that benefit. In general, one has a right to have an unjust enrichment reversed. As the law has developed it has identified various situations where persons are to be regarded as having been unjustly enriched at another's expense and where the other party may accordingly seek to have the enrichment reversed.

[278] The pursuer's case was shortly put: the only legal basis upon which Outlook retains the monies obtained by it are the Loan Agreements. If these are reduced (or declared void) on the basis they were obtained by facility and circumvention, Outlook will no longer have a legal basis upon which to retain the balance of the sums paid beyond those truly due to it immediately before these agreements were entered into.

[279] Outlook's principal defence to this part of the pursuer's case was to rely on the defences already advanced (ie that there was no circumvention or misrepresentation and that the pursuer had not proved the figures necessary to his case). I have already rejected Outlook's position on those matters.

Decision

[280] I accept that the pursuer has made good its case, in both fact and law, and that he is entitled to the remedies sought in these two actions. I shall grant interlocutors giving effect to my decision. I will reserve all question of expenses meantime.