



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 10

A335/16

OPINION OF LORD BRAILSFORD

In the cause

(FIRST) JAMES STEPHEN AND ANOTHER

Pursuers

against

DOROTHY THOMPSON MELVILLE AND ALISTAIR MELVILLE

Defenders

Pursuer: Borne, QC; MBM Commercial LLP

Defender: Dewar; Balfour + Manson LLP

23 January 2020

[1] The first pursuer is the trustee in the sequestration of Stuart McCallum Melville (“SMM”) having been appointed in that capacity by the sheriff at Aberdeen on 27 July 2017. The second pursuer is the Accountant in Bankruptcy in his capacity as the trustee in sequestration of Calum Gerrard Melville (“CGM”) having been appointed in that capacity by the sheriff at Aberdeen on 7 January 2016. The defenders are spouses and reside together at an address in Largs.¹ They are the parents of SMM and CGM. In the present action the pursuers seek payment by the defenders jointly and severally of (1) the sum of €2,000,400 and (2) the sum of €749,624.

¹ They will be referred to as “DTM” or “AM” or, if the context is of them as spouses, “the defenders”

[2] The action called for proof on 9 April 2019 and concluded on 26 April 2019. The pursuer adduced evidence from the following witnesses:

- (i) SMM
- (ii) John Butler
- (iii) Deborah Wilkinson
- (iv) Ross Atkinson
- (v) John Rutherford
- (vi) Steven George

The defender adduced evidence from the following witnesses:

- (i) CGM
- (ii) Peter Macari
- (iii) Dr Evelyn Gillies
- (iv) AM
- (v) DM

In addition the parties entered into a joint minute tendered to the court on the first day of proof.² In essence the joint minute agreed that a significant number of documentary productions which featured in the evidence were true copies of the original documents. In addition, in terms of paragraph 42 of the joint minute, the parties agreed a chronology of events which form the background to the issues in the action. For convenience and clarity the agreed chronology is incorporated in this opinion as an appendix.

[3] The action concerns the authenticity or otherwise of a document bearing to be a loan agreement dated 27 August 2008 between on the one hand SMM and CGM as lenders and the defenders as borrowers. That document was produced and referred to for its terms

² No 28 of process

which were incorporated in the pleadings. The document bore to be prepared by a firm of solicitors. In terms of the document the defenders received a single advance of €2,000,400. The defenders' position was that although the signatures which appeared on pages 7 and 8 of the document were genuine and their own, they did not knowingly sign any loan agreement in favour of the lenders on the purported date of signature. The creation of the document, the terms of the document and the circumstances of signature are contentious and were the subject of evidence adduced at proof. They will be discussed in detail at a later stage in this opinion.

Background summary

[4] Notwithstanding the contentious nature of the loan document and its creation there was less contention in relation to a significant portion of the background prior to the creation of the loan agreement. This background was spoken to in evidence by a number of witnesses and is necessary to put those matters which are in contention in context. It is however in my view possible, on the basis of the evidence adduced, to state this background relatively succinctly.

[5] In or about 1990 the defenders set up a company to provide services to the offshore oil industry in Aberdeen. The company was from August 1990 named Grampian Test & Certification Ltd. At inception AM was the managing director of the company with, at a later date DTM becoming a finance director, initially on a part-time basis. SMM and CGM were employed by the company as test engineers from its inception.

[6] In terms of a document entitled "Agreement" dated 19 September 2001³ SMM and CGM entered into a contract with the defenders the effect of which was that they acquired a controlling interest in Grampian Test & Certification Ltd. Thereafter it would seem there was some corporate restructuring, the details of which are not germane to the issue in dispute but resulted in the creation of a company named GTC Holdings Ltd which was the holding company for Grampian Test & Certification Ltd. SMM and CGM were directors of GTC Holdings Ltd. Records show an issued share capital of GTC Holdings Ltd as being 10,000 ordinary shares with SMM and CGM each owning 4,250, DTM and AM owning 250 and Uberior investments, a vehicle of the Bank of Scotland who had provided funding to SMM and CGM for the buyout of the defenders' interest in Grampian Test & Certification Ltd owning the remaining 1,000 shares

[7] In 2006 it came to light that sums amounting to approximately £1 million had been withdrawn from the accounts of the group of which GTC Holdings Ltd was the holding company without notification or authority. Whilst there was no agreement between the parties as to the cause of this occurrence and, further, the evidence on the matter was limited, it was established that at the insistence of the Bank of Scotland a report into the unauthorised withdrawal of funds from the company was commissioned from PWC, a firm of chartered accountants. The conclusion of the report was that the unauthorised withdrawals had been instigated by CGM and on that basis, CGM was required to resign as a director of GTC Holdings Ltd, which occurred on 12 June 2006.⁴ The Bank of Scotland also required that the company funds misappropriated is repaid. The final settlement figure in that regard was £1,274,980.70. Payment of that sum was made in November 2006.

³ No 6/26 of process

⁴ No 6/49 of process

[8] In October 2006 the defenders entered into a loan agreement. The purpose of that loan was to repay to GTC Holdings Ltd the funds misappropriated by CGM. In November 2006 the sum of £1,274,980.70 was paid to GTC Holdings Ltd in full and final settlement of any claims arising from the actions of CGM in relation to the unauthorised withdrawal of funds from that company.⁵ On 28 November 2006 in terms of a Share Purchase Agreement DTM acquired CGM's shareholding in GTC Holdings Ltd⁶.

[9] Broadly contemporaneously with the ascertainment of CGM's activities in withdrawing funds from GTC Holdings Ltd without authority, the subsequent report by PWC and CGM's sale of his shareholding in that company, the Bank of Scotland exerted pressure on SMM as the largest shareholder to sell the company. There was evidence that the bank as lenders to the company would compel a sale in the event that SMM did not take effective steps in that direction of his own volition. It was commercially advantageous to the shareholders of CTC Holdings Ltd to retain control of any sale of the company and to that effect the company entered into negotiations, which ultimately proved successful, with a third party company, Cosalt Offshore Ltd ("Cosalt"). GTC Holdings Ltd were ultimately sold to Cosalt in terms of a Share Purchase Agreement dated 12 and 13 September 2007.⁷

[10] On 15 October 2007 an initial consideration from the sale of GTC Holdings Ltd was paid to the defenders in the sums of (i) £2,254,955.22 – which was transferred to an account held with Credit Suisse (UK) Ltd and (ii) £2,186,859.83 which was transferred to an account in the name of ATM held with the Bank of Scotland.⁸ On 30 October 2007 the sum of £2,087,000 was transferred by DTM to an account with Credit Suisse (UK) Ltd. On

⁵ No 6/21 of process

⁶ No 7/22 of process

⁷ No 7/29 of process

⁸ Nos 6/57 and 7/23 of process

25 February 2008 a further sum of £1,381,407.71 was transferred by solicitors to an account held with Lloyds Bank.

[11] On 20 August 2008 a senior associate in McGrigors LLP, a firm of solicitors, sent drafts of a document entitled "Loan Agreement" to CGM.⁹ These documents appear to have formed the basis of the "Loan Agreement" that constitutes the contentious issue in the present action. On 10 October 2008 a further draft loan agreement was sent by email from McGrigors to CGM.

Evidence

(1) Pursuers

(i) SMM

[12] SMM gave evidence about the matters which I have summarised in paragraphs [4]-[10] hereof. I do not consider his evidence in relation to these matters requires to be rehearsed at length. In essence he gave information in relation to his and CGM's acquisition of a substantial shareholding in GTC Holdings Ltd from his parents in 2001. In relation to the events in 2006 when an unauthorised withdrawal of funds from the company was discovered, his position was that whilst he was aware of the occurrence and that PWC had been instructed to prepare a report, he had no knowledge of either the investigation or the details of the outcome. He indicated that his understanding was that CGM had created what he described as "bogus invoices" in order to embezzle money from the company. It was his position that CGM was responsible for this. He stated that CGM resigned as both a director and employee of the company in 2006.

⁹ No 6/23 and 6/24 of process

[13] SMM gave evidence, of relatively limited scope, in relation to the sale of GCT Holdings Ltd to Cosalt. The gravamen of that evidence was that a sale was necessary to satisfy the Bank of Scotland and that it was in all shareholders' commercial interests if they retained control of such a sale. He gave further evidence in relation to the funds released to the shareholders as a consequence of the sale. This involved the creation of the Credit Suisse account. His evidence was that the shareholders, essentially himself and his parents the defenders agreed that it would be advantageous to create a pool of money from the proceeds of sale of GCT. On his evidence these pooled resources were to be used as an investment fund for property purchase and other investments. It was also designed to be a means whereby the defenders could be paid. To that end funds created by the sale of GCT to Cosalt were used to purchase heritage from the purchasing company which had prior to the sale been owned by GTC Ltd. A company, Denmore Investments, was also set up to act as an investment vehicle. The intention was that he and CGM would be responsible for the management of the portfolio represented by the funds in the Credit Suisse account. He stated that it was agreed that he, CGM and his mother, the first named defender, would all require to sign off any cash transaction being paid from the funds at credit with Credit Suisse.¹⁰

[14] In relation to the disputed loan which is the subject matter of the dispute, his evidence in chief was that the defenders had taken out a mortgage over Spanish property they owned and wished to borrow from the Credit Suisse funds in order to repay this mortgage. The matter was discussed between SMM, CGM and the defenders. After these discussions SMM's position was that CGM consulted McGrigors and instructed them to draw up a document which would be used as part of this arrangement. It is a matter of

¹⁰ No 6/57 of process

agreement that a draft of a loan agreement was sent to CGM by email timed 17.05 on 18 August 2008.¹¹ A revision was sent timed 12.33 and dated 20 August 2008.¹² A further draft was sent by McGrigors to CGM at 14.37 on the same day.¹³

[15] SMM's evidence in relation to the signing of this document was as follows. The Loan Agreement was prepared by Ross Atkinson of McGrigors LLP acting on the instruction of CGM. The signing took place on 27 August 2008 within the offices of Cosalt, formally the offices from which GTC Holdings Ltd traded. Signing took place in the office occupied by SMM. The final draft of the loan agreement had been sent by email to CGM on 20 August 2008 and had then been forwarded by email to SMM. The copy used for signing was printed by SMM using a printer located in CGM's office in the building. Two copies were printed. CGM asked Steven George, a long-standing employee of GTC Holdings Ltd to act as a witness. The defenders were present in the office. The document was signed by all signatories whilst they were present in SMM's office. The authenticity of the signatures is not disputed in this action. SMM's evidence was that the signed Loan Agreement was thereafter kept by him at his home.

[16] SMM also gave evidence in relation to his knowledge of a disposition in his and CJM's favour relative to heritable property at 252 Queen's Road, Aberdeen, known as "Rocksley". This property was in 2009/10 the defenders' matrimonial home.

[17] At proof SMM was shown a disposition of that property, granted for love, favour and affection in favour of himself and his brother CGM. The disposition bore to be signed by Alistair Melville and witnessed by Steven George and was dated 10 May 2010. SMM's evidence was that he could not remember where the document came from. He stated "My

¹¹ No 6/52(a) of process

¹² No 6/52(b) of process

¹³ No 6/52(c) of process

father would have had it done by a solicitor". He was then shown a letter dated 13 October 2009¹⁴ from McGrigors to the defenders. That letter stated that the solicitors has been advised that the defenders had agreed to transfer ownership of the property at 252 Queen's Road, Aberdeen to CGM and SMM. SMM claimed no knowledge of that letter. He stated that at or about that time McGrigors acted for CGM and added to that "probably for me as well". He further maintained that the signed disposition¹⁵ was the document that was appended to McGrigors' letter of 13 October 2009. He could not explain why McGrigors' letter was dated in October 2009 and the disposition was signed on 10 May 2010. He asserted that the defenders would know of this disposition, saying "It's rubbish of my parents to say they knew nothing of this". He was asked to explain why his parents would enter into a contract with third parties to sell the said premises in April 2010, notwithstanding the terms of the letter from McGrigors dated 13 October 2009 and the signed disposition. He could offer no explanation for this. He did however state that he accepted that his parents agreed to sell the said property to independent third parties and, further, that the sale was given effect to.

(ii) *John Butler*

[18] John Butler is a digital forensics expert employed by Geode Forensics Ltd. His expertise is in the analysis of material generated by computers, mobile phones and the like. His qualification and experience were provided in a report he prepared and were not the subject of challenge by the defenders.

¹⁴ No 7/20 of process

¹⁵ No 6/46 of process

[19] Mr Butler had been asked to “assess the significance or otherwise of differences in layout between documents as printed by the originating author and the revisions that were returned having been transmitted electronically to another party ...”. To enable him to carry out this task Mr Butler was provided with the draft of the “Loan Agreement” sent by McGrigors to (CM on 20 August 2008 at 14.37¹⁶ and the signed “Loan Agreement” dated 27 August 2008¹⁷ . On the basis of these instructions he had produced a report.¹⁸ In terms of his instructions Mr Butler was concerned with commenting on why different printed versions of an electronically stored source document might show changes. His view was that if deliberate reformatting of the document was set to one side then there were two principal reasons why this could occur. These were digital factors and optical factors. He then explained how this could occur.¹⁹ He then carried out two sets of experiments to test what he had stated having regard to the documents he had been sent. His conclusions having undertaken this work were as follows:

“It would not surprise me at all if the documents as printed by the recipient contained differences in white space, pagination, page numbers, margins, type-face and scaling and visible metadata from the original and in my opinion this is a natural consequence of sending document in Word rather than in PDF or TIFF. I am actually quite surprised that the source and final documents that I saw are as close to identical as they are.

The experiments demonstrate that documents with different print, copy and scanning histories show scaling and distortion that cannot be the result of any digital process. They have to be the result of the optical copying or scanning processes between the document originals and the final copies. Different copies will produce different results.”²⁰

¹⁶ No 6/24 of process

¹⁷ No 6/1 of process

¹⁸ No 6/51 of process

¹⁹ See page 4 of 6 in No 6/51 of process

²⁰ See page 6 of 6 in No 6/51 of process

[20] Mr Butler had further been asked to consider a report prepared on behalf of the defenders by Dr Evelyn Gillies. For reasons explained in his report Mr Butler did not agree with the conclusions arrived at by Dr Gillies. Mr Butler expressed his opinion in the following way:

“... Without a clear statement of the printing history of the documents examined by expert Dr Gillies, in my opinion her results are flawed and cannot be applied to any copies other than the exact ones that she was given. The best test is a comparison of the original documents with copies that have been laser printed from the original Word file and even then if different printers were involved then some differences cannot be ruled out.”

(iii) *Deborah Lorraine Wilkinson*

[21] Ms Wilkinson had been employed as a personal assistant by Cosalt Plc in Grimsby in 2007. At or about that time she met on several occasions CGM who then worked for GTC, a part of Cosalt, and was a relatively frequent visitor to Cosalt's offices in Grimsby. Ms Wilkinson's evidence was that she left the employment of Cosalt in 2009 when she moved to live in South Wales. She had informed CGM of her resignation and relocation. He then offered her employment as his personal assistant. He indicated to her that her residence was irrelevant and he was happy that she worked from home. Her recollection was that she left the employment of Cosalt on 30 October 2009 and commenced employment with CGM immediately thereafter. She was employed by CGM until September 2015.

[22] Her evidence was that when she commenced employment with CGM he was still involved with Cosalt/GTC. She stated that he also had an interest in a company called Global Integrity Services. In about 2013 she was told that she was to “put her salary through” a company called Oilfield Integrity Management. She also said that CGM was involved in a number of other companies. She was asked about the number of employees Oilfield Integrity Management had and when the figure of 135 employees was put to her

stated that it was definitely not as many as that. Her position was that her employment with CGM did not end well. He had not been in the habit of paying her salary promptly. By August 2015 she was due two months of arrears of salary. She could not continue on this basis and accordingly resigned.

(iv) *Ross Atkinson*

[23] Mr Atkinson was at the time he gave evidence employed as an Investment Banker. He had qualified as a solicitor in 2000 and had been employed as a senior associate solicitor by McGrigors LLP between 2006 and 2008.

[24] When employed by McGrigors he had met CGM who was a client of that firm. His recollection was that he had met SMM on only one occasion. In relation to the Loan Agreement in dispute he took no instructions from SMM and had only taken instructions from CGM.

[25] Mr Atkinson was examined in relation to any knowledge he had relative to misappropriation of funds from GTC in 2006. His evidence was that CGM had consulted him. CGM had informed him that he owed GTC money which Mr Atkinson believed arose from misappropriation of funds from GTC. CGM also informed Mr Atkinson that GTC were going to terminate his employment contract and "liquidate his shares". Mr Atkinson agreed to act for him in relation to these matters. He was told that Dundas and Wilson, a firm of solicitors, acted for GTC and the Bank of Scotland in relation to the issue of misappropriation of funds from the company. He entered into discussions on behalf of CGM with Dundas & Wilson. He was shown a number of documents relative to these

discussions.²¹ He accepted that these documents “looked accurate”. Whilst he had no actual recollection of the matters contained within the documents he took no issue with the gravamen of these.

[26] He was questioned and gave further evidence in relation to the loan agreements created on 20 August 2008. He was shown these documents and the accompanying emails²². Whilst he could not say that he drafted these agreement he agreed that he had sent them to the recipient identified in the header part of the emails, that is CGM. He thought the documents were probably based on a template that had simply been amended to identify the intended parties to the agreement. He was unable to explain the reasons for the change between the first and second drafts but did not appear to consider they were any more than corrections.

(v) *John Rutherford*

[27] Mr Rutherford was at the time he gave evidence a consultant with Shepherd & Wedderburn LLP. Between 2006-2012 he had been Head of Corporate at McGrigors LLP.

[28] Mr Rutherford confirmed that in 2006 he had acted for CGM in relation to the misappropriation of funds from GTC. He also confirmed that at that time Ross Atkinson acted under his immediate supervision.

[29] In relation to the loan agreement created by McGrigors in August 2008 his evidence was that this was all handled by Ross Atkinson and he had no precise recollection of the matters.

²¹ Nos 6/12, 6/14 and 6/18 of process

²² No 6/23 and 6/24 of process

(vi) *Steven George*

[30] Mr George was a technical manager employed at the time of giving evidence by a company named First Integrated Solutions.

[31] He had stated he had known the Melville family since the late 1980s. He had initially met CGM when they played football together at that time. Thereafter he was employed by GTC from December 1991. His recollection was that at that time CGM was employed as the operations manager of that company. In addition to a friendship with CGM he had, through his employment, become familiar with SMM and both defenders in this action. His position was that he had known all these four persons well until approximately ten years ago when due to a change in employer he ceased having much regular contact with them.

[32] In relation to the loan agreement in dispute in the present action he acknowledged that the signature purporting to be his "looks like my signature". He also confirmed that the address given for him on the document was his address at the time the document was created.

[33] He was questioned about the circumstances of the creation of the document and how it came to be signed by him. In his evidence in relation to those matters he said that it was a long time ago. He further stated that in the course of his work he had to sign many documents. He said that he required to sign lifting certificates certifying the safety of equipment used in the oil industry. Consequently he said he had no particular recollection of the signing of the documents in dispute in this action. He could go no further than say that the signatures he was shown "all appear to be my signature". He accepted the possibility that he witnessed the signing of the documents by the defenders but said he had no recollection of that.

(2) *Defenders*

(i) CGM

[34] CGM's evidence in relation to matters from the inception of GTC Ltd until the events of 2006 did not differ materially from that given by SMM and does not therefore require repetition.

[35] In relation to the events of 2006 he accepted that "I took money out of GTC" although he asserted that SMM was also involved in the wrongful removal of funds from the company. His position was that he and SMM took £1.1 million from the company over a period of about year and he accepted that "we shouldn't have".

[36] In relation to the loan document in contention in this action CGM was shown the principal²³ and confirmed that he recognised the document and that he had signed it. In examination in chief his initial account of the creation of the document and its signature was as follows: He stated that SMM was not "comfortable" with the defenders retaining a proportion of the share capital of GTC Ltd. He said the concern relating to the defenders maintaining a significant shareholding was that on the event of their deaths a third brother, who was neither a party to this action nor apparently a prominent player in any of the events with which this litigation is concerned, might through inheritance acquire a commercially valuable interest in the shareholding of the company. In order to avoid that eventuality his position was that he and SMM essentially created a fictitious loan agreement with the intention that they could "utilise" in the event that the third brother stood to benefit as a result of inheritance. To that end CGM stated that he contacted McGrigors, he could not recall whether Mr Rutherford or Mr Atkinson, and told them that he and SMM were lending their parents, the defenders, money and to facilitate that wished McGrigors to prepare a loan

²³ No 6/1 of process

agreement. He then said with reference to his parents, the defenders, “we got them to sign it” and intended to keep it until their death and then produce it to preclude their brother from inheriting.

[37] In relation to the signing of the document CGM’s position was that he and SMM signed it with Steven George as a witness. He said signing of the document by himself, SMM and Steven George took place in SMM’s office at Cosalt’s offices in Aberdeen. He stated that “no one else was in attendance”.

[38] At this stage in his evidence in chief CGM also stated that he and SMM “made up a three page document saying we would pay mum and dad £300,000 a year”.

[39] The description of the creation of the loan agreement and the signing thereof given in evidence by SMM was put to CGM. He described SMM’s version of events as “utter tripe”. He maintained that his mother had never visited the office of GCT Ltd. Although he accepted that his father occasionally visited these premises he maintained that his parents were never there as a couple to sign the document. He stated, again in cross-examination, that he took the loan agreement to his parents’ house and they signed it there. He said that he took two copies of the loan agreement to his parents’ house. His evidence was that essentially he told them that the document provided that SMM and he would pay them £300,000 per annum and that they would leave the money in the Credit Suisse account to him and SMM. He said this arrangement was designed to ensure that their brother did not benefit from the company by way of inheritance. His position was that both copies of the agreement he had taken to his parents’ house were signed and he took them both away.

[40] I should record that at the end of examination in chief counsel for the defenders put to CGM that he had acted dishonestly in relation to a number of matters, including the creation of the loan agreement and representations made to various persons, including the

police, in relation to his involvement with the company Oilfield Integrity Management. He accepted those matters and expressly accepted that he had acted dishonestly in regard to these matters. The matter was put again to him quite bluntly in cross-examination where senior counsel for the pursuers suggested that he was a liar, a proposition which he answered in the affirmative.

(ii) *Peter Anthony Macari*

[41] Mr Macari is a retired solicitor. He practiced for 46 years. The defenders were his clients when he was a partner in the firm of Ian Smith & Co. The defenders were his clients for more than 20 years.

[42] In or about the spring of 2010 Mr Macari said he was consulted by the defenders in relation to their intention to sell their family home, a property in Aberdeen named "Rocksley". Another firm of solicitors were to be responsible for marketing of the property but Mr Macari was engaged to negotiate and conclude missives and draft any necessary disposition.

[43] Mr Macari negotiated a sale for the house for a price of £875,000. Subsequent to the conclusion of the bargain Mr Macari received at his office a document purporting to be a disposition of the defenders' said house in favour of CGM and SMM. He was shown a copy disposition which he was able to identify as being similar to that which had been delivered to his office in April 2010.²⁴ Mr Macari's recollection was that the document had been pushed through the letterbox of his office without an envelope. He said the document caused him some confusion. In the first place there was a header in bold at the top of the document in the following terms:

²⁴ No 6/46 of process

“This is an important document, you should take independent legal advice before signing and sign only if you want to be legally bound.”

Mr Macari described it as unusual to find such a header on a disposition. He could not understand, given that the document purported to represent a concluded bargain, why he had not received the deed prior to completion of a bargain with third party purchasers of the property. Attached to the document was a handwritten note bearing SMM’s name.

Mr Macari attempted to contact SMM by email. He sent the document to the defenders with an accompanying letter. Mr Macari was sufficiently concerned about the disposition that had been pushed through his door to consult the Law Society of Scotland for advice on how he should proceed.

[44] Mr Macari also gave evidence about file notes he took in 2012 when on two occasions SMM had attempted to borrow money from the defenders. On both of these occasions the defenders consulted Mr Macari for professional advice. On both occasions Mr Macari said he had advised the defenders not to proceed.

(iii) *Dr Evelyn Gillies*

[45] Dr Gillies was a forensic document examiner employed by an organisation named Forensic Documents Bureau. Prior to that employment she was employed for 13 years as a forensic document examiner by Grampian Police. She was instructed by solicitors acting on behalf of the defenders to prepare a report on the document 6/1 of process. Her report was produced.²⁵ In addition she produced an addendum.²⁶ She adhered to her report and the

²⁵ No 7/11 of process

²⁶ No 7/12 of process

addendum in evidence. Having considered and examined the Loan Agreement²⁷ Dr Gillies identified six features in the layout thereof which “seem unusual”²⁸. These features were:

- The mismatch of the index pagination with the pages the Clauses actually appear on.
- The inclusion of the file name, location and path on eight of the pages.
- Several of the pages, appear to have been crammed with as much detail as possible, as shown by the lack of space at the bottom of these pages.
- The title of clause 7 on a different page separated from all the details of the clause.
- The differences between the top margins of pages 7 and 8, both with each other and the preceding pages ...
- The differences between the spacing of the signing lines on pages 7 and 8.”

On the basis of these findings her conclusion was that “the original document produced by McGrigors LLP may have been altered”. Her evidence in relation to potential alteration of the document was consistent with the account of the creation and signing of the document given by SMM. Further it was not wholly consistent with the account of the creation and signing of the document given by CGM.

(iv) *Alistair Melville*

[46] Mr Melville’s evidence was in short compass. His position was that he had not signed the loan agreement which is the subject matter of the principal dispute before the

²⁷ No 6/1 of process

²⁸ No 7/11 of process at page 7 of 18

court.²⁹ He maintained that he had never seen the document before shown it for purposes of the present litigation. He further stated that he had not signed any document of loan wherein his sons SMM and CGM were syndicated lenders. He did not borrow €2.04 million from the said persons. Beyond this his position was that he and his wife had never agreed to transfer title in their residence to their sons SMM and CGM for no consideration and for love, favour and affection. They had decided to sell their private residence and move to another part of Scotland when he and his wife felt pressurised by the demands SMM and CGM were making upon them for money.

(v) *Dorothy Thompson Melville*

[47] Mrs Melville confirmed that she and her husband had disposed of the majority of their shareholding in GTC Ltd to their sons SMM and CGM in 2001. She further stated that in or about 2006 CGM had misappropriated a large sum of money from the company. The Bank of Scotland had as a consequence insisted that CGM be divested of his shareholding in the company which was achieved by means of the sale of shares held by CGM and the company to the defenders. At or about the same time in order to repay the funds CGM had misappropriated funds from the company she and her husband raised a loan of €1.9 million over property they owned in Cadiz, Spain. Her position was that she and her husband never received the loan funds which were paid direct to GTC Ltd. In this connection she was shown a Bank of Scotland suspense account statement³⁰ and acknowledged that the sum received by GTC Ltd from the defenders amounted to £1,284,802.01. The position she stated in evidence in relation to the loan secured over the Spanish property was that it was repaid

²⁹ No 6/1 of process

³⁰ No 7/18 of process

out of what she termed “a communal fund” when GTC Ltd was sold. The communal fund was identified as the bank account held with Credit Suisse (UK) Ltd. Her position was that the funds within that account belonged to herself, SMM and CGM. She was shown a payment instruction dated 29 July 2008³¹ addressed to Credit Suisse (UK) Ltd. Her position was that this was an instruction in order to effect repayment of the secured loan over the Spanish property to the appropriate lender. She stated that the instruction was given by herself, SMM and CGM. She was shown a Credit Suisse account statement³² and confirmed that this reflected the instruction to make a payment to the lender in relation to the Spanish property. It was put to her that the funds paid to the Spanish lender was a loan facility extended to her by her sons. Her response to this suggestion was that it was “rubbish”.

[48] In relation to the Loan Agreement in issue she accepted that the signature beside her name on the document “looks like” her signature. She further stated that she “did not believe that the back two pages belonged to this”, by which I understood that she meant that the back two pages of the document were not properly or originally part thereof. Her position in general was that “I wouldn’t have signed a loan agreement”. She did express awareness in evidence of a stated wish on the part of SMM and CGM to ensure that her third son would not benefit by way of inheritance on the death of her and her husband. She said that her sons CGM and SMM had put pressure on her to attempt to ensure that this would not happen.

[49] In relation to the purported disposition for a nil consideration and love, favour and affection purportedly granted by her and her husband to SMM and CGM her position was

³¹ No 7/19 of process

³² No 7/32 of process

that at no time had she and her husband decided to transfer their title to these sons for a nil consideration. She disputed that the signature on the rear of the document looked like her signature. She said that if the document had been genuine she would have taken it to Mr Macari and “he would have told us not to be so stupid” and she would have declined to sign the same.

Submissions

Reliability and credibility

[50] In this case, perhaps somewhat unusually, the submissions of counsel for both parties relied heavily on attacks to the credibility and reliability of a number of witnesses. Having regard to the prominence of this matter in the presentation of their cases by counsel it is sensible if I deal with it before summarising the arguments on behalf of each party.

[51] In submission counsel for the pursuers invited me to accept as credible and reliable all the evidence adduced on behalf of the pursuer. So far as the defenders’ evidence was concerned senior counsel did not challenge the reliability and credibility of Mr Macari and Dr Gillies. He did not directly challenge the credibility of Alistair Melville but submitted that that witness had “very little recollection of the events in question” primarily as a factor of his age. Moreover it was submitted that Mr Melville’s evidence was in any event “extremely limited in scope”. Having regard to these factors I was invited to place very little weight on such evidence as Mr Melville gave. The evidence of CGM and Dorothy Melville was challenged as being neither credible nor reliable.

[52] Turning to the submission on behalf of the defenders no challenge was made to the reliability or credibility of Mr Butler, Ms Wilkinson, Mr Atkinson or Mr Rutherford. SMM and Mr George were however characterised as being neither reliable nor credible.

Reliability and credibility - Pursuers' submissions

(i) CGM

[53] In challenging the reliability and credibility of CGM senior counsel for the pursuer firstly observed that the witness had, on his own evidence, fraudulently induced his parents to sign the Loan Agreement. The submission was developed by stating that CGM's evidence in relation to the Loan Agreement was largely unsupported by contemporaneous documentation. Further, in relation to the Loan Agreement CGM's evidence was both internally inconsistent and at variance with evidence in relation to the matter given by other evidence presented by the defenders. More generally counsel submitted that CGM had been evasive in his giving of evidence and cited a number of examples. These were a refusal by the witness to accept that he was dismissed for fraud by Global Integrated Services notwithstanding the express terms of a letter to that effect which was an agreed production.³³ Reference was yet further made to CGM's own admission in evidence that he had submitted a fabricated invoice using a fabricated email address to his own advantage but not withstanding these admissions a refusal to accept that his conduct amounted to a "scam". Reference was further made to his evidence in relation to the evidence of Deborah Wilkinson which he entirely rejected albeit that witness's evidence was not subsequently challenged by either counsel for the pursuer or defender. My attention was also drawn to CGM's assertion that his brother, SMM, was complicit in the fraudulent misappropriation of in excess of £1 million from GTCH Holdings Ltd despite that allegation

³³ No 6/37 of process, letter from Global Integrated Services to CGM dated 6 December 2013 confirming the termination of a service agreement with the company of immediate effect on the grounds of gross misconduct

being unsupported by the evidence of any other witness and directly contradicted by the terms of the investigation carried out into the misrepresentation by PWC.³⁴

(ii) *Dorothy Melville*

[54] Senior counsel's submission was that although Mrs Melville was prepared to accept aspects of the history of GTC Holdings Ltd and, further, that it was plain from her own evidence and from that of her husband and sons that she was "astute and financially well informed" her evidence in relation to the critical aspect of the litigation, that is the circumstances of the signing of the Loan Agreement, was evasive and inconsistent. There was inconsistency between her oral evidence and the defenders' pleadings. Moreover her evidence was inconsistent with other persons who spoke to the signing of the document. Having regard to these features the submission was that her evidence in relation to the signing of the document was neither credible nor reliable. The submission in relation to Mrs Melville's credibility was developed by the invitation to the court to take into account the fact that she was present throughout the entirety of the other evidence in the case with the exception of that given by CGM and her husband. It was accepted that whilst she was entitled to be present throughout the evidence the practice of a defender being present when contentious evidence is adduced has been described as:

"undesirable ... in arriving at any conclusions upon facts which are in dispute between the parties I may have occasion to comment on the circumstances that they were present."³⁵

It was observed that the Inner House has described the practice of a defender being present during the hearing of contentious evidence as "inexpedient".³⁶ I was invited to have regard

³⁴ See No 7/28 of process

³⁵ *Perman v Binny's Trustees* 1925 SLT 123 per Lord Constable at 124

to Mrs Melville's presence during the evidence in the case when assessing her reliability and credibility.

Reliability and credibility - Defenders' submissions

(i) SMM

[55] Counsel for the defender submitted that this witness's evidence was neither credible nor reliable. The basis of this submission was based, in so far as I could determine, on a consideration of the totality of SMM's evidence. It was submitted that the evidence was "obviously self-serving". It was said that SMM "tended to fence with questions during cross-examination and, on occasion, became argumentative". SMM's answers to "simple questions were convoluted". He was said to have given two inconsistent accounts concerning the circumstances of the execution of the Loan Agreement³⁷. Further it was submitted that he continued to maintain the genuineness of the love, favour and affection disposition in favour of himself and CGM relative to the defenders' matrimonial home³⁸ despite "a considerable body of evidence to the contrary". In this connection it was pointed out that he was unable to offer any adequate explanation to the question of why such a document was either necessary, or indeed appropriate, in circumstances where a commercial sale had already been agreed in relation to the relevant property.

[56] The submission was that the court should have regard to all these factors and view the totality of SSM's evidence with them in mind. Having regard to these factors it was

³⁶ Fraser v Smith 1937 SN 67 per Lord Moncrieff

³⁷ No 6/1 of process stating initially "I've printed it off and we signed it" and subsequently "Callum brought it back and it was signed"

³⁸ No 6/46 of process

submitted that the court "... should be slow to accept as true anything he has said which is uncorroborated."

(ii) *Steven George*

[57] Counsel for the defender drew my attention to Mr George's position that he had no recollection of the circumstances whereby his signature came to be on the Loan Agreement.³⁹ It followed that he could not say whether or not the defenders had been present at the time the document was submitted. It was accordingly submitted that the evidence of this witness was of no assistance to the pursuer. The submission did however go further asserting that Mr George presented as "... a reluctant, nervous and evasive witness. His stated position that he has forgotten anything that happened is altogether suspect." I was invited to take an adverse inference from his claim to have ceased dealing with the defenders following their retirement. I was invited to consider that Mr George could not be regarded as a credible and reliable witness "... albeit he declined to lie on oath."

Pursuers' submissions

[58] The submission was that the principal dispute in the litigation was the validity of the Loan Agreement entered into between the defenders, SMM and GCM.⁴⁰ Whilst a number of other issues between the parties were canvassed in evidence these were said to be not directly relevant to the validity of the loan agreement and, as I understood it, primarily relevant to the issue of reliability and credibility of a number of witnesses.

³⁹ No 6/1 of process

⁴⁰ No 6/1 of process

[59] The Loan Agreement was submitted to be valid and accordingly that the pursuers were entitled to enforce their rights under it. It was noted that the pursuers relied upon a signed, probative document the principal of which was produced. It was trite law that the Loan Agreement was presumed to be valid and presumed to have been signed on the date which it bears.⁴¹

[60] It was noted that the defenders' position in relation to the Loan Agreement was that it was fraudulently created. That allegation was said to require proof of fraudulent actings contrary to the express terms of the written document. It was accepted that the standard of proof was the balance of probabilities however my attention was drawn to authority that supported the proposition that cogent, clear, careful and precise evidence will be required to satisfy the civil standard of proof when fraud is averred.⁴²

[61] In relation to the facts founded upon to support the proposition for the pursuer senior counsel submitted that SMM had given a straightforward account of the signature of the Loan Agreement. The account which had been given was consistent with the terms of the agreement. That account was essentially that the agreement was drafted by Ross Atkinson of McGrigors on the instructions of CGM. An initial draft was emailed to CGM on 18 August 2008 with a revised draft sent first at 12.33 on 20 August and later at 14.37 on the same date. The final document sent was identical in terms, albeit not appearance, to that signed by the defenders.

[62] So far as the signing of the document was concerned the account of SMM was that this was achieved in his office with all signatories present. The version signed was printed by SMM using a printer located in CGM's office. While SMM did this CGM went and got

⁴¹ Requirements of Writing (Scotland) Act 1995, section 3(1), and (8)

⁴² Walker & Walker "The Law Evidence in Scotland" (4th edition) paragraph 4.3.1; Cowans Trustee v Johnston (1865) 3 M 935 per LP Colonsay at 937-8

Steven George to attend as a witness to signatures. Thereafter the document was signed by all parties. The signatures appearing on the Loan Agreement were acknowledged by each of the signatories to be genuine. The signed Loan Agreement remained in the possession of SMM thereafter.

[63] This evidence was then contrasted with the position presented by the defenders. The defenders' evidence was said to show differing and inconsistent accounts of the manner in which the Loan Agreement came to be signed. The submission was that none of the accounts given were credible and that none met the test of cogency and clarity to which my attention had been drawn.

[64] I was reminded that in Answer 2 of Contumaciousness in the defenders' written case it was averred that the Loan Agreement was brought to the defenders' home by CGM in the form of a three page document which had earlier been created by SMM, witnessed by CGM, by "tampering with the purported Loan Agreement". It was further averred that the third page of the document alleged to have been brought to the defenders was the signature page. The averments then proceeded that the defenders were told that the agreement provided for an annual payment to them of £300,000 in return for their agreement to leave the balance of the Credit Suisse account to SSM and CGM, rather than to their brother. It was averred that DTM was given only a brief opportunity to review the terms of the document but notwithstanding noticed a "specific discrepancy namely that the page numbers at the foot of each page did not coincide with the Table of Contents". It was further averred that DTM would, if she had been content with the entire document, have initialled each page but that she did not do so. Further that she did not "see fit" to retain a copy of the document.

[65] CGM in evidence gave an account of the production and signature of the document which was inconsistent to that which was narrated in the pleadings. This was said to be of

significance because on the defenders' own version of events only CGM and SMM were involved in the creation of the Loan Agreement presented to the defenders for signature and the manner in which it was alleged to have been created. It followed that on the defenders' version of events CGM's account became critical to the credibility of the defenders' version of events.

[66] CGM's credibility and reliability as a witness was already the subject of criticism in the pursuers' submission. The general attack on CGM's credibility and reliability was however developed in relation to the Loan Agreement. His account was said to be internally inconsistent, inconsistent with evidence of other witnesses and further inconsistent with available contemporaneous documentation. It was submitted that CGM's evidence was that the agreement signed by the defenders was produced by combining the signature pages from the agreement drafted by McGrigors and emailed to him on 20 August 2006 with another agreement which CGM maintained SMM "hacked up" to merge with the Loan Agreement. This other agreement was, again on CGM's evidence, a further legal document which happened to be in his and SMM's possession. This account is inconsistent with that found in the defenders' pleadings where no other agreement is mentioned. In CGM's own evidence he subsequently departed from his original account stating "I think there is a separate document ... but I wasn't specifically involved in that so I don't have the details." A further point was made that there was no support for the version given by CGM in any documentary evidence. No alternative agreement was ever produced. The only other agreement produced by McGrigors was one in terms of which the defenders were to be paid £300,000 per annum. This document was not however produced until October 2008, more than two months after the signing of the Loan Agreement and does not appear to have advanced beyond draft form.

[67] In terms of their written pleadings the defenders' position was that the agreement presented for signature was a three page document. In evidence CGM was inconsistent referring to both a four page and a three page document. Either version was submitted by counsel for the pursuer to be improbable. The Loan Agreement has two signature pages in the contents page, which are founded upon by the defenders in their pleadings. It would follow that a three page document would consist only of the contents and signature pages. Even if CGM was correct that the document was four pages the entire substantive contents of the false agreement said to have been produced from a style provided by a firm of solicitors would require to have been compressed into one page.

[68] CGM also stated in evidence that he explained to the defenders that the document presented to them provided that he and SMM would pay them £300,000 per year. There was, as already indicated, no evidence of any agreement to that effect beyond the draft produced some months later in October 2008. In any event CGM's explanation to the defenders is rebutted by DTM's own evidence who was clear that she considered she was signing, and had been told by CGM that she was signing, a will.

[69] It was further pointed out that CGM's evidence was that two copies of the false agreement were produced, with SMM retaining both. This was inconsistent with the written pleadings and with the evidence of DTM both of which describe one copy of the agreement only.

[70] It was also observed that CGM's evidence given in court differed from that in an affidavit sworn by him on 23 October 2016.⁴³ That affidavit made no mention of a second or further legal document from which the false agreement was said to have been "hacked". It

⁴³ No 7/14 of process

mentioned only one signature page being attached in contrast to the two signature pages found in the Loan Agreement.

[71] Having regard to the foregoing matters the submission was that the defenders version on record was not supported by the evidence of CGM which was critical to the position they adopted.

[72] Senior counsel for the pursuer then addressed the evidence of DTM, the first defender. Her evidence was also said to be inconsistent. It was pointed out that in evidence she stated that she was aware that the numbering of the document was inconsistent, with the first page of the document not having 13 clauses to allow clause 14 on the signature page to follow. This was inconsistent with the terms of her pleadings making specific reference to a table of contents. In contrast to the evidence of CGM her evidence was that only a copy of the agreement was presented to her. There was no reference made by her in her oral evidence to her alleged usual practice, as set out in her pleadings, of initialling each page for signature as a means of verifying that she had checked each page of a document.

[73] The first defender maintained she had never been present in the office in Aberdeen where SMM worked and where the document was said to have been signed. The breadth of this statement was challenged as being improbable given that the premises in question had been formerly owned by the company of which she had been finance director. It was observed by senior counsel that this matter was not put to SMM or Mr George in cross-examination. The evidence of DTM where she stated that she had never been in the building concerned emerged, unsolicited, in cross-examination at a stage when DTM was being put under pressure due to inconsistencies in her account of the signing. This was of importance given that the location of the signing of the Loan Agreement had formed part of the pursuers' case as pled. If it was DTM's position that she had never been present in the office

where the document was said to have been signed this should have been made the subject of averment. Had it been challenged in the defenders' pleading the matter could have been explored in evidence. Having regard to these considerations no weight should be given to DTM's contention that she had never been present in the office where the pursuers maintained the signing of the document took place.

[74] In the submission of senior counsel for the pursuer the most significant element of DTM's evidence was her contention that she believed that she had been signing a will. This position was maintained in both evidence in chief and cross-examination. The evidence contrasted with that given by CGM who made no mention of any will. Moreover DTM's evidence was that the agreement to pay her and her husband £300,000 per annum was "different" and done "in a different place". This was submitted to be fundamentally inconsistent in a central element of her account of the signature and is "highly significant" in assessing her credibility and reliability in relation to her account of the signature. A further strand was developed by counsel for the pursuers. He observed that the witness stated that the purpose she attributed to a loan document was that this was to "make sure that the money in the Credit Suisse went only to Stuart and Callum". It was said that such an account, and the belief that the primary purpose of the document was to act as a "will", is consistent with evidence given by SMM as to the purpose of the document.

[75] Senior counsel for the pursuer dealt relatively briefly with the expert evidence adduced by Mr Butler, on behalf of the pursuers, and Dr Gillies on behalf of the defenders. He observed that neither expert could comment on the events of the signature of the Loan Agreement itself. It followed that the evidence was secondary to the primary factual evidence led by the parties. It was however accepted that it formed a background to which evidence may be assessed by the court.

[76] In that regard it was noted that Mr Butler's evidence concerned discrepancies in scaling and spacing observed in the final version of the Loan Agreement. It was noted that Mr Butler's evidence as set out in his report was that such discrepancies were likely to be the result of digital factors and optical factors. Mr Butler's evidence, which I was invited to accept, was that discrepancies of that nature could not be assessed as significant without knowing the full history of the document.

[77] In relation to Dr Gillies' evidence it was noted that the witness had, quite properly, conceded that while she was able to comment on the appearance of the document as it was presented to her she was unable to draw any factual inferences or make conclusions from its examination. She also accepted that the inconsistencies which she had noted could simply be caused by the underlying computer files, an explanation which is consistent with what was described by Mr Butler in his report. Dr Gillies did give evidence on the numbered of staple holes which could be observed in the document. The submission on behalf of the pursuer was that very little weight could be attached to this evidence as it related only to holes which were found when the document was examined by Dr Gillies many years after they were created. Dr Gillies was in no position, nor in fairness did she claim to be able to explain how the holes came to be present.

[78] Having regard to these factors the submission was that no material assistance was to be gained from the expert evidence in the case. It was essentially neutral.

Defenders' submissions

[79] The defenders' submissions on the evidence was predicated upon a number of well recognised legal propositions, none of which as I understand it were disputed by the pursuers. Given that consensus of view the propositions may be briefly stated. First, that

the burden of proof rests with the party disputing the authenticity of a probative deed. That onus may be discharged by direct testimony or by proof of facts and circumstances from which an inference in favour of the challenger to the deed may be drawn⁴⁴. Second, that an admission on record that money has been received is not proof of a loan, nor does it raise a presumption in favour of a loan. Where written evidence of a loan exists the onus lies on the borrowing party to prove repayment or that the money was not given in loan.⁴⁵ Third, that modern statutory provisions, where applicable, contemplate that the witnessing of a traditional document should be done in one continuous process.⁴⁶ Fourth, the court's attention was drawn to the general rule against the admission of collateral evidence. It was however submitted that there is an exception to that general rule where what is sought to be demonstrated is a "system of actings" or "a consistency of actions" or a "nexus". Lastly, it was observed that forgery *per se* is not an offence and that the *actus reus* of the crime is complete when the document is deliberately placed in the hands of a third party as genuine.

[80] Counsel for the defender then proposed and answered five questions which were, in his submission, determinative of the outcome of the case. These questions were: (a) where, as in this case, the pursuers seek enforcement of an *ex facie* probative deed have the defenders discharged the onus accepted to be incumbent upon them by direct testimony or by proving facts and circumstances from which an inference in his favour may be drawn? (b) In any event was there a loan by SGM and CGM to the defenders? (c) Were the documents which constitute numbers 6/1 and 6/46 of process witnessed in one continuous process or *ex intervallo* by Steven George and, if *ex intervallo*, how long was the interval and what was the reason for it? (d) Has a course of conduct on the part of SMM and CGM

⁴⁴ Hendry v Clanline Steamers Ltd 1949 SC 320 at page 328

⁴⁵ Fraser v Bruce (1857) 20 D 115; Thomson v Geekie (1861) 23 D 693; Bishop v Bryce 1910 SC 426

⁴⁶ Requirements of Writing (Scotland) Act 1995, section 3(4)(e)

emerged during the evidence such as to render collateral evidence about "Rocksley" relevant? and (e) Are numbers 6/1 and 6/46 of process forged documents?

[81] In relation to the first of those questions, have the defenders discharged the onus of proof incumbent upon them, there were a number of propositions based on the evidence. There was said to be a compelling body of oral evidence, supported by the evidence of a skilled witness, which evidence "casts real and substantial doubt on the validity of ..." numbers 6/1 and 6/46 of process. It was noted that only one witness, SMM, maintained the validity of both documents.

[82] Further, it was submitted to be "inconceivable" that DTM and AM would have knowingly signed a loan agreement in favour of their sons. They were persons who had accrued "significant wealth and entitlements" following the sale of the company to Cosalt. Their financial position was "in no way eloquent of any need for a loan". In any event they both stated in evidence that they had never seen the loan agreement number 6/1 of process and did not sign it.

[83] It was then submitted that there was actual evidence of forgery of documents. Reliance was placed on the evidence of CGM, DTM and AM who all contended that 6/1 of process was a forged document. Reliance was placed on the explanation given by CGM in evidence of how the forgery was achieved using the draft loan agreements obtained from McGrigors. In this context reliance was also placed upon CGM's "propensity for arranging for copy signatures to be manipulated by others". The evidence of Deborah Wilkinson was relied upon in relation to this submission. On the basis of the foregoing it was submitted to be more likely that the loan agreement 6/1 of process was manufactured by SMM and CGM. It was also said to be more likely than not that Steven George did not witness DTM and AM signing number 6/1 of process.

[84] Lastly, in relation to this question, it was submitted that “it does not stand to reason that 6/46 is a genuine document when viewed in the context of the defenders’ concluded bargain of the sale of Rocksley”. It was noted that such a transfer of title would have resulted in a material breach of contract and, further, that it would have implied that the defenders divested themselves for no consideration of a house with a market value of £875,000. The testimony of Mr Macari was said to lend credence to this proposition. It was also observed that only SMM maintained that number 6/46 was genuine.

[85] The second question proposed for the defenders was the question whether there was a loan by SMM and CGM to the defenders. In relation to this question it was submitted that the pursuers founded upon the payment to “an account operated by the first defender” on 30 July 2008.⁴⁷ It was however noted that this payment has been explained as a repayment of the bailout funds raised by the defenders and secured over their Spanish property and paid to the group on 8 November 2006. It was also observed that CGM and DTM and AM dispute that a loan was ever made and that whilst SMM maintains a loan was made, he did accept that the payment instructed from funds held with Credit Suisse to the defenders was “to pay off the loan over the villa”.

[86] The third question posed by counsel for the defenders concerned the signing of 6/1, were the signatures done in one process or over a period of time and if the latter, what was the reason for it? The submission in relation to this question depended upon the inability of the witness Steven George to assist the court in any respect in relation to the signing of 6/1 of process. It was said that a negative inference could be drawn from Steven George’s inability to assist the court. This was developed by saying that when this factor was considered

⁴⁷ Article 2 of Condescence

along with what was said to be differing accounts given in evidence by SMM of the signing of 6/1, the court could no longer be confident in regarding the process as “probative”.

[87] The fourth question posed was, as I understood it, aimed at persuading the court that ostensibly collateral evidence relative to the signing of the disposition relative to DTM and Alistair Melville’s heritable property known as “Rocksley” was relevant to the determination of the main issue in the case, the authenticity or otherwise of the loan document number 6/1 of process. The court was urged to answer this question in the affirmative reliance being placed on the whole content of CGM’s testimony. That evidence was said to be “crystal clear”. It was said to demonstrate a system of actings by CGM and SMM that were designed as a means of acquiring the defenders’ assets with the intention of denuding their brother of any prospect of inheritance from his parents’ estate.

[88] The last question was the blunt one of whether or not 6/1 and 6/46 of process were forged. The submission was again that that question should be answered in the affirmative. As I understood the proposition the court was invited to answer the question in the affirmative based on the foregoing submissions which I have outlined.

Analysis and Conclusions

(i) Reliability and Credibility

[89] Following the structure of submissions on behalf of both parties and the potentially fundamental role of the question in determining the outcome of this action I deal firstly with the question of reliability and credibility.

[90] The reliability and credibility of four witnesses was challenged in this case. The pursuers challenged the reliability and credibility of CGM and DTM. The defenders challenged the reliability and credibility of SMM and Steven George. In the context of

reliability and credibility I should note that senior counsel for the pursuers whilst not challenging the reliability and credibility of AM did submit that through age, that witness had very poor, if any, memory of the matters about which he was questioned. In terms of his evidence he had plainly relied on the assistance of his wife, DTM, in relation to decision-making. Having regard to these considerations senior counsel for the pursuers limited his submission in respect of the evidence of AM to an invitation to the court to place very little weight upon it. In my view that position regarding the evidence of AM was justified and I adopt it in my determination of the factual issues in the case.

[91] Turning to the issue of the reliability and credibility of the other two witnesses whose evidence in this respect was challenged by the pursuers, I deal firstly with DTM. The challenge was to the effect that this person who was plainly astute and financially well informed, both matters she accepted in cross-examination, gave evidence which was evasive and inconsistent in relation to her signing of the loan agreement. Inconsistency was said to be found first between her pleadings and the evidence she gave in court. Second, there was said to be inconsistency between her evidence and other witnesses to the circumstances of the signing of the loan agreement.

[92] I accept that a factually senior counsel for the pursuers was correct in relation to both these submissions. In relation to discrepancies between the pleadings and DTM's oral evidence. In Answer 2 of the Closed Record it is averred:

“Dorothy Melville briefly glanced at other pages of the document at the time. She noticed a specific discrepancy namely that the page numbers at the foot of each page do not coincide with the Table of Contents.”

In her oral evidence DTM did not mention this matter offering another explanation for her evidence that the numbering on the document 6/1 of process was inconsistent. It was also averred in Answer 2 that:

“It has always been Dorothy Melville’s practice to initial each page of any document, having checked the terms thereof, as well as signing the signature page of the document.”

She gave no evidence to this effect in court. I should also note when considering the pleadings the absence of any averment by the defenders to the effect that DTM had never been in the office premises where it was averred by the pursuers that 6/1 of process was signed. The statement to that effect was made unsolicited. Given the importance of the issue of signature of 6/1 I consider there was force in the submission of senior counsel that DTM’s assertion, if correct, could and should have been the subject of averment as a matter of fair notice.

[93] Secondly, the evidence given by DTM was not wholly consistent with the evidence given by CGM or, for that matter, SMM.

[94] Whilst such inconsistencies cannot be ignored and must be considered when evaluating evidence I have to consider whether they are of sufficient gravity to enable me to treat all evidence given by this witness as being incredible and unreliable unless supported by evidence from another reliable and credible source. In considering that issue I was invited by senior counsel for the pursuer to have regard to DTM’s demeanour in court. In my opinion reliance on a witness’s demeanour is both a difficult exercise and one which must be exercised with great care. It is, again in my view, to be expected that witnesses will, as a matter of probability, be anxious and nervous when giving evidence. Allowance must also, again in my view, be made for the consideration that a witness will, quite properly, have given thought in advance to their evidence and that this process might, quite legitimately and without any conscious intent to deceive the court, be influenced by their own perception of the matters about which they are giving evidence. Having regard to those considerations, whilst I accept that DTM at times during her evidence appeared

defensive and indeed at some stages reluctant to be forthcoming, I am not persuaded that her demeanour whilst giving evidence could, of itself, objectively judged, entitle me to disregard her evidence in total. I am however more concerned in relation to the discrepancies in this witness's evidence with the case pled by her on record, in the case of her presence or otherwise on any occasion in SMM's office the absence of averment or prior disclosure anent this potentially important matter and, thirdly, inconsistencies in DTM's evidence and that of CGM. These factors are material and collectively cause me to be cautious about accepting the evidence of DTM. I have concluded that I can only accept DTM's evidence if supported by evidence from another credible and reliable witness.

[95] The position in relation to the challenge by senior counsel for the pursuer to the reliability and credibility of the evidence of CGM is, in my view, in a different category. Somewhat unusually, at least in my experience, CGM was a witness who accepted that he had on occasion been untruthful. At the outset of his cross-examination he freely accepted that he was a person who both in the context of the matters about which he was giving evidence in this case and, further, in relation to other aspects of his business dealings had told lies. Indeed at one point his evidence went so far as to accept that he was a liar. Such acceptance of dishonesty would entitle me, without consideration of any question of demeanour, to seriously entertain a submission that CGM's evidence should be wholly disregarded as being incredible and unreliable unless supported by evidence from a credible and reliable source. I should however indicate that CGM's demeanour in court was, as a matter of my observation, far from satisfactory. He was truculent and at times belligerent. On one occasion he required to apologise to the court for his verbal hostility to counsel who was questioning him. Put bluntly he was a witness about whom I had many misgivings. Having regard both to his accepted untruthfulness, further matters which were put to him

and where he denied untruths but which on the basis of documents proved in evidence appear to be correct, his demeanour in court and his overall attitude I have formed the view that this witness was incredible and unreliable. Accordingly I am prepared to accept any evidence uttered by CGM only in circumstances where there is acceptable evidence on the same point from a credible and reliable witness or from a document which has been proved in evidence.

[96] In relation to the challenges in respect of reliability and credibility made by the defence I deal initially with the witness Steven George. The challenge by counsel to Mr George was general. In both chief and cross Mr George denied any recollection of the circumstances of the signing of the loan agreement.⁴⁸ The submission was that when giving this evidence Mr George “presented as a reluctant, nervous and evasive witness.” On this basis it was said that I was entitled to draw an adverse inference from his evidence.

[97] I am not persuaded that there is merit in these submission for the defender. My impression was that Mr George was attempting to assist the court. He was, I accept, nervous when giving evidence but as I have already indicated I would not regard that as either unusual or unexpected when a person unfamiliar with the court process is required to give evidence in court. It is true that he professed no memory of the signing of the loan agreement. He advanced two reasons for this. First, the simple lapse of time. He was giving evidence more than 10 years after the events about which he was being questioned. Second, he indicated that he was in the habit of signing many documents during the course of his employment with GTC Holdings Ltd. I took this to mean that he would have difficulty in remembering any particular occasion when he signed a document. I consider both the explanations proffered by Mr George for his lack of memory about the signing of

⁴⁸ No 6/1 of process

the loan agreement to be plausible. I consider that I am entitled to treat the evidence he uttered, for what it may be worth, as reliable and credible.

[98] The last witness challenged was SMM. There was a general challenge to the demeanour of SMM in the witness box. In relation to that matter I accept that when being cross-examined by counsel for the defender SMM was, on occasion, aggressive and somewhat defensive. For reasons I have already rehearsed I did not find that particularly surprising. I am not prepared to regard the demeanour of SMM as giving me any basis upon which to consider him incredible or unreliable in total. In relation to his evidence itself it is correct, as was submitted by counsel for the defender, that his account of the signing of the loan agreement stood on its own and was contradicted by the evidence of CGM and DTM. The evidence of the last two witnesses was however, as already noted, not consistent with each other. I accordingly do not consider the version of events in relation to the signing of the loan agreement given by SMM can be discounted simply on the basis that it did not match other evidence.

[99] There are, however, two aspects of SMM's evidence which do require careful consideration in the context of his reliability and credibility. First, in relation to the funds taken from the Credit Suisse account and paid to the defenders I have noted, as also apparently did counsel for the defender, that at one stage in cross-examination SMM appeared to accept that these funds were intended to be utilised in repayment of a loan taken by the defenders, secured over their Spanish property, and utilised to repay the funds CGM had dishonestly appropriated from GTC Holdings Ltd. That explanation would be inconsistent with the explanation of the loan constituted in the agreement which is sought to be enforced in this action. The second area where I have concerns with the evidence of SMM relates to the purported disposition in favour of SMM and CGM granted by the defenders in

relation to their residential property known as "Rocksley". Counsel for the defenders forcefully submitted that there was no obvious, or genuine, reason for this disposition. There was evidence from DTM that she had not agreed or signed the disposition. She also stated that she would have consulted her longstanding private client solicitor, Mr Macari about this matter. Mr Macari gave clear and effectively unchallenged evidence to the effect that he would not have advised his clients, the defenders, to enter into this transaction. There is the further consideration that prior in time by approximately a month to the love, favour and affection disposition in favour of SMM and CGM there was a contract for the sale of the defenders' heritable property "Rocksley" between the defenders and third parties with no connection to the issue in dispute in this action. Implementation of the love, favour and affection disposition would have had the effect of potentially rendering the defenders in breach of contract in relation to the third party purchasers of "Rocksley". Mr Macari gave further evidence as to the unusual circumstances in which he came to be in possession of the disposition. Unsolicited, the apparently signed disposition was simply deposited through the letterbox of his office. When all those matters are considered I am unable to accept that the love, favour and affection disposition apparently granted by the defenders in favour of their sons SMM and CGM was a *bone fide* document. A necessary implication of that finding is that I reject SMM's evidence in relation to the involvement he had with this document as being credible or reliable evidence.

[100] There are two considerations which I consider arise out of these findings. The first is whether my conclusion in relation to the love, favour and affection disposition should have any bearing on my consideration of other evidence given in the case by SMM. This arises from the fact that the transaction, if there was one, in relation to the heritable property "Rocksley" was, in my view, collateral to the issue in this case. As already noted counsel for

the defender accepted that there is a general rule against the admission of collateral evidence. As a matter of relevance collateral issues to the main issues of fact are generally inadmissible. The exception to this rule, again something which was not as I understand it a matter for dispute, is that where the collateral fact sought to be addressed demonstrates a "system of actings" or "a consistency of actions" the evidence can be relied upon. The "consistency of action" which counsel for the defender says arises in the present case is a tendency by SMM to be dishonest in relation to matters concerning the finances of his parents and, more particularly, an intention to arrange the affairs of the defenders by SMM and CGM in such a way as to preclude a third brother from gaining any benefit from the estate of the defenders. On the basis of the evidence I have heard I accept that submission. I am accordingly prepared to have regard to the evidence in relation to the love, favour and affection disposition in assessing the credibility and reliability of SMM. When both the factors I have adverted to are considered I have formed the view that in relation to the loan agreement and, further, the love, favour and affection disposition there have been efforts by SMM to mislead the court. For this reason, as with the witness CGM, I am not prepared to accept SMM's evidence unless supported by the evidence of another credible witness or by documents proved to the satisfaction of the court.

(ii) Expert evidence

[101] I can deal briefly with this aspect of matters. The pursuers' skilled witness, Mr John Butler, spoke to his report. He was able to account for apparent inconsistencies between the draft loan agreements and that which was signed on the basis of technical factors. I have already quoted the relevant passages in Mr Butler's reports in paragraphs [18] and [19] of this opinion. The report and evidence of the defenders' skilled witness Dr Gillies was

criticised by Mr Butler because it proceeded without a clear statement of the printing history of the documents examined by her. As I understood Dr Gillies accepted the validity of this criticism in her evidence. Other factors upon which Dr Gillies founded were, as again she accepted, artefacts which could have taken place after the documents had been signed. Having regard to these considerations I prefer the evidence of Mr Butler to that of Dr Gillies. That said I regard the skilled evidence as being essentially neutral in this case, a position which I understand was ultimately accepted by counsel for both parties. It follows that I do not consider that there is skilled evidence which assists the court in determining whether or not the disputed loan agreement was genuine or not.

(iii) General considerations

[102] Having disposed of those matters I can turn to more general considerations arising out of the evidence. I start with acceptance of the proposition made by senior counsel for the pursuers that the principal issue in the dispute is the validity of the Loan Agreement number 6/1 of process. The Loan Agreement is, or at least purports, to be a probative document. That being the case both parties are at one in accepting that the Loan Agreement requires to be given effect to unless, in the context of this case, it can be proved by the defenders that the document was a fraud. The standard of proof in relation to the issue of fraud is, again a matter which was common between the parties, on the balance of probabilities. It should however be noted that notwithstanding that factor there is longstanding authority that:

“[T]he law in no case presumes fraud, - in no doubtful matter does the law lean to the conclusion of fraud. Fraud is a thing that must be clearly and conclusively established.”⁴⁹

⁴⁹ Cullens Trustees v Johnston (1865) 3M 935 per Lord President Colonsay at 937-8

[103] The submission made by counsel for the defenders did not, in my view, seriously differ from the approach of senior counsel for the pursuers. It was however presented somewhat differently by posing five questions which it was submitted by him the court should consider to be of assistance. The first, and in my view most important, question was whether the defenders have discharged the onus which they accepted was incumbent upon them to prove that there was no loan. I consider that question falls to be answered in the affirmative so far as the defenders are concerned. This answer is not easily arrived at having regard to the adverse findings of reliability and credibility I have made in respect of SMM, CGM and DTM. I consider the correct analysis to be that having regard to SMM's admission in relation to the intention for which the Credit Suisse funds were credited to the defenders' account and the defenders rejection of the existence of a loan the loan agreement, falls to be regarded as a device. Notwithstanding its terms the purpose of the loan agreement was not as stated in the writ but was intended by SMM and CGM and, as a matter of probability, the defenders as a means to deprive a third son of the defenders from the full extent of any entitlement he might have in their estate.

[104] Beyond those considerations based on the evidence the conclusion I have reached is that the purported loan agreement was not what it bore to be, I express the view that it was a scheme or device to prevent a third party benefiting from the defenders' estate which view finds support in general consideration of the affairs and dealings of SMM, CGM and the defenders.

[105] The foregoing finding effectively deals with the second question posed by counsel for the defenders. I answer that question in the negative. In my view on the evidence there was no loan by SMM and CGM to the defenders. The transaction noted in the Credit Suisse

account was, in my opinion, intended to repay the sums which the defenders had borrowed on the security of their Spanish property.

[106] The third question posed by counsel for the defenders relates to the signing of the documents. These questions are, in my view, superseded. I am however bound to observe that there is no consistency in evidence adduced by either party in relation to the signing of the loan agreement. I am not satisfied that I can form any concluded view as to the circumstances in which the document number 6/1 of process was signed.

[107] The fourth question relates to the relevance of the evidence in relation to the property in "Rocksley". In dealing with reliability and credibility I have already answered that question. I consider that I am entitled to have regard to that evidence.

[108] The fifth and final question raised the issue of whether the document 6/1 and 6/46 were forged. As will be apparent I answer both these questions in the affirmative.

(iv) Determination

[109] Having regard to all the foregoing I consider that the defenders have discharged the onus incumbent upon them. I am not satisfied that the pursuers have proved their case. I will accordingly uphold the defenders' first, third and fourth pleas-in-law and assoilzie the defenders from the conclusions of the summons.

Appendix

DATE	EVENT	REFERENCE
19 September 2001	Agreement entered into between the defenders, Calum Melville and Stuart Melville in relation to the proceeds of a sale of any of the shares in Isandco Three Hundred and Seventy Five Limited.	Production 6/26
12 June 2006	Calum Melville resigns as a director of GTC Holdings Limited	Production 6/49
25 October 2006	The defenders enter into a loan agreement with the Bank of Scotland and draw down €1,999,000.	Production 7/1
November 2006	£1,274,980.70 paid to GRC Holdings Limited in full and final settlement of claims arising from Calum Melville's actions.	Production 6/21
28 November 2006	Share Purchase Agreement between Calum Melville and the first defender in terms of which the first defender purchased the 4,250 ordinary shares in GTC Holdings Limited held by Calum Melville.	Production 7.22
12 September 2007	Deed of Gift granted by Stuart Melville in favour of the defenders.	Production 7/9
12 September 2007	Share Purchase agreement between the first defender and Stuart Melville, in terms of which Stuart Melville purchased 2,125 ordinary shares in GTC Holdings Limited from the first defender.	Production 7/24
12 and 13 September 2007	Share Purchase Agreement concluded for the sale of GTC Holdings Limited to Cosalt Plc	Production 7/29
12 and 14 September 2007	Declaration of trust entered into by the first defender in favour of Calum Melville over the issued ordinary shares in Denmore Investments Limited held by the first defender.	Production 6/6
15 October 2007	Initial consideration from the sale of GTC Holdings Limited paid by Maclay Murray & Spens LLP to Stuart Melville and Dorothy Melville in the sums of £2,254,955.22 (transferred to Credit Suisse (UK) Limited) and £2,186,859.83 (transferred to the first defender's account with the Bank of Scotland) respectively.	Productions 6/57 and 7/23

30 October 2007	£2,087,000.00 transferred by the first defender to Credit Suisse.	Productions and 6/53 and 7/30
25 February 2008	£1,281,407.71 transferred by Maclay Murray & Spens LLP to account ...1746 with Lloyds Bank.	Production 7/26
29 July 2008	€2.4 million transferred from Credit Suisse to the following accounts and in the following proportions: €2.2 million to the first defender's account held with Confederacion Espanola De Casas De; €180.00 to Calum Melville's account ...4344 held with the Bank of Scotland.	Productions 6/22 and 7/19
20 August 2008	Drafts of loan agreement sent by Ross Atkinson (McGrigors LLP) to Calum Melville in emails sent at 12.33 and 14.37.	Productions 6/23, 6/24
10 October 2008	Draft loan agreement sent by email by John Rutherford (McGrigors LLP) to Calum Melville in respect of a Yearly Advance by Calum Melville and Stuart Melville to the defenders.	Production 6/8