OUTER HOUSE, COURT OF SESSION

[2023] CSOH 33

CA135/21

OPINION OF LORD SANDISON

In the cause

VED PARKASH

Pursuer

against

THE ROYAL BANK OF SCOTLAND PLC

Defender

Pursuer: Tosh; Drummond Miller LLP (for MBS Solicitors)
Defender: Massaro; Addleshaw Goddard LLP

23 May 2023

Introduction

[1] In this action the pursuer, Ved Parkash, seeks reduction of three personal guarantees granted by him in June and August 2006 and April 2007 respectively, in favour of the Royal Bank of Scotland and in corroboration of the debts of a company with which he was associated, Kasssk Limited. The claimed ground of reduction is that the guarantees were signed by him on the basis of an essential error induced by misrepresentations made on behalf of the Bank. After very lengthy delays in the conduct of the action, it eventually came before the court for a diet of proof before answer which proceeded over four days.

Background

[2] The pursuer is presently 74 years old and has been a property investor since 1985. He began investing in property as a sole trader, on occasion using the trading name KK Properties and Development, in 1985. In the course of his business he built up a portfolio of properties using bank borrowing secured by way of Standard Securities over the properties in the portfolio. He became a customer of the Royal Bank in 2002, and entered into various loan and overdraft agreements with it between then and 2007, in each case as an individual. From the start of 2006 until about 2008, his relationship manager at the Bank was Brian Craig. In 2006 Kasssk was formed and the pursuer and his children formed its board of directors. The pursuer then approached Mr Craig on three separate occasions, in June and August 2006, and April 2007, to seek two loans and an overdraft respectively from the bank for Kasssk, and on each occasion signed the documentation which the bank required him to sign in order for the facility in question to be made available to the company. Amongst the documents which he was asked to sign on each such occasion was a personal guarantee supported by Standard Securities already held by the bank over properties in his portfolio. The guarantees are for principal sums of £480,000, £147,500 and £25,000 respectively. These are the guarantees which he seeks to have reduced. The pursuer accepts that he granted two further personal guarantees to the bank, one in July 2004 in respect of the liabilities to the bank of his daughter Samantha Parkash, and the other in July 2008 in respect of Kasssk's liabilities to the bank. These two guarantees are not challenged.

The Evidence

Pursuer's Factual Case

The Pursuer

[3] The pursuer provided two affidavits which formed his evidence in chief. Their content may be summarised as follows:

He had a good relationship with the bank and with Mr Craig in particular. They would have lunch on occasion, and he would send Christmas gifts to Mr Craig. When he and Mr Craig first agreed a loan for Kasssk, he asked Mr Craig to prepare the relevant paperwork and let him know when it was ready for signature. There was no mention of any personal guarantee or that he would be signing anything in any capacity other than as a director of Kasssk. After first signing some papers in May 2006, he had been telephoned in June and told that further loan paperwork was ready at the bank for signing. No documents had ever been sent to him. On 28 June 2006 his son drove him to the bank and waited outside in the car while he went in to sign the papers. He identified himself to the staff at reception and after a short while Kirsty Lawson, a manager, appeared to show him the papers that were waiting for his signature. She told him where to sign each document, which he did. Although Mr Craig knew that his eyesight was very bad and that he struggled to read documents, Ms Lawson made no offer to read the content of the papers to him. She mentioned nothing about the possibility of taking legal advice. After he had signed what was required, he was shown out of the building and did not receive, then or later, any copies of what he had signed. The same sequence of events had occurred in relation to the other facilities made available to Kasssk, the papers for which he signed when he attended at the bank on 4 August 2006 and 26 April 2007. The only difference was that it had been Mr Craig who had met him and supervised the signing of the documents on those

occasions. In July 2008 he had sought further funding for Kasssk and had happened to be with his solicitor, Mr Soutar of Hadden Rankin, when a representative of the bank had called and said the relative paperwork was ready. Mr Soutar had come with him to the bank, where a staff member other than Mr Craig had provided the papers for the first time, just as before, and Mr Soutar had signed as his witness. On no occasion was he aware that he was signing a personal guarantee, and would not have done so had he known, as it was not his policy to make his personal property available as security for the company's debts. He considered that the bank's position was adequately covered by the Standard Securities it held over his own portfolio of properties. He had been shocked when, in 2014, the bank had told him that it was calling up its personal guarantees. The only time he had granted a personal guarantee to the bank was to facilitate a moderate loan to his daughter Samantha. In cross-examination, the pursuer accepted that he had been a reasonably successful businessman and that he knew what banks usually required before making loans. In 2006 he could read documents except in very small print, and he drove his car in his local area. He was not conscious at the time of having granted a personal guarantee to the bank in 2004 in order to secure the liabilities of his daughter; he had been under the impression that he and she had simply been joint borrowers, until informed to the contrary at some later date. He had set up Kasssk for his son Kunal to run, but it was the pursuer rather than Kunal who dealt with Kasssk's business with the bank, and Kunal was not consulted about it. The pursuer was unable to explain why the loan documentation included certificates about what had been agreed at board meetings of Kasssk signed by Samantha when, as he maintained, no documents had been sent out in advance of the signing meetings; perhaps Samantha had accompanied him to the bank and he had forgotten about it, or perhaps those certificates alone had been sent out for advance signature. In any event, no such board meetings had

actually taken place. He was equally unable to explain the circumstances in which a Standard Security signed by him two days before the August 2006 guarantee, and in connection with the same loan transaction, had been witnessed by a person whose name he did not recognise and stating her address as being in Buccleuch Street, Edinburgh. As far as he was concerned, all relevant documents had been signed at the bank's premises. When it became apparent that his evidence about the circumstances surrounding the execution of the 2008 guarantee, and his awareness that that was the nature of the document he was signing, was almost entirely at odds with that of his former solicitor, Mr Soutar, he had no explanation as to why that might be; he was right and Soutar was wrong, as was the bank's representative in that transaction, Kevin Shanks.

Kunal Parkash

[4] Kunal Parkash is the pursuer's son. He swore an affidavit as his evidence in chief, in which he stated that he did not have much to do with his father's businesses until recently. His father was very trusting of his bankers and his professional advisers in general. In summer 2006 he had, upon request, driven his father from their home to Edinburgh city centre and waited outside the bank's office in St Andrew Square there while his father went inside for five minutes. Upon returning to the car, his father had said that he had been signing paperwork which had been made ready for him. No further discussion was had. A similar episode occurred shortly afterwards, and again in April 2007. Although he did assist his father by reading to him business documents which his eyesight hindered him from reading himself, he did not recall ever having read out documents from the bank.
In cross-examination, he confirmed that he had not engaged with the bank in relation to Kasssk's banking arrangements; that was left entirely to his father. He had never heard any

mention of guarantees, not even those which his father was not challenging. He had never taken Samantha to the bank.

Brian Warner

[5] Parties agreed by joint minute that the affidavit of Brian Warner, a retired solicitor who formerly acted for the pursuer in conveyancing matters, should stand as his evidence. It stated that he was not aware of the guarantees in question and had given no advice about them. He was aware of the difficulties experienced by the pursuer in reading documents.

Defender's Factual Case

Brian Craig

[6] Mr Craig had died before the proof was heard, but two witness statements given by him in 2016 and 2022 were admitted as his evidence in terms of section 2(1)(b) of the Civil Evidence (Scotland) Act 1988. They were to the following effect:

He was a relationship director with the bank from January 2006. One of the customers he looked after was the pursuer. They did not have a close relationship, and it was purely a business one. He had become aware in the course of their relationship that the pursuer had some issues with his eyesight, but was unaware of the details. In the context of the bank's lending to the pursuer as an individual, there was evidently no need for any personal guarantee. However, when it came to lending to Kasssk, the bank required adequate security, and that would take the form of a personal guarantee from the pursuer in addition to a heritable security over the company's property. The pursuer would first have had to discuss with him why the company wanted the loan and what he expected the return to be. The matter of security would then be discussed, and he would have explained that a

personal guarantee would have to be granted. That was non-negotiable, at least in the case of lending to a company operated by the pursuer. The amount of the guarantee would be the difference between the prudently written-down value of the security granted by the company and the amount of the facility afforded to it. He would have compiled a credit report, checked with the pursuer that the details were right, and would then have submitted the report to the appropriate department of the bank to sanction the lending. The facility documentation would then have been produced. He was sure that, as well as discussing the terms of the guarantee and the reasons why it was required, he would have emailed the pursuer the terms of the loan, which would include the requirement for a guarantee. The guarantee itself would not have been sent out, because if the opportunity to take legal advice was to be waived, it was the bank's policy to require the relevant waiver and the guarantee to be signed in person at a meeting with the bank's personnel. If the guarantor did want to take legal advice, the guarantee would be sent directly to his lawyer.

He was not at the signing meeting in respect of the first loan to Kasssk on 28 June 2006, which had been conducted in his absence by his colleague Kirsty Lawson. Such meetings followed a process set out in writing specifically for each meeting by the bank's Credit Documentation Department, and took a lot longer than five minutes. At the meeting, each of the loan terms would have been read through and there was every opportunity for the pursuer to obtain legal advice. There would have been a form waiving the option to take legal advice as part of the pack made available at the signing meeting, and it would be read out to the customer. If the customer was happy to proceed without legal advice, that form would have been signed; otherwise the signing meeting would have been stopped so that such advice could be taken. The pursuer had chosen to waive the opportunity to take legal advice and had signed the relative form. There were usually three copies of the

documentation so that the bank could have one copy and the customer the other, with one spare, but that was not an invariable practice. The process would have been the same in respect of the subsequent facilities made available to Kasssk in August 2006 and April 2007, save that he had evidently conducted those signing meetings himself. The pursuer had read the documents presented to him at those meetings before signing them. At the April 2007 meeting, he had held the documents a couple of centimetres from his eyes when reading them, but had not asked for any help.

Kirstine Watt

[7] Kirstine (Kirsty) Watt, formerly Lawson, gave evidence in chief by way of two witness statements, which may be summarised as follows:

She was an assistant commercial manager at the bank between 2004 and 2006, which involved working with and assisting a relationship manager with his or her portfolio of around 60 customers. She had conducted the signing meeting with the pursuer on 28 June 2006. She had not previously known him. She had been told that he had problems with his eyesight, but observed no such problems at the meeting, and he had not asked for any help. She was aware that he was concerned about getting a parking ticket on his car outside the office, but the meeting had taken longer than five minutes. Two copies of each document to be signed would have been available, marked as the bank and customer copy respectively. She would have gone over the terms of the guarantee with the pursuer and would have highlighted to him the wording on the guarantee document that suggested that independent legal advice should be taken. She would have given him the opportunity to read it for himself. She would have done the same things in relation to the document waiving legal advice which he had also signed, and would have followed the process for the meeting as

laid down by the bank's Credit Documentation Department. She was very careful about that as a result of a personal family experience she had had concerning a misunderstood guarantee.

[8] In cross-examination, she accepted that her meeting with the pursuer had been a routine one. She re-iterated her position she had a good memory for the processes to be followed, and, as a perfectionist, would certainly have followed them precisely. She would have asked the pursuer if he knew that what he was signing was a guarantee, and would have specifically pointed out to him that he had the option of taking legal advice. Copies of the general loan documentation would have been sent out in advance of the meeting, but not the guarantee. The pursuer had not asked for assistance in reading or understanding the documentation; had he asked for it, it would certainly have been given.

Kevin Shanks

[9] Kevin Shanks gave evidence in chief by way of a witness statement, which may be summarised as follows: He was an assistant manager at the bank in 2008. At that point the bank perceived that it was exposed in relation to the liabilities of Kasssk because the value of the properties over which it had granted Standard Securities to the bank was thought to have fallen. The Bank wanted a further personal guarantee from the pursuer as a condition of continuing to provide financial support to the company. Although the pursuer was reluctant to grant a further personal guarantee, he had ultimately agreed to do so. A copy of the proposed guarantee had been provided to the pursuer's solicitor, Alasdair Soutar of Hadden Rankin, to allow him to review it and provide advice to the pursuer. No concerns had been raised and there had been a signing meeting on 1 July 2008 attended by the pursuer, Mr Soutar and Mr Shanks, at which the pursuer had signed the guarantee.

[10] In cross-examination, he accepted that he did not specifically recall the meeting at which the guarantee had been signed, and was asked about the apparent inability of the bank to find and produce the correspondence which it was said must have been sent to the pursuer in connection with the 2006 and 2007 Kasssk transactions, for which he had no very clear explanation.

Alasdair Soutar

[11] Parties agreed by joint minute that the witness statement of Alasdair Soutar, a solicitor who formerly acted for the pursuer, should stand as his evidence. It stated that he could not recall the details of how he had assisted the pursuer in 2008, but that his file notes recorded that he had explained the terms of the guarantee granted then to the pursuer, and that the pursuer had confirmed that he understood the nature of the document. Mr Soutar had signed a clause confirming these matters as part of the signing process.

Expert Evidence

[12] Concurrent expert evidence was heard from ophthalmologists Mr Shahriar Nabili (instructed by the pursuer) and Dr Alistair Adams (instructed by the defender) in relation to the pursuer's eyesight at the times he signed the guarantees in question. They agreed that, without glasses, it would have been very poor, with a high level of myopia and astigmatism, but that in an optician's consulting room, he would have been able to read the documents. Mr Nabili considered that the pursuer's eye conditions would have made it difficult for him to see the documents clearly and specifically for an extended period of time, and that matters such as lighting, font size and print quality would affect his ability to read them.

Dr Adams did not accept that these matters, so long as they were within ordinary parameters, would have a significant effect.

Pursuer's Submissions

[13] On behalf of the pursuer, counsel submitted that the pursuer had only been asked to sign loan papers relating to Kasssk by Mr Craig. He was not told that he was being asked to sign personal guarantees in respect of the liabilities of Kasssk. He had significant difficulties with his eyesight. He could not and did not read the guarantees. Instead, he relied upon what he had been told by Mr Craig and signed them. He was in error as to the nature of the documents that he signed. The error was an essential one. The guarantees would fall to be reduced if that error was induced by misrepresentation: *Fletcher* v *Lord Advocate* 1923 SC 27 at 35 and 37. The pursuer had to prove that (i) there was a misrepresentation of fact, (ii) the misrepresentation was made by or on behalf of the defender, and (iii) the misrepresentation was material in the sense that it was a factor that induced the pursuer to sign the guarantees: *Royal Bank of Scotland plc* v *O'Donnell* [2014] CSIH 84, 2015 SC 258 at [25]–[26]. The pursuer did not require to prove fraud or negligence. The state of mind of the party who made the representation was irrelevant.

[14] Mr Craig's description of what the pursuer was being asked to sign as "loan papers" was a representation of fact made by him acting within the scope of his employment with the defender and, thus, on behalf of the defender. It may not have been false when viewed in isolation. However, the fact that a representation might literally be true was not determinative. The court's task was not to construe the words used in isolation, but instead to consider whether those words, when viewed in the light of the surrounding circumstances, created a false impression: *Park's of Hamilton (Holdings) Ltd* v *Campbell* [2008]

CSOH 177 at [18]. These questions fell to be examined rigorously in the case of cautionary obligations: *O'Donnell* at [27] and [41]–[43].

[15] Even if there was no misrepresentation, this was one of the rare cases in which uninduced, unilateral error was sufficient because the pursuer was in actual error as to the nature of the guarantees rather than merely their legal effect: *Ellis* v *Lochgelly Iron and Coal Co Ltd* 1909 SC 1278 at 1282; *Steel's Tr* v *Bradley Homes (Scotland) Ltd* 1972 SC 48 at 58; *McCallum* v *Soudan* 1989 SLT 522 at 523D-F; *Royal Bank of Scotland* v *Purvis* 1990 SLT 262 at 265H-K; McBryde, *The Law of Contract in Scotland*, paragraphs 15.40–15.41. Even if that required the pursuer to show that something short of misrepresentation induced his erroneous belief as to the nature of the guarantees, the nature of the security provided by the pursuer in relation to earlier transactions with the defender (which was confined to Standard Securities), coupled with the lack of any proper explanation as to the nature of the guarantees, was sufficient for that purpose.

[16] Whilst the pursuer bore the legal burden of proving error or misrepresentation, there was only so much that he could say and do in order to prove a negative. Ultimately, the persuasive burden rested firmly on the defender, as the party who offered to prove that the pursuer knew what he was signing at the time that he did. Any doubt about those issues should be resolved in favour of the pursuer.

[17] The court should accept Mr Parkash's evidence as credible and reliable. He had answered the questions put to him in a candid and straightforward manner. He was clear about what he could and could not recall. His oral evidence was consistent with his written evidence. He made appropriate concessions even where it was not in his interests to do so. Mr Craig's statements were admissible hearsay, but should be received *cum nota* because the pursuer had had no opportunity of testing their weight or credibility by cross-examination:

Polanski v *Condé Nast Publications Ltd* [2005] UKHL 10, [2005] 1 WLR 637 at [74]; *Welsh* v *Stokes* [2007] EWCA Civ 796, [2008] 1 WLR 1224 at [23]. The absence of corroboration was important: *Gordon* v *Grampian Health Board* 1991 SCLR 213, and its absence could be of some evidential value in itself. If, for example, it could reasonably have been obtained and there was no good reason for not obtaining it, that might be a matter to which the court could give appropriate weight: *MAH (Egypt)* v *Secretary of State for the Home Department* [2023] EWCA Civ 216 at [86]. Further, where Mr Craig's statements were ambiguous, they should be read *contra proferentem*: *Walker's Trs* v *McKinlay* (1880) 7 R (HL) 85 at 98.

[18] Ms Watt's evidence should not be regarded as credible and reliable. It had plainly been reconstructed by reference to documents she had been shown and what she knew she ought to have done, rather than being based on any active memory of what she had done. Her reluctance to accept that in cross-examination seriously undermined her credibility and reliability. It was clear that, consciously or not, she was intent on protecting the defender's (and, thus, her own) position.

[19] The difference between the ophthalmological experts should be resolved in favour of the pursuer. It was more likely than not that the pursuer would have had significant difficulty in reading detailed, closely spaced print.

[20] In summary, the pursuer was asked to sign loan papers relating to Kasssk by Mr Craig. He was not told that he was being asked to sign personal guarantees for liabilities of Kasssk. He had significant difficulties with his eyesight. He could not and did not read the guarantees. He relied upon what he had been told by Mr Craig. What Mr Craig told him was a misrepresentation, even if he did not realise it at the time. The misrepresentation was material. The pursuer would not have signed the documents presented to him if he had known that they were guarantees. The court should reduce those documents.

Defender's Submissions

[21] On behalf of the defender, counsel submitted that it was for the pursuer to satisfy himself of the legal import of the documents he signed before signing them: *Smith* v *Bank of Scotland* 1997 SC (HL) 111 at 117, per Lord Clyde. An exception applied where the relationship between principal borrower and guarantor was such as would lead a reasonable person to believe that the guarantor's consent might not be fully informed or freely given, but that did not apply in cases such as the present when a company director was guaranteeing the debts of a company in which he was a director and shareholder: *Wright* v *Cotias Investments Inc* 2001 SLT 353 per Lord Macfadyen at [20]. As a general principle, parties were bound by the contracts that they sign, whether they read them or not: *L'Estrange* v *F Graucob Ltd* [1934] 2 KB 394 per Scrutton LJ at 403; *Peekay Intermark Ltd* v *Australia and New Zealand Banking Group Ltd* [2006] 1 CLC 582 at [43]; *Toll (FGCT) Pty Ltd* v *Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40]–[50]; Chitty on *Contracts* (34th ed 2021 and as updated by the first supplement, 2022), paragraph 15.005; *Young* v *Clydesdale Bank Ltd* (1889) 17 R 231 at 243 and 248; *The Royal Bank of Scotland PLC* v *Purvis* 1990 SLT 262 at 265L–266B; McBryde, *The Law of Contract in Scotland*, 3rd ed (2007), paragraph 6.12.

[22] In English law, the plea of *non est factum* was available where the grantor of a document argues that he or she did not intend to sign it by reason of some disability: *Saunders* v *Anglia Building Society* [1971] AC 1004. The extent to which an equivalent to the plea of *non est factum* applied in Scots law was uncertain, although it was referred to in Gloag and Henderson, *The Law of Scotland* 15th ed (2022) at Vol 1, paragraph 7.30.

[23] A misrepresentation by a bank could provide a basis to reduce a personal guarantee, subject to the following conditions: (1) There would need to have been an inaccurate statement of fact or law made by the defender's employee to the pursuer; (2) The pursuer would have had to have in fact been induced to enter into the personal guarantees on account of that inaccurate statement; and (3) The matter misrepresented would have to be sufficiently important that it would have been a factor which would have induced a reasonable person to enter the contract (*Ritchie* v *Glass* 1936 SLT 591 and *McBryde*, para 15.68).

[24] Where the misrepresentation was said to arise from an oral statement, there needed to be clear evidence of the terms of the representation, the time and place at which it was made, and the context in which it was made: *Hamilton* v *Allied Domecq PLC* 2006 SC 221 at [2] and [89].

[25] The pursuer had not proved what was required. The Court had no adequate evidence about what was said during the conversations between the pursuer and Mr Craig before the respective signing meetings. That made it difficult to reach a confident view as to whatever was said constituted a representation at all. If the court was unable to find that there were misrepresentations, the pursuer's case would have failed. The condition of the pursuer's eyesight did not assist him; on his own account, he made no attempt to establish what the documents he was signing were.

[26] In any event, the pursuer's account was neither credible nor reliable. It compared unfavourably with that of Mr Craig (despite its limitations) and of Ms Watt. The latter's evidence, in particular, was compelling as to what had been done at the signing meeting she conducted. By contrast, the pursuer's evidence was riddled with inconsistencies, some peripheral to the matters in issue, some directly relevant to them. In particular, his

explanation that he did not think that the bank would need further security for the lending to Kasssk because it already had security over his other properties was confused and nonsensical. His account of how he came to grant the 2008 guarantee was plainly a fabrication, and although that guarantee was not challenged in this action, what he had claimed in relation to it cast considerable doubt on the truth of the other parts of his evidence. The ophthalmological evidence was not determinative of the case. The experts agreed that the pursuer could have read the various documents in this case, and indeed he accepted as much himself in oral evidence.

[27] Neither party made any reference to a requirement for *restitutio in integrum* to be possible as a pre-condition of reduction of the guarantees.

Decision

[28] The explicit basis upon which the action proceeds is encapsulated in the pursuer's first plea-in-law, which is in the following terms:

> "1. The guarantees having been signed by the pursuer as a result of essential error induced by misrepresentations made on behalf of the defender, and being voidable at the instance of the pursuer, Decree of Reduction should be pronounced as first concluded for."

It is not open to the pursuer at the conclusion of the proof to advance, in addition to that case, a separate argument that the guarantees should be reduced on the basis of an uninduced and unilateral error on his part. The pursuer's case is and always has been that he was led into error, not merely that he happened to wander into it. Had an additional case based on uninduced error formed part of the action, the pursuer's pleadings would have been subject to the discipline of the weaker alternative rule and a very harsh spotlight would have been shone on that additional case, imperilling the entire action had it upon such

inspection been found wanting. It is not possible now to turn back the clock and make a proof obtained on one basis about something different in addition.

[29] Had it been appropriate to consider a case of uninduced and unilateral error, I would have rejected it. While it may be possible in theory to conjure up a set of circumstances in which a party to an apparent contractual obligation may be able to show that, objectively viewed, he was not consenting to undertake that obligation because of such an error on his part, such circumstances are vastly more likely to exist in the imagination of a professor of law setting an undergraduate examination in contract law than they are in any remotely likely real-life scenario. I agree in this regard with the observations of Lord McCluskey in *Royal Bank* v *Purvis* already cited. The pursuer's case on uninduced error is not materially different from, and is certainly no better than, that of the unsuccessful plaintiff in *Saunders*. He knew that he was going to the bank to sign documents which pertained to facilities being made available to Kasssk. He cannot sensibly have thought that those documents were without legal significance of some sort of other. Although it might have been very difficult for him, given his eyesight problems, to read the papers and determine their precise import in the context of the signing meeting, on his own account he made no effort of any kind to find out what that import was. He simply signed what was put in front of him. In these circumstances it does not lie in his mouth to say that he should be relieved of the obligations which outwardly he undertook because of some entirely self-generated error about their nature.

[30] The pursuer's case thus stands or falls on the issue of misrepresentation, and in particular that all he had been told, whether before or at the relevant signing meetings, about the nature of the documents which he signed and which transpired to include personal guarantees, was that they were "loan papers" or words to similar effect.

[31] The pursuer's version of events in that regard cannot be accepted as reliable. His written and oral evidence contained numerous oddities and clear discrepancies, either internally or in comparison with other evidence, about what had happened before and at the meetings in question. Some of those matters (for example, where in the bank buildings the meetings took place, or how long the meetings took) are capable of being explained by the passage of time since the events in question. Others (for example, his apparent confusion about his own portfolio of properties being already available to the bank as security for Kasssk's debts, irrespective of the grant of the personal guarantees) may be ascribed to an imperfect understanding of the intricacies of cross-securitisation and separate corporate personality. However, his inability to explain with any conviction how it was that Samantha had come to sign certificates about Kasssk's supposed board meetings as part of the package of documents provided to the bank, or how one of the Standard Securities he granted over Kasssk's property had been executed by him two days before the meeting at which the relative guarantee was signed, witnessed by a person with no apparent connection to the bank, when a crucial part of his claim was that no documents of any sort had ever been provided in advance of a signing meeting, begins to undermine the confidence that may reasonably be placed on his account.

[32] Matters only get worse when one considers the pursuer's evidence as to the events leading up to, and at, the execution of the 2008 guarantee. While the background circumstances surrounding the grant of that guarantee were very different from those pertaining to the earlier guarantees which the pursuer challenges (Kasssk's affairs having fallen into disarray, the leverage of the bank to exact a guarantee having thus increased, and the matter being dealt with by specialised Bank personnel rather than Mr Craig or Ms Watt), the pursuer's evidence on how the 2008 guarantee came to be executed is entirely at odds

with the evidence of his own solicitor, Mr Soutar. Mr Soutar was clear, having consulted his file notes, that in advance of the signing meeting he had advised the pursuer that he was being asked to sign a guarantee and what that entailed, and that the pursuer had indicated that he understood that. Mr Soutar's attendance at the signing meeting was as the pursuer's lawyer, not merely to witness the signing of the guarantee, but also himself to sign a confirmation that appropriate advice had been given to the pursuer. Mr Soutar's evidence was not made the subject of challenge. The pursuer's account that Mr Soutar had told him nothing about the guarantee, and was effectively present at the signing meeting by accident, cannot be accepted. Further, if the pursuer's evidence as to the circumstances leading up to, and at, the signing meeting for the 2008 guarantee is so wide of the mark, it is difficult to place any confidence in the accuracy of his essentially similar account (ie that there was no prior indication of what he was to sign, and no such information provided at the signing meetings) of the circumstances pertaining to the grant of the earlier guarantees. Nothing in the other evidence adduced on behalf of the pursuer (which was either uncontroversial or of little to no moment) is capable of supplying that essential deficiency in the pursuer's case.

[33] For those reasons, I do not accept the pursuer's evidence that he was told nothing about the nature of the documents he was to sign beyond that they were "loan papers" as reliable. Rejection of the pursuer's evidence on that matter, although enough to result in the failure of his claim given that the burden of proving an adequate ground of reduction rests on him, does not in itself provide any positive evidence of what (if anything) he was told about the nature of the documents to be signed. However, on that matter I found the evidence of Ms Watt as to what happened at the signing meeting she conducted, and as to the bank's processes in connection with the signing of guarantees, to be clear and convincing. She had long ago left the bank's employment and indeed the banking sector as

a whole. She had no particular reason to exaggerate the degree to which she and others complied with those processes. Her evidence was supported in general terms at least by the evidence of Mr Craig on the subject of those processes (even allowing for the fact that his evidence could not be subject to cross-examination), and in turn supported his evidence on the subject. I have no hesitation in concluding on the basis of the evidence of Ms Watt and Mr Craig that, at the very least, the pursuer was informed at each of the signing meetings pertaining to the guarantees under challenge that amongst the documents he was signing was a personal guarantee, and that it was open to him to take legal advice before he signed. Questions of the pursuer's ability to read the documents at the signing meeting do not arise; he was told orally and in terms what the guarantees were.

[34] I, further, do not accept that the pursuer was in fact at any material time labouring under a positive misapprehension as to the nature of the documents he signed and which he now challenges. Rather, I consider that suggestion to be a retrospective characterisation of events. If the pursuer was paying any attention at all at the signing meetings, there was no room for any such confusion, but more pointedly and in any event he manifested throughout the events under examination such a pervasive incuriosity, even insouciance, about the nature of the documents in question that it is difficult to conclude otherwise than that he had no real interest in the subject and was in effect prepared to sign whatever the bank wanted him to sign in order to obtain the funds which Kasssk needed to embark upon and maintain its planned business. Such an attitude is by no means uncommon amongst entrepreneurs confident of the success of what they are undertaking, and appears to me to be the outlook which the pursuer had towards his activities at the relevant times.

[35] It follows from what has already been said that it is not necessary to determine whether the pursuer's claim that all he had been told about the nature of the documents to

be signed was that they were "loan papers" or the like amounts to a relevant claim that there was a misrepresentation at all. Had it been necessary to determine that matter, I would have held that it did not. I accept that, in cases of oral misrepresentations, it is not necessary to specify the exact words said to have been used so long as their sense is stated, and that what is proved to have been said need not be untrue when viewed in isolation, if nonetheless it is calculated (ie has as its natural even if unintended result) to lead to a false impression being created in the mind of its hearer. Those propositions are set out clearly in *Park's of Hamilton* v *Campbell* at [15]–[18].

[36] In the present case, as was conceded by counsel for the pursuer, the description of what was to be signed, including the personal guarantees, as "loan papers" or the like was not in itself false; the guarantees were indeed one element of the paperwork which the bank required to be signed before it would release the loan monies to Kasssk. The pursuer's case is that, in the context of earlier lending having been made by the bank to himself as an individual, which lending self-evidently did not and could not include any requirement for personal guarantees, it was misleading for Mr Craig to refer in such inspecific terms to what would be required for the loans to Kasssk, and not to identify positively that a personal guarantee was amongst those documents.

[37] It is, however, not possible to regard what is alleged to have been said as objectively misleading. The loans previously made to the pursuer had carried with them full personal liability for their repayment on his part. A requirement for personal liability in connection with the loans to Kasssk in issue in the present case was a continuation of that situation, not a departure from it. The pursuer did not appear to put any particular store in the concept of separate corporate personality, referring to Kasssk as "his" company and directing its banking affairs accordingly, but rather maintained that he thought that there would be no

requirement for a personal guarantee because the bank already held the security of his portfolio of investment properties. However, as a matter of fact and law those properties were not available as security for the loans to Kasssk unless and until the pursuer entered into the personal guarantees required of him. If there was any misapprehension on the part of the pursuer as to what might or might not be included amongst the papers which required to be signed as a condition of the advancement of the loan funds, it was entirely the product of his own subjective thought processes which were not reasonably based on anything said or done on behalf of the bank.

Conclusion

[38] I shall sustain the defender's third plea-in-law, repel the pursuer's pleas, and grant decree of absolvitor.