Case No: HC-2017-001662

Neutral Citation Number: [2018] EWHC 1558 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS LIST

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 22/06/2018

Before:

MR JUSTICE HENRY CARR

- -

Between:

FSHC GROUP HOLDINGS LIMITED	**Claimant**
- and –	
BARCLAYS BANK PLC	**Defendant**

- -

MR DAVID WOLFSON QC, MS ROSALIND PHELPS QC, and MR MATTHEW ABRAHAM (instructed by **Allen & Overy LLP**) for the **Claimant**
MR MARK HOWARD QC, MR STEPHEN HOUSEMAN QC, and MR GREGORY DENTON-COX (instructed by **Latham & Watkins LLP**) for the **Defendant**

Hearing dates: 11 & 14-17 May 2018

- -

Approved Judgment

MR JUSTICE HENRY CARR:

Introduction

1. This is a claim for rectification of two Deeds ("the 2016 Accession Deeds") which were entered into on 18 November 2016 between the Claimant ("the Parent") and the Defendant ("Barclays"). The basis of the claim is common mistake. The parties entered into the 2016 Accession Deeds, in the case of the Parent as a security provider, and in the case of Barclays as a Security Agent and trustee for secured creditors, pursuant to finance documents carried out in 2012.

2. The Parent contended that the 2016 Accession Deeds do not accurately reflect the state of agreement between the parties. It submitted that, from contemporaneous documents, what the mistake was, how the mistake happened, and how it ought to be corrected, are all apparent.

3. The Parent summarised its case as follows: The terms of a private equity financing transaction completed in 2012 required the Parent to provide security over a shareholder loan which was part of the overall funding. Having belatedly spotted, in 2016, that the relevant security documentation had either never been provided or could not now be located, an attempt was made by the Parent to provide that security by way of the 2016 Accession Deeds. By a mistake, far more onerous obligations were undertaken by the Parent than were required ("the Additional Obligations"). There was no intention on either side for the Parent to provide the Additional Obligations; the intention was only to make good the missing security over the shareholder loan; as the Parent put it to "*fill the gap*". In light of the Additional Obligations themselves, and also in the context of the parties' commercial relationship, it made no sense for the Parent to undertake them. By this rectification claim, the Parent seeks to delete the Additional Obligations.

4. Barclays, as security agent, has no economic interest in the outcome of these proceedings. It is acting on the instructions, at least primarily, of H/2 Capital Partners ("H/2"), a privately-owned US based hedge fund which holds the majority of the relevant debt. If the claim fails, the Parent contended that H/2 would receive a valuable windfall, in the form of a guarantee claim against the Parent (which the Parent contended was potentially worth hundreds of millions) and indirect recourse to valuable assets owned by the Parent. This is of importance as, in the accounts of Elli Investments Limited as of 31 December 2016, there is a material uncertainty which may cast doubt on the ability of that company to continue as a going concern. Yet no consideration was given for the guarantee which was provided by the Parent. This, it submitted, would be a commercially absurd outcome, which was not intended by either of the parties to the 2016 Accession Deeds.

5. Barclays presented a different case theory. In summary, it submitted that the 2016 Deeds were short, simple and unambiguous documents drafted by the Parent's lawyers, reviewed and recommended for execution by the Parent by an internal lawyer for the Parent's ultimate parent company, and put forward to Barclays for execution once they had already been executed by the Parent. By

the 2016 Accession Deeds, the Parent acceded to and agreed to be bound by all the terms of existing security documents (the Intercompany Receivables Security Assignments; the "IRSAs") which had previously been executed between Barclays and other parties to the original transaction.

6. A failure to provide security would amount to a Default under the relevant financing documents, which would in turn (according to Barclays) become an Event of Default, with potentially very serious consequences for the Parent, if not remedied within 30 business days. In addition, a quarterly compliance certificate was required to be filed by 28 November 2016, and having the security in place would enable a clean certificate to be given.

7. Barclays argued that a deliberate choice was made by the Parent to seek to remedy the Default through the device of an accession to a pre-existing security agreement, because it was considered that Barclays would be more comfortable with, and execute more quickly, a document to whose terms Barclays had already agreed. Seeking to negotiate a new, bespoke, security agreement with Barclays would increase the prospects of the issue (and the potential Event of Default) coming to the attention of the creditors for whom Barclays was agent, during restructuring negotiations that were ongoing with those creditors at the time.

8. Barclays submitted that in taking advantage of this expediency, the Parent failed to investigate or think through its possible consequences. According to Barclays, the Parent now seeks, through rectification of the 2016 Accession Deeds, to create, retrospectively, a bespoke document of the sort that it chose, in its own interests, not to seek to negotiate during the time-sensitive period in question in November 2016.

9. It was common ground that the key question for the court is: what was the parties' intention, assessed objectively, when they executed the 2016 Accession Deeds, and whether the parties shared a common intention. However, the parties' submissions as to common intention were diametrically opposed.

10. The Parent submitted that an objective observer would readily conclude that the common intention was to do no more than "*fill the gap*" left by the failure to provide security in 2012. The effect of the 2016 Accession Deeds was to massively overreach the gap. They fundamentally altered the existing capital structure of the deal, by giving the creditors recourse to assets which were hitherto, and intentionally, outside the structure set up in 2012.

11. Barclays submitted that an objective observer would conclude that: (a) the Parent, in conditions of some urgency, took the view that by acceding to the IRSAs it would *at least* plug the gap left by the missing security (a matter on which Barclays was not required to form any view); (b) Barclays was prepared to accede to such security having done so previously; (c) the parties did not concern themselves with whether by providing security in this form and as a matter of expediency, the Parent did more than was strictly required; and (d) the Parent took on the obvious risk that it would do more than was strictly required to plug the gap. In those circumstances, it was impossible to conclude that the parties had any shared common intention when they entered into the 2016

Accession Deeds other than that the Parent would be bound by all of the terms of the IRSAs including those which they now seek to avoid.

12. It will be apparent from this introduction that this is a difficult case, with very significant commercial consequences. Rectification cases are fact sensitive, and resolution of this dispute requires an intense focus on the facts.

Legal Principles

13. Various aspects of the law in relation to common mistake were discussed by the parties, which I summarise below.

The juridical basis of the doctrine

14. A helpful summary of the juridical basis for rectification on the ground of common mistake is set out in Hodge, *Rectification* (2nd Ed, 2016) at [1-02]:

> "Where the terms of the document fail to reflect the true accord between the parties, the document may be rectified so as to make it correspond to their common agreement or understanding. The proper function of rectification is to correct a mistake in the way in which the written document has purported to record the parties' transaction: it is about putting the record straight."

15. This summary is supported by the decision of the Court of Appeal in *Allnutt v Wilding* [2007] EWCA Civ 412. Mummery LJ stated at [5] that "*rectification is but one aspect of a wider equitable jurisdiction to relieve parties from the consequences of their mistakes"*. He referred at [10] to the statement of Rimer J at first instance that the function of the equitable doctrine is to "*enable the parties to correct the way in which their transaction has been recorded."* Mummery LJ said at [11]: *"In other words it is about putting the record straight."*

16. The jurisdiction cannot be exercised to relieve a party of the consequences of a bad bargain. As Lord Walker in *Pitt v Holt* [2013] 2 AC 108 at [131]:

> "Rectification is a closely guarded remedy, strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences."

17. It follows that the court does not have a "*roving commission to do whatever it regards as fair in relation to a claim for rectification*": per Neuberger J in *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 404 at [41]. On the other hand, the court is exercising an equitable jurisdiction and in circumstances where an objective observer would conclude that the parties had a continuing common intention which their agreement does not reflect, it may be inequitable not to rectify the agreement.

The distinction between a mistake as to legal effect and consequences

18. As indicated in the passage cited above from *Pitt v Holt*, there is a distinction between a mistake as to the legal effect of a document and a mistake merely as to the consequences of a document. This may not be an easy distinction to draw. In *AMP (UK) Plc v Barker* [2001] Pens. L.R. 77 Lawrence Collins J observed at [70]:

> "…rectification may be available if the document contains the very wording that it was intended to contain, but it has in law or as a matter of true construction an effect or meaning different from that which was intended… It is sometimes said that equitable relief against mistake is not available if the mistake relates only to the consequences of the transaction or the advantages to be gained by entering into it… If anything, it is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them. The cases certainly establish that relief may be available if there is a mistake as to law or the legal consequences of an agreement or settlement, and in the present case Mr Simmonds QC ultimately accepted that, if there was a mistake, it was a mistake as to legal effect and not merely as to consequences."

19. The distinction between legal effect and consequences is therefore a mechanism to ensure that parties are not released from bargains which they regret, merely because they did not appreciate the consequences of what they had agreed. Obviously, a mistake as to the commercial consequences of a transaction does not, of itself, mean that rectification is precluded. Commercial consequences often follow from legal obligations, and the commercial consequences of a mistake are the underlying reasons for bringing a claim for rectification.

Interpretation and rectification

20. In *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 WLR 1333, Lord Neuberger observed that the court will, inevitably, not adopt precisely the same approach to a rectification claim as it adopts to an interpretation issue. At [198] he identified three differences:

    i) In a rectification claim, the antecedent negotiations are admissible: indeed, they are normally of central relevance;

    ii) Even in relation to written contracts, some subjective evidence of intention or understanding is not merely admissible, but is normally required in a rectification claim: the party seeking rectification must show that he indeed made the relevant mistake when he entered into the contract; and

iii) Rectification is an equitable remedy and therefore is subject to somewhat different rules from interpretation.

21. Since rectification is concerned with the correction of a mistake in an agreement, the fact that the provision sought to be rectified is clear as a matter of interpretation is not an answer to such a claim. In *Daventry* Lord Neuberger said at [211]:

> "… it is self-evidently insufficient for a defendant to defeat a rectification claim simply by establishing that the terms of the provision which he put forward clearly departed from the prior accord. Rectification is often sought, and granted, in relation to contractual terms which are perfectly clear. Decisions such as *George Cohen Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Lloyd's Rep 97 (see at 106, column 1), cited with approval in *Chartbrook* [2009] 1 AC 1101, para 62, make that proposition good. Many, possibly most, rectification claims involve the claimant seeking to rectify a provision in an agreement whose terms are clear …"

22. Barclays pointed out that when interpreting security arrangements, which secure the interests of several different creditors who may hold different instruments, issued at different times and in different circumstances, the wording of the instrument is paramount, and this is not the type of case where the matrix of fact ought to be relevant; *BNY Mellon Corporate Trustee Services v LBG Capital No 1 plc* [2016] UKSC 29; [2016] Bus LR 725; per Lord Neuberger at [31]. I bear this point in mind when considering whether the parent has provided the necessary proof required for rectification. However, I am not concerned with interpretation of security arrangements – their interpretation in the present case is clear. Rather, I am concerned with a claim for rectification of those instruments for common mistake and in my view, the facts are crucial.

Objective intention

23. In *Chartbrook v Persimmon Homes Ltd* [2009] 1 AC 1101 the House of Lords considered that whether there was a common continuing intention must be objectively determined. Lord Hoffman said at [60] that:

> "Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be."

24. Lord Walker and Baroness Hale agreed with Lord Hoffman's approach. Baroness Hale said at [100]:

> ".. If the test of the parties' continuing common intentions is an objective one, then the court is looking to see whether there was such a prior consensus and if so what it was. Negotiations where there was no such consensus are indeed "unhelpful". But negotiations where consensus was reached are very helpful indeed. If the language in the eventual contract does not reflect that consensus, then unless there has been a later variation of it, the formal contract should be rectified to reflect it. It makes little sense if the test for construing their prior consensus is different from the objective test for construing their eventual contract. This situation is, and should be, quite different from the situation where one party is mistaken as to its meaning and the other party knows this - the latter should not be permitted to take advantage of the former."

25. The consideration of rectification in *Chartbrook* was technically *obiter*. In *Daventry* Toulson LJ and Lord Neuberger expressed some reservations about this approach; *per* Toulson LJ at [173] – [175] and Lord Neuberger at [195]. However, Etherton LJ set out the policy considerations justifying the intervention of equity at [85] – [88] and concluded at [89] that such analysis "*shows why it is good policy to favour objective accord or objective change of accord over subjective belief and intention in cases of rectification for mutual mistake*.":

26. The Court of Appeal in *Daventry* accepted that they should follow the objective approach set out by the House of Lords in *Chartbrook*, and it is therefore binding.

Subjective understanding

27. Lord Hoffman explained in *Chartbrook* at [64] - [65] that evidence as to uncommunicated subjective intention was admissible and might have some evidential value where the prior consensus was based wholly or in part on oral exchanges or conduct. He recognised that the evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course, one party may have misunderstood the position, but it may be the case that the parties' subjective intentions will coincide with the conclusions of the objective observer.

28. Lord Hoffman referred to the judgment of Laddie J in *Cambridge Antibody Technology Ltd v Abbott Biotechnology Ltd* [2005] FSR 590, in which he rejected a submission that evidence of the subjective state of mind of one of the parties contained in statements which had not been communicated to the other party ("crossed the line") was inadmissible. Lord Hoffman said:

> "64 …. In my opinion, Laddie J was quite right not to exclude such evidence, but that is not inconsistent with an objective approach to what the terms of the prior consensus were. Unless itself a binding contract, the prior consensus is, by definition, not contained in a document which the parties have agreed is to be the sole memorial of their agreement. It may be oral or in writing and, even if the latter, subject to later variation. In such a case, if I may quote what I said in *Carmichael v National Power plc* [1999] 1 WLR 2042 , 2050–2051:
>
> > "The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done."
>
> 65 In a case in which the prior consensus was based wholly or in part on oral exchanges or conduct, such evidence may be significant. A party may have had a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. Evidence of subsequent conduct may also have some evidential value. On the other hand, where the prior consensus is expressed entirely in writing, (as in *George Cohen Sons & Co Ltd v Docks and Inland Waterways Executive* 84 Ll L Rep 97) such evidence is likely to carry very little weight. But I do not think that it is inadmissible."

29. Etherton LJ considered the relevance of the subjective understanding of the parties at [81] - [82] of *Daventry*. He noted that it is an essential part of the cause of action to establish that a mistake was in fact made:

> "81 First, as Lord Hoffmann said (at [65]), evidence of a party's subjective belief or understanding is not inadmissible. It may have some evidential value as to what was actually said and agreed, although, where the prior consensus is expressed entirely in writing, it is likely to carry very little weight.
>
> 82 Secondly, and which is really an aspect of the same point, a party can always give evidence that the wording of the document was the result of a mistake. That is an essential part of the cause of action. Whether or not the mistake is such as to give rise to a right to rectification will, however, depend on the objective assessment of whether there was a common continuing intention to which the document failed to give effect."

Requirements for rectification for common mistake

30. The following statement of principle by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 was cited with approval by Lord Hoffmann in *Chartbrook* at [48]:

> "The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

31. There was some debate between the parties as to whether, "*outward expression of accord*" is a separate requirement to that of showing of a common and continuing intention, or whether they are two sides of the same coin. In my view, this question was answered by the Court of Appeal in *Daventry*. Etherton LJ (with whom Lord Neuberger agreed in this respect at [227]) said at [80]:

> "Lord Hoffmann's clarification was that the required 'common continuing intention' is not a mere subjective belief but rather what an objective observer would have thought the intention to be: see *Chartbrook* at [60]. In other words, the requirements of 'an outward expression of accord' and 'common continuing intention' are not separate conditions, but two sides of the same coin, since an uncommunicated inward intention is irrelevant."

32. Etherton LJ held that for rectification for common mistake requires that:

i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

ii) such common continuing intention existed at the time of execution of the instrument sought to be rectified;

iii) such common continuing intention to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be; and

iv) by mistake, the instrument did not reflect that common intention.

33. In *DS-Rendite Fonds Nr 106 VLCC Titan Glory GmbH v Titan Maritime SA* [2013] EWHC 3492 (Comm) Hamblen J stated at [47] that:

> "In relation to the need for an "outward expression of accord", it has been stated that this is "more an evidential factor than a strict legal requirement" – per Mummery LJ

> in *Munt v Beasley* [2006] All ER (D) 29 at [36]. As stated in *Chitty on Contracts* (31st ed.) at 5-117: "the accord may include understandings that the parties thought so obvious as to go without saying, or that were reached without being spelled out in so many words".”

34. Mr Howard QC, on behalf of Barclays, submitted that the approach in *Chitty*, adopted by Hamblen J, was incorrect, and insufficiently supported by authority, although he acknowledged that there might be some cases in which communication between the parties amounted to sufficient outward evidence of a particular intention in relation to a particular term in the bargain, even without it having been spelt out in express words.

35. The difference between the parties on this issue was narrow. In my judgment, the statement in *Chitty* (now at [3-064] 32nd ed.) is correct. As Lord Hoffman made clear in *Chartbrook* at [65] the court is primarily concerned with the objective assessment of statements which have been communicated to the other party i.e. “*crossed the line*”. It would be inconsistent with the objective of rectification for common mistake if the court were precluded from considering, as a part of that assessment, understandings that the parties thought so obvious as to go without saying, or that were reached without being spelled out in so many words.

Subsequent conduct

36. It is permissible to have regard to events after the execution of the relevant document when considering whether there was the required outward intention of accord. This proposition was set out by HHJ Hodge in *Saga Group Limited and another v Paul* [2016] EWHC 2344 (Ch); [2017] 4 WLR 12 at [43]:

> “A further point to note is that it is legitimate to have regard to what happens after a deed is executed in order to ascertain the intention at the time it was executed. Evidence that administrative practice did not change after execution of the relevant instrument sought to be rectified is capable of amounting to evidence that there was no intention to make a change. Authority for that is to be found in observations of Etherton J in the case of *Gallaher v. Gallaher Pensions Limited* [2005] EWHC 42 (Ch), reported at [2005] Pensions Law Reports 103, at paragraph 141 and in *Merchant Navy Officers Pension Fund Trustees Limited v. Watkins* (previously cited) at paragraph 20 by Mr. John Martin QC (sitting as a Deputy Judge of the Chancery Division).”

37. However, as Males J noted in *Equity Syndicate Management Ltd v Glaxosmithkline plc* [2015] EWHC 2163 (Comm) [26]:

> “To be clear, this is not to say that subsequent conduct may create a common intention where none existed at the time when the contract was concluded, but that evidence

> of what the parties said and did subsequently may cast light on what they intended at the time."

Convincing proof

38. In *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at p521F Brightman LJ said:

> "But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself"

39. This does not mean that the standard of proof is higher than the civil standard. Rather, it reflects the fact that sufficiently strong proof is required to persuade the court to depart from the express terms of a written instrument, which *prima facie* evidences their common intention: as Leggatt J said in *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm) at §85:

> "The explanation for the statements that "convincing proof" is needed where rectification is claimed lies in the very nature of the allegation that the written instrument does not record the parties' common intention. It is not, in truth, the standard of proof which is high, thereby differing from the normal civil standard, but that sufficiently strong proof is needed to counteract the evidence of the parties' intention displayed by the instrument … The fact that the parties to a contract have approved particular language as the appropriate expression of their bargain is thus often itself cogent evidence that the document correctly records their common intention, so that convincing proof will be needed to displace that inference."

Form of the words in which common intention is expressed

40. As an equitable jurisdiction, rectification for common mistake is concerned with substance over form. Provided that there is an objectively expressed common intention, there is no requirement to prove a precise form of words in which that intention was expressed. In *Crane v Hegeman-Harris Co Inc* [1971] 1 WLR 1390 at 1399E Simonds J observed that:

> "It is, of course, true for the purposes of rectification you must find that which was specifically intended, but the exact form of words in which the common intention is to be framed appears to me to be immaterial as long as in substance and in detail their intention is to be ascertained."

41. The same principle was applied by Males J in the *Equity Syndicate* case at [27], where he stated:

> "It is in principle possible to have a prior consensus as a result of a discussion in general terms as the extent of the insurance cover to be provided, rather than by specific discussion of the terms of particular clauses …"

42. Accordingly, if the parties shared a common intention, they do not need to have formulated the words by which the common intention is to be given effect in a subsequent rectification claim. In *Grand Metropolitan plc v The William Hill Group Ltd* [1997] 1 BCLC 390 at 395B-G, Arden J stated that:

> ".. it was not necessary that the parties should at the material time have formulated the words which it is sought to insert by rectification. It is sufficient that the parties had the necessary common continuing intention as to the substance of that which would be achieved by the rectification sought."

43. Rectification does not fail merely because there is more than one way to give effect to the common intention: in *Notiondial v Beazer Homes Ltd* [2009] EWHC 3333 HHJ Waksman QC stated at [39] that:

> "equity is not to be prevented from giving relief merely because the parties had not agreed on the mechanics by which effect should be given to the clear and simple common intention".

Absence of discussion as evidence of intention

44. It was contended by Mr Wolfson QC on behalf of the Parent that an objective common intention can be discerned even where that matter is not discussed between the parties; in certain circumstances, the very absence of any discussion can itself be evidence that the parties did not intend it. The following authorities were relied upon:

    i) *Saga Group Ltd v Paul* [2017] 4 WLR 12 at [42] and [54] where the HHJ Hodge QC accepted counsel's submission that:

    > "[w]hilst it is necessary to show intention objectively, in a case such as the present, where the error lay in making an unintended change, it is not necessary to show that it was ever outwardly stated by the parties that they did not intend that particular change… the absence of objective evidence of a positive intention not to make the particular change is not fatal to a claim for rectification. That is because an intention not to make the change can be sufficiently proved by the absence of any evidence that the change was intended."

    ii) *Industrial Acoustics Company Limited v Crowhurst* [2012] EWHC 1614 at [45] where Vos J said that:

> "…it seems to me that there will be cases, particularly in a pensions context, where it will be permissible to allow rectification when one can say by implication perfectly clearly that the parties did not intend by the Deed they entered into, to effect a particular change, even though they had not stated outwardly to each other (or indeed at all) that they did not intend to effect that change, simply because the change was not in any form discussed."

iii) *Konica Minolta Business Solutions UK Ltd v Applegate* [2013] EWHC 2536 (Ch) where Edward Bartley Jones, QC (sitting as a Deputy High Court Judge), following Vos J in *Industrial Acoustics*, noted at [31] that:

> "…care needs to be taken when applying these basic principles [regarding common mistake rectification] to a set of circumstances where a written instrument was intended to produce Result A but has, in fact, produced Result X. The parties may never have addressed Result X because it may have come as a total shock to them. But, on objective analysis, it can clearly be seen that there was no common intention to achieve Result X and that any outward expressions of accord between the parties are wholly inimicable to Result X. If so, as I understand the position, there is no bar whatsoever to rectification occurring. None of this involves any enquiry into uncommunicated subjective intentions of the parties."

45. Mr Wolfson submitted that the more unexpected Result 'X' is, the more likely the court will be to find a common accord that it was not intended, even where it is not expressly discussed.

46. Mr Howard sought to distinguish those cases on the basis that they were concerned with amendments to pension schemes which raise particular issues, as they are neither bilateral contracts nor voluntary settlements. He submitted that in determining whether a change was intended to be made to a pension scheme, the circumstances may justify starting with an assumption that the parties intended that the existing version of the scheme would be preserved, save insofar as they had made a positive decision to change some provision of it. In those circumstances, if it can be seen from the evidence that the change in question was never discussed at all, the absence of discussion may itself support the conclusion that the parties did not intend to make that change: on the footing that the Court can assume that if they had intended it, they would surely have discussed it.

47. I accept that amendments to pension schemes raise the particular issues identified by Mr Howard. I do not accept that the principle is confined to pension cases. In my judgment, the authorities illustrate the proposition that, where an important change is made to an existing arrangement between the parties, the absence of any discussion of that change may itself be evidence that the parties did not intend it. Whether that is true in any case depends on all the circumstances.

Attribution

48. Where a document is negotiated by one person, who refers it to another for approval, it is necessary for the purpose of rectification to identify the person or persons who made the decision to enter into the transaction. In *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] 2 All ER (Comm) 748, Patten LJ stated at [41] that:

> "… the decision-maker ought in principle to be the person who has the authority to bind the company to the contract. The expressed intentions of a mere negotiator will therefore be immaterial unless he is also the decision-maker or shares in a relevant way those intentions with the person who is the decision-maker on behalf of the company. But, whilst those principles are easily stated, their application to the facts of any given case may be less straightforward."

49. In the *Hawksford* case, the Trustees, who had authority to execute the contract, gave no thought to the relevant provisions but instead authorised another person, (a Mr Begg) to negotiate terms; in practice, the Trustees would follow Mr Begg's recommendations if he was happy for them to enter into the contract. At [43] Patten LJ concluded that:

> "Even if this does not make Mr Begg the decision-maker, what it does, I think, do is to demonstrate, when looked at objectively, that the trustee entered into the Amended SPA with the positive intention that it should give effect to the terms which Mr Begg had negotiated and agreed. …It is therefore a case where, on the facts, the mistaken assumption on the part of Mr Begg was shared by Hawksford…."

50. In *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch) at [198] Mann J identified the following principles, derived from *Hawksford*:

> "(a) One is looking for the person who in reality is the decision maker in the transaction in order to find intentions in relation to rectification.
>
> (b) In the case of the company that person will usually be the person with authority to bind the company.
>
> (c) Someone who is not a person with power to bind can nonetheless be treated as the decision maker if that is the reality on the facts.
>
> (d) The intention of a "mere negotiator" may be relevant if it is shared with the actual decision maker; but, as it seems to me, that is because the intention has become that of the actual decision maker.

> (e) Where a person who would normally be expected to be the decision maker (such as the board of a company) leaves it to a negotiator to negotiate a deal and produce a contract by instructing solicitors, on the understanding that the decision maker would do a deal on those terms, then the negotiator's intention is the relevant one, either because that person is the decision maker, or, if that description is not apt, because the technical decision maker has simply adopted the intentions of the negotiator (*Hawksford* at paragraph 43; and see *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC) at para 130)."

51. In the light of these authorities, the Parent submitted, and I accept, that where a corporate entity uses a third party to negotiate terms, the intention of the third party may be the relevant intention for rectification purposes, either because the third party's intention has been shared with the corporate entity, or because the corporate entity has adopted the third party's intention.

The Factual Background

The 2012 Acquisition

52. Mr Wolfson set out certain background to the 2012 Acquisition, which I regard as uncontroversial. The Parent is an indirect subsidiary of Terra Firma Capital Partners III, LP, an investment fund. The Parent is the holding company of the Four Seasons Health Care Group which is the largest independent provider of elderly care services in the UK ("the FSHC Group"). Terra Firma acquired an interest in the FSHC Group on 12 July 2012 through its indirect subsidiary Elli Acquisitions Limited ("the 2012 Acquisition").

53. As part of the 2012 Acquisition, various finance documents were put together, including:

    i) A revolving credit facility dated 29 April 2012 that was converted into a term loan ("the Term Loan Facility");

    ii) A senior secured note indenture dated 28 June 2012 ("the SSN Indenture" and "the Senior Secured Notes");

    iii) A senior note indenture dated 28 June 2012 ("the SN Indenture" and "the Senior Notes"); and

    iv) An Intercreditor Agreement dated 27 June 2012 ("the ICA"), which governed the relationships and priorities between lenders, the noteholders and other relevant lenders and borrowers ((i) and (iv) together "the Finance Documents").

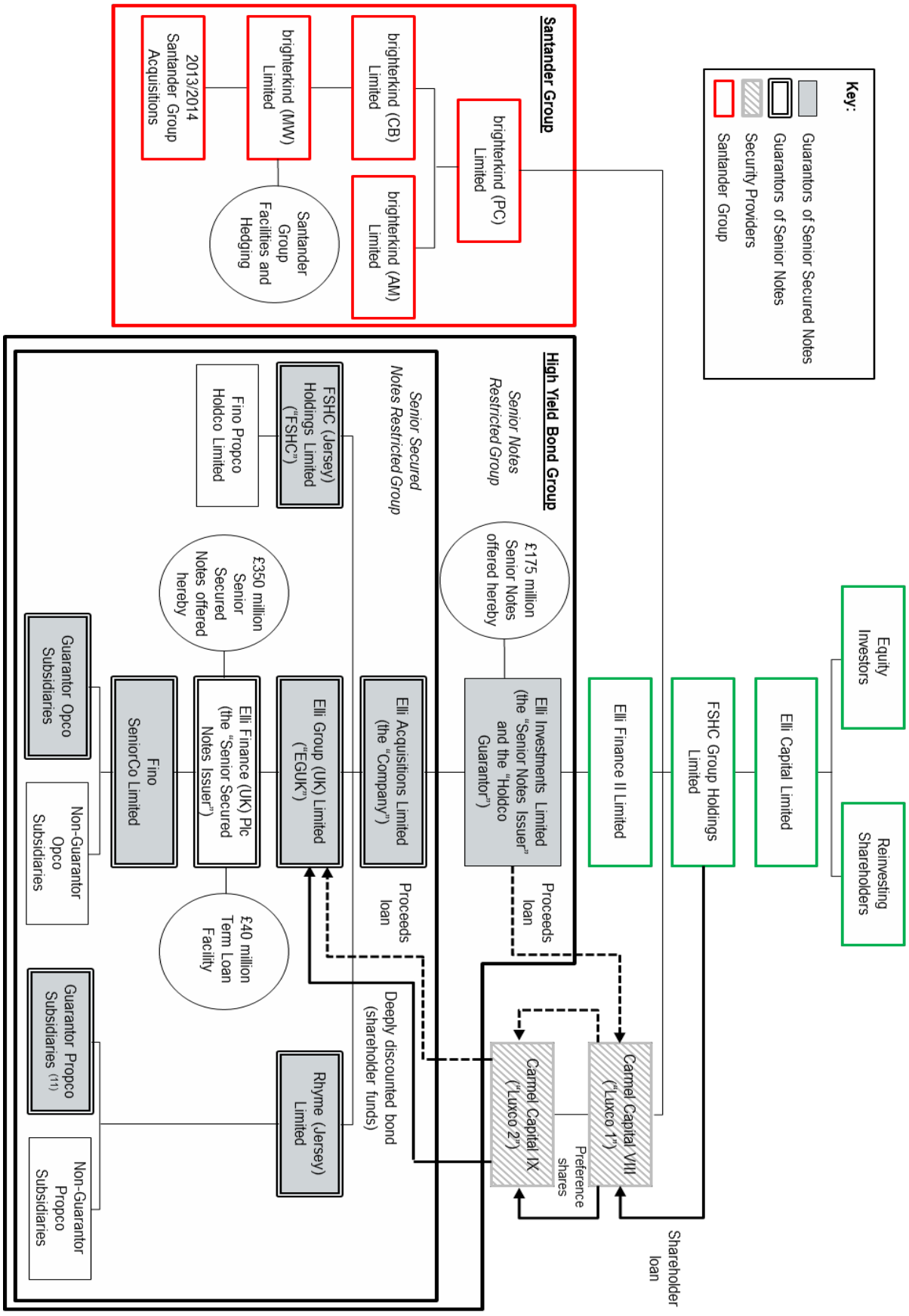
54. Further, an Offering Memorandum dated 14 June 2012 ("the Offering Memorandum") included information, as at the date of the document, on the

terms of the Senior Secured Notes and the Senior Notes and the guarantees of the Notes, including redemption and repurchase prices, security, covenants and transfer restrictions.

The corporate structure of the FSHC Group

55. The current corporate structure for the FSHC Group is shown in a chart used by the parties during the trial, reproduced overleaf.

Corporate structure for the FSHC Group



56. The group of companies holding both the relevant assets and the repayment obligations ("the High Yield Bond Group") comprises Elli Investments Limited and its subsidiaries. The Parent sits above the High Yield Bond Group, and the High Yield Bond Group does not extend to other assets owned by the Parent, including the "Santander Group" owned by brighterkind (PC) Limited. Although the Parent is not described in the chart as a "Security Provider" (that being a defined term used in the Offering Memorandum, on which the chart was based), following its accession to the ICA in July 2012, the Parent was obliged to provide security as described below.

Key terms of the Finance Documents

57. The Finance Documents are complex and took up several volumes of the trial bundles. At my request, the parties agreed, or in the case of the Offering Memorandum attempted to agree, documents setting out key terms of the Finance Documents. Those documents were lengthy and I consider it necessary to set out some but not all of the terms identified by the parties.

(1) The Term Loan Facility

58. Pursuant to the terms of the Term Loan Facility, certain companies became subject to a number of affirmative, negative and financial covenants and undertakings contained in the Term Loan Facility Agreement:

    i) the affirmative covenants require, among other things, the provision by Elli Acquisitions Limited ("Elli Acquisitions") of certain financial information:

        a) quarterly reports must be provided within 60 days of the relevant quarter end, and consolidated annual audited financial statements must be provided within 120 days of the relevant year end;

        b) as the quarterly and annual financial information is used to test compliance with the Term Loan Facility, all quarterly and annual financial information must be delivered to Barclays, together with a compliance certificate substantially in the form scheduled to the Term Loan Facility ("the Compliance Certificate"); and

        c) each Compliance Certificate must be signed by two directors of Elli Acquisitions and provide confirmation that the financial covenants have been complied with and that no Default (as defined in the Term Loan Facility) is continuing (or, if this statement cannot be made, identifying the Default that is continuing and the steps, if any, being taken to remedy it); and

    ii) the negative undertakings include, among other things, restrictions with respect to the activities of certain group holding companies:

a) at completion of the 2012 Acquisition, the holding company restrictions applied to six companies (defined in the Finance Documents as the "*Holdcos*"): Elli Investments Limited ("Elli Investments"), Elli Acquisitions, Elli Group (UK) Limited ("EGUK"), Elli Finance UK Plc, Carmel Capital VIII S.à.r.l ("Luxco 1") and Carmel Capital IX S.à.r.l ("Luxco 2");

b) the Parent (defined in the Term Loan Facility as "Elli Holdings Ltd") is not described, listed or defined as a Holdco; and

c) the holding company restrictions specify that each of the six Holdcos will not carry on any business, own any assets, incur any liabilities or grant any security other than those permitted by the holding company restriction clause.

59. A Default is defined in the Term Loan Facility as: (i) an Event of Default or (ii) any event or circumstance specified in clause 25 which would with the expiry of a grace period or the giving of notice be an Event of Default. A Default will cease to be continuing if it has been remedied or waived.

60. The events or circumstances which give rise to an Event of Default under the Term Loan Facility are set out at clause 25. Of importance are:

i) Clause 25.2(b), which provides that it is an Event of Default if a Compliance Certificate is not delivered in accordance with the requirements of clause 22.

ii) Clause 25.3, which provides that it is an Event of Default if:
"Any Holdco, Obligor or Third Party Chargor does not comply with any provision of the Finance Documents to which it is a party… [unless] the failure to comply is capable of remedy and is remedied within 30 days… of the earlier of (i) the Agent giving notice to the Company, the relevant Obligor or the Third Party Chargor and (ii) any Obligor becoming aware of the failure to comply."

iii) Clause 25.10, which provides that it is an Event of Default if:
"any party to the Intercreditor Agreement (other than a Finance Party) fails to comply with the provisions of, or does not perform its obligations under, the Intercreditor Agreement… and, if the non-compliance or circumstances giving rise to the misrepresentation are capable of remedy, it is not remedied within 30 Business Days of the earlier of the Agent giving notice to that party or that party becoming aware of the non-compliance or misrepresentation."

iv) Clause 25.17, which provides that:
"On and at any time after the occurrence of an Event of Default which is continuing the Agent may, and shall if

> so directed by the Majority Lenders, by notice to the Company:
> …
> (b) declare that all or part of the Utilisations, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, at which time they shall become immediately due and payable;
> …
> (d) exercise or direct the Security Agent to exercise any or all of its rights, remedies, powers or discretions under the Finance Documents."

61. A "*Third Party Chargor*" is defined as:

> "(a) Luxco 1; (b) Luxco 2; and (c) any other entity that has provided Transaction Security over any or all of its assets in respect of the obligations of any of the Obligors under any of the Finance Documents but is not a Guarantor."

62. Following the Parent's entry into the 2016 Accession Deeds, the Parent was also within the definition of Third Party Chargor.

63. Luxco 1, Luxco 2 and the Parent are not listed as Guarantors of the Term Loan Facility.

(2) The Shareholder Loan

64. The Shareholder Loan contains an acknowledgement by the Parent (as lender) and Luxco 1 (as borrower) that the Shareholder Loan and all amounts payable thereunder constitute "*Shareholder Liabilities*" as defined in the ICA.

(3) The Shareholder Creditor Accession Undertaking

65. The Shareholder Creditor Accession Undertaking provided that in consideration of the Parent being accepted as a "*Shareholder Creditor*" for the purposes of the ICA, the Parent:

i) confirmed that it intended to be a party to the ICA as a Shareholder Creditor as from the date of the Undertaking;

ii) undertook to perform all the obligations expressed in the ICA to be assumed by a Shareholder Creditor; and

iii) agreed that it would be bound by all the provisions of the ICA as if it had been an original party to the ICA.

(4) The ICA

66. The following definitions are relevant:

i) "*Shareholder Liabilities*" is defined as including: "*all Liabilities of any Debtor to any Shareholder Creditor (including… Holdco Liabilities)*";

ii) Holdco Liabilities includes the Liabilities owed to (i) Elli Investments by Luxco 1, (ii) Luxco 1 by Luxco 2, and (iii) Luxco 2 by EG(UK);

iii) "*Shareholder Creditors*" is defined as including:
"(a) any Original Shareholder Creditor [Elli Investments, Luxco 1 and Luxco 2] and
(b) any direct or indirect shareholder (or Affiliate who is not a member of the Group) of the Company [Elli Acquisitions] (and their respective transferees and successors) which has made a loan or financial accommodation to the Company [Elli Acquisitions] or another member of the Group [which definition for the purpose of the ICA includes Luxco 1]… and which accedes to this agreement by executing a Creditor/Creditor Representative Accession Undertaking in accordance with this Agreement..."

67. The ICA contains an obligation in Clause 10.6(b) (the "Clause 10.6(b) Obligation") on Shareholder Creditors (namely, Elli Investments, the Luxco entities, and the Parent following its accession to the ICA):

> "The Shareholder Creditors shall ensure that the Shareholder Liabilities are pledged at all times as security for the Secured Liabilities [the Term Loan Facility and the SSN Indenture], the Additional High Yield Liabilities and the High Yield Bridge/Notes Liabilities [the SN Indenture]."

68. As a result of the above terms of the ICA, following its execution of the Shareholder Creditor Accession Undertaking and its entry into the Shareholder Loan, the Parent (as a Shareholder Creditor) was obliged under the ICA to ensure that the Shareholder Loan was pledged at all times as security for the Secured Liabilities, the Additional High Yield Liabilities and the High Yield Bridge / Notes Liabilities (as defined in the ICA).

69. Barclays' role as the Security Agent is set out in clause 18 of the ICA, which provides *inter alia* that:

i) all Secured Parties irrevocably appointed Barclays to act as their agent and trustee under the ICA and with respect to the Security Documents (as defined in the ICA), and irrevocably authorised Barclays to execute each Security Document expressed to be executed by Barclays on their behalf;

ii) Barclays declared that it would hold any security expressed to be granted in favour of Barclays and all proceeds of that transaction security on trust for the Secured Parties on the terms set out in the ICA;

iii) Barclays would have only those duties, obligations and responsibilities which are expressly specified in the ICA and/or the Security Documents to which Barclays was a party (and no other duties were to be implied). Barclays' duties under the ICA and the Security Documents (as defined in the ICA) are solely mechanical and administrative in nature; and

iv) except for where a contrary indication appears in the ICA or where the ICA requires the Security Agent to act in a specified manner to take a specified step, Barclays must act in accordance with any instructions given to it by the Instructing Group as to whether, and in what manner, it should exercise or refrain from exercising any rights, powers, authorities and discretions.

(5) The IRSAs

70. The IRSAs were entered into by: (1) Elli Investments, Luxco 1 and Luxco 2 as Assignors; (2) Luxco 1, Luxco 2 and EGUK Limited as Debtors; and (3) Barclays as Security Agent. They provide:

i) by the first ranking IRSA, first ranking security for the Term Loan Facility and the SSN Indenture debt; and

ii) by the second ranking IRSA, second ranking security over the same assets for the SN Indenture debt.

71. The IRSAs reflect each other (other than their ranking and, as a result, the definition of the "*Secured Obligations*" and "*Secured Parties*" secured by each) and contain the following relevant provisions:

i) "*Assigned Agreement*" is defined as:
"each document, agreement and/or instrument evidencing Holdco Liabilities and/or Shareholder Liabilities including, but not limited to, the documents, agreements and/or instruments listed in Schedule 1 to this Deed."

ii) Clause 2 (*Covenant to Pay*):
"each Assignor as primary obligor covenants with and undertakes to the Security Agent (for the benefit of itself and the other Secured Parties) that it will on demand pay the Secured Obligations when they fall due for payment"

iii) Clause 3 (*Security Assignment*):
"3.1 (*Security Assignment*)
As further continuing security for the payment of the Secured Obligations, each Assignor assigns by way of security absolutely with full title guarantee to the Security Agent all its rights, title and interest in, under and to the Assigned Agreements…

3.2 (*No Assumption of Obligations*)

The Security Agent will not incur any obligation under the terms of the Assigned Agreements as a consequence of this Deed and each Assignor shall at all times remain liable to perform all of its obligations in respect of the Assigned Agreements."

iv) Clause 6 (*Negative Pledge*):

"6.1 (*Negative Pledge*)
No Assignor may:

(a) create or agree to create or permit to subsist any Security over all or any part of the Charged Property other than the [First Ranking Security Assignment / the Second Ranking Security Assignment];

(b) sell, assign, novate, transfer or otherwise dispose of all or any part of the Charged Property or the right to receive or to be paid the proceeds arising on the disposal of the same, or agree or attempt to do so other than the [First Ranking Security Assignment / Second Ranking Security Assignment]; or

(c) dispose of the equity of redemption in respect of all or any part of the Charged Property,

in each case, to the extent it would result in a breach of any applicable term of a Secured Debt Document save with the prior written consent of the Security Agent.

6.2 (*Holding Company Restrictions*)

No Assignor may carry on any business, own any assets, incur any liabilities or grant any Security other than:

(a) ownership of shares in its Subsidiaries, intra-Group debit balances, intra-Group credit balances and other credit balances in bank accounts, cash and Cash Equivalent Investments but only if those shares, credit balances, cash and Cash Equivalent Investments are subject to the Transaction Security;

(b) the provision of administrative services (excluding legal services, but including the on-lending of monies to Restricted Subsidiaries in the manner described in paragraph (a) above and management services to its Subsidiaries of a type customarily provided by a holding company to its Subsidiaries and the ownership of assets necessary to provide such services;

> (c) the entry into and performance of its obligations (and incurrence of liabilities) under the Transaction Documents to which it is a party;
>
> (d) the granting of Transaction Security to the Secured Parties in accordance with the terms of the Secured Debt Documents;
>
> (e) professional fees and administration costs in the ordinary course of business as a holding company;
>
> (f) as contemplated by the Structure Memorandum;
>
> (g) directly related or reasonably incidental to the establishment and/or maintenance of its or its Subsidiaries' corporate existence; or
>
> (h) any other activities which are not specifically listed above (i) which are ancillary to or related to those listed above and which are customary for a holding company to undertake and (ii) which are de minimis in nature."
>
> (Clause 6.2 comprises "the Holding Company Restrictions")

v) Clause 14.3 (*Primary liability of Assignor*) which provides that:
> "Each Assignor shall be deemed to be a principal debtor and the sole, original and independent obligor for the Secured Obligations and the Charged Property shall be deemed to be a principal security for the Secured Obligations"
>
> (Clauses 2 and 14.3 together have been described in these proceedings as "the Guarantee Obligation")

vi) Clause 14.4 (*Security Agent*) which provides that:
> "The provisions set out in clause 18 (*The Security Agent*) of the [ICA] shall govern the rights, duties and obligations of the Security Agent under this Deed."

(6) The Offering Memorandum

72. The Luxco entities are identified in the Offering Memorandum as "*Security Providers*" and not as "*Guarantors of Senior Secured Notes*" or "*Guarantors of Senior Notes*". The Parent is not identified in the Offering Memorandum as a "*Security Provider*" or a "*Guarantor of Senior Secured Notes*" or "*Guarantor of Senior Notes*".

73. The descriptions of the terms of the Senior Secured Notes and Senior Notes describe a "*Limitation on Holdco Activities*" (which are similar, but not identical, to the Holding Company Restrictions in the IRSAs). The "*Limitation on Holdco Activities*" applies only to "*Holdcos*", which are defined in the Notes (and the Term Loan Facility) to include Elli Investments, Elli Acquisitions,

EGUK, Elli Finance (UK) Plc and the Luxco entities. The Parent is not defined as a "*Holdco*".

The Santander Group Acquisition

74. Between 2013 and 2014 the Parent acquired via its subsidiary brighterkind (PC) Limited two further sets of care homes, the Avery Homes and the Majesticare Homes. These transactions were separate from the 2012 Acquisition.

75. The Avery and Majesticare transactions used a newly-incorporated group of companies which had at its top brighterkind (PC) Limited, a direct subsidiary of the Parent. As indicated in the corporate structure chart (supra) brighterkind (PC) Limited and its subsidiaries form what is known as the Santander Group (because the debt financing for the purchase was provided by Santander UK Plc). The Santander Group is a separate investment by Terra Firma, acquired at a different time, funded by a separate equity drawdown and separate accounting treatment. It is not linked to Terra Firma's investment in the High Yield Bond Group companies as part of the 2012 Acquisition.

The Parent's omission to provide security

76. The Parent omitted to provide security over the Shareholder Loan in 2012. No-one noticed that omission at the time. I shall set out later in this judgment how that omission was discovered.

77. The Finance Documents in relation to the 2012 Acquisition did not subject the Parent to the Additional Obligations, namely the Holding Company Restrictions or the Guarantee Obligation contained in clauses 2, 6.2 and 14.3 of the IRSAs. The Additional Obligations have now been undertaken by the Parent pursuant to the 2016 Accession Deeds. In particular, the Parent was not required to pay the debt of the High Yield Bond Group owed to the Secured Parties. Nor was it subject to any restrictions on how it may carry on its business, own assets or incur liabilities.

Key terms of the 2016 Accession Deeds

78. The 2016 Accession Deeds were entered into by the Parent and Barclays (as Security Agent). There were two 2016 Accession Deeds: one providing first ranking security over the Shareholder Loan for the Term Loan Facility and the SSN Indenture debt by way of accession to the first ranking IRSA, and the second providing second ranking security over the same asset (the Shareholder Loan) for the SN Indenture debt by way of accession to the second ranking IRSA.

79. The 2016 Accession Deeds reflect one another (other than their ranking) and so for present purposes I refer to following provisions in the first ranking 2016 Accession Deed:

    i) Recital D provides that:
    "Certain Group companies (the Assignors) entered into a security assignment of intercompany receivables dated

12 July 2012 (the Security Assignment) with the Security Agent as security for the Secured Obligations."

ii) Recital E provides that:
"In accordance with the terms of the Intercreditor Agreement, the Additional Assignor is required to pledge to the Security Agent its rights and interests under Shareholder Loan as security for the Secured Obligations. The Additional Assignor has agreed to enter into this Deed in order for the Shareholder Loan to become an Assigned Agreement and to become an Assignor under the Security Assignment."

iii) Clause 2 (*Accession*) provides that:
"With effect from the date of this Deed:

(a) The Shareholder Loan will become an Assigned Agreement; and

(b) The Additional Assignor will:

(i) become a party to the Security Assignment as an Assignor; and

(ii) be bound by all the terms of the Security Assignment which are expressed to be binding on an Assignor."

iv) Clause 3 (*Security*) provides that:
"(a) As further continuing security for the payment of the Secured Obligations, the Additional Assignor assigns absolutely with full title guarantee to the Security Agent all its rights, title and interest in, under and to the Shareholder Loan …

(b) The Additional Assignor and the Security Agent agree that the Security Agent shall hold:

(i) the Transaction Security created or expressed to be created by this Deed;

(ii) all proceeds of that Transaction Security; and

(iii) all obligations expressed to be undertaken by the Additional Assignor to pay any amounts in respect of the Secured Obligations to the Security Agent as trustee for the Secured Parties,

on trust for the Secured Parties on the terms and conditions contained in the Security Assignment and the Intercreditor Agreement.

(c) The Security Agent will not incur any obligation under the terms of the Shareholder Loan as a consequence of this Deed and the Additional Assignor shall at all times remain liable to perform all of its obligations in respect of the Shareholder Loan."

v) Clause 5 (*Protection of Security Agent*) provides that:
"The Additional Assignor will grant to the Security Agent all of the protections and indemnities granted to the Security Agent by the Assignors under the terms of the Security Assignment, including those set out in clause 14 (Protection of Security Agent and Receiver) of the Security Assignment."

vi) Clause 6 (*Miscellaneous*) provides that:
"With effect from the date of this Deed:

(a) the Security Assignment will be read and construed for all purposes as if the Additional Assignor had been an original party in the capacity of Assignor (but so that the security created on this accession will be created on the date of this Deed); and

(b) in accordance with clause 23.2 (Changes to Parties) of the Security Assignment, the Security Agent, for itself and as agent for each of the Assignors, agrees to all matters provided for in this Deed."

80. The effect of clause 2(b)(ii) and clause 5 of the 2016 Accession Deeds is that the Parent is bound by all the terms of the IRSAs, including the Additional Obligations clauses 2, 6.2 and 14.3.

Effect of the Additional Obligations

81. The Luxco entities (and Elli Investments) entered into the IRSAs in 2012. However, the security that they provided was worthless as their relevant assets consisted of intercompany loans owned by the High Yield Bond Group, which was already obliged to pay the debt. The Additional Obligations resulted in the Parent's other assets, including the Santander Group, being included in the debt and security package provided to the Secured Parties. These assets are very valuable. It is the Parent's contention (strongly disputed by Barclays) that this was never intended by any party; the Santander Group was an independent investment by Terra Firma which sat outside the High Yield Bond Group investment, and which did not fall within the scope and terms of the debt and security package set up in connection with the 2012 Acquisition.

The discovery of the missing security and how it was progressed

82. As well as contemporaneous documents, the Parent relied on evidence from the following witnesses to explain the discovery of the missing security and how it was progressed:

i) Iain Stokes, a director of the Parent, who executed the 2016 Accession Deeds on its behalf;

ii) Ian Field, a partner in the banking team and Head of Global Restructuring and Insolvency Group at Allen & Overy ("A&O"), who was involved in the drafting of the 2016 Accession Deeds;

iii) Matthias Baudisch, a partner in the US Corporate Finance Group at A&O, who was involved in the identification of the missing security and the decision to prepare a document to correct the problem;

iv) Fergus Baker, an associate in the banking team at A&O, who drafted the 2016 Accession Deeds and made contact with Barclays and Latham & Watkins ("Lathams") during the relevant period;

v) Earl Griffith, a partner in the banking department at A&O, leading the team advising in relation to the High Yield Bond Group Restructuring, who had limited involvement in the events in question and gave evidence that he did not read the IRSAs during the relevant period;

vi) Nick Berkeley, a member of the legal counsel team at Terra Firma Capital Partners Limited ("TFCPL"), the entity advising Terra Firma, who advised the Parent to sign the 2016 Accession Deeds;

vii) Jan Arie Breure, a director of the Parent, who provided advice and assistance to the High Yield Bond Group and Terra Firma in relation to the efforts to restructure the High Yield Bond Group; and

viii) Benjamin Taberner, the Chief Financial Officer of the FSHC Group, who gave evidence, amongst other things, as to going concern issues in respect of the High Yield Bond Group.

83. Messrs. Griffith, Breure and Taberner were not cross-examined, and accordingly their evidence stands accepted. The remaining witnesses for the Parent were cross-examined, and it was not suggested that any of them were not telling the truth. However, it was suggested that in certain respects their evidence was an *ex post facto* reconstruction and should not be relied upon. In this section I set out the evidence of the Parent's witnesses, much of which is disputed by Barclays. I shall then decide on the reliability of that evidence.

Evidence of the Parent's witnesses

84. Since 2014, A&O have advised the High Yield Bond Group in relation to a solution for its long-term capital structure. Mr Griffith had primary responsibility for advising in relation to the High Yield Bond Group restructuring. Mr Griffith was on sabbatical between 11 July and 26 September 2016, during which time Mr Field supervised the matter in his absence.

85. On 15 August 2016, Mr Baudisch received a query by telephone from Mr Berkeley regarding the Luxco entities. Following that conversation, Mr Baudisch reviewed the Offering Memorandum but found no mention of the Parent granting security. He also contacted Mr Baker asking him to locate (amongst other things) the security documents pledging the Shareholder Loan as a result of the query he had received from Mr Berkeley.

86. Mr Baker located copies of the IRSAs and, following an exchange of emails with Mr Baudisch, looked at the definition of Assigned Agreements in Schedule 1 to determine whether they granted security over the Shareholder Loan. Mr Baker's evidence (disputed by Barclays) is that he did not read any other clauses of the IRSAs at this stage. Mr Baker provided copies of the IRSAs to Mr Baudisch, but he was unable to locate a document granting security over the Parent's rights and interests under the Shareholder Loan in A&O's records. Mr Baudisch gave evidence that he could not specifically recall having a discussion with Mr Baker on 15 August 2016, and that he does not recall reviewing the IRSAs at that stage or at any other stage before the 2016 Accession Deeds were executed.

87. On 17 August 2016, Sian Harrison, the lead associate at A&O working on the High Yield Bond Group restructuring, explained to Mr Baker that Elli Acquisitions was required to provide a compliance certificate under the Term Loan Facility that no Default was continuing at the date of the certificate; she asked him to review the Term Loan Facility and consider whether A&O were aware of any Defaults at that time.

88. Mr Baker gave evidence that:

    i) He read the definition of Default in the Term Loan Facility, which referred to "*an Event of Default or any event or circumstance specified in Clause 25 (Events of Default) which would (with the expiry of a grace period, the giving of notice, the making of any determination under the Finance Documents or any combination of any of the foregoing) be an Event of Default*";

    ii) He noted that clause 25.10(a) of the 2012 Term Loan Facility stated that it was an Event of Default if: *"Any party to the Intercreditor Agreement… fails to comply with the provisions of, or does not perform its obligations under, the Intercreditor Agreement… and, if the non-compliance…. are capable of remedy, it is not remedied within 30 Business Days of the earlier of the Agent giving notice to that party or that party becoming aware of the non-compliance…"*; and

    iii) He looked at the Clause 10.6(b) Obligation in the ICA, which stated that: *"The Shareholder Creditors shall ensure that the Shareholder Liabilities are pledged at all times as security for the Secured Liabilities, the Additional High Yield Liabilities and the High Yield Bridge/Notes Liabilities.*"

89. Mr Baker notified Ms Harrison of clause 25.10(a) of the Term Loan Facility and the Clause 10.6(b) Obligation. At her suggestion, Mr Baker informed Mr Baudisch of these clauses.

90. A discussion then took place between Mr Baudisch and Ian Field on 17 August 2016. Mr Field's evidence is that Mr Baudisch identified that the Parent was potentially in breach of the Clause 10.6(b) Obligation and also brought to his attention that this would give rise to an Event of Default under the Term Loan Facility unless remedied within 30 business days of the Parent becoming aware of its non-compliance. Mr Baudisch and Mr Field agreed that, if no document granting security over the Parent's rights and interests under the Shareholder Loan could be found, documentation would need to be prepared to grant such security.

91. Mr Field says that Mr Baudisch suggested that, if no security documents could be found, rather than creating new security documents from scratch, it would be time and cost effective for the Parent to pledge its rights and interests under the Shareholder Loan by way of accession deeds to the IRSAs. Mr Field thought that, as the Shareholder Loan was perceived to be worthless, this would also address the risk of a technical default without changing the commercial position of the parties. Mr Field explained that the thinking was that Barclays was more likely to be comfortable with the Parent acceding to an existing security document which had been executed by Barclays, as opposed to seeking to negotiate and agree a standalone security document. Mr Field's evidence is that he did not review the IRSAs at this stage.

92. Mr Baudisch's evidence is that he cannot recall precisely what he discussed with Mr Field on 17 August 2016, or at what point the idea of acceding to the IRSAs came about (or indeed who suggested this). I accept Mr Field's evidence about their discussion on 17 August 2016.

93. On 17 August 2016, Mr Field, Mr Baudisch and Mr Baker had a telephone conversation with Mr Berkeley, discussed the absence of a document granting security and asked him to search TFCPL's records for such a document. That conversation was summarised in an email from Mr Baker to Mr Field and Mr Baudisch on 18 August 2016:

> "MB noted that the Carmel Accession Deed referred to Transaction Security relating to the [Shareholder Loan]…and that A&O did not have a copy of a document creating such security…
>
> NB agreed to search the Parent's records… IF noted that if the Parent has not pledged the liabilities owed to it by [Luxco 1] under the [Shareholder Loan], this could give rise to a technical Default under the [Term Loan Facility]…"

94. On 23 August 2016, Elli Acquisitions gave a Compliance Certificate which stated that no Default was continuing. The next Compliance Certificate was due on 28 November 2016.

95. On 14 September 2016, Mr Field instructed Mr Baker to prepare draft accession deeds to the IRSAs. Mr Baker recalled that Mr Field had indicated that Barclays was likely to be more comfortable with the Parent acceding to a pre-existing agreement. He also gave evidence that Mr Field did not refer to the Additional

Obligations or state that the IRSAs might contain provisions that were unsuitable for the Parent to accede to. Mr Field's evidence (disputed by Barclays) is that he had still not read the Additional Obligations in the IRSAs at this stage.

96. Mr Baker drafted the deeds on the basis of a precedent from another transaction provided to him by Ms Harrison. Mr Baker's evidence is that he started with the first ranking 2016 Accession Deed, and drafted it as follows:

i) He added recital (C) which referred to the Shareholder Loan Agreement and the fact that the Parent had acceded to the Intercreditor Agreement as a Shareholder Creditor, and recital (E) which stated: *"In accordance with the terms of the Intercreditor Agreement, the [Claimant] is required to pledge to the Security Agent its rights and interests under Shareholder Loan as security for the Secured Obligations"*;

ii) He referred to clause 3.1 of the relevant IRSA and noted that the intercompany loans which each Assignor had charged its rights, title and interest in, were defined as Assigned Agreements. He therefore included sub-clause 2(a) which stated that *"the Shareholder Loan will become an Assigned Agreement"*;

iii) For sub-clause 2(b), save for reflecting defined terms, he followed the wording of clause 2 of the precedent exactly. He said that he did not consider reviewing each use of Assignor in the relevant IRSA in light of Mr Field's instructions to him;

iv) He added the second sentence of recital (E) after drafting sub-clause 2(b);

v) He used the wording of clause 3.1 of the relevant IRSA when drafting sub-clause 3(a) and based sub-clause 3(b) on paragraph 2 of the 2012 Debtor Accession Deed;

vi) He based the drafting of clause 4 on clause 4(a) of the relevant IRSA;

vii) He based clauses 5(a) and 5(b) on the wording of clauses 4(a) and 4(c) of the precedent. He looked in the relevant IRSA for a provision which would allow a party to execute the deed on behalf of other parties; he identified clause 23 as potentially relevant from the table of contents, and referred to clause 23.2 as the basis for Barclays (as Security Agent) agreeing to the provisions on behalf of the Assignors; and

viii) He noted that the table of contents to the relevant IRSA stated that clause 8 related to undertakings. He saw that sub-clause 8.3 provided that Debtors under Assigned Agreements were required to pay any amounts payable by them into pledged bank accounts, but concluded that the Parent was not required to pledge any of its bank accounts and Luxco 1 was not required to pay any amounts payable under the Shareholder Loan into a pledged account.

97. Mr Baker used the draft of the first ranking 2016 Accession Deed as the base for the draft of the second ranking 2016 Accession Deed. Save for replacing *"Security Assignment"* with *"Second Ranking Security Assignment"*, the wording of recital (F) and sub-clause 2(b) mirrored that of the equivalent clauses in the draft of the first ranking 2016 Accession Deed.

98. Mr Baker's evidence (disputed by Barclays) is that he did not read clauses 2 (*Covenant to Pay*), 6.2 (*Holding Company Restrictions*) and 14.3 (*Primary Liability of Assignor*) of the IRSAs, and was thus unaware that the IRSAs included the Additional Obligations and that the wording of sub-clause 2(b) in the 2016 Accession Deeds would result in the Parent acceding to such obligations.

99. Mr Baker sent his initial drafts of the 2016 Accession Deeds, along with a draft email to Mr Field and Mr Baudisch (attaching the IRSAs), to Ms Harrison on 15 September 2016 for comments. After incorporating Ms Harrison's manuscript comments, he circulated the draft 2016 Accession Deeds, together with related documents (including the IRSAs), to Mr Field and Mr Baudisch on 19 September 2016. He later sent a follow-up email to Mr Field and Mr Baudisch on 26 September 2016 asking if they had any comments on the draft 2016 Accession Deeds.

100. Mr Field then reviewed the draft 2016 Accession Deeds. Mr Field's evidence (disputed by Barclays) is that he read them with a focus on ensuring they would be in a form acceptable to Barclays so that it would execute them and close the security gap as soon as possible. He says that he did not turn his mind to whether the IRSAs contained any other obligations (including the Additional Obligations) or to the consequences of the Parent becoming an "*Assignor*" under the IRSAs. Although at [14] of his Second Statement Mr Field did not recall having reviewed the IRSAs when considering the draft 2016 Accession Deeds, he accepted during cross-examination that he must have read clause 3.2 because he asked Mr Baker to include a provision which tracks the wording of this clause.

101. During an oral conversation on 27 September 2016, Mr Field asked Mr Baker to add:

    i) a clause stating that Barclays would not incur any obligations under the Shareholder Loan as a consequence of the relevant 2016 Accession Deed and that the Parent shall at all times remain liable to perform all of its obligations in respect of the Shareholder Loan; and

    ii) a reference to protections provided to the Security Agent in the relevant IRSA.

102. Mr Field also says that he asked Mr Baker to check if Mr Baudisch was comfortable with the 2016 Accession Deeds given that he was more familiar with the transaction and the documents.

103. Mr Baker understood that Mr Field thought Barclays would be more comfortable executing the 2016 Accession Deeds if these additions were made. He amended the draft 2016 Accession Deeds as follows:

i) He inserted a new clause 3(c); and

ii) He referred to the table of contents in the IRSAs for a reference to protections provided to the Security Agent and noted that clause 14 in each was titled '*Protection of the Security Agent and Receiver'*. He therefore inserted a new clause 5 in the draft 2016 Accession Deeds which specifically referred to clause 14 of the IRSAs. Mr Baker says (disputed by Barclays) that he did not, however, review clause 14 in the IRSAs or look at any other clauses in the IRSAs when making the amendments.

104. Mr Baker provided hard copies of the draft 2016 Accession Deeds (as amended) to Mr Field and Mr Baudisch in person.

105. At some point in September 2016, Mr Berkeley informed A&O by telephone that he could not locate the missing security.

106. On 29 September 2016, Mr Field orally confirmed to Mr Baker that he had no further comments on the draft 2016 Accession Deeds and asked Mr Baker to send them to Mr Berkeley. Mr Baker duly sent an email to Mr Berkeley attaching the draft 2016 Accession Deeds:

> "The Accession Deeds have been drafted in case the Security Agent is unable to locate a copy of the documentation under which the Parent pledged its rights and interests under the Shareholder Loan…If required, the simplest way for the security to be documented is by way of accession to the Security Assignments…
>
> Subject to your thoughts, the next steps would be as follows:
>
> A&O explanatory call with Ben [Taberner] covering the following:
>
> 1) ICA requires the Parent to pledge its rights and interests under the Shareholder Loan in favour of the Security Agent…
> 2) [Luxco 1] ICA debtor accession deed suggests that such security has been granted. However both TF and A&O have searched and cannot locate copies of the relevant security documents.
> 3) A&O will ask the Security Agent whether they can provide copies of the documents.
> 4) If the Security Agent cannot, as a belt and braces measure we have prepared the Accession Deeds…
>
> A&O engagement with the Security Agent
>
> 1) Explain 1) and 2) above.

> 2) Ask them to provide copies of the relevant security documents.
> 3) If they cannot, ask them to countersign the Accession Deeds.
>
> Please let us know if you are happy for us to carry out the steps above."

107. Later on 29 September 2016, Mr Berkeley informed Mr Baker by telephone that he wanted to consult Andrew Geczy (the CEO of TFCPL) about the content of the email.

108. At some point between 29 September 2016 and 3 October 2016, Mr Berkeley reviewed the draft 2016 Accession Deeds. Mr Berkeley's evidence (disputed by Barclays) is that he read them with a focus on whether they secured the Shareholder Loan. Mr Berkeley gave evidence that he reviewed some (but not all) of the provisions of a copy of one of the IRSAs that he had previously printed in mid-August 2016 when looking into a tax issue. In particular, Mr Berkeley says that he only read: the definitions of "*Assigned Agreement*", "*Assignor*" and "*Charged Property*"; clause 3.1 (*Security Assignment*); clause 6.1 (*Negative Pledge*); and clause 8 (*Undertakings*).

109. Mr Berkeley considers it possible that he may have read that same printed copy again in November 2016 in relation to the notice requirements for perfection. Mr Berkeley's evidence (disputed by Barclays) is that at no time during the period from August to November 2016 did he read clauses 2 (*Covenant to Pay*), 6.2 (*Holding Company Restrictions*) and 14.3 (*Primary Liability of Assignor*) of the IRSAs. Although Mr Berkeley cannot be certain, he considers that all of the black/red ink markings and yellow/orange highlighting on his printed copy would have been made between August and November 2016; and that any blue ink markings arose from his review in February/March 2017 following the discovery of the Additional Obligations.

110. On 3 October 2016, Mr Baker sent an email to Ian Field and Mr Griffith (copied to Mr Baudisch) stating that Mr Baudisch had no comments on the draft 2016 Accession Deeds. Mr Baudisch's evidence is that he did not read the draft 2016 Accession Deeds because they were English law documents. In any event, Mr Baudisch says that at no stage did he anticipate the 2016 Accession Deeds would alter the structure of the 2012 financing, and he had no intention to grant additional value to the security pledged to Barclays.

111. At some point before 17 October 2016, Mr Berkeley informed A&O that he did not have any comments on the draft 2016 Accession Deeds.

112. On 17 October 2016, Mr Berkeley informed Mr Baker by telephone that he had spoken with Mr Geczy who, in turn, had asked him to consult Guy Hands, the chairman of TFCPL. Mr Berkeley then spoke to Mr Hands later that day, who indicated that his preference was for A&O to contact Barclays before involving the Parent. Mr Berkeley did not provide Mr Geczy or Mr Hands with copies of the draft 2016 Accession Deeds or the IRSAs.

113. On 19 October 2016, Mr Berkeley had a telephone conversation with Mr Baker during which he relayed Mr Hands' preference for A&O to contact Barclays in the first instance. He asked Mr Baker to call Barclays to explain that A&O and TFCPL could not locate a copy of the document granting security over the Parent's rights and interests under the Shareholder Loan; and to ask Barclays whether they could provide A&O with a copy. Mr Berkeley asked that A&O should allow Barclays time to locate the missing security before A&O discussed the execution of the 2016 Accession Deeds.

Reliability of the disputed evidence

114. During cross-examination, as in their statements, the witnesses from A&O were clear that they had made a serious error. They each gave evidence that they did not read and consider all of the relevant terms of the IRSAs, and that each had mistakenly assumed that others had done so. Mr Stokes relied on Mr Berkeley and the team at A&O to review the 2016 Accession Deeds and the IRSAs. He is not a lawyer and he never saw the IRSAs; (T1/107 and 127). Mr Berkeley said that he was working on the basis that A&O had reviewed the IRSAs and satisfied themselves that they were fit for purpose (T3/146).

115. Mr Baker, who was a junior associate at the time, explained that he considered (entirely reasonably, in my view) that Mr Baudisch and Mr Field were responsible for checking whether all of the provisions in the IRSAs were satisfactory for the Parent to assume; T1/166-167. Mr Field assumed that Mr Baudisch had reviewed the IRSAs; for example T2/139-141 and 167-168; and Mr Baudisch thought that Mr Field or other members of the A&O team had reviewed the IRSAs; T3/48-50 and 76. In summary, their evidence was that none of the A&O team undertook the task of reviewing the IRSAs to see whether they were appropriate documents to which the Parent should accede, and this essential task fell through the cracks.

116. The explanation that these individuals had not read the Additional Obligations in the IRSAs was strongly challenged by Barclays. Mr Howard pointed out that if the rectification claim failed, this could have very serious commercial consequences for the Parent (and its parent company, Terra Firma) and for A&O. He noted that the Courts have recognised that in a rectification action, witnesses giving evidence as to their own intentions at the time a document was entered into may "*have a very real interest in what are said to be the defects in the drafting being resolved*" (per Chief Master Marsh in *A v D* [2017] EWHC 2222 (Ch) at [31]). They may have devoted much time "*to looking back on what happened or what they believe they intended to happen*".

117. In those circumstances he submitted that there is an obvious danger that witnesses may have convinced themselves that they had intentions which they did not, and that there was a consequent need for caution in relation to their evidence (per Rimer J in *Lansing Linde Ltd v Alber* [2000] Pens LR 15 at [128]), even where (as here) they were admitting to a mistake potentially against their personal interests.

118. He also drew attention to a perceptive passage in the judgment of Mr Bartley-Jones QC in *Konica Minolta Business Solutions* (supra) at [38].

> "Finally, I also remind myself that the Court must be cautious of rectification claims of this nature since the effect may well be to relieve solicitors who have made an error from the consequences of that error. That is not to say that rectification should not be ordered. But it does mean that the Court should look astutely at the evidence, since such evidence, although honestly given, is capable of being warped by a subconscious wish to avoid liability for professional negligence."

119. He submitted that the evidence of certain witnesses, particularly Mr Baker, Mr Field and Mr Berkeley, that they had not read certain clauses of the IRSAs at the time, but had read and considered other clauses, was wholly implausible. The witnesses had convinced themselves, *ex post facto*, that this was the case but they could not have avoided seeing clauses which are now sought to be deleted, which were on the same page as clauses which they must have read at the time. These points were forcefully explored during cross-examination and I have assessed the witnesses' evidence in the light of them.

120. Mr Baker is a young solicitor who remained calm and measured during cross-examination. The manner in which he gave his evidence did him credit. He explained at T1/161-165/14 that this was the first occasion on which he had drafted security documents. Therefore, he decided to follow the precedent which had been given to him by Ms Harrison. He used the precedent to draft the 2016 Accession Deeds and only looked at the clauses of the IRSAs which were necessary for the 2016 Accession Deeds. As a result, he was neither looking at nor critically evaluating the other clauses. He used the index in the IRSAs to find the accession clause for the Deeds, which was clause 2. He did not read clause 3.1, even though it was on the same page, because it was not concerned with it. This evidence was credible, and I accept it.

121. Mr Field accepted during cross-examination that he must have read clause 3.2 of the IRSAs, which, as indicated above, he had not remembered when drafting his second statement. However Mr Field was clear that he had not read the Additional Obligations in the IRSAs. Had he done so, he would have known immediately that the Parent could not accede to them because of their legal implications; see (T2/155/13-156/8) and in particular:

> A. So we hadn't looked at or picked up any of those provisions, because if I had of ['ve] reviewed those provisions, I would have been aware of the consequences of those provisions in providing a guarantee where the 10.6 obligation that we were trying to comply with didn't require us to provide a guarantee. That's clearly of a wholly different nature from what we were anticipating entering into."

122. It was put to Mr Field that he must have read and understood these clauses. He simply did not consider them significant, because: the IRSAs had previously been entered into by the other Assignors (the Luxco entities); he did not have in mind the Santander assets (also referred to as the brighterkind assets); and did

not think through the implications. Mr Field refuted this; T2/174/18 – 176/9. He said:

> " A. But I did know that they owned the brighterkind assets because I had it on charts in my room that repeatedly showed me that the parent and the brighter -- and the Santander group was part of the same corporate structure and I'd reviewed those. I was very familiar with those diagrams as being the building blocks for the proposed restructuring.
>
> …
>
> A. No, I disagree. I was aware that the parent owned the assets and, even if they didn't, I wouldn't have wanted them to accede to those obligations that they weren't required to enter into. This was - - we were trying to put in place security over what we understood to be a worthless loan. There's no way I would have wanted the parent to have acceded to the guarantee obligations on any basis, even if they had no assets, but I certainly was aware that they did own the Santander group."

123. In my judgment, Mr Field was well aware of the fact that the Parent owned the Santander Group and the brighterkind assets in 2016, and had not forgotten about this. Further, I accept that Mr Field either did not read, or did not mentally process, the Additional Obligations in the IRSAs (other than clause 3.2). Had he done so, as a very experienced transactional lawyer with full knowledge of the position of the Parent and of the High Yield Bond Group, he would have realised immediately that the Parent should not enter into those obligations.

124. Mr Baudisch was clear that he had not read the IRSAs as he wrongly assumed that Mr Field was doing this. I accept his evidence. He said:

> "… we would not be here had there not been a mistake. That's -- clearly Mr Field, as he explained in his testimony, sort of assumed that I would be looking at this. I frankly had no idea that he was assuming that and that's how neither of us apparently ended up looking at it and that is the reason we're here and that's very regrettable. I wish I had, but I didn't." (T3/48- 49)

125. Mr Berkeley was emailed by A&O drafts of the 2016 Accession Deeds together with the IRSAs entered into in 2012. He accepts that he looked at the IRSAs. He stated in his witness statements that he had not reviewed the Additional Obligations. He said at [9] of his second statement:

> "My primary focus when reviewing the 2012 Intercompany Receivables Security Assignments was on whether the 2016 Accession Deeds secured the 2012 Shareholder Loan Agreement. My review was therefore primarily limited to the provisions that I considered were important for pledging the Claimant's rights and interests under the 2012 Shareholder Loan Agreement. My review of the 2012 Intercompany Receivables Security Assignments did not extend to reading clauses 2, 6.2 or 14.3. I did not carry out a comprehensive review of the 2012 Intercompany Receivables Security Assignments because I relied on A&O, who had prepared the 2016 Accession Deeds."

126. This evidence was strongly challenged in cross-examination. It was submitted that any suggestion that Mr Berkeley had not seen the relevant clauses was simply implausible. It was submitted that Mr Berkeley, in common with Mr Baker and Mr Field, read some or all of the clauses in question (or was at least aware that the IRSAs contained, for example, a clause headed "*Covenant to Pay*"), but simply did not turn his mind to the question whether those were appropriate or inappropriate clauses for the Parent to accede to and be bound by in November 2016.

127. It was submitted that it would have been impossible for Mr Berkeley to mark-up clause 3.1 without reading clause 2. Further, Mr Berkeley highlighted the clause 6.1 (*Negative Pledge*) and it was said to be implausible that he did not notice clause 6.2 (*Holding Company Restrictions*). He accepted that even seeing the heading "*Holding Company Restriction*" would have caused him to realise that the IRSAs contained some restrictions on what the Parent, as a "*Holding Company*", could do, but he maintained that he had not seen that heading.

128. As to clause 2 of the IRSAs, Mr Berkeley acknowledged that it was now impossible for him to miss the clause as it was one of the clauses sought to be rectified. But he said (T3/153 -154):

> "But back in 2016, when I was looking at it, it was entirely possible that I didn't look at it. Whether my eyes saw the text above, that's entirely possible, but there's a difference between that and actually reading it and – – or even being conscious of it. I'll give you an example. You know, I have read almost an entire page before on the tube of a book without literally taking in one word because my mind was on other things … I don't think I read it at all because I think if I had read it, it would have leapt out at me for what it is. You know, a covenant to pay the high yield bond obligations."

129. He made the same point about clause 6 of the IRSAs. It was put to him that he must have noticed the heading that referred to a restriction on the holding company. He said (T3/142/10-16):

> "I disagree. I think if you're – – you know, when I was looking at this, it was on a selective basis. I never read the [IRSA] in its entirety so I don't think I ever read that. That's my recollection because I think, if I had it would have jumped out at me as it did when it was brought to my attention that there was a big problem with that provision."

130. It was put to Mr Berkeley that he had only joined the group at the end of July, and did not know, or did not have at the front of his mind when reviewing the IRSAs, that the Parent had acquired the Santander Group. He refuted this suggestion. He had been provided with more than 10 structure charts by A&O in the first month of joining and on each of those charts the Santander Group was shaded in red to show that it was separate from the High Yield Bond Group, with a clear line connecting it to the Parent. Furthermore, he was involved in separate workstreams around the Santander Group and so had seen the Financing Documents. He said that a guarantee of the High Yield bond debts by the Parent would have struck him as alarming, which the directors would have had to consider very carefully in 2016.

131. Mr Berkeley struck me as a very capable transactional lawyer. I accept his evidence that he assumed that the IRSAs were suitable for the purpose for which they were intended, namely to fill the gap, as he relied on A&O to have reviewed them. He was only focussing on particular clauses that he considered were important for that purpose. Lawyers are used to finding the relevant and excluding the irrelevant. He knew that the Parent owned the Santander Group when reviewing the documents sent to him by A&O. He either did not read, or did not process, the Additional Obligations. Had he done so, he would have immediately realised that the Parent should not enter into them, at least without discussion and authorisation at the highest level.

132. Having heard the evidence given by the Parent's witnesses, I accept it. The Additional Obligations were obviously inappropriate for the Parent to assume, and this would have been immediately apparent had those terms of the IRSAs been reviewed by A&O or Mr Berkeley at the time and drawn to the attention of Mr Stokes.

Outward facing communications between Mr Baker and Mr Branwhite and Mr Baker and Mr Kandola

133. In addition to hearing evidence from the Parent's witnesses on such communications, I heard evidence from the following witnesses, called by Barclays:

    i) Paul Branwhite, an Assistant Vice President at Barclays' Agency Department, who executed the 2016 Accession Deeds on behalf of Barclays and was in correspondence with both A&O and Mr Berkeley in relation to the missing security; and

    ii) Suroop Kandola, an associate in the banking team at Lathams, who was involved in discussions with A&O regarding the 2016 Accession Deeds

and (according to Mr Branwhite) probably advised Barclays in relation to whether they should be executed.

134. On 20 October 2016, Mr Baker made initial contact with Mr Branwhite, by an email with the subject line *"Four Seasons – intercompany loan between FSHC Group Holdings Limited and Carmel VIII S.a.r.l – security":*

> "…the security document that we have not managed to locate is an assignment of the Parent's rights and interests under an intercompany loan agreement which it entered into with [Luxco 1]…
>
> Both we and the Parent have searched thoroughly for this document and the Parent has asked us to check whether you have a copy in your records? If so, would it be possible for you to provide us with a copy at your earliest convenience?"

135. On 24 October 2016, Mr Baker made a follow-up telephone call to Mr Branwhite during which Mr Branwhite agreed to ask Barclays' solicitors, Lathams to check their records for the missing security.

136. On 26 October 2016, Mr Baker emailed Mr Branwhite requesting an update on Lathams' search:

> "Thanks for your time on the phone on Monday afternoon and for agreeing to check with Lathams whether they have a copy of the security assignment of [the Parent's] rights and interests under the intercompany loan which it entered into with [Luxco 1].
>
> Have you heard back from Lathams? If they could confirm either way whether they have a copy of the document in their records, that would be really helpful"

137. On 7 November 2011, in the absence of a response from Mr Branwhite, Mr Baker sent a further email to Mr Branwhite:

> "Thanks for following up with Lathams on the below. Have they managed to check whether they have a copy of the security assignment of [the Parent's] rights and interests under the intercompany loan which it entered into with [Luxco 1]? If you could let us know either way, that would be great"

138. On 8 November 2011, Mr Branwhite confirmed to Mr Baker that he had *"chased again"* and apologised for the delay.

139. On 9 November 2016, Mr Berkeley's evidence is that he had a telephone conversation with Mr Branwhite during which Mr Branwhite confirmed that Barclays did not have the missing security and therefore suggested that Mr Berkeley contacted Lathams directly. Mr Branwhite has no specific recollection of this conversation, but acknowledges that it must have taken place shortly

before he emailed contact details of the relevant individuals at Lathams to Mr Berkeley (at 14.45).

140. Later that same day, at 15.16, Mr Branwhite forwarded an email addressed to him from Antonina Semyachkova at Lathams to Mr Baker, which stated: *"we have checked our records and we do not appear to have this document"*. At 15:43, Mr Branwhite also emailed Mr Berkeley: *"Latham's have confirmed just now that they do not hold this document…I have informed Fergus @ A&O"*.

141. Mr Baker did not contact Mr Branwhite again until 14 November 2016, when they spoke by telephone. The handwritten script Mr Baker prepared in advance of the telephone conversation stated, amongst other things:

> "…As docs require it in interests of both Sec Agent + comp to have doc showing the security
>
> > Have drafted simple confirmatory sec document and had it executed by comp. would require counter signature on behalf of Barclays…"

142. Mr Baker's evidence is that he followed the script closely, and the gist of the telephone conversation was as follows:

i) He referred to Ms Semyachkova's email on 9 November 2016, which confirmed that Lathams had been unable to locate a copy of a document assigning the Parent's rights and interests under the Shareholder Loan;

ii) He noted that, as the Finance Documents required such a security document to be entered into, the Parent and Barclays were required to have in place and accordingly should execute such a security document. He explained that the Parent had executed the 2016 Accession Deeds and that it was necessary for Barclays to execute them in order for them to become effective; and

iii) He said he would send copies of the 2016 Accession Deeds for execution along with signing instructions and all relevant documentation relating to the 2016 Accession Deeds.

143. Whilst Mr Branwhite has said that he has no specific recollection of the contents of his telephone conversation with Mr Baker, his evidence is that he probably would have said that he would need to run the 2016 Accession Deeds past Lathams before executing them. I accept that, with this addition, Mr Baker's evidence concerning their telephone conversation, based on his contemporaneous script, is accurate.

144. On the same day, Mr Baker emailed Mr Branwhite attaching copies of the 2016 Accession Deeds executed by the Parent and other related documents, including the IRSAs (copying, amongst others, Mr Griffith and Mr Kandola):

> "Thanks for your time on the phone earlier. As discussed, attached are copies of two deeds confirming the assignment of [the Parent's] rights and interests under it's *[sic]* intercompany

> loan agreement with [Luxco 1] (the Deeds). The Deeds have been signed on behalf of the Parent and we are holding original copies…
>
> Thanks for letting us know that Lathams will be taking a look at the documents. Also attached is a zip file containing copies of the following documentation relating to the Deeds:
>
> 1) the Parent/[Luxco 1] Shareholder Loan;
> 2) the Parent and [Luxco 1] Intercreditor Agreement Accession Deeds;
> 3) the First ranking security assignment of intercompany receivables; and
> 4) the Second ranking security assignment of intercompany receivables.
>
> I'm happy for Lathams to contact me directly should they have any questions relating to the above. If possible, we would like the documents to be executed by COB on Wednesday [16 November 2016]…"

145. On 16 November 2016, Mr Baker emailed Mr Branwhite asking whether he and Lathams had considered the 2016 Accession Deeds, to which Mr Branwhite responded that he had not heard anything from Lathams and would chase them. During a telephone conversation between Mr Baker and Mr Branwhite that day, Mr Branwhite indicated that Mr Kandola had some questions for Mr Baker about the 2016 Accession Deeds.

146. On 16 November 2016, Mr Baker emailed Mr Kandola directly (copying, amongst others, Mr Branwhite):

> "I understand from Paul that you have a couple of questions regarding the background to the documents attached to my email [to Mr Branwhite on 14 November 2016]. The recitals to the accession deeds set out the relevant facts relating to the requirement for the Additional Assignors to pledge to the Security Agent their rights and interests under the Shareholder Loan. Perhaps it would be best for us to speak by phone so that I can answer any specific questions that you have directly…"

147. Lathams' telephone records for 16 November 2016 show that Mr Baker and Mr Kandola spoke between 15.41 and 15.49. There is no contemporaneous note of the telephone call between Mr Baker and Mr Kandola on 16 November 2016. It is Mr Baker's evidence that, during that call:

    i) He explained why the Parent had executed the 2016 Accession Deeds, highlighting that the Parent had entered into the Shareholder Loan Agreement and that, as a result, the Claimant and Luxco 1 had acceded to the ICA as a Shareholder Creditor and a Debtor respectively;

ii) He highlighted that the ICA required Shareholder Creditors to ensure that the Shareholder Liabilities were pledged at all times as security for liabilities of companies owed to the Secured Parties, and that the definition of Shareholder Liabilities included the liabilities of Luxco 1 (as a Debtor) to the Parent (as a Shareholder Creditor) in accordance with the Shareholder Loan;

iii) He noted that the Parent and Barclays and their respective legal advisers had all been unable to locate a copy of a document assigning the Parent's rights and interests under the Shareholder Loan and explained that the Parent had executed the 2016 Accession Deeds in order to comply with their obligations under the ICA; and

iv) He highlighted that certain group companies and Barclays had entered into the IRSAs and explained that the Claimant had decided to secure its rights and interests under the Shareholder Loan by acceding to the IRSAs on the basis that Barclays was likely to be more comfortable with the Parent acceding to an existing security document which had been executed by Barclays, as opposed to seeking to negotiate and agree a new standalone security document.

148. Mr Kandola's evidence regarding that same telephone conversation was that:

i) He did not believe that Mr Baker used the terms "*Luxco 1*", "*Shareholder Creditor*", "*Shareholder Liabilities*" and "*pledged*";

ii) Mr Baker referred to the ICA but did not refer to any specific provisions (whether clause 10.6(b) or otherwise); and

iii) Mr Baker explained that the security would be given by way of accession to existing security documents, which Mr Kandola understood to be the IRSAs attached to Mr Baker's email of 14 November 2016. They did not discuss why the Parent had structured the security in this way; as the 2016 Accession Deeds had already been executed, Mr Kandola did not raise the question.

149. On 18 November 2016, Mr Baker updated Mr Branwhite on his telephone conversation with Mr Kandola by email:

> "After we spoke on Wednesday, I took Suroop (copied) through the questions that he had. Please let me know if either of you have any further questions. As explained below, the company were keen to have the documents executed by COB this Wednesday past. If possible, it would be helpful if the documentation could be countersigned today"

150. Mr Branwhite replied to Mr Baker on the same day, attaching scanned copies of the signature pages executed by Barclays and confirming that the originals were being sent by courier to him.

Communications between A&O and Mr Stokes

151. On 9 November 2016, Mr Baker sent an email to the directors at the Parent, including Iain Stokes, attaching copies of the 2016 Accession Deeds for execution by the Parent:

> "We have located documents relating to all security that we believe was granted in favour of Barclays as Security Agent other than the: 1) first ranking…and 2) second ranking…security assignments of the Parent's rights and interests under it's *[sic]* intercompany loan agreement with [Luxco 1] (the Security Assignments). The records of both Terra Firma and the Group have been searched. In addition the Security Agent (Barclays) have checked their records and cannot locate copies of the documents.
>
> In order to complete the Group's records, we suggest that the Security Assignments are re-documented. Under the terms of the Finance Documents, the Parent is obliged to have documented the Security Assignments. Strictly speaking, it is an Event of Default under the Term Loan if the Security Assignments are not in place. As part of Q3 reporting, as directors of Elli Acquisitions Limited you will, within the next fortnight, be asked to execute a compliance certificate confirming that no Default is continuing under the Term Loan..."

152. On 10 November 2016, Mr Stokes replied to Mr Baker noting the contents of his email and confirming that he could execute the 2016 Accession Deeds at the offices of Morgan Sharpe, the Guernsey administration agent for the Parent, the following day.

153. Accordingly, on 11 November 2016, Shawnee Pinchemain at Morgan Sharpe sent copies of the 2016 Accession Deeds executed by Mr Stokes on behalf of the Parent to Mr Baker.

Discovery of the 'mistake' and instructions to counsel

154. The key events were as follows:

i) On 1 February 2017, in the context of ongoing restructuring negotiations, Ms Harrison noted in an email to Mr Griffith that:

> "The Parent has granted both first…and second ranking…security in favour of the Security Agent with respect to the shareholder loan made by it to Luxco 1. The SNs would therefore have a secured claim back into the Parent meaning we might want to structure any newco group(s) above the Parent…"

ii) On the same day, there was a call between Ms Harrison, Mr Griffith and Mr Baker during which clause 2 (*Covenant to Pay*) of the IRSAs was identified and discussed.

iii) Mr Baker's evidence is that on or around 13 February 2017 he was asked to prepare a draft letter to Barclays explaining that the 2016 Accession Deeds had gone significantly beyond what the Parent intended. He created the first draft of that letter on 15 February 2017.

iv) On 19 February 2017, Mr Griffith, Ms Harrison and Mr Baudisch discussed the issue by telephone with Mr Berkeley. Mr Berkeley subsequently read the printed copy of the IRSA which he had previously reviewed (this time, reviewing clauses 2, 6.2 and 14.3).

v) On 20 February 2017, A&O sent an email to leading counsel seeking advice as to rectification, attaching a briefing note which, at that stage, identified a concern in relation to the Guarantee Obligation:

> "The Parent and the Security Agent executed the Accession Deeds solely to grant a pledge over the Shareholder Loan Agreement that would satisfy the Parent's Clause 10.6(b) Obligation. The Guarantee Obligation contained in the Security Assignments goes beyond what would be required to satisfy that obligation."

vi) Mr Baker then prepared retrospective attendance notes of conversations with Mr Branwhite and Mr Kandola in November 2016. Since they were prepared once the mistake had been identified, I have not relied upon them in reaching my conclusions.

vii) On 27 March 2017, A&O wrote to Lathams proposing a rectification action or further deeds or amendment documentation on the basis that:

> "…the Security Assignment Agreements contain a covenant to pay the Secured Obligations and impose certain other contractual obligations and prohibitions that are wholly inconsistent with the Parent's obligations under the Intercreditor Agreement and the other Finance Documents."

viii) On 4 April 2017, A&O sent draft Amendment and Restatement Deeds and draft Amended Accession Deeds to Lathams in order to resolve the issue consensually (which were in a slightly different form to those which are proposed in the present proceedings).

ix) On 20 April 2017, Lathams responded to A&O stating that Barclays was in principle prepared to enter into discussions regarding its intention in entering into the 2016 Accession Deeds provided that it could notify the Secured Parties.

x) Mr Stokes gave evidence that, on 7 June 2016, the directors had a telephone call with Mr Griffith during which he:

a) reminded Mr Stokes that, by way of the 2016 Accession Deeds, the Parent had acceded to the IRSAs; and

b) explained that, as a result of the drafting of the 2016 Accession Deeds, the Parent's accession to the IRSAs went further than was required from the Parent in accordance with their obligations under the Finance Documents and that the Parent had agreed to be bound by all of the terms of the IRSAs that are expressed to be binding on an Assignor (including the Additional Obligations).

xi) That same day, A&O wrote to Lathams confirming the Parent's intention to commence an action for rectification and make a public announcement through the Irish Stock Exchange. The present claim was then issued.

Common intention objectively assessed

155. As a matter of interpretation, the 2016 Accession Deeds, which were drafted by lawyers, mean that the Parent was bound by all of the terms of the IRSAs. There is no ambiguity. In those circumstances, I accept Barclays' submission that convincing proof is required to displace the presumption that the parties meant what they said. To see whether such convincing proof has been provided, it is necessary to take account of the factual background, known to both parties, and exchanges which "*crossed the line*" between the parties (set out in detail above).

156. In brief summary:

i) The Parent was required, as a result of the 2012 Acquisition, to provide security over its rights and interests in the Shareholder Loan;

ii) On 20 October 2016, A&O told Mr Branwhite of Barclays that such a document could not be located by either the Parent or A&O;

iii) Between that date and 9 November 2016, A&O requested on four separate occasions that Barclays and Lathams should search for such document;

iv) By 9 November 2016, it had been established that the document either did not exist or could not be located;

v) There was no discussion of the Additional Obligations; and

vi) The Parent executed the 2016 Accession Deeds in order to fill the gap left by the missing security.

157. After a number of communications between them, Mr Branwhite and Mr Baker spoke by telephone. Mr Baker referred to the missing security document and asked Barclays to execute the 2016 Accession Deeds. Mr Baker made clear that this was needed because the documents relating to the 2012 Acquisition required a security document to be in place. This was consistent with all of their previous communications. Mr Baker also spoke to Mr Kandola of Lathams and

explained that the purpose of the 2016 Accession Deeds was for the Parent to comply with its obligations under the ICA. Mr Branwhite then took advice from Mr Kandola of Lathams, following which he executed the 2016 Accession Deeds.

158. In my judgment, it is very significant that the entire focus of the parties was on filling the gap, and there is nothing in any of the communications between them to suggest that the parties intended, in executing the 2016 Accession Deeds, for the Parent to go further than required under the 2012 Acquisition funding and security structure. The Additional Obligations resulted in a fundamental change to that structure. The absence of any discussion about such a fundamental change is, in my view, convincing proof of an intention not to incur the Additional Obligations. Had there been such an intention, it would have been the subject of substantial discussion between the parties.

159. In my judgment, and in the unusual circumstances of this case, an objective observer would conclude that the parties shared a common intention to execute a document which satisfied the Parent's obligation to grant security over the Shareholder Loan, and did no more or less than this. Such common intention continued at the date when the 2016 Accession Deeds were executed.

Subjective intention

160. Certain issues which I deal with below were considered by the parties as a part of their case on common intention, assessed objectively. Since objective intention is assessed on the basis of the facts known to both parties and communications which crossed the line, I consider that these issues are relevant to subjective intention. However, if I am wrong, then the reasons in this section are applicable to objective intention. I have reached the same conclusion in relation to common intention, whether assessed subjectively or objectively.

Relevant minds

161. Mr Stokes, as a director of the Parent, signed the 2016 Accession Deeds, and is the relevant individual whose intention can be treated as that of the Parent. Mr Berkeley is the relevant individual both for TFCPL and Terra Firma as he communicated directly with A&O and advised the Parent to sign the 2016 Accession Deeds. Within A&O, the relevant individuals are Mr Field, Mr Baudisch and Mr Baker. Their intentions were adopted by Mr Stokes and Mr Berkeley, who relied on the advice of A&O.

Intention of the Parent

Did the Parent make a mistake?

162. Barclays contended that the Parent did not make a mistake which could justify rectification. Rather, it made a decision, and now attempts to avoid the consequences of that decision. It wished to avoid alerting the creditors to a possible Default. If the creditors learned of a Default in the midst of restructuring negotiations, that would be likely to have given them leverage and prejudice Terra Firma's position. That was the thinking behind the decision not

to mention the possible Default when dealing with Barclays. Barclays relied upon an internal briefing note from A&O to Terra Firma in March 2017 which said that:

> "On 9 November 2016, it became apparent that the Parent had not pledged the Shareholder Loan as security for the TL, SSN and SN debt. The failure to remedy this oversight within a c.2 week period would have resulted in Elli Acquisitions Limited having to disclose in the Q3 2016 TL Compliance Certificate – which had to be delivered to the TL Facility Agent by no later than 30 November 2016 - that a Default had occurred under the [High Yield Bond] Group TL Facility Agreement and ICA. Having to disclose the existence of a Default would have drastically shifted the direction of the negotiations with H/2 and HCP, and risked the stable platform the [High Yield Bond] Group had been operating under."

163. Mr Baker agreed that there was obviously a risk that if the creditors got involved they might seek to exploit the Default, although he said he was not thinking along those lines at the time (T2/4/7-17). Mr Berkeley agreed that telling the creditors that there had been a Default, even one that can be remedied, would be potentially giving them some leverage in restructuring negotiations (T3/111/5-13). He suggested, however, that the March 2017 note had overstated the position.

164. I accept that the IRSAs were selected because it was thought on the Parent's side that Barclays would be more comfortable with those documents. This would be quicker and make it less likely that the creditors would learn of the issue. However, I do not accept that this was as great a concern on the part of the Parent and its advisers, nor as urgent, as suggested by Barclays. Mr Field explained his view at the time, that once the Parent became aware of the Default, it could have been remedied prior to an Event of Default by unilaterally granting the security within 30 days. I accept his evidence.

165. Nor do I accept that Mr Baker tried to avoid alerting Lathams. On the contrary, in his email to Mr Branwhite of 14 November 2016 Mr Baker stated that he was happy for Lathams to contact him directly if they had questions in relation to the 2016 Accession Deeds and background documents. Furthermore, following his call with Mr Branwhite, Mr Baker emailed Mr Kandola, suggesting that they should speak by phone so that he could answer any of Mr Kandola's questions directly.

166. The reason for choosing the IRSAs does not, in my view, mean that the Parent intended to execute them, irrespective of their terms, to avoid alerting the creditors to a potential Default. The consequences of accepting the Additional Obligations in the IRSAs were far more serious than if the creditors had learnt of the Default. Had the Parent or A&O known of the Additional Obligations, it would never have executed the 2016 Accession Deeds.

167. Barclays relied on the fact that Luxco 1 and Luxco 2 (and Elli Investments) had acceded to the IRSAs and had agreed to terms which went beyond what they were required to do by the Clause 10.6(b) Obligation. It was contended that, via the IRSAs, security had been provided to and accepted by Barclays and the original creditors on a "*one size fits all*" basis. The Parent intended to provide the same "*one size fits all*" security as had previously been provided by the Luxco entities and accepted by Barclays. The Parent denied this. It contended that the Additional Obligations in the IRSAs had been accepted by the Luxco entities by mistake. Alternatively, because the security provided by the Luxco entities was worthless, they did not care about the Additional Obligations in the IRSAs.

168. I do not accept that the Parent intended to provide the same security as had been provided by the Luxco entities, irrespective of the terms of the IRSAs. Nor do I accept that emails suggesting that the security should be redocumented were intended to mean that. I do not accept the Parent's submission that the Luxco entities acceded to the IRSAs by mistake, in the absence of evidence from the Luxco entities. I accept that it is likely that the Luxco entities were not concerned about the terms of the IRSAs, since the only assets that were the subject of the security were intercompany loans owned by the High Yield Bond Group. However, in my view, the debate about why the Luxco entities accepted the additional obligations is of little relevance to the issue of whether the Parent intended to accept the Additional Obligations.

169. Mr Stokes executed the 2016 Accession Deeds after having obtained an explanation as to their purpose from the 9 November 2016 email from A&O, which pointed to the missing security and advised that "*in order to complete the Group's records, we suggest that the Security Assignments are re-documented*". There was no reference to the Additional Obligations. He also relied on a recommendation from Mr Berkeley his email of 10 November 2016 that he had reviewed the 2016 Accession Deeds and that it would be in the interest of the Parent to execute them. Mr Stokes stated during his cross-examination that his intention in executing the 2016 Accession Deed was to "*re-paper the parent's obligation to assign it interests over the shareholder loan*" and nothing more. He was relying on A&O to have reviewed the documents and satisfied themselves as to their suitability, and the intention of the relevant individuals at A&O was adopted by Mr Stokes. As regards Mr Berkeley, he explained in his witness statement and in his oral evidence that his intention was for the Parent to provide that missing security and nothing more.

170. The evidence of the Parent's witnesses, which I accept, is that their subjective intention was to do no more than provide the third party security which had been identified by A&O as missing, and it believed that this was the effect of the 2016 Accession Deeds.

171. Prior to entering into the 2016 Accession Deeds, there is no evidence as to any internal discussion by any of the relevant individuals concerning the Additional Obligations. Had any of these individuals been aware of them, given their significance, the effect of the Additional Obligations would have required very careful consideration. In my judgment, a mistake was made by the Parent, as to the legal effect of acceding to the IRSAs, as it was unaware of the Additional

Obligations. That is corroborated by the fact that, once the mistake was discovered, leading counsel was consulted as to whether rectification would be possible.

Commercial absurdity

172. It would have been commercially absurd for the Parent, in the absence of an agreed restructuring, to have intended to undertake the Additional Obligations and thereby alter the underlying commercial bargain in the 2012 Acquisition. The unchallenged evidence of Mr Breure sets out the relevant facts. In particular:

i) At the time the 2016 Accession Deeds were being drafted and executed, A&O was advising the Parent on the possible restructuring of the High Yield Bond Group. Mr Field (whose intention was adopted by Mr Stokes) was well aware that the Santander Group (and the brighterkind assets) was an important bargaining chip in the negotiations with the Secured Parties, led by H/2.

ii) Just after the 2016 Accession Deeds had been executed by the Parent, those negotiating a restructuring were talking about whether to offer to provide the additional assets as security "*subject to appropriate economics*". They were obviously proceeding on the basis that those assets had not already been provided by the Parent, for no consideration.

iii) The effect of the Holding Company Restrictions was that the Parent not only provided the Secured Parties with recourse to the assets in the Santander Group, but also to any future shares it may acquire following future investments by Terra Firma.

173. Further, Mr Field pointed out during his evidence that the 2016 Accession Deeds potentially gave rise to a new and different Event of Default, and were therefore unsuitable for their intended purpose of avoiding such an Event, at least without very serious consideration by the Parent. This was as a result of accession to clause 6.2 of the IRSAs, which contains the Holding Company Restriction. Clause 6.2 restricts the Parent's ability to hold any shares, unless those shares are secured in favour of the Secured Parties. As the Parent already owned shares in assets outside the High Yield Bond Group, such as shares in brighterkind (PC) Limited, Luxco 1 and Elli Finance II Limited, the Parent immediately came under an obligation either to sell or divest itself of those shares, or secure them in favour of the Secured Parties, failing which an Event of Default would arise. The Parent did not intend to undertake such an obligation.

Intention of Barclays

174. Mr Branwhite explained in his witness statement that he did not read in detail the documents that A&O emailed to him and that he did not review the draft Accession Deeds. He relied on Lathams for advice on whether to sign them on behalf of Barclays as Security Agent. He was concerned to ensure Barclays had sufficient authority to enter into the 2016 Accession Deeds, specifically whether

it needed to obtain consent from the lender group (which he considered it did not). He was also concerned that Barclays was not undertaking onerous or non-standard obligations in relation to whatever security the Parent was offering.

175. He explained that he presumed that entering into the 2016 Accession Deeds was in response to some obligation of the Parent. However, he did not concern himself with what that obligation was. He did not turn his mind to issues of whether the Accession Deeds meant that the Parent was taking on obligations that it need not have taken on, or whether the security the Parent was offering either exceeded or did not satisfy what the ICA required of it, or what commercial effect the 2016 Accession Deeds as drafted would have on the Parent. From his perspective, these were all matters for the Parent and its professional advisers, and were not a concern of Barclays as Security Agent. He was not aware of clause 10.6(b) of the ICA, and no-one brought it to his attention at any stage in the process.

176. Based on that evidence, Barclays submitted that even if the Parent did not have an intention to enter into the Additional Obligations, and made a mistake in so doing, that intention was not shared by Barclays. Nor did it make a mistake. As Security Agent, it intended to enter into the 2016 Deeds submitted by A&O.

177. This evidence was clarified during the cross-examination of Mr Branwhite, where he explained that he understood from his communications with Mr Baker that the Parent was doing no more and no less than putting in place a document to fill the gap in the missing security, and that was the only purpose of executing the 2016 Accession Deeds. In particular, Mr Branwhite was referred to Mr Baker's account of their telephone conversation on 14 November at T4/46. His evidence was as follows:

> "Q. And you would have understood Mr Baker to mean, wouldn't you, that he was going to put a document in place to fill that gap of the missing security, wouldn't you?
>
> A. Yes.
>
> Q. That was the only purpose in executing the proposed document, wasn't it: to fill the gap?
>
> A. Yes, just to replicate what should have happened, yes."

178. Similarly, Mr Kandola was cross-examined about his communications with Mr Baker. In the light of these communications, his evidence at T4/14 was as follows:

> "Q. And you didn't understand the parent to be doing anything else than filling the gap in the security, did you?

A. No, that's correct."

179. Both Mr Branwhite and Mr Kandola gave their answers frankly and fairly. Their understanding was shared by Mr Baker, Mr Field, Mr Baudisch, Mr Stokes and Mr Berkeley. All of the witnesses were experienced in their fields. Their common understanding would have been shared by the objective observer from the background facts and the communications between them.

Nature of the mistake

180. Barclays' case was that the relevant individuals in the Parent and A&O had intended to undertake all of the obligations in the IRSAs, and their mistake was that they had forgotten, or did not know, of the Parent's ownership of the Santander Group. If I had accepted the factual basis of this case, then I would have considered this to be a mistake as to the fiscal consequences of the transaction, which could not give rise to rectification. However, I have rejected that case as a matter of fact. The relevant individuals knew of the Parent's ownership of the Santander Group, but did not know of the Additional Obligations in the IRSAs, because they had not reviewed those obligations. That was not a mistake as to the consequences of a transaction, but rather as to the legal effects of the 2016 Accession Deeds.

The Parent's alternative case

181. The Parent contended that if there was no common intention, then the only relevant intention was that of the Parent. This was on the basis that Barclays had no intention at all as to the underlying commercial bargain, and/or, by analogy with the *Hawksford* line of cases, it was simply agreeing to execute the agreement that the Parent intended.

182. Since I have concluded that there was a common intention, this alternative case does not arise. However, if it had been necessary to decide the point I would not have accepted the Parent's alternative case. If Barclays had not shared the Parent's intention, then there would have been no common intention. Since no case of unilateral mistake was advanced, there would be no basis for rectification.

Conclusion

183. For the reasons set out above, I conclude that:

i) The parties had a common continuing intention to execute a document which satisfied the Parent's obligation to grant security over the Shareholder Loan, and did no more or less than this;

ii) The common intention existed at the time of execution of the 2016 Accession Deeds;

iii) The common continuing intention has been established objectively, by reference to what an objective observer would have thought the intentions of the parties to be;

iv) The parties' subjective intentions were the same as their common intention, objectively assessed; and

v) By mistake, the 2016 Accession Deeds did not reflect that common intention.

vi) In all the circumstances it would be inequitable not to order rectification.

184. Accordingly, I shall allow the claim for rectification.