Neutral Citation No: [2025] NICA 65 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **HUM12929** *ICOS No:* *16/57129* *Delivered:* **19/12/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (CHANCERY DIVISION)

Between:

NOEL SHORTT

Plaintiff/Appellant

and

BANK OF IRELAND (UK) PLC

Defendant/Respondent

The Appellant appeared as a Litigant in Person
William T Gowdy KC (instructed by DWF (NI) LLP) for the Respondent

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Before: Keegan LCJ, Treacy LJ and Humphreys J

HUMPHREYS J *(delivering the judgment of the court)*

Introduction

[1] The appellant is Noel Shortt, a businessman and property developer, who appeals against the judgment of Huddleston J whereby he dismissed his claim against the Bank of Ireland ('the Bank'), the respondent to this appeal.

[2] The judge also entered judgment on the Bank's counterclaim in the sum of £1,445,698.54 against the appellant but no issue arises in relation to that decision.

[3] The background to the matter is that the appellant owned certain properties in Derry together with a Mr Seamus Campbell which were charged to the Bank to secure lending which had been provided to acquire and improve the properties. These consisted of terrace or townhouse properties converted into flats, some 13 properties with 65 separate units. Of the 13 properties, two were vacant and one was a site with development potential.

[4] Having issued a demand for repayment, the Bank initially appointed a fixed charge receiver but ultimately elected to realise its security by selling the properties as mortgagee.

[5] The Bank decided to add the subject properties to a larger portfolio, named 'Project Lanyon', which was sold for the total consideration of around £43M in 2015. An amount of £2,168,867 was attributed to the properties formerly owned by the appellant.

[6] In his action, the appellant claimed that the Bank had acted in breach of the duties which it owed him by selling the properties at an undervalue and had attributed the wrong amount to the properties from the total sale proceeds. There was also pleaded a specific claim of bad faith against the Bank.

[6] The judge rejected these claims and held that the Bank had taken all reasonable steps to achieve the best possible sale price, was satisfied as to the attribution of the proceeds and dismissed the claim of bad faith.

[7] At the trial of the action, the appellant was represented by solicitors, senior and junior counsel although he appeared as a litigant in person at the hearing of this appeal.

The role of the Court of Appeal

[8] Before considering the merits of the appeal, it is important to keep in mind certain features of the role of the appellate court:

(i) The court will review the decision at first instance for errors of law or fairness of the proceedings;

(ii) When asked to review findings of fact, the appeal court recognises that the trial judge had the advantage of hearing and seeing the witnesses and was able to make a judgement on their credibility, and will only intervene when there has been a demonstrable failure to consider relevant evidence or a finding has been made which could not reasonably be explained or justified;

(iii) Fresh evidence is only admissible in an appeal when:

  (a) It could not with reasonable diligence have been obtained for the trial;

  (b) It would probably have had an important influence on the outcome of the trial; and

  (c) It appears credible (the *Ladd v Marshall* [1954] 1 WLR 1489 conditions).

The pleaded case

[9] In his statement of claim, the appellant set out that his business involved the purchase of old buildings which he would refurbish into one bedroom flats and let to tenants. Thirteen such buildings were the subject of the secured lending and they generated a rental income of £320,000 per annum. It was also pleaded that the appellant had fitted out the properties with kitchens, bathrooms, furniture and other equipment to a value of £700,000.

[10] The appellant states that, following the sale of the properties as part of the portfolio by the Bank, he received correspondence dated 9 December 2015 advising that it had received £2,168,867 for the properties.

[11] The appellant pleaded the following as particulars of breach of fiduciary duty:

(i) The rental income of the subject properties represented about 8.5% of the total rent roll of Project Lanyon and the Bank had under-accounted for the value of the properties;

(ii) The prices attributed by the Bank did not reflect the true, proper or best value for the properties;

(iii) The Bank failed to account for the contents of the properties.

[12] It was stated that the true value of the properties was £4,250,000 and the appellant claimed the difference in value as damages.

[13] The Bank's defence pleaded that the prices for the properties were attributed by the purchaser, not by it. It is stated that Savills were instructed as agents to market the Project Lanyon properties and they sent information memoranda to 56 institutional investors, of whom 11 submitted first phase bids. Five Phase 2 bids were received and then the top two bidders were invited to make best and final offers. This process resulted in the portfolio being sold to Lanyon Jersey Propco Limited (a company within the Lotus Group) for the best price reasonably available. The prices submitted included an overall price for the portfolio and individual prices for the properties comprised within it. Furthermore, the Bank instructed an independent valuer, Trevor Dougan MRICS, to carry out 'Red Book' valuations of the subject properties. He valued the appellant's properties at £1,865,000 in October 2015.

The evidence

[14] In April 2013, the Bank obtained a valuation of the subject properties from O'Connor Kennedy Turtle (OKT). Their opinion at that time was that the properties were worth £1,810,500.

[15] In 2015, the Bank and KPMG jointly instructed Savills to conduct the sale process of all the properties in Project Lanyon. Savills produced a set of figures which represented the anticipated prices which could be achieved for each of the properties in June 2015. These were not RICS Red Book valuations but known as Estimated Realisation Price ('ERP') . The total ERP for all the Derry properties was £2,230,000.

[16] The discovery provided by the Bank reveals that eleven bids were received in Phase 1 of the process and four bidders were invited to take part in Phase 2. During the course of this process, on 5 October 2015, the appellant made an offer via the Sekhon Group ('Sekhon') to buy back the Derry properties for £2M. Sekhon did not bid for the wider portfolio of properties.

[17] On 13 October 2015, Ian Leonard of KPMG spoke to the appellant and indicated that the Bank would be minded to sell his properties to Sekhon for £2M on the basis that they were able to complete within a very short timeframe, the suggestion being 21 days. If they were not able to complete then the properties would remain in the larger portfolio. It is recorded in an email that the appellant said he would speak to Sekhon and ask them to "mobilise their lawyers". Mr Leonard gave evidence at the hearing that they never heard anything further from Sekhon or their lawyers.

[18] On 21 October 2015, Lotus made a Phase 2 offer of £43,050,000 whilst Fitzwilliam offered £43,150,000.

[19] Two days later, Mr Dougan provided his RICS Red Book valuations of the Derry properties as follows:

Mount Royal	650,000
1 Westland Mews	90,000
11 Eden Terrace	165,000
Spencer Road	100,000
2 Westland Mews	90,000
3 Eden Terrace	165,000
3 Westland Mews	90,000
4 Westland Mews	90,000
5 Westland Mews	90,000
56 Northland Road	100,000
58 Northland Road	120,000
60 Northland Road	65,000
1 Eden Terrace	50,000
TOTAL	**1,865,000**

[20] The best and final offer ('BAFO') bids were received on 26 October 2015 and Savills recommended to the Bank that the Lotus bid of £44M should be accepted. It was £400,000 in excess of the Fitzwilliam BAFO of £43,600,000.

[21] On that same date, Audrey McStraw of Savills emailed Ruairi Mussen of the Bank and her colleague Ben Turtle in relation to the Derry properties, stating that they had now had an opportunity to consider certain "detrimental issues" in relation to the properties and had formulated an alternative valuation. This was based on a yield of 18% to the estimated realisable values previously reported, in light of the fact that demand was likely to be limited to buy to let cash purchasers. The revised valuation was in the sum of £2,230,000.

[22] The sale to Lotus completed on 1 December 2015 and the Bank wrote to the appellant on 9 December attaching a schedule of the price per property realised by the sale, to a total realisation of £2,168,867.

[23] The issue of the attribution of prices was described in senior counsel's opening of the case in the following terms:

> "It is not really an issue, my Lord. We are not quite sure how the attribution was done but we simply say that it was at a serious undervalue …"

[24] Evidence was given by both Mr Turtle and Mr Mussen on the question of attribution. Mr Turtle stated:

> "… we need apportioned pricing so that throughout a process if an asset drops out, then we know exactly what that purchaser, the value that purchaser has attributed to that price and we can therefore adjust the portfolio."

[25] In the course of questioning and in closing submissions on behalf of the appellant, senior counsel referred to an email dated 19 October 2015 from Mr Leonard to Mr Mussen and Mr Turtle:

> "In light of discussions today, see attached a revised bid sheet to include ERP. Should assist buyers in pro-rating their bids to our valuations."

[26] Attached to this email was a spreadsheet containing each of the properties in the portfolio, identified by its address and with an allocated ERP. There is then a blank column to be completed by the bidder with its allocated price for each property. This bid sheet was sent to the bidders by Mr Turtle to be completed.

[27] It does appear that the bidders applied a percentage reduction to Savills' ERP figures when preparing their Phase 2 bids.

[28] Further, reliance was placed on an email from Mr Mussen to Mr Turtle of 28 October 2015 which stated:

"Ben

I can appreciate that valuation processes may differ from firm to firm and we are travelling in the right direction however I would ask you to reconsider on the Campbell and Shortt and [REDACTED] vals.

As you know we have Trevor Dougan instructed on a formal RICS reliance basis and these 2 appear to be the only ones where there is any significant variance.

The Campbell & Shortt vals at your level appear to be very low and will cause us problems with that borrower and I'm not convinced either bidder would have chipped as much if we had received their detailed bid not a pro rata.

I suspect the 2 would broadly cancel each other out but would be much better for a lot of reasons if C&S was up and [REDACTED] down."

[29] Contained within the trial bundles prepared by the appellant's solicitors were final bid sheets emanating both from Fitzwilliam and from Lotus. Each of these templates sets out the ERP's set by Savills and the price allocated by the bidder as follows:

Property	**ERP**	**Fitzwilliam Phase 2**	**Lotus Phase 2**	**Lotus final**
Mount Royal	819,000	640,718	625,456	862,900
1 Westland Mews	126,000	98,571	96,225	89,609
11 Eden Terrace	151,200	118,284	115,470	179,218
Spencer Road	105,000	82,140	80,188	106,203
2 Westland Mews	126,000	98,571	96,225	89,609
3 Eden Terrace	151,200	118,284	115,470	179,218
3 Westland Mews	126,000	98,751	96,225	89,609
4 Westland Mews	126,000	98,751	96,225	89,609
5 Westland Mews	126,000	98,751	96,225	89,609
56 Northland Road	168,000	131,425	128,300	157,645
58 Northland Road	157,500	123,212	120,280	136,073
60 Northland Road	126,000	98,570	96,225	89,609
1 Eden Terrace	63,000	49,285	48,113	16,594
TOTALS	**2,370,900**	**1,854,773**	**1,810,627**	**2,168,867**

[30] On 10 November 2015 Mr Turtle emailed Mr Mussen asking if he was happy with the apportionment for the final Lotus bid as shown in an attached spreadsheet. He continued:

> "As soon as you're happy with this then we'll arrange to meet Lotus and try and get them to change their apportionment."

[31] On 12 November 2015 Mr Turtle emailed again attaching another spreadsheet and saying:

> "Just received the apportionment from Davidson Kempner/Lotus, this is what they plan on using as the apportionment. Please call me on the mobile if there are any issues."

[32] On 18 November 2015 an email was sent by Mr Mussen to colleagues in the Bank, the Bank's solicitors and KPMG. It stated:

> "Further to yesterday's meeting please find the attached bid breakdown which will be the individual purchase prices to be applied by DK."

[33] Attached to this email was the final spreadsheet with the individual property details, the ERP and the price allocated. Mr Mussen was asked in evidence about this spreadsheet and said that those figures came from Lotus. He was not challenged on this averment in cross-examination. The figures for the Derry properties are identical to those which appeared in the letter to the appellant dated 9 December 2015.

The judgment

[34] Having outlined the parties' respective positions and the timeline for the sale of the properties, the judge addressed the legal issues arising in the case. He identified the duties of a mortgagee exercising its powers of sale as follows:

> "when the money it is owed is due, a mortgagee can act in its own interests in deciding whether and, if so, when, to exercise its power of sale. Once it decides to sell, however, it must then take reasonable steps to achieve the best price reasonably available on the market at the time of sale or the true market value." (para [12])

[35] The judge also outlined the principle that a mortgagee must exercise its power of sale in good faith and for a proper purpose.

[36] In relation to portfolio sales, he referred to the decision of the High Court in England & Wales in *McDonagh v Bank of Scotland* [2018] EWHC 3262 at paras [136]-[153].

[37] The judge also stated the remedy for breach of duty by a mortgagee is not damages per se but an order that the mortgagee account to those interested in the equity of redemption that the proper price was received.

[38] The judge then set out the witnesses called by the Bank:

(i) Christopher Callan, the expert witness on valuation;

(ii) Ben Turtle of Savills who led the portfolio sale;

(iii) Ruairi Mussen, formerly of the Bank, as to the sale and marketing process;

(iv) Ian Leonard of KPMG, who had been appointed as a fixed charge receiver and proved the level of rents received.

[39] The only witness called by the appellant was his expert witness, Dara Furey, a financial adviser and estate agent based in Buncrana, Co Donegal, and a member of the Institute of Professional Auctioneers and Valuers. Mr Furey's evidence was that the true market value of the properties at the point of sale was £4M, rather than the £2.168M realised.

[40] The judge set out a number of criticisms which Mr Furey levelled against the valuations obtained by the Bank and the sale process:

(i) The valuation carried out by OKT in 2013 was at the bottom of the market and failed to take account of rates payments and cash top-ups from tenants;

(ii) The 'drive-by' valuations conducted by Savills between June and October 2015 were expressly on a non-reliance basis and produced a range of different figures from £1.4M to £2.37M;

(iii) He doubted whether Mr Dougan could have completed his Red Book valuations within the timescale of 15 days;

(iv) Whilst the figure in his report was £1.865M, Mr Dougan sent an email to Mr Mussen on 21 October 2015 suggesting that the final valuation should be £2M;

(v) The portfolio sale was not advertised publicly but he knew a number of investors in the area who would have been interested.

[41] Mr Turtle, of Savills, gave evidence as to the rationale for the approach adopted for the sale and the targeting of institutional investors. He outlined that whilst Savills invited offers for the portfolio in excess of £55.3M, the Phase 1 bids ranged between £27.6M to £48M, and each of the bidders reduced their offer in Phase 2 as inspections

of the properties and due diligence took place. An indicative bid put forward by Doherty Baines was rejected as not being credible.

[42] Mr Turtle also gave evidence that the bid structure required bidders to apportion prices, both at the Phase 2 and BAFO stages. The attribution of prices for each individual property was not therefore carried out by the Bank.

[43] In terms of the expert evidence, the judge noted the valuers agreed that an investment approach should be adopted by calculating:

(i) The gross rents received;

(ii) Adjusting this figure by an appropriate percentage for operational expenditure ('opex'); and

(iii) Multiplying the net figure by a suitable multiplier.

[44] However, the experts differed in a number of material respects in their application of this agreed valuation method:

(i) Mr Callan used the actual cash top-ups received from tenants as part of the gross rent calculation whilst Mr Furey used a maximum figure, therefore including rent not actually collected;

(ii) Mr Callan deducted a figure of 30% for opex which he described as a normal figure whilst Mr Furey used 11-15% based on figures provided to him by management agents in Donegal;

(iii) The experts disagreed on the extent to which the properties could be described as houses in multiple occupation;

(iv) On the question of capitalisation, Mr Callan used figures of 12.5% (eight years' purchase) for three of the properties and 10% (ten years' purchase) for the others. Mr Furey used figures from other Derry based comparables although these related to the sales of individual apartments rather than entire buildings;

(v) On the uninhabited properties, Mr Furey adopted a method of sale price when developed less costs of completion which Mr Callan described as too uncertain in light of the planning status and other variables.

[45] Reference is also made to an affidavit sworn on 23 February 2023 from Mr Connor O'Leary, Deputy Group Secretary and employee of the Governor and Company of the Bank of Ireland, in relation to the role of Mr Dick Milliken, who was a non-executive director with the successful bidder. He averred that Mr Milliken was an independent non-executive director of Bank of Ireland Mortgage Bank from 25 January 2011 to 25 July 2019. This company carried on business in the provision of

residential mortgages in the Republic of Ireland and did no business in the United Kingdom. In his declaration of interests, Mr Milliken declared that he had been appointed as a non-executive director of the Lotus Group on 1 September 2012. The court also heard evidence from Mr Mussen that Mr Milliken had no decision-making role in relation to the appointment of the successful bidder.

[46] In his analysis, the judge dealt first with the method of sale, referring to *McDonagh*, and steps taken by the Bank in relation to the appointment of experts and receipt of advice. He concluded:

> "In my view, the actions adopted by the Bank in pursuing a portfolio sale fell within the realm of the discretion that was open to the Bank both as to the method of sale adopted and, indeed, the process that it followed. One has to recall that the Bank's primary role, at that point in time, was to realise as much as it could in order pay down the accumulated debt. Mr Mussen's evidence to that effect was cogent on that point. To that extent (i.e. the recovery of as much as possible) the interests of mortgagee and mortgagor were aligned, but as to the methodology to be adopted the Bank as mortgagee, in my view, had the right to adopt the approach it preferred provided that it acknowledged legal duties and obligations which it owed to its borrowers. As McDonagh makes clear, even if there were an error of judgment (which I do not accept to be the case in this instance) such an error does not constitute negligence per se, nor, indeed, a breach of the relevant duty." (para [56])

[47] In terms of the valuation issues, the judge determined that the evidence of Mr Callan was "greatly to be preferred" (para [62]). He found that Mr Callan had greater experience in sales such as this by comparison with Mr Furey but, moreover, held:

(i) Mr Furey had taken an overly generous view of the rental income whilst Mr Callan's more conservative approach based on actual receipts was to be preferred;

(ii) Mr Callan's explanation for the 30% opex deduction was more persuasive;

(iii) On capitalisation, Mr Furey looked to single unit sales which were invariably higher, whilst Mr Callan's principal comparator was more reflective of the investment market; and

(iv) Mr Callan's valuation of the uninhabited properties was consistent with the Red Book.

[48] As a result, the judge found that Mr Callan's valuation of £1,861,750 was "by far the more convincing" than Mr Furey's £4M. The various figures are summarised in this table:

Property	**Dougan**	**Callan**	**Furey**	**Sale Price**
Mount Royal	650,000	675,000	1,381,250	862,900
Westland Mews	450,000	428,500	828,750	448,045
Eden Terrace	380,000	338,250	893,850	375,030
Spencer Road	100,000	110,000	221,000	106,203
Northland Road	285,000	310,000	687,250	376,689
TOTAL	**1,865,000**	**1,861,750**	**4,012,100** (rounded to 4M)	**2,168,867**

[49] The judge also referred to the post-sale realisation figures by Lotus which, whilst not evidence of valuation at the date of disposal by the Bank, provided a form of cross-check. Lotus had disposed of the Derry properties for a total amount of £1,877,000. These figures, he found, were consistent with Mr Callan's valuations.

Property	**Sale Price**	**Date**
Mount Royal	800,000	July 2019
Westland Mews	400,000	Q4 2017
Eden Terrace	172,000	Q4 2016 to Q2 2019
Spencer Road	100,000	Q3 2018
Northland Road	405,000	Q2 2018
TOTAL	**1,877,000**	

[50] In relation to the attribution of purchase prices, the judge was satisfied on the evidence that the bid proforma was crafted in such a way that individual prices were sought from the bidders.

[51] The judge further concluded that no reasonable person, appraised of the full facts, could have considered that the involvement of Mr Milliken gave rise to a conflict of interest.

[52] In terms of the fixtures and fittings, no cogent evidence on this issue was led by the appellant at trial. The judge noted that fixtures would have been captured by the mortgage in any event and any items of furniture could have been removed. In any event, this could not have altered the outcome of the case.

[53] In light of those findings, the judge concluded that the Bank took reasonable steps to achieve the best possible price readily available and the choice of a portfolio sale did not breach of any duty owed by it as mortgagee. He therefore entered judgment for the Bank on the appellant's claim.

The grounds of appeal

[54] In a diffuse and lengthy amended Notice of Appeal, the appellant claims, in summary:

(i) The judge erred in law in his finding that the respondent did not breach its duties to the appellant in light of *McDonagh v Bank of Scotland*;

(ii) The appellant was denied a fair trial by the reason of non-disclosure of key documents by the Bank;

(iii) The trial judge ought to have recused himself;

(iv) The issue of conflict and the role of Mr Milliken was not properly or fairly addressed;

(v) The trial judge ought not to have preferred the expert evidence of Mr Callan;

(vi) The final figures attributed to individual properties were allocated by the Bank and not Lotus;

(vii) Mr Dougan was asked to fabricate evidence by the Bank;

(viii) The sale process was rigged in favour of Lotus;

(ix) The disposal ought not to have proceeded by way of a portfolio sale.

Error of law

[55] *McDonagh* concerned the sale of properties by a receiver rather than a mortgagee. Morgan J set out a number of advantages which may accrue from a portfolio sale, including a higher aggregate price, a sale of all properties being secured, shorter timescales and reduced cost. It must be borne in mind that, if there is a conflict, the mortgagee is entitled to prefer his own interests to those of the mortgagor. This is subject to the caveat explained by the judge:

> "[149] I consider, however, that the receiver is not able to include a mortgaged property in a portfolio sale unless the receiver asks himself whether that course is likely to be in the best interests of the mortgagor of that property. It is

not good enough for the receiver to want to include that property in the portfolio in order to help the mortgagee or even the owners of other properties where he has been appointed receiver. Further, the receiver must actually ask himself the relevant question. If he does not do so, then his decision not to conduct a conventional separate sale of the property where he has not formed the view that including the property in a portfolio is likely to be in the best interests of the mortgagor of that property will be a breach of duty.

[150] The breach of duty referred to in the last paragraph may or may not result in a loss to the mortgagor. If I hold that there has been a breach of duty by reason of the receivers failing to ask themselves what was in the best interests of the borrower in respect of Sony House, I would then have to make a finding as to what would have been the most likely answer to such a question which would have been given by a competent receiver.

[151] Even if the receiver did not apply his mind to the question whether it was in the best interests of the mortgagor to include the property in a portfolio sale, it might emerge that the correctly apportioned part of the proceeds of sale of the portfolio exceeded or equalled the price which would have been achieved on a separate sale of the property. In such a case, the mortgagor would have suffered no loss from the breach of duty. However, where the correctly apportioned part of the proceeds of the portfolio sale was less than the price which would have been achieved on a separate sale of the property then the mortgagor will have suffered a loss. In order to quantify the loss the court will have to assess the price which would have achieved on a separate sale of the property. For this purpose, the court will have to determine, based on valuation evidence, the most likely market value. That value is not to be equated to the lowest figure in a bracket of valuations which would have been non-negligent valuations: see Lion Nathan Ltd v C-C Bottlers Ltd [1996] 1 WLR 1438 at 1446H-1447F, South Australia Assets Management Corp v York Montague Ltd [1997] AC 191 at 221F-222A and Michael v Miller [2004] 2 EGLR 151 at [139]."

[56] The appellant says that Huddleston J erred by failing to answer the '*McDonagh* question', ie whether the inclusion of the properties in the portfolio sale was likely to be in the best interests of the mortgagor. This issue was specifically referred to in the

closing submissions prepared by senior counsel for the appellant, and the judge expressly alluded to the relevant paragraphs in Morgan J's judgment in *McDonagh*. Ultimately he reached the factual conclusion, on the evidence, that there was no breach of duty by the mortgagee.

[57] We were not asked to adjudicate as to whether the specific duties imposed on receivers in a portfolio sale and referred to in *McDonagh* apply equally to a mortgagee exercising a power of sale.

[58] In any event, even if there were a breach of duty in failing to ask the right question, the judge found on the evidence that the appellant had suffered no loss. This point of appeal can only therefore be academic unless the appellant can impeach the judge's finding on the valuation issue. As will be apparent, the crucial finding that no loss was sustained cannot be successfully challenged in this appeal.

Disclosure

[59] Much time was occupied at the hearing of the appeal and in interlocutory applications relating to this question. On 26 June 2019, the Bank provided a detailed amended list of documents following a specific discovery application. These documents were inspected by the appellant's solicitors and copies of the relevant documents provided.

[60] A further request for documents was made by letter dated 23 May 2022 but no further application for discovery was made and the trial proceeded. At no time during the trial process did counsel assert that they were in any way prejudiced by the absence of documentation or seek an adjournment for the purpose of pursuing outstanding discovery.

[61] The principal issue raised by the appellant relates to bid sheets and the apportionment of prices to individual properties by bidders. It is noteworthy that these were the subject of little consideration at trial and the evidence given by the Bank's witnesses went unchallenged.

[62] During the hearing of the appeal it became apparent that disclosure had been made of the relevant bid sheets and details of these have already been set out in this judgment. In any event, this court conducted a review of all the material which was disclosed and considered it in light of the submissions made by appellant.

[63] We can discern no unfairness in the manner in which this issue was addressed in discovery nor in the hearing of the action. It is important to bear in mind that the key issue for the judge to determine, on the evidence, was whether the Bank had taken all reasonable steps to achieve the best possible sale price for the properties at the relevant time. Even at the height of the case advanced by the appellant, any failings which there might have been on the part of the Bank made no difference to the

outcome of the key question for the judge to determine – namely whether the Bank took reasonable steps to obtained the best price available on the market at the time.

Recusal

[64] There was no application moved before or during the trial for Huddleston J to recuse himself. The appellant now seeks to rely on new material to contend that the judge ought not to have heard and determined the case by reason of his apparent bias.

[65] The appellant has identified as grounds for this contention various connections between the judge (and his former partners in Pinsent Masons or its predecessor firms) and Mr Milliken and between the judge and Mr Callan. There is, in reality, nothing 'new' about any of this information in that it was contained in publicly available material.

[66] The test for apparent bias was outlined by the House of Lords in *Porter v Magill* [2001] UKHL 67, namely whether the fair minded and informed observer, in possession of all the facts, would consider that there was a real possibility that the judge would be biased. The fair minded and informed observer will be conscious that a professional judge can be expected to discharge his duty to carry out an impartial and independent reasoning process - *Re Medicaments* [2001] 1 WLR 700 at [68].

[67] In *Locabail v Bayfield* [2000] QB 451, the Court of Appeal in England & Wales commented that:

> "Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances." (para [25])

[68] The alleged connection between the judge and Mr Callan is that each is director of a separate management company relating to residential property, those companies sharing a common registered office. This provides no basis whatsoever for any perception of bias.

[69] In relation to Mr Milliken, it is said that from 2002 to April 2009, Mr Milliken was a director of companies within the Almac Group ('Almac'), and Almac was a client of L'Estrange & Brett, a law firm in which the judge was a partner. For a period of some months between August 2008 and April 2009 both were directors of The McClay Foundation Corporate Trustee Limited, a charitable organisation associated with the founder of Almac.

[70] These limited and historical connections could never give rise to the sort of concern which would trigger the perception of bias on the part of the reasonably well informed observer and meet the test in *Porter v Magill* and *Locabail*. There is no basis whatsoever for the claim that the judge ought not to have heard this action.

The affidavit of Conor O'Leary

[71] The appellant complains about the provision of this affidavit, addressing the allegation of a conflict of interest arising in respect of Mr Milliken. Senior counsel acting for the appellant agreed that this evidence could be adduced by way of affidavit and no notice to cross-examine Mr O'Leary was served.

[72] The judge also had the benefit of oral evidence from Mr Mussen on this issue. The evidence which was admitted unassailably led the judge to the conclusion he arrived at that no conflict of interest arose. That finding is unimpeachable on appeal.

The evidence of Mr Callan

[73] Aside from the wholly unsustainable allegation of a connection with the judge, the appellant also seeks to undermine Mr Callan's expertise and professionalism by a series of comments. The time to challenge Mr Callan was in cross-examination. The judge heard detailed evidence from two competing valuation experts, read their reports and considered the minutes of their meeting. It was a central part of the judicial role in this case to weigh up the expert evidence and reach conclusions. He had the opportunity to hear those witnesses give evidence and be cross-examined. Having done so, the judge expressed a clear preference for the evidence of Mr Callan in every material respect. This was a conclusion which he was entitled to arrive at and there is no basis for this court to interfere with that.

Attribution of individual prices

[74] We have already set out in detail in this judgment the evidence in relation to this issue. In summary:

(i) All the relevant bid sheets were disclosed by the Bank;

(ii) They reveal that each of the bidders apportioned an individual price for each property as part of their bids;

(iii) In some cases, these may have been calculated by a pro rata percentage reduction from the Savills' ERP figures but they were nonetheless the figures attributed by the prospective purchasers, not the Bank;

(iv) The Bank's evidence in relation to this was never challenged at trial;

(v) In any event, this does not speak to the key issue in the case which was whether the Bank had complied with its duties as a mortgagee in taking reasonable steps to achieve the best possible price for the properties.

[75] It does appear clear from the email exchanges which postdated the final bid process that the Bank was concerned about the proper apportionment of values to the subject properties, and expressed the view that the values previously attributed to them were too low. It is a reasonable inference to draw that Lotus was persuaded to increase the apportioned figures for the appellant's properties in the final bid spreadsheet produced by it.

[76] However, that process can only have been of benefit to the appellant. The sum apportioned from the final bid was over £350,000 higher than had been the case with the Phase 2 bid. Notably, it was also almost £292,000 more than the actual sums obtained by Lotus when it disposed of the same properties.

The evidence of Mr Dougan

[77] The appellant alleges that Mr Dougan was instructed by the Bank to fabricate valuations as part of the sales process. This allegation was never a pleaded part of the appellant's case, nor was it put to either Mr Dougan or Mr Mussen during the course of the evidence at trial.

[78] The claim also has no evidential basis. The contemporaneous documents simply do not support the appellant's position.

[79] The Derry properties sold for a total apportioned price of £2,168,867, an increase of over 16% from the Dougan valuations.

[80] There is no basis to challenge the Bank's case that Mr Dougan was instructed as an independent expert to value the subject properties as part of the overall process.

The sales process

[81] The judge heard various challenges to the manner in which the properties were marketed and the handling of the sales process and concluded that the Bank's position was not susceptible to challenge. He found that reasonable care had been taken to instruct an expert to undertake the task of marketing and selling the large number of properties. The court also heard directly from the agent responsible and had sight of his detailed recommendations report. The judge found that the Bank had exercised informed judgement. Both the Bank and the mortgagors were interested in obtaining the best possible prices for the properties given that most of them were in negative equity. The choice of a portfolio sale fell, it was held, within the realm of the discretion

open to the Bank. The conclusions in this regard are set out at paras [55] and [56] of the judgment.

[82] The appellant also makes reference to the Sekhon offer. His counsel did not seek to challenge the evidence of Mr Leonard at the trial that the Bank was prepared to sell the properties to Sekhon but there was no further engagement by them following their initial proposal.

[83] We can detect no error of law or reasoning in the judge's approach. The inescapable conclusion is that the portfolio sales process delivered a better price for the properties that the independent Red Book valuations available to the Bank at the time. It was demonstrably in the Bank's best interests to obtain the best price possible in light of the distressed nature of its loan book.

Fresh evidence

[84] The appellant sought to admit in evidence on appeal affidavits which had been sworn by Dara Furey and Edmund Simpson and we have considered these. The former related to matters arising at trial which the parties were able to deal with in submissions. The latter was from another Derry businessman and there was no impediment to his evidence being adduced at the original trial.

[85] In addition, the court was referred to an unsworn statement from a Mr Duffy who had been the supervisor of the appellant's Individual Voluntary Arrangement in 2013. This issue did not arise on the appeal from Huddleston J.

[86] Accordingly, we declined to admit the fresh evidence on the basis that:

(i) The material could with reasonable diligence have been obtained for the trial; and

(ii) We could discern no important influence which it would have had on the outcome of the trial.

Conclusion

[87] The arguments made by the appellant on this appeal failed to grapple with the key legal issue. This was a case which turned on the valuation evidence of two expert witnesses. For the reasons which he outlined in his judgment, the judge clearly preferred the evidence of Mr Callan in every material respect. The sale process delivered a price for the Derry properties of over £300,000 more than the valuations of either Mr Dougan or Mr Callan. The Bank therefore complied with its duties and obtained the best price available in the market at the relevant time. The fact that the appellant believes that the Bank struck a bad deal simply does not accord with the commercial realities of the situation relating to the sale of properties which were in

negative equity. It was manifestly in the Bank's best interests to maximise its recovery in the sale of this portfolio and, as is demonstrated by the evidence accepted by the judge, this is what was achieved in all the circumstances.

[88] None of the appellant's grounds of appeal are made out. We dismiss the appeal and affirm the order of Huddleston J.