

Neutral Citation No: [2020] NICA 64

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Ref: McC11159

Delivered: 22/01/2020

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DECISION (Commercial List)

Between:

KARL THOMAS LIPSETT and KAREN LIPSETT

Plaintiffs/Appellants:

-and-

AIB GROUP UK PLC

Defendant/Respondent:

Before: McCloskey LJ, Sir Paul Girvan and Sir Ronald Weatherup

PARA 1	OVERVIEW
PARAS 2 - 4	FACTUAL MATRIX
PARAS 5 - 10	THE TWO CLAIMS
PARAS 11 - 18	JUDGMENT AT FIRST INSTANCE
PARAS 19 - 20	THE APPEAL
PARAS 21 - 32	THE CONTRACTUAL PAPER TRAIL
PARAS 33 - 38	THE DISPUTE ERUPTION
PARAS 39 - 48	THE CONTENTIOUS CONTRACTUAL ISSUES
PARA 49	THE PRE-DETERMINATION GROUND OF APPEAL
PARAS 50	OTHER GROUNDS OF APPEAL
PARAS 51 - 55	OMNIBUS CONCLUSION AND DISPOSAL

McCLOSKEY LJ (delivering the judgment of the court)

*Overview*

[1] The Appellants, Karl Thomas Lipsett and Karen Lipsett ("the Lipsetts/the Appellants"), are self-representing litigants. They were legally represented at first

instance. The Respondent is AIB group UK PLC (“the Bank”). The appeal is against the following two orders of the Queen’s Bench Division of the High Court:

- (i) By the first of its orders dated 13 May 2019 in the Order 88 summons (No 15/063301) the court ordered that the Lipsetts deliver up possession of 21 Ballymather Road, Nutts Corner, Crumlin, County Antrim BT 29 4UL (“*the Crumlin premises*”) and remitted the case to the Master to determine whether any stay on the order for possession was considered appropriate. (The Master has subsequently adjourned the proceedings generally).
- (ii) By the second order dated 13 May 2019 the court ruled that the Bank have judgment against the Lipsetts on the claim in the Writ action No 16/013357, wherein they claimed unliquidated damages from the Bank for alleged negligence *et al* and that they pay the Bank’s costs to be taxed in default of agreement.

By this appeal these Orders are challenged on a multiplicity of grounds.

### *Factual Matrix*

[2] The protagonists in the dispute are:

- (a) The Appellants who, in substance, were at all times acting together in their dealings with the Bank.
- (b) Cindy Greer, a Bank employee (who died before the trial), with whom the Appellants had all relevant pre-contract meetings and discussions.
- (c) Barry Pollock, the Bank official who sanctioned the loan arrangements.
- (d) Chris Floyd, a “*Mortgage Recovery Officer*” employed by the Bank.

Material dates and events in the litigation are:

- (e) The Bank’s Order 88 application was issued on 1 July 2015.
- (f) The Appellants’ Writ action was initiated on 12 February 2016.
- (g) On 6 May 2016 the Chancery Master made the following order in the Order 88 proceedings:

*“It is ordered that this action be transferred to the Queen’s Bench Division (Commercial List)*

*and heard together with action 2016/13357 [the Writ].*

A substantial quantity of further pleadings and interlocutory activity followed. To continue:

- (h) The trial dates were 4 – 7 February 2019.
- (i) Judgment, which was reserved, was given expeditiously, on 11 April 2019.
- (j) Each of the final orders at first instance is dated 13 May 2019.
- (k) The Notice of Appeal is dated 4 June 2019.
- (l) There is a draft amended Notice of Appeal, dated 7 January 2020, whereby the Appellants seek to add one further ground (see [21] *infra*).

[3] As the judgment at first instance demonstrates there were significant matters of dispute between the parties. These concerned, in the main, the interaction and discussions between the Appellants and one Bank employee in particular (Ms Greer), preceding the execution of the loan arrangements at the heart of this dispute. The parties were also – and remain – in dispute about the import and legal status of certain documents. Notwithstanding this unpromising framework the court, via a combination of formal directions and considerable coaxing, elicited from the parties a joint schedule identifying certain factual matters of agreement.

[4] The schedule, in its final form, incorporated a point by point commentary inserted by the Appellants. Some of these insertions, correctly analysed, were matters of comment, argument and elaboration, combined with various irrelevancies, rather than points of material disagreement. The court has refined and reduced the schedule in the following way:

- (i) The Lipsetts first presented to the Bank in January 2007. Thereafter they dealt mainly with Cindy Greer, described by the Bank as a “Mortgage Facilitator”.
- (ii) Ms Greer’s role was explained in writing on the Questionnaire completed by the Lipsetts and signed by them on 16 January 2007.
- (iii) Ms Greer died tragically in a car accident in October 2018. Ms Greer swore an affidavit in the action prior to her death. This was admitted in evidence at first instance.
- (iv) The Lipsetts were proposing to buy a residential property on the market for

sale (where they now reside) at Ballymather Road, near Crumlin (the "Crumlin property"). They were then living in a house on the Saintfield Road, Belfast (the "Saintfield property") which was on the market for sale.

- (v) The Lipsetts advised the Bank that the Saintfield property was on the market. Ms Greer contacted the Agent directly and was advised that there was an offer on the house of £395,000. Bids remained open. The Lipsetts informed Ms Greer that a sale could not be guaranteed and provided her with potential rental income figure of £10,800 per annum.
- (vi) The mortgage product, the subject of the parties' contractual arrangements, was the "First Trust Bank Flexi Tracker".
- (vii) On 16 January 2007 the Lipsetts were provided by Ms Greer with a "Key Facts" document relating to a possible mortgage with the Bank.
- (viii) On 17 January 2007 the Lipsetts returned to the Bank and at a further meeting with Ms Greer a mortgage application was completed. The Lipsetts were seeking a mortgage of £369,000 to acquire the Crumlin property.
- (ix) As part of the application process, the Lipsetts provided the Bank with a printed sheet of their assets.
- (x) The Lipsetts' financial details were inserted internally into a pro-forma recording their monthly income and expenditure.
- (xi) The application was accepted and the mortgage requested was sanctioned by Mr Barry Pollock on 28 January 2007.
- (xii) The Bank asserts that it was not expecting the Lipsetts to fund a mortgage of almost £400,000 from their joint income. The Lipsetts point out that Ms Greer completed Section F of the Mortgage Application Form on the basis of affordability from income.
- (xiii) The Bank recognised that the Lipsetts would not be able to undertake capital repayments unless they released the equity in their Saintfield property.
- (xiv) The Mortgage Offer, made on 15 February 2007, set out the terms and conditions of the proposed loan arrangement. The repayments as indicated therein were identical to those supplied in the Key Facts document. The Mortgage offered was (a) a Repayment Mortgage with (b) an initial interest only period of five years. Specific express conditions were:
  - a) A satisfactory valuation on the Crumlin property.

- b) A lien over £30,000 in a First Trust Bank account pending a £250,000 reduction in the mortgage.
  - c) A solicitors' lien over the proceeds of sale of the Saintfield Road property.
- (xv) The Bank's Mortgage Offer expressly stated:
- a) They could withdraw from it up until funds were drawn down.
  - b) If they withdrew, they would be liable for the valuation and a booking fee (these would have been £460).
  - c) The Bank had not recommended the Mortgage and they must make their own choice whether to accept it. (Only one mortgage had been identified by the Bank and there are special MCOB rules that apply to this situation).
  - d) The Mortgage was only "interest only" for the first 60 months and was a repayment mortgage thereafter.
  - e) They were given warnings about affordability particularly if their income was to go down.
  - f) The Additional Security (the Lien and Solicitor's undertaking) was set out. (See above, note at paragraph 20 in respect of the mortgage that Mr. Pollock sanctioned but was somehow not written into the Formal Offer of Mortgage).
- (xvi) The Bank asserts that the Lipsetts were provided with the Standard Mortgage Conditions. The Lipsetts dispute receiving this document. The Lipsetts were also provided with the Bank pro-forma "Tariffs for Mortgage Customers".
- (xvii) The Lipsetts opened a First Trust Account on 15 February 2007 and were issued with a formal Mortgage Offer on the same date.
- (xviii) On 19 February 2007, the Lipsetts executed a lien over the £30,000 in the First Trust Deposit Account.
- (xix) A satisfactory valuation was obtained and the parties then executed a deed of charge in respect of the Crumlin Property on 2 April 2007. The mortgage product the subject of the parties' contractual arrangements ultimately was the "First Trust Bank Flexi Tracker", entailing a loan of £390,000 by the Bank to the Lipsetts.
- (xx) The Lipsetts' mortgage became unaffordable after the bank insisted on the termination of the interest only repayments at the end of the first five years. Both parties had anticipated that the Saintfield property would be sold and capital repaid at an earlier date than transpired and in a much larger sum than transpired.

- (xxi) The Bank was prepared to provide the Lipsetts with an extension of the “interest only” period by three months. This was unacceptable to the Lipsetts.
- (xxii) The Lipsetts filed a complaint with the Bank on 13 March 2012.
- (xxiii) On 15 May 2012, the Lipsetts submitted their first complaint to the Financial Ombudsman Service (“FOS”). This was later rejected by an Adjudicator.
- (xxiv) The Lipsetts referred the matter to the Ombudsman, without success.
- (xxv) The Lipsetts had lodged a further complaint to the Bank on 19 July 2012.
- (xxvi) The Bank exercised its right of set-off in respect of the £30,000 + interest held in the Lipsetts’ Deposit Account.
- (xxvii) The Lipsetts submitted another complaint to the Bank on 4 July 2013.
- (xxviii) A further complaint letter was sent by the Lipsetts, dated 11 September 2013. Further complaint letters were sent by the Lipsetts dated 21 November 2013 and 19 December 2013.
- (xxix) A data protection complaint was made to the IFO, followed by a further complaint made to the Bank on the 4 March 2015.
- (xxx) The Bank rejected all of the Lipsetts’ complaints.
- (xxxi) The Bank issued the Order 88 possession proceedings on 1 July 2015.
- (xxxii) The Lipsetts submitted their second complaint to FOS on 1 October 2015. This was in respect of how the interest was shown on their mortgage account and became of no consequence because the Bank accepts that they have been paying the interest on their mortgage, with an additional monthly payment.
- (xxxiii) On 13 January 2016, the Ombudsman rejected the Lipsetts second complaint.

### *The Two Claims*

[5] In the first of the two cases the Bank, *qua* mortgagee, brought an application against the Appellants for possession of the premises under Order 88 of the Rules of the Court of Judicature. In the usual way the evidence generated by this application consisted of sworn affidavits, provided both initially and at later stages of the proceedings. These comprised the following:

- (a) The Order 88 summons was grounded by an affidavit sworn by the Bank's solicitor which was non-compliant with Order 41, Rule 5 of the Rules of the Court of Judicature and the applicable Practice Direction. This exhibits the charge dated 4 April 2007 and the mortgage conditions. It avers that the Appellants were indebted to the Bank in the sum of just under £250,000 and that the Bank was seeking possession of the premises in order to realise its security.
- (b) Some time later the Bank's solicitor swore a second affidavit exhibiting the formal offer of mortgage in compliance with a direction of the Chancery Master.
- (c) The Appellants' case in detail was first provided to the court in the first affidavit of Mr Lipsett sworn on 19 February 2016. The key averment in this lengthy affidavit is that the Appellants entered into the borrowing arrangements with the Bank on the basis of an asserted representation by Ms Greer that "*... we would be entitled to elect to pay 'interest only' throughout the entire 15 year term of the mortgage*".
- (d) Chris Floyd (see [2](d) above), one of the Bank's Mortgage Recoveries Officers, rejoined by an affidavit sworn on 27 July 2016.
- (e) Ms Cindy Greer swore an affidavit on behalf of the Bank on 10 October 2016 in which she describes her former employment with the Bank as "*Home Arranger*". She had no specific recollection of the key meeting with the Appellants. Many of her averments are couched in the terms of "*I would have .....*" She deposes that she "*could not*" have made an "*interest only mortgage*" offer, essentially because her role was "*.... to acquire as much information as was necessary to prepare a report and recommendation .....*" to the Bank's credit department for decision. Ms Greer further avers that those discussions which she does recall were "*.... focused on the provision of a short term interest only period in respect of the loan, thereafter reverting to capital repayments. The precise nature of the product outlined to Mr and Mrs Lipsett was set out clearly in the key facts document*". The contrary allegation was "*completely untrue*". Equally untrue was the suggestion of her representation that the key facts document "*did not mean anything*". She further denied making any comment about the state of the housing sales market. She did not represent that the mortgage could be converted to "*interest only*" at any time. To

have acted as the Appellants allege would have jeopardised her career.

- (f) Next Mr Lipsett swore his second affidavit on 16 November 2016, responding in dense detail to the affidavit of Mr Floyd (only).
- (g) The Appellants' rejoinder to the affidavit of Ms Greer was made in Mr Lipsett's third affidavit sworn on 16 November 2016.

[6] The Appellants' Writ action against the Bank was initiated on 12 February 2016. Their claim, in the language of the Writ, was for "*damages including equitable damages for loss and damage occasioned to them by reason of the negligence, misrepresentation, breach of contract, breach of statutory duty and breach of equitable duty and/or estoppel of the Defendant, its servants and agents in and around financial and lending services provided by the Defendant to the Plaintiffs and in and around the sale and provision of a mortgage by the Defendant to the Plaintiffs*".

[7] The Statement of Claim underwent multiple amendments. In its final incarnation (as served on 23 January 2017) it contained the following key averments:

- (a) The financial transaction underpinning the litigation in both cases was stimulated by the Appellants' need for finance in order to purchase the premises, which were to become their new home.
- (b) The key meetings and discussions involved the Appellants and an employee of the Bank, one Cindy Greer.
- (c) The Appellants were seeking an "*interest only*" mortgage. In response Ms Greer stated that a "*Low Start Flexi Tracker*" mortgage, which would allow the Appellants to pay "*interest only*" at any stage of the lifetime of the loan and would entail a lump sum reduction upon the sale of the Appellants' extant family home, was available.
- (d) Ms Greer provided a "*Key Facts Personalised Illustration*" indicating that the repayments would be £1860.88 for 60 months, followed by £4106.66 for 120 months.
- (e) Upon the Appellants disclosing that their main income was only some £1286 per month Ms Greer stated that they could pay "*interest only*" for the whole term of the loan. The aforementioned document had to be framed in the terms specified and the Appellants should disregard the figure of £4106.66 per month as this would not apply to them.



- (f) The arrangement would entail *"a good interest rate at 0.8% above the Bank of England base rate for the entire term"*.
- (g) The essential terms of the parties' agreement were the provision of an interest only 90% "flexi tracker" mortgage of £369,100; an interest rate of 0.8% above the Bank of England base rate for the entire term of 15 years; and the lodgement of the net proceeds from the sale of their existing home in reduction of the loan.
- (h) Approximately one week later Ms Greer stated by telephone that the Bank wished to *"take over"* the Appellants' existing mortgage; that the Appellants should deposit *"all their cash assets"* with the Bank as security; and that as further security the Bank wanted a *lien* of £30,000 to be held in a First Trust Bank deposit account.
- (i) On 15 February 2007 the Appellants received the Bank's offer of mortgage. This was in the same terms as the *"Key Facts Illustration"* with two additions, namely a letter of *lien* of £30,000 and a solicitor's letter of undertaking to lodge the net proceeds of the sale of their existing home in reduction of the loan.
- (j) *"The Plaintiffs signed the offer of mortgage and returned it in reliance upon the representations made by Ms Greer, in particular that they were agreeing to a mortgage that would be an interest only mortgage until 2022"*.
- (k) In a separate *"Tariffs (etc)"* document it was explained that *".... customers could switch between an interest only and repayment mortgage or vice versa or from one mortgage product to another"*.
- (l) The purchase of the premises was completed on 02 April 2007.
- (m) By letter dated 5 January 2012 the Bank informed the Appellants that the *"Low Start"* period of their mortgage was scheduled to expire on 29 March 2012. The Appellants' response was to request that they continue to pay *"interest only"*. The Bank refused this.
- (n) On 29 July 2012 the Bank began charging the Appellants capital and interest repayments of £3359 per month. On 19 June 2013 the Bank exercised set off and removed the *lien* and accumulated interest from the Appellants' deposit account of £32,230.02, lodging this to the Appellants' mortgage account for alleged arrears.

- (o) The sale of the Appellants' "existing" home was completed on 14 May 2014.

[8] The Appellants' case against the Bank is encapsulated in the following excerpt from their final amended Statement of Claim:

*".... It was a lawful and binding agreement between the Plaintiffs and the Defendant that the loan provided by the Defendant to the Plaintiffs for the purchase of [the Crumlin premises] would be at an interest rate of 0.8% above the Bank of England base rate for the term of 15 years and that throughout the term of the loan the Plaintiffs could opt to make 'interest only' payments on the loan."*

The following figures are pleaded:

- (i) The Appellants have paid the Bank £190,521.51, which "comprises" a lump sum reduction of £32,230.02 on 19 June 2013 (*supra*) and £85,017.43 on 14 May 2014 upon the sale of their "existing" home.
- (ii) From May 2014 the Appellants have been making monthly repayments of £401.03 which, given that the "interest only" figure would have been £275, has entailed an overpayment of £130 per month.

[9] One striking feature of the Appellants' claim against the Bank is that, from the issue of the Writ, it was for unliquidated damages only, as noted in [1] above. This was at no time rectified notwithstanding the multiple ensuing iterations of their Statement of Claim. At one stage of the pre-trial phase the Appellants were given the opportunity to provide a forensic accountant's report, which did not materialise. Their alleged financial losses, both past and future, are couched in vague and unquantified terms.

[10] In addition to the affidavits (Order 88 proceedings) and pleadings (the Writ action) summarised above one further affidavit featured in the oral submissions of the Appellants. Pursuant to an application for an order compelling discovery of specific documents under Order 24, Rule 7 of the Rules of the Court of Judicature a further affidavit was sworn by Mr Floyd (identified in [2](d) above). The thrust of this affidavit was one of robust resistance to the Appellants' discovery quest. This court was informed that in the event certain additional documents were disclosed by the Bank to the Appellants. This discrete chapter in the litigation sounds on one of the Appellants' grounds of appeal: see [21] *infra*.

### *The Judgment at First Instance*

[11] The comprehensive judgment followed a four day trial. It carefully rehearses the Appellants' case and the main elements of the evidence adduced. We summarise it as follows. The judgment records that the first instance court heard evidence from, *inter alios*, one Barry Pollock, who is the Bank official who sanctioned the mortgage. Mr Pollock (per [30]) testified *inter alia*:

*"He discounted the income figure substantially to a monthly figure of £1454 largely by discounting the 'income' attributable to savings ...*

*With that deduction he recalibrated the income on the application form and, after deduction of outgoings, it in fact showed a monthly deficit of £2429 in the first five years of the term and £4675 for the balance of the term – in marked contrast to the figures that Ms Greer had inserted into the form."*

The judgment continues at [31]:

"On the evidence this appeared to lead to a negotiation as between Mr Pollock, Ms Greer and the Lipsetts resulting in the following additional conditions being incorporated into the final sanction paper as preconditions to the loan being made:

- (a) that a satisfactory Valuation Report be obtained confirming the proposed purchase price of the Crumlin Property;
- (b) that a deposit of £30,000 be made with the Bank which would then be subject to a lien in favour of the Bank to cover any potential interest shortfall for a period of 15 months;
- (c) that a solicitor's undertaking be procured over the net proceeds of sale of the Saintfield Road Property "*in permanent reduction of the Mortgage*".

[12] Continuing, the judge added that the "*focus*" of Mr Pollock –

*"... was first and foremost on the equity in the [existing home] which he thought would be released on sale taken together with the cash savings of the [Appellants]."*

The judgment continues at [34]:

*“Mr Pollock gave evidence that although the nature of the offer made – incorporating as it did these conditions – was not the norm, it was far from unusual and facilitated applicants such as the Lipsetts to buy a new property, continue to live in the old and effectively ‘bridge’ the gap.”*

[13] Next, at [35], the judge noted that the terms of the mortgage offer to the Appellants included the following:

- (a) A loan of £369,000 (plus fees) over a term of 180 months.
- (b) A repayment arrangement entailing 60 payments at a variable rate in respect of the interest only component, being £1860.88 per month.
- (c) Alteration of the repayment thereafter to a capital plus interest model, entailing 120 monthly payments of £4106.67.

The other main terms of the mortgage offer included the cash deposit/*lien* and the solicitor’s undertaking (both noted above). The judge, at [35], also highlighted the following further terms of the mortgage offer:

“That was the basis upon which the mortgage was sanctioned and a mortgage offer was subsequently issued to the Lipsetts on 15 February 2007. It was made subject to the following points:

- a) On the basis that it was an offer and had to be accepted within a period of 28 days;
- b) That the Lipsetts were free to withdraw from the transaction up until funds were drawn down;
- c) That they would not be bound until their signature of the legal charge (and draw down of the funds);
- d) That the offer should be compared with the Key Facts documents which they had previously been given;
- e) That the Bank had “*not recommended a particular mortgage ... and that [they] must make up their own minds*”;

- f) That it was a loan for £369,000 (plus fees) over a term of 180 months on a repayment basis broken down into:
  - i. 60 payments at a variable rate in respect of the interest only component - £1,860.88 per month;
  - ii. followed by 120 monthly payments in respect of the capital and interest of £4,106.67;
- g) Finally, the additional requirements of both the cash deposit/lien and solicitor's undertaking were incorporated within the Offer as specific conditions".

[14] The judge addressed the Appellants' acceptance of the offer of mortgage in these terms:

The Lipsetts signed and returned the accepted offer on 19 February 2007 - 4 days later. That acceptance is contained in a separately and specifically designated box which has as its heading the following words:

*"We have received, read and understood this Formal Offer of mortgage, the general and other Special Conditions ... and jointly and separately agree to carry out and perform all obligations ..."* [Emphasis added]

That declaration, in turn, is under a heading which provides as follows:

*"Your home may be repossessed if you do not keep up repayments".*

He then recorded that following acceptance of the mortgage offer solicitors were instructed to act on behalf of all parties. In this context "*... the mortgage was signed by the Lipsetts in the presence of their solicitors, after legal advice ....*" on 2 April 2007. The loan was then drawn down and the purchase of the premises was completed.

[15] The impetus for the long running dispute between the Appellants and the Bank was noted by the judge at [43] - [45] in these terms:

*"Almost immediately post completion of the Transaction the property market in Northern Ireland went into collapse. The hoped for sale of the Saintfield Road Property (then agreed at £460,000) did not proceed and it*

was withdrawn from the market. It subsequently sold in May 2014 for £250,000.

In 2008, the Lipsetts had extracted (by way of re-mortgage) a further £100,000 equity from the Saintfield Road Property. There was some debate as to the purpose to which these funds were put but, on the Lipsetts' case, they say it shows that they were unable to maintain the mortgage which they had entered into to buy the Crumlin Road Property on the basis that it was unaffordable given their personal circumstances.

As a consequence of the fall in market values coupled with the extraction of equity the net amount paid to the Bank pursuant to the solicitor's undertaking was £85,017.43 as compared to the estimated £300k anticipated."

[16] The judge made the following central conclusions and findings:

- (i) The key documents were all couched in clear and unambiguous terms.
- (ii) The evidence of Mr Pollock was "*compelling*".
- (iii) The offer of mortgage and the Appellants' acceptance thereof constituted the terms of the contract between the parties, being "*a written contract for a 15 year term, 5 years of which was on an interest only basis with the balance on a repayment basis*".
- (iv) "*It obviously follows that the Lipsetts' claim that there was a binding contract for a 15 year term on an interest only basis fails*".
- (v) The Lipsetts' letter of 21 February 2012 to the Bank "... *demonstrates that they knew exactly what they were entering into*".
- (vi) The Lipsetts knew that Ms Greer was "*a Home Arranger and that her job was largely administrative. Ms Greer had declared the limits of her authority and the Lipsetts in signing the questionnaire ... acknowledged their awareness of that limitation at the very outset*".
- (vii) The Lipsetts did not repose much trust or reliance in the verbal statements of Ms Greer. In particular Ms Greer did not make any legally actionable verbal misrepresentation to the Appellants.

- (viii) These discussions were mere "*chat ... mere verbiage*".
- (ix) (At [75]) "I have concluded that it was always in their minds to undertake substantial repairs and renovations to the [Crumlin] property - which they ultimately did at a cost of circa £40,000 - to make the property suitable for their purpose. I suspect that it may be why they elected not to obtain a fuller survey of the property as would otherwise be normal. Whilst those extensive works were being carried out, from their evidence, it was clear that Mr and Mrs Lipsett wanted to retain the Saintfield Road Property as a family home. That, I find, was their main motivating factor at the operative time."
- (x) "It is simply not credible that the Lipsetts - without any other clear method by which they could repay a 15 year loan at the end of its term (other than by reference to capital assets) - would realistically expect the Bank to offer such a product as a 15 year interest only mortgage. I suggest that that incredulity is more marked when one considers that they already knew the nature and extent of what other products existed elsewhere - having already obtained six offers of finance from two alternative sources."
- (xi) "Even if I were to accept that they were labouring under such an impression the chronology of events works against them. The application process about which we heard so much was very clearly superseded by the terms of the Mortgage Offer which they subsequently received and signed - and perfected subsequent to legal advice - when the loan itself was drawn down. That period itself lasted from February to April 2007. The act of acceptance and draw down of the mortgage clearly, in my view, supersedes any question of continuing reliance upon the alleged assertions of Ms Greer."
- (xii) The "*Mortgage tariff*" document is "... no more than a list of menu prices for certain additional services the Bank may offer during the currency of a loan ... [and] ... was not embedded in the Mortgage Offer itself and, indeed, under its terms was entirely variable at the instance of the Bank".
- (xiii) The Appellants did not rely on the "*Mortgage tariff*" document in any event.

[17] The judge gave separate consideration to that aspect of the Appellants' case based on the Mortgage Conduct of Business Handbook ("MCOB"), a publication of the Financial Services Agency ("FSA"). He disposed of this element of the Appellants' case by referring to an earlier section of his judgment in which he had reproduced the terms of the various MCOB Rules invoked by the Appellants and his summary of the Bank's riposte. He made the specific, discrete conclusion that he accepted the Bank's case. He elaborated on his reasons for this conclusion.

[18] The judge formulated his omnibus conclusion in these terms:

"In summary I find that the Plaintiffs have now made their case on the Writ action. The consequence of that is that the arrears are due and owing and it follows from that that the Bank is entitled to an order for possession on the original summons which I now adjourn to the Master to allow the parties to make their respective representations on any applicable period of stay which may be appropriate in the circumstances."

Within the appeal bundles there is a subsequent order of the Chancery Master adjourning the matter generally.

### *The Appeal*

[19] The Notice of Appeal contains three umbrella grounds:

- (i) The first, entitled "*An appeal on law*" contends that the trial judge erred in law in five specific respects, each relating to the "MCOB" rules/regulations issue.
- (ii) The second ground, under the rubric "*An appeal on procedural or other irregularity in the proceedings*", has a series of particulars, all directed to the trial judge: lack of impartiality, based on the asserted non-disclosure of "*a material conflict of interest*"; an asserted failure to "*provide a ruling*" on three specified issues; an asserted failure to consider unspecified "*matters of material relevance*" relating to Mr Pollock's evidence; and, finally, an asserted failure to take into account unspecified "*matters of material relevance*" relating to the evidence of Ms Greer.
- (iii) The third ground, entitled "*An appeal on facts*" is precisely that: its ten particulars assert that the trial judge misunderstood, misinterpreted, misread or misconstrued a series of specified factual matters. There is no elaboration or specification of any of these asserted aberrations.



[20] The apparent bias ground of appeal, subsumed within the second of the umbrella grounds, relates to the trial judge's commercial connections with the Bank. These arise out of his involvement in a family commercial investment which entailed borrowing from the Bank by a limited company of which the judge is the sole director. The company has an outstanding charge to the Bank the signatory whereof is the judge and there is a registered inhibition prohibiting any dealings with the subject assets without the prior consent of the Bank. This is not a contentious matter. It is common case that this issue was not raised at the trial and was first discovered by the Appellants post-judgment. It raises an issue comparable in principle to, though factually different from, that considered by a different division of this court in *Quinn v Cloughvalley Stores* [2019] NICA 5.

[21] During a hiatus in the appeal proceedings the Appellants proposed a new ground of appeal in these terms:

**“Further Ground of Appeal on procedural or other irregularity in the proceedings:**

**Ground 10:**

Documents relied on by the Appellants were omitted from the agreed Core Evidence Bundles prepared by the Respondent. A further document had been submitted and a page removed from the Appellants' Affidavit.”

The ensuing application for leave to amend the Notice of Appeal was vigorously opposed by the Bank's legal representatives. We address this in [49] *infra*.

***The Contractual Paper Trail***

[22] The legal relationship between the parties was, fundamentally, a contractual one. The focus of this section of the judgment is on the pre-contract phase and pre-contractual activities involving the parties, culminating in the Bank's offer of mortgage to the Appellants and their acceptance, leading ultimately to the concluded loan arrangement. It is of course subject to the core dispute between the parties digested in [3] above. An inventory and objective analysis of the key documents, divorced from the core of the dispute between the parties, is necessary.

[23] The chronology of the material documents and associated events (which unavoidably overlaps slightly with [4] above) is as follows:

- (i) On 16 January 2007 two documents were generated. The first is a completed questionnaire signed by both Appellants and Ms Greer. This documents *inter alia* the Appellants' desire for a so-called “*Low Start Flexi Tracker*” mortgage entailing a loan of £369,000 and a repayment period of 15 years. It notes that the estimated value of

their (Saintfield) property was £410,000 and they had an annual income of £32,500. The document explained that there were two types of mortgage, namely “*repayment*” and “*interest only*”, describing both. In response to the question “*Which type of mortgage would you prefer?*” the option selected was “*repayment*”, with “*interest only*” deleted and at a “*variable rate*”.

- (ii) On the same date a separate document entitled “*Key Facts about this Mortgage*” (the “*key facts document*”) was also generated. It contains no signatures. It is described as a “*personalised illustration for [the Appellants] .... valid at the time of issue*”. In its material content it reproduces that of the questionnaire. It further stated “*The overall cost [of this mortgage] takes into account the payments in Sections 6 and 8 below. With a repayment mortgage you gradually pay off the amount you have borrowed, as well as the interest, over the life of a mortgage*”. The next ensuing section explained that the Appellants would be repaying £1.64 for every £1 borrowed, the “*total amount .....including the amount borrowed*” being £605,127.23. In Section 6 it was stated “*60 payments at a variable rate, currently 6.05% (in respect of interest only): £1860.88 followed by 120 payments at a variable rate, currently 6.05% (in respect of capital and interest): £4106.66.*” This was followed by a breakdown of fees to be paid, totally £775.28. In Section 12 it was stated “*Low start ..... for the first 60 months of your mortgage you only pay back interest on the mortgage. Thereafter, you make repayments of both capital and interest for the remainder of the mortgage term*”. The word “*illustration*” appears repeatedly throughout the document.
- (iii) The next document is a completed mortgage application form generated the following day, 17 January 2007. This records that the (Saintfield) house owned by the Appellants had a value of £425,000 and an outstanding mortgage of £60,000 with a named building society and was on the market for sale. The “*total mortgage required*” was specified as £369,000, the “*term*” was stated to be 15 years and the “*mortgage type*” was described as “*Repayment ..... Low Start*” and the “*mortgage product*” as “*Low St. Flexi Tracker*”. The purchase price of the new (Crumlin) property was recorded as £410,000. The multiple other contents of this document are not germane in the context of this appeal. The application was signed by both Appellants.
- (iv) Next there is a memorandum of 19 January 2007 signed by Ms Greer recommending the Appellants’ mortgage application. This states *inter alia* “*Proposal to purchase new PDH PP £410K ..... 90% mortgage facility required £369K x 15 years low start ..... it is the*

*couples intention to make a capital reduction of c.£250K on the sale of their existing PDH .....*

*Pending sale of Saintfield, clients will fund shortfall in income and exp. from savings".*

- (v) An internal "For Bank Use Only" memorandum (two pages), signed and bearing the date 28 January 2007, restates the description of the mortgage type requested, the amount of the loan requested, the mortgage term (15 years) and the payment of "interest only" during a period of 60 months at the initial rate of 6.05% followed by "capital" payments during the balance of 120 months. Ms Greer, one of three signatories of this document, is described as the "interviewer". The final section of the document records "sanctioned subject to" a satisfactory valuation, a letter of lien over £30,000 and a solicitor's undertaking in the terms expressed.
- (vi) The contents of a small number of other internal Bank documents generated around this time contain nothing of any particular significance.

[24] The formal offer of mortgage was contained in the Bank's letter of 15 February 2007 to the Appellants. This contains the following salient passages:

*"We refer to your application for a mortgage and advise that [the Bank] has pleasure in offering you a mortgage as detailed herein. This Offer is valid for 28 days from the date of this Offer. You are not obliged to enter into this Regulated Mortgage Contract .....*

*Once the mortgage funds are drawn down you cannot withdraw from the mortgage. However, the mortgage can be repaid at any stage subject to the Terms and Conditions of the mortgage .....*

*You are not bound by the terms of this Offer document until you have signed legal charge and the funds are released for your mortgage ....*

*You should compare this Offer document with the Key Facts Illustration given to you before you applied for this mortgage, to see how details may have changed .....*

*We have not recommended a particular mortgage for you. You must make your own choice whether to accept this mortgage Offer ...*

*Amount of mortgage: £369,000 plus £100 for fees ....*

*Purchase price of the property: £410,000 ....*

*The term of the mortgage will be 180 months ...*

***Mortgage type: Repayment ....***

*Product: First Trust Bank Flexi Tracker .....*

***Overall cost of this mortgage ... ..***

*With a repayment mortgage you gradually pay off the amount you have borrowed, as well as the interest, over the life of a mortgage .....*

*The total amount you must pay back, including the amount borrowed is £605,128.48 .....*

*This means you pay back £1.64 for every £1 borrowed ....*

*This Offer is based on a loan amount of £369,100 and includes the fees that are shown in Section 8 as being added to your mortgage and assumes the mortgage will start on 01 March 2007 .....*

*60 payments at a variable rate, current 6.05% in respect of interest only – monthly payments £1860.88 .....*

*Followed by 120 payments at a variable rate, currently 6.05% in respect of capital and interest – monthly payments - £4106.67 .....*

*THERE ARE NO RESTRICTIONS TO MAKING LUMP SUM REDUCTIONS OR REGULAR OVER PAYMENTS to this mortgage. If you make an overpayment or lump sum payment then the amount you owe, and so the amount of interest you pay, is reduced immediately. This provides you with an immediate benefit .....*

***Low Start*** *for the first 60 months you pay back interest only on the mortgage. Thereafter you make repayments of both capital and interest for the remainder of the mortgage term ....."*

The two items of "additional security" are specified (see [4](xiv)above). In a section entitled "General and Other Conditions" it is stated:

*“This Offer incorporates and is to be read in conjunction with -  
....*

1. *The General Conditions set out in the accompanying document headed ‘General Conditions of Offer of Mortgage’ ....*
2. *Conditions numbered 01, 02, 12, 20 set out in the accompanying document headed ‘Special Conditions (which apply if specified in the Offer)’.”*

[25] Two particular documents were attached to the aforementioned formal offer of mortgage. The first is entitled *“General Conditions of Offer of Mortgage”*. The second is entitled *“Special Conditions (which apply if specified in the offer)”*. Nothing of any special significance turns on either document. The same observation applies to the Bank official’s manuscript note dated 16 February 2007 which also seems to have accompanied the offer of mortgage.

[26] The Appellants’ written acceptance of the Bank’s offer of mortgage followed, on 19 February 2007. It is contained in a completed section at the end of the offer document entitled *“Acceptance of Formal Offer of Mortgage”*. It is in these terms:

*“I/we have received, read and understood the terms of this Formal Offer of Mortgage, the General and Other Conditions referred to above and as detailed in the accompanying document(s). Accordingly I solely/we jointly and separately, agree to carry out and perform all the documents contained or referred to in (a) this offer; (b) the General conditions; (c) the Special Conditions referred to above.”*

This is signed by both Appellants.

[27] Sequentially the next material document is that entitled *“Charge Over Deposits (by individual)”*. This is also dated 19 February 2007 and ends with the signatures of both Appellants and Ms Greer. This document is addressed to the Bank. By its terms the Appellants, as beneficial owners, charged *“.... as sole and absolute owner the Deposit(s) by way of first fixed charge in favour of the Bank as a continuing security for the repayment on demand of the Indebtedness”*. The next ensuing clause precluded the Appellants from withdrawing the whole or any part of the *“Deposit(s)”* without the prior written consent of the Bank. The security created by this charge was designed to be *“... a continuing security for the payment of the Indebtedness whensoever and howsoever it shall become owing by the Mortgagor to the Bank and shall remain in force until the whole of the Indebtedness has been repaid and is in addition to, and without prejudice to, any other security which the Bank may now or at any time hold in respect of the Indebtedness or any part thereof”*. The *“Indebtedness”* is the subject of a detailed

definition which, in substance, denotes all present and future liabilities of the Appellants to the Bank.

[28] Chronologically, the deed of charge followed next. This is dated 02 April 2007. This coincided with the draw down of the moneys loaned. The parties to this were the Appellants and the Bank. This *inter alia* defines the “Conditions” as “the First Trust Bank Mortgage Conditions current at the date hereof”. By clause 3(b):

*“The Borrower as beneficial owner .....*

*... charges the Property in favour of the Bank as security for the obligations of the Borrower to the Bank on foot of the Conditions.”*

By clause 5:

*“This Deed incorporates the Conditions and the Borrower hereby acknowledges having received a copy of the Conditions and Covenants to observe and be bound by the Conditions.”*

The charge was signed by both Appellants in the presence of two legal executives in the employment of the firm of solicitors representing the parties thereto.

[29] The mortgage conditions include the following provisions of note:

*“[Introduction] The Conditions which apply to your mortgage are shown in this booklet, your mortgage offer and any other agreement we make with you ... this introduction does not form part of the [Conditions] .....*

*[Clause 4] We may by written notice to you change your periodic payments and repayment period ....*

*We can also by written notice to you change your periodic payment if the repayment period is changed ....*

*If we give you a notice which extends the repayment period, the extension will not take effect if within seven days of receiving notice from us, you give us written notice to say that you want to increase your periodic payment ....*

*If you do not keep up the increased periodic payments ... we will then give you written notice increasing the repayment period and decreasing your periodic payments ....”*

Clause 13, under the rubric “*Payment of our Costs and Expenses*” details a series of costs and expenses payable by the mortgagor to the Bank. Clause 17 provides for a series of “*Notices and Demands*” emanating from the Bank to the mortgagor.

[30] The last of this suite of documents to be considered is the “*Tariffs for Mortgage Customers*” (the “*tariffs document*”). This document is not specifically identified in the letter of mortgage offer ([4](xv) *supra*). However, it is common case that it accompanied the letter. It is a glossy leaflet consisting of two pages. Its contents are described as “*Fees and Charges for Mortgage Customers Effective from 1<sup>st</sup> April 2006*”. It details the amount payable by the mortgagor to the Bank for various services provided. For example, there is a quarterly administration fee of £50, i.e. £200 per annum, while each arrears letter incurs a fee of £13. The discrete provision which features in the dispute between the parties is the following:

*“Alteration of repayment method - £25.00 .....*

*This fee is applied if you decide to change your mortgage from an Interest Mortgage to a Repayment Mortgage or vice versa, or, if you wish to convert from one product to another, e.g. Standard Variable Rate to Flexi Tracker. The fee must accompany the request and covers the staff time involved in preparing conversion documentation and amending the mortgage account.”*

[31] In this context it is appropriate to mention two of the Mortgage Conduct of Business Rules (the “*MCOB Rules*”) contained in a handbook published by the Financial Conduct Authority (the “*FCA*”), one general and the other specific. By virtue of Rule 11.3.1 the Bank was required to demonstrate that prior to executing the “*regulated mortgage contract*” with the Appellants it had taken account of their ability to repay. By Rule 11.3.4 the Bank was required to have, and operate, a “*written policy setting out the factors it will take into account in assessing a customer’s ability to repay*”. Factors to be taken into account included the proposed source of the repayments, the two main possible sources being income and resources other than income.

[32] The second, and more specific, relevant provision of the MCOB regulatory code is Rule 6.5.1. This states:

**“MCOB 6.5.1: Mortgages: information to be provided in the offer document or separately**

**Tariff of charges**

*If a firm makes an offer to a customer with a view to entering into a regulated mortgage contract, it must provide the customer, along with the offer document, with a tariff of*

*charges that could be incurred on the regulated mortgage contract.”*

Followed by MCOB 6.5.3:

*“A firm may include the tariff of charges as an integral part of the offer document, or provide it separately along with the offer document.*

### ***The Dispute Eruption***

[33] The Appellants argue that the tariff document entitled them (in the language used) to “change” their mortgage to one of “Interest Only”. They first made this case in an exchange of correspondence with the Bank in early 2012. The first letter in this exchange, written by the Bank, is dated 5 January 2012 and states in material part:

*“I am writing to remind you that the current Low Start option on your mortgage is due to expire on 29 March 2012. When it expires, your monthly mortgage payment will convert to Capital and Interest Repayment, as illustrated in your letter of offer. As a result, your mortgage repayment will increase.”*

The Appellants replied, by letter dated 8 January 2012:

*“In our case, the Flexi Tracker mortgage we took out with yourselves in March 2007 was intended as a short term solution to fund the purchase of [the Crumlin property] until we achieved a sale [of the Saintfield property]. Unfortunately, because of the collapse of the property market we have been unable to sell ... and it remains on the market with an asking price of £365,000 ....*

*In the circumstances, we now wish to request that our mortgage continues as it is, on an interest only basis until we achieve a sale ...”*

In the Bank’s reply, by letter dated 10 January 2012, it was explained that the “monthly mortgage repayment on capital and interest basis” would increase to approximately £3280.87 “over the remaining term of 120 months”. The Bank offered the Appellants the free and confidential service of an “income and expenditure analysis” and, to this end, requested the provision of certain documents bearing on their income and expenditure. The Appellants’ letter of reply, dated 12 January 2012, in substance repeated their earlier letter, stating *inter alia*:



*"We therefore have no alternative but to request that our mortgage continues as it is, on an interest only basis until we achieve a sale on [the Saintfield property] and can lodge the net proceeds of the sale to the above mortgage account in accordance with the agreement between us."*

[34] The Bank replied, by letter dated 20 January 2012:

*"The terms of your mortgage agreement were set out in the Formal Offer of Advance dated 15 February 2007. Your mortgage has had the maximum interest only period of five years and indeed this product is no longer available. To ask for an extension of an interest only period requires the proposition to be fully assessed. ...*

*To enable us to fully appreciate your situation, it is necessary for you to forward the documents previously requested ...."*

In their reply, by letter dated 24 January 2012, the Appellants stated *inter alia*:

*"...we are fully aware that the terms of our mortgage agreement were set out in the Formal Offer of Advance dated 15 February 2007 and this is why we have been writing to you. You state ..... 'your mortgage has had the maximum interest only period of five years'. We would point out that this is inaccurate on your part because our mortgage has not yet reached the term of five years and the reason we are writing to the First Trust Bank is to request that it remains on interest only after this five year period for the reasons outlined in our previous two letters ....*

*The 60 month low start option where interest only was paid was a time period set by the First Trust Bank and deemed a sufficient enough period of time by the First Trust Bank to achieve a sale on [the Saintfield property]. **At this time we were also told that with effect from 1<sup>st</sup> April 2006, there could be an alteration of the repayment method for a fee of £25 and we were given written details of this of which we have enclosed a copy.** This formed part of our decision to proceed with the Flexi Tracker Mortgage because as implied in this written documentation, the process of altering the repayment method seemed a matter of choice as it uses the words 'if you decide to change your mortgage from an Interest Only mortgage to a Repayment mortgage or vice versa ....' and it is this we have been referring to when we have requested that we remain on interest only until we achieve a sale on [the Saintfield property]. If there is a formal application form for*

*this, we would request that it is forwarded to us as soon as possible."*

[Emphasis added.]

The Bank's response, by letter dated 27 January 2012, was to treat the Appellants' letter as a complaint. The Appellants' reaction was to contact the Bank's correspondent by telephone. A detailed note of the conversation is included in the evidence. According to this Ms Hamilton (on behalf of the Bank) –

*"... said that changing depended on a hardship assessment of our financial position ... and the Bank would not be able to put us into interest only – the very most we would get, if anything, would be an extension of interest depending on our circumstances. She said if I submitted the paperwork she had asked for, it would go to the underwriters who would look at it. I agreed to send her all she needed ...."*

[35] The correspondence continued with the Appellants' detailed letter of 3 February 2012 which was written "*further to our telephone conversation*" and enclosed documentary evidence of income, together with bank statements, credit card statements, particulars of rental income (a Portadown property), self-employment accounts for the previous three years and particulars of child benefit receipts. Further telephone conversations between the parties ensued, followed by another letter from the Appellants to the Bank, dated 13 February 2012. This repeated the "*... we were told ...*" passages in the earlier letter of 24 January 2012, reiterating "*we were given this information in writing...*". The text continues:

*"... we note that [in the tariffs document] .... it states that the fee of £25 **must** accompany the request to alter the repayment method. As you know the current 'interest only' payments on our mortgage are due to expire on 29<sup>th</sup> March 2012, at which time it will convert to a Repayment Mortgage. For the reasons outlined in our previous correspondence we are formally requesting an alteration of the repayment method so that we can remain on 'interest only' and in accordance with the 'Tariffs for Mortgage Customers', we have enclosed a cheque for £25 made payable to the First Trust Bank."*

[36] The Bank did not respond to this letter. On 16 February 2012 a Bank official telephoned Mrs Lipsett. The gist of this communication was that this was a "*fairly complex case*" which would benefit from a meeting between the parties to discuss *inter alia* "*the other two properties and how sustainable this was and what our plans were*". A meeting was scheduled for the following day. Next, in the wake of the meeting, by a 10 page letter dated 21 February 2012, the Appellants, complying with the Bank's request, detailed their "*proposal in writing regarding the financial sustainability of our*

*mortgage in the short term and the long term prospect of its full repayment in respect of changing the repayment method from repayment to interest only.”* (Emphasis added.) The letter states *inter alia*:

*“It was never the intention for us to ever pay capital and interest on the mortgage at the level indicated on the Key Facts Illustration because it was simply never affordable to us ...*

*[The tariffs document] formed part of our decision to proceed with the Flexi Tracker mortgage product because we believed it meant what it stated and should the need arise we would be able to convert from repayment to interest only or vice versa without any great difficulty .... Whilst we agreed to the repayment option this was because the proceeds of sale of [the Saintfield property] would represent a significant repayment amount towards the mortgage ... On this Fact Finding Questionnaire the reason listed for choosing this Low Start Flexi Tracker was ‘flexibility’ which again we believed referred to its repayment method as being flexible which, by definition, means adaptable or variable. It was at this time, on this date of 16 January 2007, that we were given the [tariffs document] where it stated that we would be able to alter our repayment method if we ‘decide’ to ....”*

This letter finishes:

*“Finally, we hope that in outlining our position with as much clarity and transparency as possible, that this will enable you to facilitate a decision to change the repayment method from repayment to continuing interest only.”*

It is convenient to interpose at this point the agreed fact that the Appellants had made all of their monthly payments promptly and fully.

[37] As the end of the five year interest only period loomed the Bank, by letter dated 21 March 2012, intimated its willingness to extend the interest only period by some three months, to be followed by 117 monthly payments in respect of both interest and capital at a variable rate. The trial judge recorded at [49] that this was rejected. The Appellants have continued to make monthly payments to the Bank ever since. As noted in [8] above, they claim that by two separate payments they reduced the outstanding loan by some £117,000 and that from May 2014 they have (on their case) been overpaying by approximately 33%. It would appear that by April 2012, when the initial five year repayment period expired, the differences between the parties were irritable. Notwithstanding the Bank did not issue possession proceedings until over three years later (on 1 July 2015).

[38] Substantial further correspondence between the parties followed. For present purposes the briefest outline suffices. Over 50 letters in total were generated in the period January to April 2012. Between May and December 2012 there were over 20 further letters, augmented by default notices, formal demands and “*notes of arrears*”. The Appellants devoted themselves to their cause with notable energy and industry coupled with no little skill. They were tenacious and unrelenting. By a letter dated 13 March 2012 comprising 24 pages, they made a formal complaint to the Bank. Complaints were also made to the FSA and the Information Commissioner. None of these complaints was upheld.

*The Contentious Contractual Issues*

[39] First: on what date did the parties conclude a legally binding agreement? There was some disagreement about this. Objectively the material and uncontentious facts demonstrate that when the Appellants accepted the Bank’s offer of mortgage no concluded contract between the parties was made. This was, rather, a step *en route* to a concluded agreement, a prelude. Mr David Dunlop, of counsel, on behalf of the Bank accepted that the Appellants were at liberty to withdraw from the proposed lending and securities arrangement at any time prior to the first draw down of funds: this was explicitly stated in the offer of mortgage. There was a hiatus of some 42 days between the Appellants’ acceptance of the mortgage offer and the draw down of funds. The latter event occurred on 2 April 2007, on which date the deed of charge was executed between the parties. We conclude that a binding agreement was made between the parties on this latter date.

[40] The second issue to be addressed, again raising a purely objective question of law, is whether the tariffs document formed part of the agreement between the parties. The relevant documents and their material contents have been rehearsed above. It is common case that this was one of the package of documents provided by the Bank to the Appellants when the formal written offer of mortgage was made. The resolution of this discrete issue is in no way dependent upon the parol evidence of anyone. In making the offer of mortgage to the Appellants, the Bank was required by the MCOB Rules (*supra*) to include the tariff document. It did so. The letter used the language of “*this Offer and the attached conditions*” and “*offering you a mortgage as detailed herein*”, together with “*this Offer document*”. The Appellants in signifying their acceptance, certified that they had “*.... received, read and understood the terms of this Formal Offer of Mortgage, the General and Other Conditions referred to above and as detailed in the accompanying document(s)*”. They further expressly consented to the release of “*a copy of this Offer of Mortgage [and] any supporting application or documents ...*” to specified persons.

[41] The Bank was both the author and the provider of all documents relating to the contract negotiation and completion exercise. It was open to the Bank, in making the formal offer of mortgage, or indeed at any stage of the pre-contract phase, to state that the tariffs document did not form part of the offer. Indeed the Bank could have gone further and explained to the Appellants that the document was provided

solely for the purpose of complying with the governing MCOB Rule. The Bank did not do so. This stands in marked contrast with the “*First Trust Bank Mortgage Conditions*” document accompanying the executed deed of charge. This document begins with the “*Introduction ...*”, which ends with the following:

*“Finally we would ask you to note that this introduction does not form part of the First Trust Bank Mortgage Conditions themselves.”*

[42] The rationale underpinning the relevant MCOB rules must be that an offer of mortgage would be incomplete and/or potentially misleading if it did not incorporate the tariffs document or something comparable. This is to be viewed in the context of the rigorous regulation of the financial services industry which applied at all material times in this case.

[43] The governing legal principles are well established. The question of whether a document has been incorporated by reference in a given contract is to be determined by reference to the fact sensitive context and the supposed intention of the parties as ascertained by the court. In the present case this exercise can be performed in the absence of any parol evidence from any of the parties. It is purely objective in nature. The tariffs document did not have some distant, satellite existence or function. Rather, it was directly related to the liability of the Appellants during the lifetime of the (then contemplated) loan arrangement for the payment of costs and expenses to the Bank, a discrete topic addressed expressly in both the “*General Conditions of Offer of Mortgage*” and the (later) Mortgage Conditions. There is an indelible link. The mortgage offer would have been manifestly incomplete without it. Furthermore, the tariffs document, as a matter of fact, formed part of the documentary offer of mortgage package. It would have been viewed by any reasonable recipient as part of the Bank’s offer to the Appellants.

[44] Giving effect to the foregoing analysis, this court concludes that the contents of the tariffs document formed part of the legally binding contract executed by the parties on 2 April 2007.

[45] We turn to consider how the tariffs document issue was treated at first instance. The judge recorded the basic factual outline of the issue at [39]–[41], noting that the document was “*central to*” the Appellants’ case. At [51] he noted one aspect of the Appellants’ pleaded case in these terms:

*“That there was a binding contract formed through the meetings with Ms Greer that the mortgage would be on a 15 year interest only basis. This they say was corroborated by the ‘Tariff for Mortgage Customers document’.”*

As set forth in the summary of the Appellants’ pleaded case in [5] – [8] above, the Appellants, as part of their breach of contract case, were specifically contending that

they could “*opt to*” make interest only payments to the Bank throughout a 15 year period and the tariffs document featured in their pleading. They also made the case in both pleadings and affidavits that their contract with the Bank was *ab initio* one of interest only repayments over a 15 year period. The judge set out his findings and conclusions on the breach of contract cause of action in [65]. Neither the tariffs document nor the Appellants’ breach of contract case founded thereon features in the passages which follow. No relevant finding or conclusion was made. We consider that the dismissal of the Appellants’ breach of contract action cannot be sustained in consequence.

[46] At [66] *ff* the judge considered separately the Appellants’ misrepresentation case against the Bank. In the findings and conclusions which follow the judge *inter alia*, in substance, rejected the Appellants’ assertions relating to their conversations with Ms Greer. Anything said in this context was “*chat ... mere verbiage*” he found. At [83] – [84] the judge addressed the tariffs document. He made no clear finding on whether this was incorporated in the agreement between the parties. No such finding is to be found in his statement that “... *it is wrong to suggest that it was a core condition of the contractual relationship between the parties*”, as this is ambiguous. Furthermore, this was not the issue: rather the question was whether the tariffs document, either in isolation or in conjunction with the representations attributed to Ms Greer, constituted in law a misrepresentation. This is not properly acknowledged in the reference to “*the alleged corroborative effect of the tariff document ...*” All of the findings and conclusions in this section of the judgment are based on the court’s assessment of the interaction between the Appellants and Ms Greer. There is no analysis of the objective contractual effect and impact of the tariffs document. No exercise comparable to that in [43] above was undertaken. In addition there is evident conflation of the Appellants’ separate causes of action of breach of contract and misrepresentation. Given the foregoing analysis we consider that the dismissal of the Appellants’ misrepresentation action cannot be sustained.

[47] Furthermore, in an alternative finding, the judge stated at [84]:

“Even if I am wrong in this, the text makes it quite clear that to avail of the ability to “switch” between products the payment (in this case £25) needed to be made in advance. The Lipsetts only raised the alleged corroborative effect of the Tariff Document in the third of their substantive letters with the Bank in 2012 (*viz* their letter of 24 January 2012 onwards). That later inclusion of such an argument I actually take as evidence of the fact that there was no reliance placed on the Mortgage Tariff Document itself in 2007 when the Mortgage Offer itself was accepted. If it were otherwise it would have been quoted as justification for their position at the outset and the £25 tendered then.”

This analysis we consider unsustainable in two respects. First, it does not engage with the totality of the dense and protracted *inter-partes* correspondence preceding the expiry of the initial five year period, detailed above. Second, it fails to acknowledge that the Appellants did indeed make the requisite payment of £25 “*in advance*” viz prior to the expiry of the five year period (and, in the event, the bank returned the cheque).

### ***The Pre-determination Ground of Appeal***

[48] This ground is formulated in the following terms:

*“There is computer metadata evidence to indicate that the outcome and resultant Court Orders in respect of the two actions was decided and or agreed before the trial had concluded on Thursday 7<sup>th</sup> February 2019\*\*. (Ground 2 of an Appeal against the Court Orders dated 13<sup>th</sup> May 2019 refers).”*

[\*\* the 4<sup>th</sup> and final day of trial]

This court has considered the “*evidence*” on which this ground is based. It is of the flimsiest kind imaginable. On its face it fundamentally fails to implicate the trial judge in any exercise involving the preparation of a final order, draft or otherwise, on the asserted date. The judge, further to the direction of this court, has responded. The parties have received this response. Without this response the conclusion of this court would have been that this ground is devoid of substance and merit. It is pure fantasy. The judge’s response, which is not needed for this purpose, confirms the correctness of this conclusion beyond peradventure.

### ***Other Grounds of Appeal***

[49] We consider it abundantly clear, subject to [53] below, that the other grounds of appeal have no merit. In brief compass:

- (i) The grounds which complain that the judge either erred or failed to take into account the evidence bearing on the issues of legal advice to the Appellants before executing the charge, the Ms Greer “*complaints*” issue, Ms Greer’s training, the availability of other loan options to the Appellants and the Bank’s loan policy all relate to peripheral matters of no consequence.
- (ii) Likewise those grounds which complain that the judge failed to make certain “*rulings*”.
- (iii) The ground relating to whether the parties were agreed that the court’s determination of the Appellants’ Writ action would be determinative of the Bank’s Order 88 application is similarly of no substance.

- (iv) The ground relating to the fact that Mr Floyd was not available to be cross examined on the Appellants' behalf belongs to a vacuum, taking into account in particular that Mr Floyd's main affidavit consisted exclusively (and inappropriately) of pure sworn argument.
- (v) The ground relating to the "*confidentiality ring*" formed in respect of one aspect of the Bank's discovery of documents i.e. concerning their lending policy raises no issue of substance.
- (vi) The ground faintly raising the suggestion that the specific discovery made by the Bank in the wake of the application under Order 24, Rule 7, in a context where the Appellants were legally represented and having regard to the judgment of the court below and the terms of the Notice of Appeal, is purely speculative.
- (vii) The proposed further ground noted in [21] above is equally flawed.

As regards the remaining grounds of appeal, see [53] *infra*.

### *Omnibus Conclusion and Disposal*

[50] We have given consideration to the effect of our conclusions in [46] and [47] above. In particular the question arises whether this court, an appellate tribunal, is sufficiently equipped to resolve finally the breach of contract and misrepresentation issues to which these conclusions relate. We consider that these are not entirely objective questions of law, recognising the potential for overlap between the contractual meaning and effect of the tariffs document and the resolution of the purely factual issue concerning the alleged oral representations of Ms Greer, considered in the context of all surrounding documents and events. Furthermore, there will, foreseeably, be further argument on the construction of the tariffs document and consideration may have to be given to *inter alia* the *contra proferentem* rule of construction. This court did not have the benefit of detailed researched argument on these issues. We consider on balance that these matters belong more properly to the forum of a first instance trial than that of this court.

[51] In light of our conclusions above we do not consider it necessary to determine the apparent bias ground of appeal relating to the trial judge's connections with the Bank, while adding the following. This was not a trivial ground. It was thoroughly probed by this court, an exercise which involved a partial remittal order, with directions, under s 38(1) (b) of the Judicature (NI) Act 1978. The judge made a detailed response, which was provided to the parties. The Appellants, in turn made some thoughtful submissions relating to the judge's response at the hearing. We would remind the parties, again, that this document, in common with all other documents generated by these proceedings, cannot be deployed or



disclosed outwith the boundaries of this litigation. Furthermore, in the forum of a retrial it is difficult to envisage what relevance it would have.

[52] In this judgment in furtherance of the overriding objective we have endeavoured to resolve as many issues as possible. It will be noted that we have attempted no resolution of those issues relating to the Appellants' interaction and conversations with Ms Greer deceased. This may be linked with the immediately foregoing paragraph. The permissible scope of any retrial will be delimited by the issues resolved in this judgment and will focus mainly on the immediately foregoing issue, together with such MCOB rules issues and Bank lending policy issues as are thereby engaged. Furthermore, the court of retrial will doubtless be alert to the parol evidence principles. A fresh pleading which differentiates with full clarity between the misrepresentation and breach of contract actions, also classifying the exact type of misrepresentation alleged, will be indispensable. We observe that the trial judge had an unenviable task in this respect.

[53] Finally, this court is of the view that the continuation of this litigation would be unfortunate and should be viewed by all concerned as a matter of last resort. To this end an appropriate form of mediation is strongly exhorted. As this judgment demonstrates the merits in this regrettably protracted dispute are not one-sided. To this end we order a case management listing before the High Court within 28 days of the order consequential upon this judgment.

[54] In summary, the appeal succeeds in the respects and for the reasons elaborated in [39] - [47] above, to that extent only. There will, subject to [53] above, be a fresh trial before a differently constituted court.

[55] In principle the Appellants are entitled to an order of costs against the Bank. There will be a facility for further submissions on this discrete issue if required.