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

Delivered: 04/07/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

**Between:**

**ALAN CURRY**

**Plaintiff;**

**and**

**HSBC BANK PLC**

**Defendant.**

**COLTON J**

**Introduction**

[1] The background to this action involves the relationship between HSBC Bank Plc, the plaintiff and his wife, Ms Hilary Carmichael, between June 2004 and July 2012.

[2] During this time the plaintiff and his wife borrowed heavily from the Bank to support the purchase of a large number of properties. In parallel with this the bank also offered overdraft facilities to the plaintiff's wife in her practice as a solicitor. By March 2011 this facility had increased to £1,340,000. The facility was secured by legal charges over a number of the properties purchased by the plaintiff and his wife, some of which were in their joint names, others in her name alone.

[3] From in or about 2007/2008, following the financial crash, the plaintiff and his wife began to default in respect of their loans. Despite paying a total sum of £120,000 spread across five different loan accounts between 16 April 2009 and 23 April 2009 (about which more later), they were unable to maintain their financial obligations. In April 2012 Ms Carmichael was adjudged bankrupt. This led, in turn, to a receiver being appointed on 2 July 2012 over four properties. Since then there

has been a complete breakdown in the relationship between the parties which has resulted in multiple claims and litigation.

[4] In these proceedings the court has been presented with in excess of 4,000 pages of documents. From all the various claims and counterclaims it has not been entirely straightforward to identify the issues for the court to determine in this action. The court has carefully trawled the haystack of documentation in search of the needles of significance in relation to the matters in dispute between the parties.

[5] With the assistance of counsel, Mr John Coyle, who appeared on behalf of the plaintiff, and Mr Keith Gibson, who appeared on behalf of the defendant, it has been possible to identify the core issues in dispute.

[6] The dispute relates solely to the following six properties, namely:

- 85 Charlotte Street, Ballymoney
- 2 Church Bay, Rathlin Island
- 3-5 Ballynagard, Rathlin Island

Each of the above properties is registered in the joint names of the plaintiff and Hilary Carmichael.

- 1 Church Bay, Rathlin Island
- 3 Church Bay, Rathlin Island
- 3 Turnberry, Portstewart

Each of these properties is registered in the sole name of Hilary Carmichael.

[7] Having identified the relevant properties which are at issue in this action I propose to set out a chronology of the relevant events insofar as they relate to each of these properties:

29 March 2002	Hilary Carmichael is registered as the owner of 1 Church Bay
10 June 2004	The inception of the relationship between Ms Carmichael and the defendant. The defendant offers to Ms Carmichael a facility of some £335,000. Ms Carmichael previously had finance with the Bank of Ireland.
23 Dec 2004	First legal charge executed by the plaintiff and Hilary Carmichael with HSBC Bank over 2 Church Bay.

11 May 2005	First legal charge executed with HSBC Bank over 85 Charlotte Street by the plaintiff and Hilary Carmichael.
7 July 2005	First legal charge executed with HSBC Bank in respect of 3-5 Ballynagard by the plaintiff and Hilary Carmichael.
21 Sept 2005	The plaintiff and Hilary Carmichael registered as owners of 2 Church Bay. HSBC's first charge is registered on this date.
14 March 2006	Joint offer by HSBC Bank to plaintiff and Ms Carmichael in respect of £50,000 overdraft. The security to be held is a second legal charge over 85 Charlotte Street.
10 April 2006	The plaintiff and Ms Carmichael sign correspondence confirming that McGuinness & Canavan Solicitors were being instructed to take a second legal charge in respect of the offer of 14 March 2006.
12 May 2006	Legal charge granted to HSBC Bank over 3 Turnberry, Portstewart. The defendant's first legal charge is also registered on this date.
10 August 2006	Legal mortgage granted to Hilary Carmichael by HSBC Bank over 3 Church Bay.
22 August 2006	Overdraft of £100,000 offered to Ms Carmichael, offered subject to security including: <ul style="list-style-type: none"> <li>(i) ...</li> <li>(ii) 3 Turnberry</li> <li>(iii) 1 Church Bay</li> <li>(iv) 2 Church Bay</li> <li>(v) 3 Church Bay</li> <li>(vi) 3 Ballynagard Road</li> <li>(vii) 85 Charlotte Street</li> </ul>
22 August 2006	Consolidation facility letter combining overdraft, existing loan borrowing and additional funding for a personal income tax liability (Ms Carmichael owed the sum of approximately £200,000) in the sum of £1,100,000. The security offered up in

respect of this advance is the same as security immediately above save for the addition of a life policy.

13 Sept 2006 Letter from Hilary Carmichael confirming that McGuiness & Canavan will be appointed to take a parallel legal charge (later converted to a second charge) over 3 Turnberry, 1 Church Bay and 3 Church Bay.

13 Sept 2006 Letter of instruction to McGuiness & Canavan in respect of a first parallel legal charge over 2 Church Bay, 3-5 Ballynagard Road and 85 Charlotte Street.

17 Nov 2006 Second legal charge to HSBC over 2 Church Bay allegedly executed by the plaintiff and Ms Carmichael.

Second legal charge to HSBC allegedly executed over 3-4 Ballynagard Road by plaintiff and Hilary Carmichael.

Second legal charge to HSBC allegedly executed over 85 Charlotte Street by plaintiff and Hilary Carmichael.

Second legal charge to HSBC executed over 1 Church Bay by Hilary Carmichael.

Second legal charge to HSBC executed over 3 Church Bay by Hilary Carmichael.

Second legal charge to HSBC over 3 Turnberry executed by Hilary Carmichael.

21 Dec 2006 Hilary Carmichael registered as sole owner of 3 Church Bay. HSBC's first legal charge is registered at this time.

5 June 2007 Additional loan of £60,000 offered to Ms Carmichael. The security to be held in respect of same includes:

(i) ...

(ii) ...

(iii) Second legal mortgage over 3 Turnberry.

(iv) Second legal mortgage over 1 Church Bay.

(v) Second legal mortgage over 2 Church Bay.

	(vi) Second legal mortgage over 3 Church Bay.
	(vii) Second legal mortgage over 85 Charlotte Street.
	(viii) Second legal mortgage over 3-5 Ballynagard Road.
	(ix) ...
2 August 2007	HSBC's second legal charge registered over 3 Church Bay.
15 August 2008	Second charge registered against 1 Church Bay in favour of the defendant.
31 Sept 2008	HSBC's second legal charge registered as against 3 Turnberry.
26 February 2010	HSBC's second charge registered against 2 Church Bay.
8 March 2011	Facility letter in the sum of £1,340,000 offered to Ms Carmichael. The security for this facility was all existing security held by the Bank for the previous facilities which are set out in the security schedule and included each of the six properties which are relevant to this action.

[8] Ms Carmichael was unable to comply with the terms of the facility letter and was declared bankrupt in April 2012. Since that time the bank has been seeking to enforce its securities in respect of the debt owed to it.

### **The plaintiff's case**

[9] The plaintiff has made various claims against the bank in respect of a number of properties including the six which are the subject matter of this action.

[10] In short form, the plaintiff contends that the bank has no valid enforceable charge against him in respect of the six properties. He argues that he has not provided consent to his interests being secured on any of the properties. He seeks a range of declarations and orders but the essence of the dispute can be distilled to a number of key issues.

[11] I turn firstly to the three properties in the joint name of the plaintiff and his wife Hilary Carmichael. In respect of each of these properties the bank says that they have a valid charge, all of which were executed on 17 November 2006. The bank relies on the charge documents which are signed by both the plaintiff and Ms Carmichael and witnessed by a solicitor, Mr McGonigle, of McGuinness & Canavan. The defendant says it is the beneficiary of the first and second legal charges over all the properties (with the exception of 1 Church Bay where the first mortgage has been redeemed). The first charges are not in dispute. The defendant,

as such, says it is entitled to rely on the conclusiveness of the register pursuant to Section 11 of the Land Registration Act (Northern Ireland) 1970.

[12] In respect of the second charges dated 17 November 2006 the plaintiff denies that he ever signed the documents executing the charges. Further, he says that he has never been in the offices of McGuinness & Canavan and has only met Mr McGonigle on two occasions, neither of which involved the signing of any documentation by him. The plaintiff further relies on an argument based on the decision in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773. He says that in the circumstances where the monies were being lent for the sole benefit of the legal practice of his wife, Hilary Carmichael, and having regard to the relationship between him and his wife there was a presumption of undue influence which required him being advised in writing that he should seek independent legal advice.

[13] In respect of the three other properties held in Ms Carmichael's sole name the plaintiff claims that he has an equitable interest in these properties by virtue of financial contributions made both to paying down the capital and interest portions of the first charges. He also claims an interest based on occupancy and financial contribution to 1 Church Bay.

### **Summary of the Evidence**

[14] In the course of the hearing I heard evidence from the plaintiff, from Mr McGonigle, who was a solicitor in McGuinness & Canavan when the disputed charges were executed and also from Mr Stephen M Watson who is a relationship director employed by the defendant.

[15] Mr Curry gave evidence that he was a former police officer having joined the RUC in 1981 and reached the rank of Detective Inspector before retiring in 2009 when he received the benefit of a "Patton" payment. He also worked as a farmer and was a qualified electrician. He married Hilary Carmichael on 13 January 1990. She was a solicitor, then employed by Babington Croasdaile in Derry and she started practice in her own name in 1997/98. His only formal involvement with the practice related to an initial guarantee that was provided to the Ulster Bank for £25,000. When he recalls the circumstances of this guarantee he indicates that he was advised by the bank to seek independent advice which he obtained from a solicitor in Catherine Street, Limavady. He also did some electrical works in the initial premises but apart from that took no part in the running of that business. He described how the practice flourished and he and his wife raised a family of three children and ultimately settled in the matrimonial home at 85 Charlotte Street, Ballymoney, which was purchased in their joint names in 2004. Finance was provided through HSBC and its first charge was executed on 11 May 2005.

[16] He explained how he developed an interest in properties in Rathlin Island and how he bought four properties there over a 5-year period. His evidence was that in 2002/2003 he bought 1 Church Bay which was a new build. There had been

some delay in completion by the builder and developer. He claimed that he spent a lot of time there from 2006 onwards particularly with the children. It was treated as a holiday home initially but it was always his intention to develop it into a business and to rent it out to friends or people who came to Rathlin Island. As a qualified electrician he did some work on these sites. The outside area had not been completed and he arranged for workmen to complete the building which he financed. He was earning good money at that time and he used his wages and savings to do all the work. In addition to the work outside the site he employed a qualified joiner to complete the flooring and employed a plumber to do the plumbing work. He also built a garage for which he employed three tradesmen over a 3½ month period. These labourers were all paid cash. Significantly, he claimed that he was not aware that 1 Church Bay was in his wife's sole name. It was his understanding that it was in their joint names and he would not have permitted this had he known the true position.

[17] The purchases of the other properties in Rathlin Island were part of his plan to let and rent these premises for holiday makers. After the purchase of No: 1, No: 2, then 3 and then finally Ballynagard were purchased. Numbers 1, 2 and 3 were 100 metres from the harbour and Ballynagard was on the hill looking across to Ballycastle on the one side and Scotland on the other. All of these properties were financed by HSBC. 2 Church Bay and Ballynagard were in the joint names of him and his wife. 3 Church Bay was solely in his wife's name and it was his understanding that, like No: 1, this was in their joint names. As explained earlier, for the purposes of these proceedings there is no dispute as to the legal validity of the first charges.

[18] As far as the properties in Rathlin Island were concerned the plaintiff regarded this as a joint venture. It was very much part of his retirement plans. He did all the work in relation to the properties including the painting, decorating and other manual tasks.

[19] In relation to the property at Turnberry in Portstewart he also did the work fitting out this property. He explained that his understanding was that the funding for this property was partly provided by the sale of another property they owned and that a bridging loan had been obtained when Turnberry was purchased. He was unaware of all the detail and said that his wife, Hilary Carmichael, dealt with all the financial aspects of their endeavours.

[20] As the work continued on these various properties Mr Curry retired from the PSNI on 1 April 2009. At the time of his retirement he received a large sum in the amount of £265,000. He said that this money was used to pay off mortgages which he thought were in his name. He also indicated that all rental monies received in relation to the properties were used to pay off the mortgages.

[21] He confirmed that Hilary Carmichael's practice ended in October or November 2011 and that it has not been a source of any income since then.

[22] He only became aware of the second charges when he was contacted by a receiver in relation to 1 Church Way. Between 2012 and 2017 his evidence was that he paid off the mortgages as best he could. He continued to develop his business. In addition to the properties at Rathlin Island he also owns a commercial boat which he rents out for trips to Donegal and Scotland. He claims that he has been trying to resolve his difficulties with the bank but they have been refusing his payments and that they have turned a “deaf ear” to his efforts.

[23] In relation to Mr McGonigle, he claims that he only met him once and that was in 2012 at his house in Charlotte Street. He had called to see the children and he had a general conversation with Mr McGonigle who was in the house at that time, consulting with his wife. He appeared to be agitated. Mr McGonigle indicated to him that he had met him once before at a junior rugby session.

[24] He claimed that he was never in the offices of McGuinness & Canavan solicitors in Upper James Street and that he never signed any documents in Mr McGonigle’s presence.

[25] In the course of his evidence in chief he was shown each of his purported signatures on the documents creating the second charges on the three jointly owned properties. In respect of the property at 85 Charlotte Street the signature appears as Alan Curry. He was definite that this was not his signature when shown to him. In relation to Ballynagard Road his signature appears as David Alan Curry. He accepts that this was his name but that he never signed his name as David Alan Curry but used Alan Curry. Finally, in relation to 2 Church Bay where the signature again appears as Alan Curry he denied that that was his signature.

[26] He was then shown a series of signatures which he accepted were his. These included signatures from correspondence with the bank on 12 February 2013, a customer signature record dated 22 April 2013 and the direct debit mandate signed on 1 March 2009. On reflection he said he could not say that he never signs his name as David Alan Curry but generally he signed it as Alan Curry.

[27] Under cross-examination by Mr Gibson, Mr Curry accepted that when his wife initially commenced her practice he agreed to provide “a helping hand” where he either paid or guaranteed a sum of £25,000 (it was not clear from his evidence which) in 1997/1998. He said he was happy to assist his wife at that time but pointed out that he actually received independent legal advice on the insistence of the bank. He indicates that that was the only time he has ever been in a solicitor’s office. He accepted that he did sign various documents in the possession of the bank and says that he probably signed these at the kitchen table at home. He remained adamant that his signature was never witnessed by a solicitor. He was aware of the fact that Ms Carmichael had changed banks from the Bank of Ireland to HSBC. His impression was that his wife’s business was going very well and he took no interest nor was he involved in the practice’s finances. He was busy working and dealing



with the properties in Rathlin Island and did not discuss with her how her business was going. He was aware that she did have borrowings but did not know the detail. As far as he was concerned Hilary looked after the finances. They had a joint bank account all throughout the relevant time but Hilary “ran the finances”. Specifically, he denied seeing a letter on 14 March 2006. That was a letter addressed to both him and his wife at their home address at 85 Charlotte Street, Ballymoney. The letter related to a facility of £50,000 and referred to the second legal charge over 85 Charlotte Street. He indicates that he spent a lot of time in Rathlin Island in or around that time but he certainly had no memory of seeing that letter. Hilary opened the mail and always did the banking. He said this “was just the done thing”. He was not shown everything and she took decisions in relation to the financing. He said that he certainly would not have given authority to some of the things she did but of which he is now aware. In particular, he said that he would not have agreed to provide security in respect of the properties he considered to be jointly his in respect of a loan of £1.3m. He regarded his marriage as a partnership but he had very little to do with her business or the financial side of affairs.

[28] He did not dispute that his signatures appeared on the first legal charges but says that they were not witnessed as represented by a Sandra Wylie. When pressed as to when he did sign it he feels it was probably at the kitchen table when Hilary brought it home to him to sign. He accepted that he took no issue in relation to the first charges on any of the properties. It was the second charges of 17 November 2006 which he disputed. He thought his wife was running a successful business and was not aware of the extent of her borrowings. The security was never mentioned to him.

[29] He did concede that the signature David Alan Curry on the second charge in relation to 3-5 Ballynagard Road did look like his signature even though he would not normally sign it David Alan Curry. He said it was “not unlike my signature”. He speculated that it may have been photocopied from another document but did not know whether it was forged.

[30] He said that his wife never forced him to do anything. He said that he and his wife had discussed the purchase of the properties which are the subject matter of this action but that he understood they were being bought in joint names. He was aware that finance had been provided by HSBC in relation to the properties. Again, he took no issue about the signature on the first mortgages for the three properties in his joint name. He accepted that his signatures appeared on those mortgages but that they were not sworn in a solicitor’s office. He dealt with the fixing up. His wife dealt with the financing. He had no reason to doubt the properties were in joint names.

[31] Mr Curry was adamant that he had used his “Patton” money to help pay off the various debts relating to these properties. The amount which he claimed he paid off varied between £265,000 and £200,000. Again, the evidence on this point was unclear and the plaintiff was not able to point to an account demonstrating when the

money was lodged and what it was used for. The court did see statements from Hilary Carmichael's solicitor's account which showed repayments in respect of the various loans associated with these properties as follows:

16 April 2009	£20,000 paid by Hilary Carmichael in respect of account number ending in 1071
21 April 2009	£10,000 paid by Hilary Carmichael in respect of loan ending in 6002
21 April 2009	£10,000 paid by Hilary Carmichael in respect of loan ending in 5686
23 April 2009	£10,000 paid by Hilary Carmichael in respect of loan ending in 1593
23 April 2009	£20,000 paid by Hilary Carmichael in respect of loan ending in 1071
23 April 2009	£50,000 reduction to loan ending in 3675

[32] This totals £120,000 and whilst there clearly is a deficit in terms of the paper trail I am prepared to accept that this was money provided by the plaintiff to his wife from his "Patton" payment. However, it falls well short of the monies that he claims he repaid.

[33] He was tested on the circumstances in which he claimed to "occupy" 1 Church Bay. As already rehearsed in his evidence in chief he believed he moved into 1 Church Bay in 2006, with the property having been purchased in 2002. The delay arose from difficulties with completion by the builders and the developer. He thinks it was built in 2004 and remained unoccupied between 2002 and 2005. In 2006 he initially used it as a holiday house but from 2007 onwards it became more permanent. He resided in the property and from 2008 onwards he claimed it was his first home. Prior to that time it had been his second home. On reflection he varied this evidence when he continued to give evidence on the second day of the hearing when he suggested that in fact it was purchased in 1998 but was not registered until 2002. He knew that the property had been purchased by way of mortgage from HSBC. In an affidavit he swore in the proceedings on 10 March 2017 he stated that he had lived in the property since it was built in 1998/1999 and that it was his "principal residence".

[34] He was strongly challenged about his assertion that 1 Church Bay was his "principal residence". It was pointed out that this was not referred to in the original letter from his solicitors of 6 July 2012. In the course of the court proceedings his address is referred to as 85 Charlotte Street, Ballymoney, see for example his application for an inhibition in which he gave his address as 85 Charlotte Street. The

same application also records his address in the UK for service as 85 Charlotte Street. In a form of authority on 29 August 2012 his address was given as 85 Charlotte Street. That was the address for service in relation to the proceedings in this matter. He is not on the electoral roll for 1 Church Bay.

[35] In response to all of this he claimed that he used both addresses and spent much of his time on Rathlin Island. He maintained his denial of ever meeting Mr McGonigle in a solicitor's office.

[36] In his evidence to the court Mr McGonigle explained that he has been a solicitor for 23 years. Between 2005 and 2007 he was a junior partner in McGuinness & Canavan Solicitors. He was very familiar with conveyancing law and practice which he dealt with on a daily basis. He confirms that prior to 2005 he had been working with Michael Canavan since about 1998. He recalls dealing with the conveyance in respect of 1 Church Bay when he dealt with Hilary Carmichael. After his initial instructions he estimates that he acted for her in respect of the purchase of between 15 and 20 properties. Some were in Hilary Carmichael's sole name, some were in joint names. He was also involved with some re-mortgaging work on her behalf. He recalls meeting the plaintiff on two distinct occasions, both of which were in his office. He remembers on the first occasion the plaintiff was strikingly dressed wearing Ray Ban sunglasses and a brightly coloured t-shirt. He was tanned and much smaller than he had expected. His recollection was that he came to sign documents on that occasion.

[37] On the second occasion he remembers Hilary Carmichael and the plaintiff coming to his office. He remembers that Hilary was driving the car and that he saw them in a consultation room behind the reception to sign a number of documents. He did recall the incident described by the plaintiff when they met at 85 Charlotte Street although he remembers the circumstances differently. He had been compelled to go there by his partner because of Hilary Carmichael's failure to pay a bill which needed to be paid urgently. When shown the signatures relating to the second charges on 17 November 2006, whilst he did not have specific recollection of them being signed, he has no doubt that they were witnessed by him. He understood the importance of attesting documents in these circumstances and is satisfied that he did in fact witness them as the document suggests. In terms of providing advice to Mr Curry in respect of the option for independent legal advice he indicated that he had no doubt that such a letter was also sent although no copy of the letter has been produced by either him or the bank.

[38] Under cross-examination by Mr Coyle he accepted that at the relevant time in November 2006 he was a very busy conveyancing practitioner with up to 50-60 cases on a weekly basis. It was not uncommon to have 4 to 5 completions on a Friday at that time. In terms of his recollection of the meetings he was able to recall the small room behind the reception area because it was used as a bookkeeper's room and he was conscious that it contrasted greatly with the "plush office" of Hilary Carmichael.

[39] He did not have any other documents in relation to the matter in terms of diary entries, attendance notes or correspondence. All that was available were the documents creating the charges. He had no files in relation to the matter. It was pointed out that the Law Society recommendation was to retain papers for 6 years in relation to cases and 10 years for mortgages. He agreed that the bank had issued a writ against the solicitors in 2012 arising from these charges but despite that no papers appear to have been retained. He denied any suggestion that he had met Mr Curry at a children's rugby match. He said he had not been at a rugby match in 20 years. He pointed out that he had Mr Curry's mobile phone number. It was given to him by Hilary Carmichael in and around the time of the purchase of 1 Church Bay. He needed the number because particular issues would arise from time to time which he could deal with. (This may well accord with the complications which arose after the purchase of this property.) He reiterated that he felt he had no doubt that an "Etridge letter" would have been sent.

[40] He accepted that the bank had felt they were unsecured in relation to the second charge but this related to an issue involving the use of the forms applicable in England and Wales which created some difficulties in terms of the enforcement of the loan.

[41] I heard evidence from Mr Watson who is a manager of HSBC for whom he has worked for 41 years. In 2012 and 2013 he became responsible for managing the Northern Ireland accounts including that of Hilary Carmichael and her relationship with the bank.

[42] Essentially his involvement with the case related to his assessment of the documentation and steps taken from that date onwards to try to secure the loans.

[43] He explained the difficulty that arose which led to the issuing of proceedings against the solicitors who acted both for the bank and the plaintiff and Hilary Carmichael to the effect that an English charge form had been used which, in his view, did not invalidate the charge but did create issues about the way the bank's security could be enforced.

[44] He took the court through the documentation in relation to the relationship between the plaintiff, the bank and Hilary Carmichael to which I have referred and upon which I have relied in setting out the facts and chronology.

[45] In terms of whether an "Etridge letter" had been sent he indicated that the bank was not able to produce one and all that could be relied upon was a print out from a computer entry which records:

"Independent legal advice - required, authority held."

No such authority or letter seeking authority has been produced.

[46] Finally, after the proceedings ended I issued a third party summons against the PSNI directing that it disclose any document it has in relation to the plaintiff's hours of duty on Friday 17 November 2006.

[47] In response to that summons the court received a diary entry in the following terms:

<b>Date</b>	<b>Hours on Duty</b>	<b>Details of Supervision or other duties performed or matters coming under notice</b>
Fri 17 November 2006	0900-1700	Duty Craigavon and Ballymena re staff app for Janet.

### **The properties in the sole name of Hilary Carmichael**

[48] In relation to the properties at 3 Church Bay, Rathlin Island and 3 Turnberry, Portstewart the plaintiff's case centres around his assertion that he has an equitable interest in these properties by virtue of his financial contributions and his efforts in refurbishing/building the various properties. In the amended statement of claim the plaintiff pleads that he was in actual use and occupation of these properties. However, there simply was insufficient evidence that this was so. It does appear that he let the properties out as part of his business but there is simply no evidence of his occupation of these properties prior to the legal mortgage in favour of the defendant. In any event any assertion of occupation of these properties is inconsistent with the evidence of occupation at 85 Charlotte Street and 1 Church Bay.

[49] In relation to financial contributions it has been very difficult to establish precisely what contributions were in fact made by the plaintiff. In his evidence he asserted that the "Patton" money he received namely £265,000 was used to pay off the various loans from the defendant. The evidence suggests that between 16 April 2009 and 23 April 2009 a total of £120,000 was repaid to the defendant and these monies were spread across five different loan accounts. The records indicate that the £120,000 was paid through Hilary Carmichael's solicitor's client account and there is nothing in the documentation to suggest that the source of this money was in fact the plaintiff. Certainly the evidence does not support his suggestion that the total amount of £265,000 was paid to the defendant from this source. On balance I am prepared to accept that the likely source of £120,000 was the plaintiff's "Patton" money, albeit the evidence was unclear. Of this £120,000, £20,000 went towards payment of the mortgage at 3 Church Bay on 23 April 2009. In respect of 3 Turnberry a repayment of £10,000 was made to the relevant loan account on 23 April 2009.

[50] The plaintiff was aware that these properties were purchased with the assistance of mortgages and therefore were burdened. Fundamentally in relation to these properties the plaintiff's difficulty is that at best he can only establish an

equitable interest. Since the payments and contributions giving rise to this alleged interest were made after the creation of the legal interest in favour of the defendant any equitable interest that might arise could not outrank that of the defendant. If the plaintiff's evidence is correct he may well establish an equitable interest in Ms Carmichael's equity in the properties. It may well be that he had an agreement with Ms Carmichael in respect of these properties but that is a matter between them. Any interest claimed by the plaintiff in respect of these properties is not a prior beneficial interest but was acquired after the mortgage was created. In those circumstances it seems to me that the mortgagee's interest takes priority. Further it is noted that in fact the defendant has an order for possession in respect of 3 Church Bay.

[51] I conclude therefore the plaintiff has not established any interest in respect of 3 Church Bay, Rathlin Island or 3 Turnberry, Portstewart, which has any priority over the defendant's interest created by the second charge which is in dispute. **His claim for any of the relief sought in respect of these properties against the defendant is dismissed.**

[52] The position in relation to 1 Church Bay is somewhat different. Like 3 Church Bay and 3 Turnberry the defendant has a validly executed legal charge against Ms Carmichael. However, the plaintiff pleads that at all material times he was in actual occupation of this property. If he establishes that in fact he was in occupation of 1 Church Bay at the time of the second charge then he will be able to establish an equity in the property. In that event the court will have to consider how to satisfy that equity.

[53] That he was in occupation at the relevant time was a matter of substantial dispute at the hearing.

[54] In order to establish occupation it is not necessary that the relevant premises be a principal or main residence.

[55] As appears from the chronology the history in relation to 1 Church Bay is that Hilary Carmichael was registered as sole owner on 29 March 2002. The plaintiff was aware that the property was purchased with the benefit of a mortgage. On 22 August 2006 an overdraft of £100,000 was offered to Hilary Carmichael subject to security which included 1 Church Bay. On 22 August 2006 there was a consolidated facility letter which combined overdraft, existing loan borrowing and additional funding for a personal tax liability for Ms Carmichael. The security offered up in respect of this advance also included 1 Church Bay. Finally, the second legal charge was granted on 17 November 2006.

[56] On 4 July 2012 the plaintiff first intimated a claim in respect of 1 Church Bay via correspondence from his solicitors at that time to the receivers appointed claiming that he had an equitable interest in the property arising by virtue of various payments made by him to the mortgage accounts and work done in renting out and

maintaining the properties. The advancement of monies towards reduction of the debts was again advanced on 9 July 2012 in respect of 1 Church Bay. In December 2016 the plaintiff wrote to the defendant's solicitors indicating that he intended to bring a claim to establish his interest in 1 Church Bay. A Writ of Summons issued on 14 August 2017 and in the Statement of Claim issued in September 2017 the plaintiff further claimed an interest in the property at 1 Church Bay.

[57] In this Statement of Claim he makes the case that he was in actual occupation of the property both at the time of the first charge registered on 11 April 2006 and of the second charge dated 17 November 2006 but not registered until 15 August 2008.

[58] Overall the plaintiff's evidence as to his alleged occupation of the premises at 1 Church Bay was very unclear and imprecise. I do accept that from 2008 onwards 1 Church Bay has in fact been his preferred home. I accept that since his retirement from the Police Service in Northern Ireland in 2009 the plaintiff has operated a bed and breakfast business from this property. As to the position prior to that date I could not be satisfied that he in fact "occupied" the premises as a matter of law prior to the creation of the legal interest in favour of the defendant, that is the creation of the bank's second charge.

[59] I therefore conclude that the plaintiff is not entitled to the relief he seeks in these proceedings against the defendant in respect of 1 Church Bay. As is the case with 3 Church Bay and 3 Turnberry, the plaintiff may well enjoy an equitable interest in Ms Carmichael's equity in the property. That however, is of no avail to him in respect of his claim against the defendant. **Therefore his claim against the defendant in respect of this property is dismissed.**

### **Properties in the joint names of the plaintiff and Hilary Carmichael**

[60] The court has grave concerns about the propriety of the second charge in relation to these properties insofar as they as relate to the plaintiff's legal interest. The concerns are not easily resolved. They relate to a number of factors and are compounded by the fact that the evidence in relation to the factors from both parties is less than satisfactory.

[61] I have a doubt about the circumstances in which this charge was allegedly signed by the plaintiff. Arising from the many legal documents created between the relevant parties over the years the court has had the opportunity to examine purported signatures of the plaintiff on legal documents. I have not received any expert evidence on the point but as a layman there appears to be significant variations in the signatures of the plaintiff in various documents. Those variations create a real doubt in my mind as to whether they have all been signed by the same person. As to the specific signature on the disputed second legal charge in relation to the property at 3-5 Ballynagard Road the plaintiff did concede, under pressure, that the signature did look like his but he speculated that it may have been photocopied from another document.

[62] As to whether the signature was in fact attested the court also has a considerable doubt. There are no diary entries, records or attendance notes to confirm the plaintiff's attendance at the relevant solicitor's premises on the date in question. This is despite the fact that the relevant solicitor's firm were on notice of a legal dispute in relation to the matter since 2012. The court has seen a diary entry that is a contemporaneous record made by the plaintiff of his whereabouts on the day he was supposed to have signed the relevant documents. This diary entry was produced as a result of a third party disclosure order made by the court and was in the possession, custody and control of the PSNI. The court is driven to the conclusion that it is a genuine document. In those circumstances the fact that he was on duty in Craigavon and Ballymena between 9.00 am and 5.00 pm makes it unlikely that he would have attended at the solicitor's premises and signed the various relevant documents at that office on that date. This is particularly so if it is suggested that he attended at the office in plain clothes, in a bright short sleeved Polo shirt with Ray Ban aviator glasses in a day in late November. Of course it may be that he attended attired in this way on a different occasion.

[63] The overall context of the creation of the charge also causes the court significant concern. The very significant sum of money involved in the second charge namely in excess of £1m, later rising to £1.34m was for the purposes of funding the legal practice of the plaintiff's wife, Hilary Carmichael. It cannot seriously be disputed that in this scenario there was an obligation to advise the plaintiff to seek independent advice compliant with the obligations established in the case of **Royal Bank of Scotland v Etridge (No. 2)** [2002] 2 AC. There is no record of this being done. The best the defendant could do was to refer to a partial screenshot to the effect "Independent legal advice - required, authority held". No such authority has been produced.

[64] All of this has to be seen in the context of the plaintiff's evidence that he left the matter of finances entirely to his wife. I accept this evidence and find it credible in the circumstances as they relate to the plaintiff and his wife. It is significant that the sum of £120,000 which I have found was in fact provided from the plaintiff's "Patton" money was actually filtered through Hilary Carmichael's solicitor account.

[65] In the course of the hearing, with the leave of the court the plaintiff amended the statement of claim in the action to plead particulars of undue influence. In terms of that plea I accept that the plaintiff did place his financial affairs in the hands of his wife and that he relied upon her. He had confidence in her and relied upon her to deal with the legalities and financing of the various property acquisitions undertaken by them. In short he trusted her to deal with the financial aspects.

[66] The second charge was manifestly to the advantage of his wife and to his disadvantage. The amount secured to his wife was to her sole benefit and advantage as it provided liquidity to her business and practice as a solicitor. There was a



manifest disproportionate imbalance of benefit in favour of Hilary Carmichael as against the plaintiff.

[67] In those circumstances I can readily accept that a presumption of undue influence by Hilary Carmichael on the plaintiff could be established. I have already said and indeed it is not in dispute that an Etridge letter or advices to the plaintiff that he should obtain independent legal advice was required in the circumstances of this case.

[68] The difficulty for the plaintiff is that he does not make the case that his will was overborne by Hilary Carmichael and that he signed the document in those circumstances. He did in his evidence say that he frequently signed papers “on the kitchen table” at Hilary Carmichael’s request and it may be that the signatures giving rise to the second legal charges were effected in this way.

[69] When pressed by Mr Gibson on behalf of the defendant the plaintiff refused to speculate as to whom in fact did forge his signature if that indeed was his case. However I do not consider that in the circumstances of this case it is necessary for the court to determine whether in fact the signatures were forgeries.

[70] Taking all matters into account I have come to the conclusion that the defendant cannot establish that the second legal charges in dispute are valid against the plaintiff in respect of the joint properties. The evidence as to signature, attestation and the requirement to advise the plaintiff to take independent legal advice is simply insufficient. In fact the evidence points to the contrary. The court is not satisfied that the second legal charges were entered into as a result of the exercise of a full, free and informed consent by the plaintiff.

[71] I acknowledge that I have some reservations about the plaintiff’s evidence. Ultimately, however this is a court of equity and I am not satisfied about the propriety of the second charges.

[72] I therefore conclude that the Bank cannot rely on the second legal charges of 17 November 2016 against the plaintiff in respect of the three properties in which he is the legal joint owner.

[73] I will hear the parties on the terms of the appropriate final order in relation to the plaintiff’s statement of claim and the defendant’s counterclaim and also in relation to costs.