Neutral Citation No: [2017] NICA 63 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **GIL10407** ***Delivered:*** **17/10/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

BETWEEN:

ULSTER BANK LTD

Plaintiff/Respondent;

and

FARZAM ESMAILI

Defendant/Appellant.

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Before: GILLEN LJ, STEPHENS LJ and McBRIDE J

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GILLEN LJ (giving the judgment of the Court)

Introduction

[1] This is an appeal from the judgment of Colton J delivered on 25 May 2017 and a subsequent order made by Colton J dated 14 June 2017 whereby the judge ordered that the appellant:

(i) deliver to the respondent possession of the lands and premises situate at and known as 124-126 Lisburn Road, Belfast on or before 7 July 2017.

(ii) pay £1,499,159.32 to the respondent.

(iii) shall have his counterclaim dismissed.

(iv) pay the respondent's costs of this action to 2 December 2014 to be taxed in default of agreement.

(v) pay the respondent's costs of the action from 3 December 2014 onwards to be taxed in default of agreement, such order not to be enforced without leave of the court.

The appellant represented himself before this court with the assistance of a McKenzie Friend. Ms Simpson QC appeared on behalf of the respondent with Mr Colmer.

Background

[2] The background to this issue is comprehensively set out in the judgment of Colton J of 25 May 2017. In essence the facts are as follows:

[3] In January 2006 the appellant sought loan facilities from the respondent (the Ulster Bank) in relation to the purchase of premises at 124/126 Lisburn Road, Belfast ("the premises").

[4] At that time the appellant was the proprietor of a takeaway pizza food business in a rented unit which was part of the premises. The building having come on the market for sale, the appellant entered into discussions with the Commercial Development Department of the respondent concerning a loan of the money in relation to the potential purchase of the premises.

[5] Ms Shauna Burns, a senior manager employed by the respondent, entered into discussions with the appellant concerning this matter. At the trial before Colton J, the content of those discussions was a clear matter of dispute.

[6] The essence of the appellant's case is that he claims he sought a loan from the bank to both purchase and, crucially, redevelop the premises.

[7] The respondent's case throughout these proceedings is that the loan sought was only to enable the appellant to purchase the premises and that there was no promise to loan money to redevelop the premises.

[8] It is the respondent's case that Ms Burns did discuss the appellant's future plans to develop the premises but it is asserted that he neither sought nor did the respondent offer future development funding at that or any time.

[9] It is common case that a loan in the form of a written loan facility was given, that facility being amended as time went on. The appellant accepted the terms of the facility letter as evidenced by his signature.

[10] That original facility letter of 23 March 2006 from the respondent to the appellant is a pivotal document. It was described by the learned trial judge at paragraph [51] of his judgment as "a crucial document as it outlines the offer that was made to the first defendant by the bank at that time". It merits recitation of some of the contents.

> "Facility A: Demand Loan

A1 Borrower
Farzam Esmaili

A2 Provider
Ulster Bank Ltd Boucher Road Branch

A3 Facility and Amounts
Demand loan of £1,100,000

A4 Purpose
The facility will be made available to the borrower *for the sole purpose* (**our emphasis**) of purchasing 124/126 Lisburn Road Belfast

The Bank shall not be responsible for monitoring or ensuring the use or application by the borrower of the facility or any part of it.

A5 Availability

While amounts drawn under the Facility are repayable on demand, at the bank's absolute discretion or in accordance with normal banking practice, in the absence of such demand it would remain available until 31 March 2007 prior to which date it will be reviewed and extended by mutual agreement between the bank and the borrower."

[11] This original facility letter of 23 March 2006 then went on to contain a number of other conventional paragraphs, the document itself being approximately 8 pages long.

[12] There were subsequent facility letters, all of which contained the phrase that the loan was "for the sole purpose of purchasing the premises".

[13] Repayment of the loan facilities was secured by the grant of legal charges over three properties namely 124-126 Lisburn Road, Belfast, 142 Barnfield Road, Derriaghy owned by the first defendant's sister Parie Dokht Esmaeili and a second charge over the appellant's property at 22 Wellington Park, Belfast. The second legal charge was removed from the loan on 16 November 2007.

[14] Under the terms of the loan agreement the appellant drew down £987,762.50 on 4 August 2006. Demand was made for repayment of the loan on 20 April 2011 but to date no repayment has been made.

[15] After the original facility letter had been signed C & H Jefferson Solicitors on behalf of the respondent discovered that Barnfield Road lands were owned by the respondent's sister and that a third party charge should be obtained from her. To reflect the change in the security which was to be provided, a new facility letter was issued by the bank on 4 May 2006. The appellant signed the facility letter on 8 May 2006 indicating he was bound by its terms. Again the facility letter was in similar terms to the letter of March 2006 and referred to the sole purpose of the loan being the purchase of the premises and did not refer to development funding.

[16] One of the preconditions of the letter of 4 May 2006 was that valuations in respect of the premises and Barnfield Road lands would total £2M. Valuations provided by the Commercial Property Solutions valued the premises at £900,000 (31 July 2006) and the Barnfield Road lands at £750,000 (27 July 2006). Since these did not total £2M, the appellant provided a second legal charge over his house at Wellington Park, Belfast which he was developing as further security.

[17] As happened on each occasion, when approval for either a loan or further security was required, Ms Burns, submitted the request to the Credit Approval Branch of the bank.

[18] A subsequent facility letter, erroneously dated 4 May 2006, was issued to the appellant and it was signed by him on 3 August 2006 confirming that he agreed to be bound by the terms and conditions. Once again that facility letter expressly stated that the facility was to be made available to the borrower *for the sole purpose* of purchasing 124-126 Lisburn Road, Belfast.

[19] Although in many respects the facility letter of 23 March 2006 and the discussions with Ms Burns were pivotal aspects of this case, further meetings between representatives of the respondent and the appellant played a role in the submissions of the appellant in this case. These can be summarised as follows.

[20] It is an important part of the respondent's case that the provision of the two additional securities made it clear that the appellant was not relying on future bank funding as his only means of repaying the facility. It is the respondent's case that the provision of security to repay the original loan was a crucial part of the decision to provide the loan in the first place.

[21] On 25 May 2006 Ms Burns made enquiries about the proposed completion date for the purchase of the premises. On 18 July 2006 the Planning Appeals Commission refused planning permission in relation to 22 Wellington Park, Belfast.

[22] On the basis of the further facility letter, the appellant drew down £987,762.50 on 4 August 2006 to cover the purchase of the premises, stamp duty and solicitor's fee.

[23] A discrete matter arose over the contention of Ms Burns that the loan facility was increased to include £100,000 for the purposes of developing the Wellington Park premises. It is the appellant's contention that the planning application for the apartments had been lodged in 2004 and was refused in 2005 and the appeal was refused on 1 August 2006. He therefore contends that the entry in the bank's records in which Ms Burns seeks this increase is inaccurate. Ms Burns asserts that she was not told about the refusal of planning permission and invokes the submission that she had made to the Credit Approval Department (hereinafter referred to as "Credit") seeking the increase because "as he is also developing Wellington Park into apartments it may require fees etc to be covered … on confirmation of this application I will submit an increase paper for this £100,000 uplift."

[24] It is clear that the appellant sought a further increase in the facility to enable him to acquire an apartment in Adelaide Street in Belfast for his son. This was a matter of controversy in the case.

[25] This actual increase was dealt with by Mr Kyle Lindsay, then senior manager for the respondent, who took over the appellant's account after Ms Burns left on maternity leave in July 2007.

[26] Mr Lindsay, indicated that between 9 July 2007 and 16 July 2007 the appellant attended with the bank in relation to the additional facility sought. He contended the meeting was also attended by Mr Peter Rooney on behalf of the bank in accordance with previous procedures outlined by Ms Burns. It was alleged by Mr Lindsay that at this meeting the appellant indicated his son wished to purchase the apartment in Adelaide for £493,000 and he wished to borrow £500,000 to cover the purchase price plus acquisition costs. He was seeking a bridging facility until his son obtained a mortgage and until the sale of Barnfield Road was completed. He also was seeking, allegedly, £30,000 for personal expenses and £120,000 to cover a further 12 months interest roll up.

[27] After the meeting, with the assistance of notes made by Mr Rooney, Mr Lindsay prepared a report to Credit dated 16 July 2007 seeking the increase sought by the appellant.

[28] The uplifts of £120,000 and £30,000 were approved by Credit but initially the request for financing of the purchase of the flat was turned down albeit subsequently approved after further information was provided and with a number of additional conditions. That was later rescinded when it became clear that the son's mortgage had been declined.

[29] The learned trial judge properly pointed out that this series of submissions for credit approval by Mr Lindsay demonstrated the procedures required before any loan could be agreed. It did not support the suggestion made by the appellant that the increase in the facility was granted without apparent hesitation or that the

increase was offered without any due diligence, assessment of affordability being conducted by the bank.

[30] The appellant contended that this meeting between 9 and 16 July 2007 had never taken place, that there was no documentary proof or evidence to substantiate it by way of written records, CCTV record, or evidence of signing in at such a meeting. In October 2007 the appellant requested the release of the Wellington Park property as security on the loan. The appellant contended Mr Lindsay agreed to this but as the learned trial judge pointed out the documentation makes it clear that this was something which required approval from Credit and Mr Rooney with Mr Lindsay's approval, did submit a report to Credit seeking release of the property. The request was approved on 16 November 2007 and a new facility letter reflecting this position issued on 16 November 2007. Hence the family home is not the subject matter of these proceedings.

[31] In January 2008 the respondent contended that the appellant sought further uplifts with an additional facility of £100,000 to begin processing a planning application in respect of Barnfield Road. After going through the necessary procedure by way of a submission of a credit report dated 28 January 2008, Credit approved that request on 28 February 2008 and a facility letter was issued on that date making the offer of loan facilities. That letter was never signed or accepted and hence in July 2008 when the defendant was seeking a "top up" of his residential mortgage from his local branch manager Mr Lindsay confirmed that the facility letter had never been accepted.

[32] In his evidence Mr Lindsay indicated that when he took over the management of the appellant's account, his understanding was in accordance with the credit application and facilities offered by the bank as outlined by Ms Burns. In particular he contended that he clearly understood that the bank had not agreed to provide development funding in respect of the Lisburn Road property and that any development funding would only be considered by the bank and Credit if planning permission in respect of the Lisburn Road property was achieved. At that stage a fresh application for credit would be made and funding would only be advanced if it was approved by Credit. Mr Lindsay contended that throughout the period during which he managed the account at no stage did the appellant ever allege that the bank had already agreed to development funding. He accepted that the development of the Lisburn Road property had been discussed but always on the basis that any request for development funding could only be considered once planning permission had been granted.

[33] In November 2008 Mr John O'Hara took over management of the appellant's account as Mr Lindsay was moving to a different department within the bank. Once Mr O'Hara took over, he arranged a meeting with the appellant which he suggested was for the purpose of discussing the handover of the account. He contended that when examining the files he became aware that there were insufficient funds available to cover the forthcoming interest payment in December 2008. If this was

not covered the account would move into default and he therefore prepared an application to Credit dated 5 November 2008 seeking a £5,000 increase in the loan facilities to be provided to the appellant. The application requested the renewal of facilities with the £5,000 increase for a further three months. The purpose of the time frame was to obtain up-to-date valuations and decision of the planning application for the Lisburn Road property at which stage a repayment strategy could be assessed.

[34] Prior to the meeting with the appellant he drafted a facility letter to reflect the approvals which he had obtained from Credit and he brought this letter dated 17 November 2008 to the meeting. Again what took place in relation to the facility letter and at the meeting is a matter of dispute. The matters in dispute included:

- Whether or not Mr O'Hara asked the appellant to sign a facility letter immediately or whether he suggested the appellant take the letter away and return it to him.

- Whether or not the appellant read the facility letter quickly and indicated that he was happy to sign it there and then.

- The appellant contended that the facility letter of 9 September 2008 confirmed an increase in facilities to £1,290,156 and that therefore Mr O'Hara's request to increase it by £5,000 actually resulted in an apparent decrease in the facility. This was explained in evidence before the learned trial judge by Mr Lindsay and Mr O'Hara indicating that the initial mistake was made by Mr Lindsay who, when he looked at the low limit on the bank's internal system, observed that the limit was set at £1.27m which was out of line with the limit which had actually been approved at £1.25m. This arose because of a system error which meant that the interest charged to the account was erroneously added to the limit marked on the system. He subsequently rectified the position in his report to Credit on 5 November 2008 so as to effectively bring the loan limit back in line. Therefore the letter dated 9 September 2008 signed by Mr Lindsay stated the incorrect low limit caused by the system error. The subsequent facility letter issued by Mr O'Hara on 17 November 2008 in fact therefore provided for an increase of £5,000 from £1.25m to £1.255m and not to the decrease that was suggested by the appellant. The learned trial judge was totally satisfied by the explanation given by Mr Lindsay and Mr O'Hara. Obviously we did not have the benefit of observing Mr Lindsay or Mr O'Hara being cross examined about this matter and hence it is very difficult indeed for this court to overrule Colton J's assessment on this issue

[35] Mr O'Hara placed considerable importance on the report that he had prepared on 20 November 2008 to Credit outlining that a number of repayment options were being considered and that understanding the value of the assets was an essential part of being able to determine how repayment could be achieved. That report expressly refers to the fact that he thought it would be "unlikely" that the

bank would finance the development of the Lisburn Road property even if planning were granted. A sale of the property "as is" was the preferred option. The report also indicates that the appellant was proposing an alternative strategy namely selling his own dwelling house at Wellington Park, Belfast. It was the respondent's case that this was yet another indication that the appellant was exploring other means of repayment as he was well aware that the bank had given no commitment to the development of the Lisburn Road property.

[36] Consequently as a result of the submission to Credit, the loan was extended and a further facility letter was sent by Mr O'Hara to the appellant on 17 December 2008 which increased the facility by £10,000 to cover the costs of obtaining valuations. This letter was not signed by him. These valuations were not obtained until May 2009. In the interim there was a further meeting between the appellant and Mr O'Hara and a Mr McCormick who was taking over management of the appellant's account on behalf of the respondent. Once again a credit report was furnished by the bank officials after that meeting on 18 February 2009. This demonstrated that the bank was in discussions with the appellant to explore repayment options and once again ran contrary to any suggestion that the bank had given a commitment in relation to development funding.

[37] By April 2009 Mr O'Hara was reporting to Credit that valuations had not been received. It was also noted that any option involving development of finance was not considered a viable option by the respondent's Credit Department.

[38] After the report was sent off Mr O'Hara wrote to the appellant on 4 April 2009 outlining the importance of providing the valuations and stating that if valuations were not obtained then the respondent could not consider further interest roll up and that the facilities would be in default. It was the appellant's contention that this letter came as a shock to him as it did not reflect the tenor of the verbal discussions that they had been having.

[39] In any event valuations were eventually obtained which revealed that the appellant was under secured. These valuations had been obtained from Mr Morrison of Myles Danker. The appellant, as appears in the judgment of the learned trial judge, accused Mr O'Hara of influencing Mr Morrison's reports.

[40] Subsequently the matter was referred to the Global Restructuring Group in the bank in December 2009. There were meetings with a Ms Fiona King and a Mr Charles Sung including discussions about how the matter might be resolved without coming to any positive conclusion. The final meeting with the bank appears to have been on 20 April 2011 and fixed charge receivers were appointed by the bank on 29 July 2011 in respect of the relevant premises.

[41] None of the monies lent to the appellant has been repaid

The appellant's case

[42] It has always been the appellant's case that notwithstanding the written terms of the facility letters signed by him the bank had agreed to provide finance for both the purchase and the redevelopment of the premises and that this agreement had been reached with Ms Burns after the meetings in January 2006 and April 2006.

[43] As the learned trial judge points out at paragraph [11] of his judgment, the appellant accepts that he borrowed monies from the plaintiff for the purchase of the premises but claims that he was given assurances that once he received planning permission to develop those premises he would be provided with sufficient funds to complete the development. Consequently, in light of what he regards as a legally binding obligation on the part of the respondent, he was not required to repay the loan until the development was completed.

[44] Alternatively he makes the case that he was induced by and relied on the representations in agreeing to the loan on the terms set out in the facility letter. He submits that he would never have entered into this agreement but for those representations and the respondent cannot rely on the agreement on the basis of the alleged misrepresentations or alternatively on the basis of estoppel.

[45] Mr Esmaili set out 16 grounds of appeal to which we shall refer in the course of this judgment. They covered a wide ranging number of disparate arguments which in essence were all factual challenges to the findings made by the learned trial judge.

[46] In advance we invoke the words of Simon Brown LJ in *R (Richardson) v N. Yorkshire CC (CA)* [2004] 1 WLR at 1920 where he said:

> "I am conscious that despite the unusual length of this judgment it nevertheless leaves unaddressed a number of Mr McCracken's disparate arguments. For that I shall hope to be forgiven. Where, as here, an appeal is pursued in a somewhat scatter gun fashion, it is simply not practicable to examine every pellet in detail."

[47] In this appeal the appellant has attempted to retry the case with a multiplicity of factual assertions which seek to challenge finding of fact by Colton J (see paragraph [52] below).

[48] In an attempt to summarise the gravamen of Mr Esmaili's appeal, nine main points by way of challenge can be discerned from grounds 1-16 set out in the Notice of Appeal.

(1) The existence of any meeting between himself and Mr Lindsay/Rooney between 9 and 16 July 2007.

(2) The record of the facility of 1 August 2007 and the original loan value of £1.25m together with the overdraft of £20,000.

(3) The evidence of Mr Lindsay and Mr O'Hara with regards to the letter of 9 September 2008.

(4) The failure to have appropriate regard to the plaintiff's own credit sanction report from Mr Jim Rodgers of 2 March 2006.

(5) Most importantly, a direct challenge to the evidence of Ms Burns with regard to the allocation of £100,000 "on a sole purpose" facility term ignoring all evidence of oral agreements and discussions surrounding the facility letters.

(6) The failure of the learned trial judge to place any or sufficient weight on the alleged failure of the respondent to call witnesses who might have been expected to have been called.

(7) The failure of the learned trial judge to place weight on the evidence of Kaveh Shirazi builder who confirmed date, attendees and reason for the meeting on 23 May 2007.

(8) The learned trial judge erred in accepting the evidence of Ms Burns with regard to the true ownership of Barnfield Road.

(9) The learned trial judge failed to have regard to the principles in *Capron v Government of Turks and Caicos Island and Another* [2010] UKPC and *Walsh v Bank of Scotland* [2012].

Conclusions

[49] We have carefully read the lengthy written submissions of Mr Esmaili and his oral submissions made before us. We have come to the conclusion that we must dismiss his appeal. Our reasons for so doing are as follows:

[50] The appellant failed to recognise that a first instance trial is the "main event" factually rather than a "try out on the road". (See *DB v Chief Constable of PSNI* [2017] UKSC 7 at paragraph [78].

[51] We invoke the comments by Lord Kerr at paragraph [78] of that judgment where he said:

> "A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."

[52] The appellant in this instance has throughout the proceedings attempted to introduce a merits based approach based on a challenge to various factual findings made by the learned trial judge who had heard this case over a lengthy period with the benefit of witnesses and cross-examination. He thus had the benefit, which was denied to this court, of observing the witnesses, assessing their credibility, seeing how they reacted under cross-examination and forming a measured and reasoned opinion of their truthfulness.

[53] Thus in relation to the meeting which allegedly occurred between 9 and 16 July 2007 with Mr Lindsay and Mr Rooney and the facility letter of 1 August 2017 (which essentially embraced grounds 1-5 of the 16 grounds of appeal) we can well understand the learned trial judge accepting that such a meeting had taken place.

[54] In short, the appellant made the case that:

- there was no evidence to prove his presence at the bank at that stage.
- there was no photographic or written evidence to prove his meeting with these men.
- the assertion of meetings between 9-16 July was all very vague and unsubstantiated.
- the learned trial judge, at paragraph 80 of his judgment, was factually incorrect in his assessment. In particular so far as he relied on the alleged reports to credit arising out of the meeting of 16 July 2007, the appellant alleges that these were fictitious.
- he did not require £120,000 of an uplift.

- Mr Rooney did not give evidence on this matter and that is contended to be a highly significant omission on the part of the respondent given that the issue was in dispute as to his attendance at the meetings.

- The loan to the appellant in May 2006 was £1.2m contrary to the assertion by the respondents.

[55] This is a classic case of where the learned trial judge had the opportunity to view and hear the evidence of Mr Lindsay and was obviously sufficiently impressed by his credibility to accept that, contrary to the assertion by the appellant these meetings had taken place. Moreover it would seem highly implausible that a meeting in July 2007 would have been totally fabricated and thereafter, in the absence of any meeting, a report to Credit dated 16 July 2007 seeking to increase the facility would have been put forward to the Credit Department. What would the purpose have been in doing this? What possible logic would there be in Mr Lindsay and for that matter Mr Rooney fabricating a report of 16 July 2007 to Credit and then making a re-submission to Credit on 27 July 2007?

[56] The appellant has raised the absence of Mr Rooney as a witness in the course of the original hearing. There is no doubt that where a party declines to call on an available witness, the court may infer that witness would not help his case (see *Lynch v MOD* [1983] NI 216 at 222H). However equally, the learned trial judge was perfectly entitled to form a view as to the credibility of Mr Lindsay notwithstanding the absence of Mr Rooney. Having believed what he has said, the learned judge is entitled to give greater weight to this factor than the absence of Mr Rooney.

[57] There was a further attack on the credibility of Mr Lindsay and Mr O'Hara making up grounds 6 and 7 of the grounds of appeal. Ground 6 challenges the learned trial judge's acceptance of the evidence of Kyle Lindsay and John O'Hara with regard to a letter of 9 September 2008 and its computer generated erroneous nature. Once again this is a question of credibility and it is noteworthy that the learned trial judge, having considered the conflict between the appellant and Mr O'Hara on this matter, said at paragraph [163]:

> "In terms of the conflict between Mr O'Hara and the first defendant about what took place in relation to the facility letter of 17 November 2008 I preferred the evidence of John O'Hara. Overall I found Mr O'Hara to be an impressive and reliable witness. He gave his evidence with careful consideration and I accept it."

[58] We find no basis whatsoever for challenging this actual finding based on the credibility of the witnesses following the meeting of September 2008.

[59] The appellant seemed to think that the absence of documentary proof somehow ended the matter and that in the absence of such written material, the

court should find in his favour. He failed to recognise that the absence of the documentation to which he had adverted was at least partly due to the passage of time according to the respondent and this was accepted by Colton J. In short we find nothing to suggest that there was identifiable error, either in fact or in law or that the evidence demonstrates a misunderstanding of relevant evidence, a failure to consider relevant evidence or that there is any material suggesting that the judge had gone "plainly wrong" in failing to find the fraudulent behaviour alleged against these bank officials.

[60] The essence of the appellant's case as set out in Grounds 8, 9, 10, 11, 13 and 14 of the Notice of Appeal was that Ms Burns was completely disingenuous and untruthful about the arrangement.

[61] As indicated above the appellant contended that he had been assured that once planning permission had been obtained he would be provided with sufficient funds to complete the development of the property. He asserted he had no means of repaying the loan other than by developing the premises and then selling the completed units or using the rental income from the funds to repay the loan. He would not be required to repay the loans until the development was completed. He was expressly informed to ignore the terms and conditions of the original facility letters which expressly contradicted his representations. He alleged that Ms Burns continued to reassure him that the plaintiff would honour its commitments even when the handling of his account was passed to other officials in the bank. Far from being obliged to repay the loan, in truth he should be provided with a further loan to enable full development of the premises.

[62] The learned trial judge read the affidavits of Ms Burns and observed her giving evidence. Thus, at paragraph [139] of his judgment Colton J indicated that "the determination of the conflict depends on my assessment of the evidence given by the two key witnesses in the case namely the first defendant (the appellant) and Ms Burns – although I accept that other evidence is also relevant on this issue". He went on to say "I have considered a number of affidavits from both Ms Burns and the first defendant. I have heard them give evidence which has been vigorously tested in cross-examination. No court can claim infallibility in assessing the truthfulness or reliability of witnesses who are in direct conflict. The court must do its best on the basis of its assessment of the witnesses and consider all the background evidence in coming to a conclusion on the balance of probabilities."

[63] He rejected the appellant's assertions of dishonesty against Ms Burns on a factual basis. We see no reason to come to a contrary conclusion.

[64] A few brief reasons can be set out to illustrate why the appellant's case was wholly implausible in relation to Ms Burns:

- Why would Ms Burns have made these representations without obtaining authority from the Credit Department of the bank? The learned trial judge

was particularly influenced by the Credit reports that were prepared by Ms Burns and subsequently by the other bank officials who gave evidence in the case. As the learned trial judge pointed out, they provide a clear contemporaneous account of their approach and thinking at the relevant time. The subsequent credit applications required by changing circumstances demonstrates the careful way in which Ms Burns and her successors dealt with this loan.

- Why would she have made her reports to Credit without mentioning the issue of redevelopment if she was all the while telling the appellant that the advances would be for development?

- What possible benefit will have accrued to her?

- Why would the original facility letter (and all ensuing facility letters) have failed to mention this and expressly referred to the advances being for the sole purpose of purchase?

- Why would the appellant not have insisted that the facility letters be amended to include reference to the development funding? The appellant is not an inexperienced or young man and must have been well aware of the significance of the omission of a commitment to fund the development. Why would he have accepted Ms Burns alleged exhortation to ignore the terms of the facility letter without inviting changes to the terms of the repeated facility letters?

- As the learned trial judge pointed out, if the appellant is correct then Ms Burns made an open-ended offer to provide funds to complete a development which had not even received planning permission, for an undefined period and without any security and all the while concealed this from Credit?

[65] In short the appellant's case offends against both common sense and obvious bank practice.

[66] In a characteristically careful and searching judgment, the learned trial judge did not overlook certain of the flaws in Ms Burn's evidence. However as often has been said credibility is not a seamless robe and because the learned trial judge found fault with her on certain occasions, that did not serve to rob her of overall credibility in the essential matters in the case.

[67] At paragraph [151] the learned judge recorded:

> "I do not say that Ms Burns was a "perfect" witness. I find that she expressed herself in trenchant and adamant terms and was reluctant to make any

> concessions to the defendants. In particular I have a concern about an alleged meeting between Ms Burns, the first defendant and his builder Mr Shirazi who was described as a close friend."

[68] The trial judge rejected Ms Burns' assertion that she had not attended any such meeting. He concluded that there had been a meeting between Ms Burns, Mr Shirazi and the appellant. However he was perfectly entitled to come to the conclusion, weighing up the overall credibility of Ms Burns, that "it may well be the case that Ms Burns has simply forgotten about such a meeting". We have no reason to find such an assertion implausible.

[69] Similarly, it appears that Ms Burns was mistaken in considering that the appellant had misled her about the Barnfield Road ownership. It looks as if this issue emerged when the solicitor investigated the matter and it became clear that the appellant may well have drawn it to the attention of the bank at an early stage. Mr Stanfield apparently said in evidence that he had been told this matter by the bank. Once again, this simply illustrates that the learned trial judge had reason to conclude that Ms Burns was not a perfect witness but that does not in any way impugn his overall conclusions in this case as to where the truth of the question of the funding lay.

[70] As the learned trial judge correctly pointed out at [165]:

> "At the end of my consideration of this case I come back to the facility letters which were clear in terms of the purpose of the loan and which in my view govern the relationship between the parties in this case. I therefore reject any defences based on the alleged representations made by or on behalf of the bank. The money has been lent and in my view it is repayable."

We find this conclusion to be unimpeachable.

[71] In relation to Ground 8 where the appellant asserts that the learned trial judge failed to have any regard to the respondent's own credit sanction report from Jim Rodgers of 2 March 2006, we find that his construction of the email does not bear scrutiny. Colton J had clearly considered it and specifically adverts to it at paragraph [48] of his judgment. In any event that credit sanction report does not serve to undermine the fundamental findings of the judge on the question of the importance of the facility letters.

[72] In the course of his wide ranging approach with detailed analysis of the minutiae of the case – most of which did not bear on the essential issues in the case – the appellant has attempted to retry the entire case. In the course of this analysis he

has criticised the learned trial judge for not dealing with every detail that he has raised. Where, as here, a challenge or appeal is pursued in such a fashion, it is not practicable to examine every pellet in detail.

[73] Some examples of further disparate points raised will suffice to make the point.

[74] Firstly on frequent occasions the appellant has attacked the absence of verification and documentation produced by the respondent on a number of issues. He, through his counsel and solicitor, had ample opportunity to raise these matters with the learned trial judge at the trial and to point out any obvious omissions in the process. However, once again the appellant failed to grasp that the learned trial judge found that the key component of this case was the facility letters which he declared to be clear in terms for the purpose of the loan and which governed the relationship between the parties in the case. The matters raised by the appellant were clearly peripheral to the central issue which guided and governed the decision of the learned trial judge. We see no reason to differ from that approach.

[75] Secondly, the appellant cited a number of authorities none of which touched upon the central issue in the case or assisted his appeal in any material way. Three examples will suffice.

[76] First, *Royal Bank of Scotland v Carlyle* [2015] UKSC 13. In that case the bank lent Mr Carlyle ("C") funds to purchase a development plot. C's case was that he depended on bank finance not only for the purchase of the plot but also for its development. The bank lent C monies for the purchase of the plot but denied there was any agreement to provide the further development finance.

[77] A number of fundamental differences factually arise between Carlyle's case and the instant case. During the original hearing evidence was given by C, his accountant (who had been present at some meetings with the bank) and an Assistant Director of Commercial Banking at the bank's local branch all of whom backed up the plaintiff's version of events. This local bank official gave evidence that she recalled C saying to her that the bank should not give any funding unless it agreed to fund the development costs. She also said that C was told on various occasions funding for the development would be advanced. The bank called no evidence at all. The judge found in favour of C preferring his evidence and that of his witnesses over the case of the bank who had called no witnesses.

[78] Interestingly, when the matter reached the UK Supreme Court, the Court of Appeal having reversed the finding of the original hearing, Lord Hodge at paragraphs [20] and [21] expressly indicated that had he been hearing the case at first instance he would have found in favour of the bank but that the Court of Appeal must not substitute its views for determinations reached by the trial judge.

[79] It can be readily recognised that this case runs counter to the appellant's arguments not only on the basis of the different factual circumstances of the two cases but also because *Carlyle* makes it clear that it is not the task of the Appellate Court to decide the case as if at first instance or to substitute its views for those of the trial judge unless she is plainly wrong.

[80] Secondly, at Ground 16 of his Notice of Appeal the learned trial judge is criticised for failing to apply the principles set out in *Walsh v Bank of Scotland* [2012] NIQB 36. That was a case in which Weatherup J granted an injunction restraining the defendant bank from taking any steps to enforce facilities that had on paper expired. The judge's reasoning was based on assurances he found had been given by the relationship manager to the plaintiff at the time the short term facilities were created to the effect that the facilities would be converted into long term borrowings.

[81] The appellant fails to grasp the fact that the judge in the instant case arrived at a different factual finding from the judge in *Walsh* and hence the outcome was different.

[82] Thirdly, the appellant at Ground 15 of his appeal criticises the judge for placing weight on a decision of the Privy Council in *Capron v Government of Turks and Caicos Island and Another* [2010] UKPC. That was a case where the appellant had claimed that he and other partners in a proposed company had concluded an agreement with the Government of the Turks and Caicos Islands for the development of lands. The appellant had advanced a claim in proprietary estoppel.

[83] The fact of the matter is that in the instant case the appellant had also relied on the principle of estoppel. It was entirely appropriate that the learned trial judge should cite the comments of Lord Kerr in *Capron's* case and also for that matter of Lord Walker in *Yeoman's Row Management Limited v Cobbe* [2008] UKHL 55 when deriving the appropriate principles that should guide him when considering the concept of propriety and equitable estoppel.

[84] Finally, although the Consumer Credit Act 1974 does not find a specific place in the Notice of Appeal, we note that it was raised at the initial hearing and is mentioned in the course of the appellant's skeleton argument. We can deal with this matter briefly. As the learned trial judge pointed out at paragraph [173] of his judgment, *if* he had accepted the appellant's evidence as to the assurances and representations made by the bank the wide empowering scope of Sections 140A and 140B of the Act may well have provided a basis upon which to reject or alter the relief being sought. However on the facts as he found them that did not arise and consequently he concluded, properly in our view, that the provisions of the Act were of no assistance to the appellant. In particular he notes that the appellant was described as a property developer with whom property development was his "main business". Additionally he was a graduate who had successfully run and sold a business and obtained development finance in the past. The relationship between such a man and the bank can never be considered to be unfair in such circumstances.

[85] We therefore conclude that this appeal must fail. We affirm the findings and decision of Colton J save that the period of stay imposed by him has now sped. We consider that this whole matter has gone on far too long without any justification on the part of the appellant. The time has come for him to face up to his responsibilities and obligations. Accordingly we shall impose a stay on the judgment for two weeks only from the date of this judgment.

[86] We invite the parties to address us on the issue of costs.