Neutral Citation: [2017] NICh 14 | *Ref:* **COL10281**

Judgment: approved by the Court for handing down | *Delivered:* **25/05/2017**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2012 No. 035726

BETWEEN:

ULSTER BANK LIMITED

Plaintiff;

-and-

FARZAM ESMAILI

Defendant.

2012 No. 94616

BETWEEN:

ULSTER BANK LIMITED

Plaintiff;

-and-

PARIE DOKHT ESMAEILI
AND
AMIR ALI ESMAILY

Defendants.

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COLTON J

THE RELIEF SOUGHT

[1] In the first action the plaintiff seeks (i) possession of premises situate at 124-126 Lisburn Road, Belfast ("the premises") and (ii) payment of monies due on foot of a loan dated 4 August 2006 (which was later replaced and superseded by subsequent loans) made between the defendant and the plaintiff.

[2] In relation to the second action the plaintiff seeks (i) possession of lands at 142 Barnfield Road, Derriaghy ("Barnfield Road") owned by the first defendant, who

is the sister of the defendant in the first action and which were the subject matter of a third party legal charge in an agreement made between the plaintiff and the defendant in the first action and (ii) an order setting aside the transfer of Barnfield Road by the first defendant to the second defendant on 20 August 2013.

[3] The two actions are inextricably linked and were heard together. Although the defendants in the two actions are related their names are spelt differently. I have adopted the spellings in the titles to the actions. For the sake of convenience I propose to refer to Farzam Esmaili, Parie Dokht Esmaeili and Amir Ali Esmaily as the first, second and third defendants respectively.

SUMMARY OF THE ISSUES

[4] In January 2006 the first defendant sought loan facilities from the plaintiff in relation to the purchase of premises at 124-126 Lisburn Road, Belfast. At that time he ran a takeaway pizza food business in a rented unit which was part of the premises. The building came on the market for sale and the first defendant, who was a long term customer of the bank, approached it to see if it would be feasible to borrow money in relation to the potential purchase of the premises. He was referred to the commercial development department of the bank and met with a Ms Shauna Burns who at that time was a senior manager employed by the bank. What took place at that meeting and subsequent meetings between the first defendant and Ms Burns is a matter of dispute. The first defendant says that he sought a loan from the bank to both purchase and re-develop the premises. The plaintiff's case is that the loan sought was only to enable him to purchase the premises. It is accepted by the bank that there was a discussion about his future plans to develop the premises but it says that he neither sought nor did the plaintiff offer future development funding. In any event, after discussions and some correspondence, the plaintiff offered the first defendant a loan in the form of a written loan facility which was amended as matters developed. He accepted the terms of the facility letter as evidenced by his signature.

[5] All of the facility letters provide that the loan was for the sole purpose of purchasing the premises. The letters provide that the loan facilities were repayable on demand and in the absence of a demand would be reviewed at various defined dates in the future. None of the letters refer to development funding.

[6] Repayment of the loan facilities was secured initially by the grant of legal charges over three properties; one ("the first legal charge") over the premises; the second, ("the third party legal charge") over a site at 142 Barnfield Road, Derriaghy ("Barnfield Road") owned by the first defendant's sister Parie Dokht Esmaeili and the third, a second legal charge ("the second legal charge") over the first defendant's property at 22 Wellington Park, Belfast.

[7] The second legal charge was removed from the loan on 16 November 2007. The third party legal charge is the subject matter of the second action.

[8] Under the terms of the charges, statutory powers of sale (and other powers) became exercisable at any time after demand and default of repayment.

[9] Pursuant to the loan agreement the first defendant 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.

[10] The first defendant's case is that notwithstanding the written terms of the facility letters signed by him the bank agreed to provide finance for both the purchase and the redevelopment of the premises and that this agreement was reached with Ms Burns after meetings in January 2006 and April 2006.

[11] He accepts that he borrowed monies from the plaintiff for the purchase of the premises but says that he was assured that once he received planning permission to develop those premises he would be provided with sufficient funds to complete the development. He says this created a legally binding obligation on the plaintiff and that as a consequence he was not required to repay the loan until the development was completed. Alternatively he argues that he was induced by and relied on these representations in agreeing to the loan on the terms set out in the facility letter. He argues that he would never have entered into this agreement but for those representations and says that the plaintiff cannot rely on the agreement on the basis of the alleged misrepresentations or alternatively on the basis of estoppel.

[12] Finally he draws on the "unfair credit relationship" provisions of the Consumer Credit Act 1974 (as amended) (sections 140A and 140B) which gives the court wide powers to vary the credit and security relationships between the parties should it find the relationship to be unfair.

[13] In terms of the allegations made by the first defendant these are disputed by the plaintiff and by Ms Burns in particular. She is adamant that no promises, assurance or representations were made in relation to the future development of the premises. She says that all the documentary evidence in this case supports her assertion. The resolution of the central dispute in this case turns on questions of fact and my assessment of the credibility and reliability of the witnesses who gave evidence.

[14] The second action relates to the third party charge on the lands at Barnfield road.

[15] In the course of the discussions between the parties and before the first defendant was provided with any loan it emerged that one of the proposed securities for the loan namely the lands at Barnfield Road were actually owned by his sister, the second defendant. Although the first defendant held a power of attorney over these lands the solicitors acting for the plaintiff at that time, C & H Jefferson, advised that the plaintiff should obtain the second defendant's consent to the grant of a third party legal charge to properly secure the loan. As the second

defendant was in the USA at this time the solicitors sought confirmation from a USA attorney that she understood the nature of the charge she was granting. A USA attorney instructed on her behalf along with the second defendant signed the relevant documentation purporting to grant the third party legal charge "unconditionally".

[16] These cases initially proceeded to trial before Deeny J as the Commercial Judge. In the course of that hearing the second defendant did not participate in the proceedings and pleaded no defence. After an adjournment of the hearing before Deeny J the plaintiff discovered that the second defendant had transferred the Barnfield Road lands to Amir Ali Esmaily, the first defendant's son for "natural loving affection" (sic) which the plaintiff says is in breach of the terms of the charge.

[17] The second defendant's case is that she was advised by her USA attorney that he had spoken to the solicitor acting for C & H Jefferson, a Mr Stanfield, and that Barnfield Road would be provided as security for five years and could be called upon if there was a shortfall once the development of the Lisburn Road property had been completed. It was alleged that she subsequently transferred Barnfield Road to her nephew in 2012 because she had been ill and was due to undergo surgery. She wanted him to look after any legal matters to do with Barnfield Road. Again in terms of this dispute the written documentation is clear but the resolution of the dispute depends on contested evidence between the attorney acting for the second defendant and Mr Stanfield who at the relevant time advised the bank in relation to the charge.

THE TRIAL

[18] Ms Jacqueline Simpson QC appeared with Mr Adrian Colmer BL on behalf of the plaintiff. Mr Gerald Simpson QC appeared with Mr Richard Shields BL on behalf of the defendants. I also thank the solicitors in this action for the thorough and meticulous way in which they prepared the voluminous trial bundles.

[19] I am indebted to counsel for their diligence in the preparation and presentation of this claim. Their written submissions were of particular assistance to me.

[20] During the course of the trial I was presented with a huge volume of written and oral material.

[21] In terms of witnesses I heard evidence from Ms Shauna Burns, Mr John O'Hara, Mr Kyle Lindsay and Mr Ian Stanfield on behalf of the plaintiff and three witnesses for the defendant – Mr Esmaily, Mr Shirazi and Mr Saboorian.

[22] In addition I considered multiple affidavits from six deponents.

[23] I was also provided with the entire banking records relating to the bank and the first defendant dating back to 1995. In the course of the hearing no stone was left unturned or grievance left unexamined by Mr Simpson on behalf of the defendants concerning their relationships with the bank.

[24] In preparing this judgment I have carefully trawled the haystack of documentation in search of the needles of significance in relation to this dispute. I propose to focus on the matters which are relevant to this dispute and which help me to resolve what ultimately reduces to a factual dispute between the witnesses who gave evidence in this trial.

Chronology

[25] Since 1988 the first defendant operated a "Pizza Paradise" pizza takeaway from premises at 126 Lisburn Road. He rented a unit in these premises. There was another business operating at 124 (a Chinese takeaway) and there were rooms above the premises. In 2005/2006 the premises became available for sale. He approached his local Ulster Bank branch which handled his everyday business with a view to obtaining a loan to purchase the premises. Because the potential purchase price exceeded £0.5m the matter was referred to the bank's Belfast business centre where he met a Ms Shauna Burns on 17 January 2016. What took place at that meeting is a matter of dispute.

[26] Present at the meeting were the first defendant, Ms Burns and her assistant Sarah Lamont. The first defendant says that at the meeting he informed Ms Burns that he had been "offered the opportunity" to purchase the property at 124-126 Lisburn Road. He was keen to avail of that opportunity and re-develop it into a mixed use residential and commercial development. His account of the meeting is that he outlined his plan to her in considerable detail. He indicated that he had already spoken to a Mr John Casey a planning consultant who had been involved in the successful development of a similar site across the road from the premises. He says that he actually told Ms Burns that his proposal was to build six apartments on three floors and retain the ground floor as commercial units at circa 5000 square feet. He outlined the costs involved at £50 to £60 per square foot depending on final specification which would equate to approximately £1m in build costs. He indicated that it would take about three years to achieve planning for something of this nature. In relation to the proposed development he intended to employ his friend Mr Kavi Shirazi to undertake the building of the project.

[27] He told Ms Burns that the premises would be marketed for £575,000 but that the price was going to be considerably higher. Crucially, he claims that he made it clear to Ms Burns that he was not in a position to contribute to the project financially nor would he be in a position to service or make capital payments towards reducing the loan or interest payments until the development was complete. He says that he asked the bank for funding to acquire the premises, to pay for planning fees and

architect fees and other costs associated with obtaining planning permission as well as funding to complete the building work itself.

[28] The first defendant claims that Ms Burns was positive about the project and demonstrated a knowledge of what would be required for the development of this type of premises. Crucially he claims that during the interview Ms Burns "explained to me how the plaintiff may be able to provide a loan to purchase and redevelop the premises subject to obtaining further details from my accountant … she explained that … there would be no repayments made until completion …" This was strongly denied by Ms Burns. It was her evidence that at this meeting the first defendant requested funds of £725,000 to purchase the premises. At the meeting she alleges that Mr Esmaily set out his background in the following way. He was an experienced businessman having previously operated an electronics business which he had successfully sold. He had been running the pizza carryout business at a modest profit but he had developed a number of properties and was in the process of developing his family home at 22 Wellington Park, Belfast. As a result of this he had accumulated a considerable net worth. He considered property development as his main business over the last couple of years and for the future. He indicated that if he purchased the premises it should obtain a rental income of £30,000 per annum which had the potential to increase to £35,000. His plan was to buy the premises to secure the Pizza Paradise business and apply for planning permission to refurbish the retail units and convert the rooms upstairs into apartments. He did not want to make a cash contribution to the purchase.

[29] In assessing the matter it was Ms Burns' evidence that her view was that the value of the premises would not be sufficient to provide the plaintiff with adequate security in respect of any loan to purchase. This was of particular importance in this situation, where, it was unclear whether the first defendant would obtain planning permission to develop the premises and if so, when and for what. Whilst she recognised that it was likely the value of the premises would be enhanced if planning permission was obtained, there was no certainty that this would be the case.

[30] In relation to planning it was Ms Burns' evidence that she was told that planning could be achieved within one year. In considering this issue I consider it significant that the first defendant subsequently submitted an optimistic planning report from Mr Casey dated 14 February 2006 which did not anticipate a refusal of planning permission for the premises. Nor did it indicate any timescale for achieving planning permission. The first defendant subsequently received a letter from JW Architectural Design in relation to the development proposal for the premises on 28 April 2006 which stated that "there is still a large degree of risk with this proposal concerning planning and roads". The letter also indicated that the Road Service may ask for a percentage of street parking which "would make the whole application fall apart". The report also suggested that the floor area of the apartments would only be 600 sq ft. This letter was not provided to the bank. This issue is relevant to the question of the potential duration of the project and the

required lending. The loan facility was to expire within a year but it was renewed as matters developed. Ms Burns did not enquire about the progress of planning prior to her leaving on maternity leave in July 2007. Indeed, it was Ms Burns' evidence that she said to the first defendant that because he did not have planning she could not consider development funding. Her focus was on the security required for the loan.

[31] It was for this reason she says that at this meeting she raised the issue of additional security to support the making of the offer of a loan to the first defendant. Her evidence was that in response he put forward two properties by way of potential security. He indicated that he had a home in Wellington Park which he was developing and a site at 124 Barnfield Road, Lisburn which could be used as make weight security. In relation to the Barnfield Road lands Ms Burns' evidence was that he represented that he owned the Barnfield Road lands and was in the process of selling them for £1.2m. The lands were in the middle of a substantial development and the developer of the adjoining lands wanted to buy his site. The sale proceeds from these lands could be used to reduce or repay the loan. On the issue of the Barnfield Road site the first defendant was adamant that he informed Ms Burns that this property was owned by his sister but that he had power of attorney that would allow him to deal with the property. He points out that this power of attorney would have been with the bank by reason of his relationship with it over the years. He accepted that the family had been seeking to sell the property and if it was sold the proceeds would go in reduction of any loan. He did not accept for one minute however that the sale of Barnfield Road would be a pre-condition of a loan from the bank. There was also a dispute about the Wellington Park premises in that it appears that at that stage planning permission had been refused for the proposed development and he was considering an appeal. He says this was disclosed to Ms Burns but her evidence was that he was developing this property.

[32] The entire issue of the security and in particular the lands at Barnfield Road is in my view important to an understanding and resolution of the dispute in this case. The plaintiff's argument was that the site was a vital element in the decision to offer loan facilities. This was the means by which the first defendant would repay the loan for the purchase of the premises.

[33] At the end of the meeting it was agreed that the first defendant would provide further information to Ms Burns in relation to his financial situation so that the bank could consider whether it could make any offer to him.

[34] The general procedure involved was described by Ms Burns as follows.

> "If I was prepared to recommend the application for a loan I would have to prepare a report for the Credit Review Team ("CRT"). The CRT was a quorum of business banking regional directors who would independently assess the application. If approved by

> CRT, the recommendation would then be sent to a credit underwriting division for final approval ("credit"). Therefore the decision as to whether or not to offer a loan was not mine; it had to be sanctioned by CRT and credit."

[35] It is stating the obvious that after the first meeting there was no agreement between the parties. From Ms Burns' perspective depending on the further information provided by the first defendant she would seek approval for a loan. From the first defendant's perspective he felt that the meeting was positive and he averred that "she explained to me how the plaintiff may be able to provide a loan to purchase and re-develop the property subject to obtaining further details from my accountant … After our discussions Ms Burns put in place a yearly loan structure".

[36] Whilst Ms Burns accepted that there was a discussion about the development of the Lisburn Road property after purchase the key focus for the first defendant at this meeting was the purchase of the premises as he wanted to secure this property quickly. She did discuss the options in relation to future development and also what would happen if planning was not achieved. In this regard she regarded the security provided by the site at Barnfield Road as vital. She indicated to him that if the bank were to lend it would likely be a condition that the sale proceedings from the Barnfield Road site would be used to reduce the debt. The sale proceeds could be used as a contribution if he were to apply for development funding in the future. In the absence of such a contribution she could not see how the bank would agree to provide development funding.

[37] It was Ms Burns' evidence that after this initial meeting she was unsure as to whether the first defendant would return to seek assistance from the bank. She was equally unsure as to whether the bank could assist. This was "not an everyday transaction" as there was "no cash contribution" and there was a "planning risk/speculative risk". Having spoken with credit she e-mailed the first defendant seeking additional information regarding his ability to service/pay the debt on 27 January 2006. The e-mail was in the following terms:

> "Hi Farzam,
>
> From a security point of view the transaction is satisfactory, but the point I need additional comfort on is servicing/paying the debt due to the speculative nature of the transaction.
>
> In a worse case scenario I need to be assured that you have sufficient other income to repay the debt if;
>
> (a) Planning is not achieved and/or

(b) The units cannot be let.

Can you provide me with information on what other disposable income you would have?

Kind regards

Shauna"

[38] Both parties in this action say that this e-mail supports their version of what took place at the meeting on 17 January. The first defendant says that the inference to be drawn from this e-mail is that the parties had discussed re-development as an integral element of what was planned. Thus there is a reference to the speculative nature of the transaction and what would happen if planning is not achieved for the development. Ms Burns however said that the speculative nature of the matter related to the planning risk. At that stage the first defendant had not applied for planning permission and it was unclear planning permission would be granted and if so when it would be granted and for what. She recognised that obtaining planning permission would enhance the value of the property. This could have a number of consequences for the loan. For example it was common at that time for developers to purchase properties, obtain planning and sell them on with increased value in a short time thereby repaying the loan. Equally any increase in value would increase the potential income from the premises which could also go to repaying the loan. What she was concerned about was ensuring that full repayment could be achieved if planning permission was not granted, as the premises alone would provide insufficient security.

[39] In addition on 27 January 2006 Ms Burns also sent an e-mail to the first defendant apologising for not having sent "… HOT (Heads of Terms) as discussed … I wanted to speak to our Credit Department about the transaction first …". Ms Burns says that this confirms she could not have made any offer to the first defendant and that he understood the process of her having to refer her submission to credit.

[40] Following this the first defendant did send further information to Ms Burns which supported the representations he had made at the meeting. In particular she was provided with a letter from his accountants, Cleaver Black, dated 16 February 2006 which confirmed that the first defendant had "carried out a number of property transactions and developments and he would look on this as his main business over the last couple of years and for the future;" that he was developing Wellington Park; that he had considerable "net worth" (£1.85m) and that he generated income from his own business Pizza Paradise to support his family and, that if he purchased the premises, he could also generate a rental income from the adjoining tenant. The letter also confirmed that the first defendant had trained as an electronics engineer and had obtained an MSc in electronics from Queen's University Belfast in 1984. It confirmed the setting up of his electronic business PARS ELECTRONICS and that it

had traded successfully before being sold in 2002. The letter also referred to the development of 142 Barnfield Road, Derriaghy which was described as an acre site in the middle of a new development of 950 houses. There was a further reference to 20 Wellington Park in which it was indicated that the first defendant was currently living but that it was "seen primarily as and was purchased for a development opportunity and an application has been put in for a 6,500 square feet development".

[41] In addition a report from a planning consultant John Casey was also provided.

[42] In my view Ms Burns accurately described this material as "very generic ... fine at that stage for putting a purchase loan in place". She stated however that it would fall well short of what would be required to support an application for development funding and that any such support would need to be "so much more detailed".

[43] In terms of how to assess what actually took place at the meeting on 17 January 2006 the first defendant was particularly critical of the failure of the plaintiff to produce any notes from the meeting. He was adamant that both Ms Burns and her assistant took notes in the course of the meeting. Ms Burns says that no such notes have been retained but that in any event the notes taken would have formed the basis for the credit application which she made on 1 March 2006. This credit application and subsequent credit applications are in my view important documents in this case. They are a detailed, clear and contemporaneous account of what was being proposed by the author at that time and carry significant weight with me. The credit application of 1 March 2006 states clearly that the purpose of the application "is to seek approval for facilities totalling £825k to purchase 124/126 Lisburn Road, cover of purchasers costs and seeks interest roll up for one year". The document sets out an accurate customer profile as presented to Ms Burns. It identifies the weaknesses of the application relating to the debt service ability in the following terms:

> "A loan would be partly served from the £30k rental income from this building. FE believes this will be increased in the short term to £35k. Despite this we have incorporated interest roll up on the facility of £50k which could cover the £20k annual shortfall."

[44] She refers to the speculative risk which she says was mitigated by factors which relate to the make weight security. These were the residential property in Derriaghy which had been valued in its current state at £800k but which had a potential worth to an identified vendor, who was developing houses on either side of the lands, of say £1.8m. The assessment indicated, as per the letter from the defendant's accountants, that "FE is looking for £1.2m for the property, these funds will be used to reduce our debt." The credit application refers to the assertion that the first defendant had carried out a number of property transactions and

developments and that he would look at this as his main business over the last few years and for the future. There is also a reference to the net assets statement of the first defendant indicating a net worth of say £1.85m. The total value of the properties namely the premises and Barnfield Road lands made the loan to value ("LTV") achievable and well under the normal 70% requirement for a loan of this nature. The total securities would also enable the bank to provide interest roll up.

[45] It is also clear from this document that Ms Burns was aware of the first defendant's intention to develop the premises and that "there will be future business from other developments".

[46] Thus the facility sought was to be interest only for 12 months "until revised planning is received for the site". It was envisaged that "at that stage it will be restructured on a development facility subject to credit approval". (My underlining)

[47] Therefore, it was clear from the credit application that Ms Burns was seeking authority to offer a loan for the sole purpose of purchasing the premises and the figure of £825k was sufficient to cover the anticipated cost of the premises at that time together with purchaser's costs and roll up interest. It was also clear that she hoped that in the event of planning permission being granted there would be an opportunity for the bank to provide further loans and the restructuring of the loan on to a development facility, subject to credit approval. A key strength in making the recommendation was the value of the securities being proposed.

[48] On 22 March 2016 Ms Burns made a re-submission to credit seeking approval for increased facilities as the first defendant had agreed the premises for sale in the increased sum of £910k. This re-submission was considered and sanctioned by a Mr Jim Rodgers on behalf of the bank on 22 March 2006. A sanction of re-submission comments are as follows:

> "Profile description; re submission profile
>
> Uplift approved to accommodate the higher purchase price. Minimum valuation condition has been amended to £2m to maintain LTV see 54% (this should be achievable as the Barnfield Road property is to be valued at £1.5m) and we have incorporated additional conditionality in relation to the drawing of funds for stamp duty, fees and planning costs."

[49] Pursuant to this sanction an "offer" was made to the first defendant in the form of a facility letter dated 23 March 2006.

[50] Before considering the facility letter I digress to refer to a bizarre episode that emerged from the first defendant's diary entries which were disclosed after the original opening of the case. An entry of 8 March 2006 records:

> "At 7pm (SMcK) called to the pizza shop and left his number. I called, he said he is the one bidding against me for the property, the estate agent gave me my number. I explained why I have to buy property. He says why don't I leave. I said why doesn't he stop bidding, he asked what's in it for him. I ask what does he want, he said £200,000. I said is vice versa applicable. He said yes. I said this is very unusual. I need to talk and think about this."

Subsequent entries show that the first defendant met with this gentleman to discuss the proposal further and "how to do a deal". On 10 March 2006 the first defendant "met (SMcK) outside Park Hotel in his car. He offered to pay me £200,000, or I pay him the same so one of us would stop bidding. I said he pays me I need to have a shop of (X) … square footage." There were further entries recording further contact but ultimately the first defendant agreed the premises for sale at the increased sum of £910k. The plaintiff says that these entries support Ms Burns' impression that the first defendant intended to buy the property "no matter what", on the basis that he wanted to safeguard his Pizza Paradise business. The fact that he was prepared to contemplate securing a large cash payment together with a unit to rent from which he could trade his business is said to be inconsistent with the suggestion that he was anticipating a promise of development funding.

[51] The facility letter of 23 March 2006 is a crucial document as it outlines the offer that was made to the first defendant by the bank at that time.

[52] The total facility was for a "demand loan of £1,110,000 (one million one hundred thousand sterling).

[53] The **purpose** of the facility letter was "for the sole purpose of purchasing 124/126 Lisburn Road, Belfast". The facility was to be repayable on demand, at the bank's absolute discretion or in accordance with normal banking practice, in the absence of such demand it will remain available until 31 March 2007 prior to which date it will be reviewed and may be extended by mutual agreement between the bank and the borrower. In terms of repayment it was expressly stated that the facility is to be repaid in full on 31 March 2007 if not already demanded by that time.

[54] The liabilities under the facility were to be secured by way of a first legal charge over 124/126 Lisburn Road, Belfast and a first legal charge over 142 Barnfield Road, Derriaghy. In addition the facility expressly provided that the sale proceeds of 142 Barnfield Road, Derriaghy were to be lodged in reduction of debt and that the first defendant could not agree to any development, without having first repaid the bank debt, without the consent of the bank.

[55] It is common case that Ms Burns met with the first defendant to discuss the terms of the facility letter on 19 April 2006. As was the case with the meeting on 19 January 2006 there is a dispute about what took place at that meeting.

[56] The first defendant's evidence was that he read the document carefully and that he then had marked with a yellow highlighter on his copy matters of concern that he intended to discuss with Ms Burns. These concerned, inter alia, the printed conditions concerning repayment, Barnfield Road, default interest, and penalty interest. His evidence was that whilst the document on its face said that the facility was available to 31 March 2007, he was assured by Ms Burns that it would be extended. On the provision in the facility letter that it was to be "repaid in full" his evidence was that he was told this was "for review, so we can assess progress of development and planning – if more money is needed we can adjust if necessary".

[57] In the course of the meeting he queried terms such as "default interest" given that the facility itself was to provide for rolled up interest. His evidence was he was told this did not apply, that some terms in the facility letter were general and that some were even contradictory.

[58] The provisions in the facility letter regarding "penalty interest" were discussed. Mr Esmaily's evidence was that he had highlighted this because:

> "I was very clear that I had wanted to develop – any reference to it was alarming to me. She said that it was absolutely bank jargon – we know you want to purchase and develop and development of the property is an integral part of the whole deal."

[59] His evidence was that it was agreed at this meeting that the bank would provide the funding to purchase the premises, including the cost of planning permission, and upon determination of the final size of the premises a quantity surveyor would cost what would be required to complete the build and the bank would make those funds available.

[60] His evidence was that he would not have bought the premises had these assurances not been provided to him.

> "She said that when the development was finished a mortgage would be put in place and the loan would be repaid through the rental income from the units".

[61] This account was vehemently denied by Ms Burns. Her clear recollection of that meeting was that the main issue raised by the first defendant was the interest rate. Indeed in the course of this discussion she recalls him referring to "other banks" which he believed would offer "better rates" which confirmed her impression that there was no guarantee that he would accept the offer. In her

evidence she corrected an averment in the first defendant's affidavit to the effect that the facility was £1.1m against a bid of £825k which was clearly incorrect because she had been advised that the purchase price had increased to £910k which resulted in an increase of the original proposed facility of £825k to £1.1m. The additional £275k was provided for the additional purchase cost, planning fees, stamp duty and associated interest.

[62] She was vehement in her denial that she suggested that the terms of the facility agreement could be ignored. She could not say this and would not say it. She pointed to the absurdity in her view of the suggestion that the bank would provide detailed terms and conditions in an offer of facilities only for her to state that they had no contractual force. The agreement could not have been clearer in terms of the purpose of the loan and the terms and condition of the loan. It was put in place for one year because she had been advised that it would take one year to complete the planning process. The loan was put in place to fund the purchase of the Lisburn Road property and the loan would be repaid from the sale of the Barnfield Road site or through development finance following an application approved by credit. Indeed her evidence was that the first defendant may well have gone to another lending institution for development finance if that was what he wanted. She pointed out that if the offer to him was not suitable, or he had concerns with it, it was open to him to seek a different offer from another bank or indeed to reject the offer that was made. She places particular emphasis on the fact that he had highlighted matters he wanted to discuss on the letter but that one matter he did not highlight was the express purpose of the loan and the failure of the facility letter to refer to any redevelopment. Ms Burns evidence was that he presented as an experienced businessman who raised points of detail about interest and who clearly understood what she was saying and what was on offer. She points out that he would have been familiar with a facility letter for a development loan having been issued with such a letter in May 2004 in respect of the property at Wellington Park.

[63] The first defendant did not sign the facility letter at that meeting but subsequently signed it. He said that he signed this and subsequent facility letters to renew the loan on the basis of the assurances allegedly given by Ms Burns.

[64] After the facility letter was signed the relevant paperwork was sent to C & H Jefferson to take security on behalf of the bank i.e. a charge over the premises and over the Barnfield Road lands. In the course of their work C & H Jefferson discovered that the first defendant did not "own" the Barnfield Road lands. Rather, they were owned by his sister, the second defendant. C & H Jefferson advised that, notwithstanding the first defendant's power of attorney in respect of the affairs of his sister, a third party charge should be obtained from her.

[65] 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 first defendant signed the facility letter on 8 May 2006 indicating that he would be bound by its terms. Again the facility letter was in similar terms to the March letter and clearly referred to the

purpose of the loan as the purchase of the premises and did not refer to development funding.

[66] During May, June and July 2006 C & H Jefferson worked to take security on behalf of the bank.

[67] One of the pre-conditions of the facility letter dated 4 May 2006 was that valuations in respect of the premises and Barnfield Road lands would total £2m. Valuations provided by Commercial Property Solutions valued the premises at £900k (31 July 2006) and the Barnfield Road lands at £750k (27 July 2006). As they did not total £2m the first defendant offered a second legal charge over his house at Wellington Park which he was developing as further security and an application was submitted by Ms Burns to credit on this basis. A subsequent facility letter erroneously dated 4 May 2006 was issued to the first defendant at that time and it was signed by him on 3 August 2006 confirming that he agreed to be bound by the terms and conditions contained therein. Again the facility letter, as was the case in the previous facility letters, expressly stated that the facility was to be made available to the borrower for the sole purpose of purchasing 124-126 Lisburn Road, Belfast. The bank argues that the provision of two additional securities proved that the first defendant could not have been relying on future bank funding as his only means of repaying the facility. The provision of securities to repay the original loan was integral to the decision to provide the loan.

[68] On the basis of this facility letter the first defendant drew down £987,762.50 on 4 August 2006 to cover the purchase price of the premises, stamp duty and solicitor's fee.

[69] In relation to the issue of the ownership of Barnfield Road the first defendant is adamant that he told Ms Burns that he was not the owner and that he had a mere power of attorney at the first meeting in January 2006. Again this is something which is strongly denied by Ms Burns. She points out that had she been aware of this she would not have made the credit application in the way that she did nor would C & H Jefferson have been instructed on this erroneous basis. She says that the documentation clearly supports her understanding that he owned the land in question. She would have no reason for misrepresenting this position and says that the first defendant is dishonest in this assertion.

[70] In terms of the delay between 8 May and 3 August 2006 the following emerges from the documentation. In the course of the preparation of the various charge documents e-mails were exchanged between the second defendant and her USA attorney, Mr Saboorian. C & H Jefferson also had on-going contact with the first defendant's then solicitors.

[71] On 17 May 2006 John Casey provided advice as to the PAC, on behalf of the first defendant, in relation to an appeal relating to the planning application which had previously been refused for 22 Wellington Park.

[72] On 25 May 2006 Ms Burns made enquiries about the proposed completion date for the purchase of the premises. On 12 June Ms Burns asked Mr Stanfield if the third party charge had been returned, as the first defendant wished to pay a deposit to secure the premises. C & H Jefferson indicated that much of the delay was being caused by the inaction of the first defendant's then solicitor.

[73] On 18 July 2006 the PAC issued its decision confirming refusal of planning permission in relation to 22 Wellington Park with the letter from the PAC being dated 1 August 2006.

[74] On 19 July 2006 the first defendant sought assurance from his solicitor that he would be able to obtain the benefits of the lease of the Chinese takeaway (No. 124).

[75] On 20 July 2006 Mr Saboorian sent a letter confirming that the second defendant in the second action had had the benefit of independent legal advice in relation to the third party charge.

[76] In relation to the registration of the securities the discoverable documentation revealed considerable correspondence between the bank's solicitors and the first defendant's former solicitors. In particular C & H Jefferson wrote to the relevant solicitors complaining about matters not disclosed in the original report on title and requesting documents which were to have been supplied pursuant to undertakings given at the time of completion. This correspondence continued from October 2006 into 2009. The undertaking was only formally released on 6 February 2009 but there was still further correspondence after that date.

[77] In relation to the facility letter which resulted in the draw down another issue in dispute relates to the charge on the property at Wellington Park. Ms Burns was clear that the loan facility was increased to include £100,000 for the purposes of developing the Wellington Park premises. The first defendant points out in his second affidavit that the planning application for the apartments had been lodged in 2004 and was refused in 2005. The appeal was heard in May 2006 and the appeal refused on 1 August 2006. He therefore suggests that the entry in the bank's records in which Ms Burns seeks this increase is inaccurate. Ms Burns is adamant that she was simply not told about the refusal of planning permission and points out that the further submission she made to credit could not be clearer. She sought an 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 £100k uplift".

[78] The next development in relation to the loan relates to a request made by the first defendant to increase the facility to enable him to acquire an apartment in Adelaide Street for his son. The value was approximately £500,000. In his evidence he suggested that this was treated as a mere formality by the bank, firstly in the form of oral representations by Ms Burns and subsequently when the bank agreed to

increase the facility "without apparent hesitation". This actual increase was dealt by a Mr Kyle Lindsay who took over the first defendant's account after Ms Burns went on maternity leave in July 2007.

[79] In the meantime it appears that the Planning Service informed Bradley McClure, the architects now acting on behalf of the first defendant that the proposed plans for the Lisburn Road premises were unacceptable due to "off road" parking issues. This information does not appear to have been passed to the plaintiff.

[80] The next note referring to contact between the parties related to the request for finance in relation to the purchase of the property at Adelaide Street, Belfast. This matter was now in the hands of Mr Kyle Lindsay who was a senior manager working for the plaintiff at the time. He indicates that between 9 July 2007 and 16 July 2007 the first defendant attended with the bank in relation to the additional facilities being sought. The meeting was also attended by a Mr Peter Rooney on behalf of the bank in accordance with previous procedures outlined by Ms Burns. At the meeting the first defendant indicated that his son wanted to purchase an apartment in Adelaide Street, Belfast. The purchase price for the apartment was £493k. He wished to borrow £500k to cover the purchase price plus acquisition costs. His son was hoping to obtain a mortgage (with Ulster Bank House Mortgages) for a portion of the purchase price with the remainder of the £500k loan to be repaid from the sale of the Barnfield Road site which he expected to sell for £1.6m in October 2007. The first defendant was therefore seeking a bridging facility until his son obtained a mortgage and until the sale of the Barnfield Road site was completed. He also sought £30k for personal expenses and £120k to cover a further 12 months interest roll up.

[81] 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 first defendant.

[82] In relation to the £120k and £30k uplift sought these were approved by credit. However, in relation to the request for the financing of the purchase of the flat this request was initially declined by credit for the following reasons.

(a) The bridging facility was too "open" in the absence of proving debt service ability.

(b) The amount for which the first defendant's son could obtain a mortgage was unknown and he did not have a mortgage offer. Further, the Barnfield Road site had not yet been agreed for sale.

(c) The bank was uncomfortable in allowing any significant uplift facility secured against the Barnfield Road site on the basis that the security was held by way of third party charge.

(d) There was no justification for the significant revaluation of the Lisburn Road property noting that planning had not yet been obtained.

[83] A re-submission was then prepared by Mr Peter Rooney and approved by Mr Lindsay and was submitted to credit on 27 July 2007 which contained additional information as follows:

(a) Belfast city office mortgage advisor had advised that the approximate mortgage available to the first defendant's son may be £150,000 without a parental guarantee. The first defendant and his son were to meet with Joanne Bentham the following week to make an application for the mortgage. They proposed a pre-condition that a minimum £150k mortgage offer was to have been granted to the first defendant's son before drawing of the £500k to purchase the apartment. Further, they proposed that a solicitor's undertaking be obtained in respect of the full mortgage proceeds to ensure that they are lodged to the first defendant's account in debt reduction.

(b) A valuation from Osborne and King in respect of the Lisburn Road property dated 25 July 2007 placed a market value of £1.5m on the Lisburn Road property (based on site value) with a value of £1.8m on the basis of planning permission being achieved for eight duplex apartments and three ground floor retail units. The valuation further confirmed that the Lisburn Road property is in a strong location for both residential and retail demand.

(c) The security position was clarified as follows confirming a loan to value of 55%.

- Legal charge over the Lisburn Road property. Open market value £1.5m (Osborne King valuation dated 28 June 2007).

- Third party legal charge over the Barnfield Road site. Open market value £750k (CPS valuation dated 20 July 2006).

- Second legal charge over the Wellington Park property. Open market value £925k (CPS valuation dated 2 August 2006).

- Proposed solicitor's undertaking over £150k mortgage proceeds.

(d) It was expected that the Barnfield Road site would go to the Osborne King auction in October 2007 and expected to sell for in excess of £1.5m.

[84] Mr Lindsay gave evidence to the effect that he had spoken to Osborne King in relation to this matter and they had confirmed that the first defendant had discussed

putting it on the October 2007 auction with them and that a value in excess of £1.5m was realistic.

[85] On the basis of this additional submission and information credit approved the request but on the basis of a number of additional conditions including:

(a) In the event of delays being encountered in relation to the sale of Barnfield Road site or the sale proceedings being insufficient to reduce overall debt to a level acceptable to the bank the first defendant was to place the Lisburn Road property on the market for sale by 31 December 2007.

(b) Confirmation must be received by the bank from C & H Jefferson that the power of attorney held by the bank in respect of Barnfield Road site remained valid.

(c) The bank must be satisfied with the conditions in the first defendant's son's mortgage offer.

[86] As a result of this a facility letter was issued on 1 August 2007.

[87] However, in or around mid-September 2007 the first defendant contacted Mr Lindsay to indicate that his son's mortgage application had been declined as his employment had not been confirmed as permanent. Therefore, with Mr Lindsay's approval Mr Peter Rooney informed credit as to the position on 17 December 2007 and asked that the limit be reduced accordingly but to include the £120k uplift to cover a 12 month interest roll up and £30k to cover personal expenses.

[88] Although this is not directly relevant to the issues in dispute in this action it is nonetheless illuminating in the context of the dealings between the parties. Firstly, it demonstrates the procedures required before any loan could be agreed. It does not support the suggestion made by the first defendant that the increase in the facility was granted "without apparent hesitation" or that the increase was offered without any due diligence or assessment of affordability being conducted by the bank. Furthermore, it is clear that the sale of Barnfield Road was being expressly considered to reduce overall debt and it was contemplated that the Lisburn Road property be put on the market for sale by 31 December 2007 if the debt was not reduced.

[89] In any event it appears that Barnfield Road was not part of the Osborne King auction in October 2007. The first defendant was now planning to develop Barnfield Road himself.

[90] In October 2007 the first defendant requested the release of the Wellington Park property as security on the loan. In his evidence he suggested that Mr Lindsay agreed to this but again the documentation makes it clear that this was something

which required approval from credit and Mr Rooney, again with Mr Lindsay's approval, did submit a report to credit seeking release of the property. This was justified on the basis that the loan to value if the property was released would be 56% based on the valuations held on the Lisburn Road property of £1.5m and the Barnfield site as £750k. This request was approved by credit on 16 November 2007 and a new facility letter reflecting this position was issued on 16 November 2007. Happily this means that the family home is not the subject matter of these proceedings.

[91] In January 2008 the first defendant again met with Kyle Lindsay and Mr Rooney enquiring about the possibility of funds being advanced to develop Wellington Park. In his evidence he also indicated that he discussed the possibility of buying Bed World at 120/122 Lisburn Road which had come up for sale and also discussed the possibility of a facility of £100,000 to begin processing a planning application in respect of Barnfield Road. In his affidavit dealing with this matter the first defendant avers that Mr Lindsay agreed to lend £340,000 for re-development of Wellington Park and a further loan of £200,000 to discharge the mortgage on Wellington Park. The documentation makes it clear that again the plaintiff went through the necessary procedure by way of a submission of a credit report dated 20 January 2008. This was prepared on the understanding that it was the first defendant's intention to renovate Wellington Park and sell it on as a development opportunity. It contained pre-conditions in relation to the development and the request was based on the clear understanding that the Wellington Park property would be sold on completion of the refurbishment work. Credit approved the request on 28 February 2008 and a facility letter was issued on that date making the offer of loan facilities. The letter was never signed or accepted. 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 of February 2008 was not effective as "… facilities were approved but have not been drawn to date as (the first defendant) never accepted our facility letter".

[92] In the meantime Mr Lindsay noted that the last annual review meeting in relation to the loan had taken place on 1 August 2007 and that the facilities were due for renewal on 1 September 2008. Therefore on 29 August 2008 he prepared a report to credit seeking an extension of facilities until 1 November 2008 to allow the annual review meeting to take place in October 2008. Credit approved his request and he issued a supplementary letter to the first defendant on 9 September 2008. This was a much shorter letter than the standard facility letter and was commonly used when the bank was extending the terms of facilities previously granted.

[93] This letter was the subject matter of extensive enquiry in the course of the trial which I shall explain shortly.

[94] In or around November 2008 Mr John O'Hara took over the management of the first defendant's account as Mr Lindsay was moving to a different department within the bank. In his evidence Mr Lindsay was clear that when he took over the

management of the first defendant's account he had examined the bank's files and had discussed the case with Ms Shauna Burns. His understanding was totally in accordance with the credit application and facilities offered by the bank. In particular 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 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. Throughout the period during which he managed the account at no stage did the first defendant 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. Mr O'Hara submitted affidavit evidence and gave oral evidence at the trial.

[95] Mr O'Hara had previously been a senior manager in the employment of the plaintiff with whom he ceased employment on 6 February 2013 as he was emigrating to Spain for family reasons. He contradicted the first defendant's assertion that his account had been moved to Mr O'Hara's department. The account had not been transferred but rather Mr Lindsay had moved on and he was taking over management of the account. On doing so he rang the first defendant and asked him to attend a meeting on 19 November 2008. The first defendant says he thought that this meeting "was to discuss the provision of funding for the build". Mr O'Hara was clear that this was not the case. His evidence was that the purpose of the meeting was to discuss the handover of the account. He wanted to introduce himself to the first defendant, understand the current position and explore repayment options. At that stage Mr O'Hara did not have up-to-date valuations of security held and indeed did not know whether or not planning permission had actually been granted for the premises.

[96] In preparation for the meeting Mr O'Hara had examined the files and became aware that there were insufficient funds available to cover the forthcoming interest payment in December. If this was not covered the account would move into default. He therefore prepared an application to credit dated 5 November 2008 seeking a £5k increase in the loan facilities to be provided to the first defendant. This was in order that interest roll over could be provided to cover interest charges which would be due in the following month. The application to credit requested the renewal of facilities with the £5k increase for a further three months. The purpose of the timeframe was to obtain up-to-date valuations and a decision on the planning application for the Lisburn Road property at which stage a repayment strategy could be assessed. Prior to the meeting he drafted a facility letter to reflect the approvals which he had got from credit and he brought this letter dated 17 November 2008 to the meeting. What took place in relation to the facility letter and at the meeting is a matter of dispute.

[97] The first defendant's evidence was that at the start of the meeting Mr O'Hara introduced himself and they had a lengthy discussion about Iranian and Persian history. After this conversation Mr O'Hara produced the new facility letter and asked him to sign it as a matter of urgency. His explanation was that the facility needed to be increased by £5,000 to £1,255,000.00 in order to prevent the account going into default. He claimed that he asked if he needed to read the letter and that Mr O'Hara told him it was exactly the same facility as before with the only difference being the advance of an extra £5,000 and that he had to sign it now so that his boss would "not have a go at him". He says he did not read the letter in any detail but he was told that he had to sign it there and then and he did so.

[98] Mr O'Hara completely denies this account. His evidence was that he suggested that the first defendant take the letter away and return it to him. He did not ask him to sign the facility letter "there and then" nor did he indicate it was a matter of urgency, save that he told him that an interest charge would occur in three weeks' time. He specifically recalled that he was asked whether the facility letter was different from previous letters and he advised him that it was "broadly" the same but that he did not have to sign it "there and then" and that he could have an opportunity to read it at home. He explained the reason for the facility letter and pointed out that the interest charged would not be applied for three weeks. Therefore, it did not have to be signed on that day. His evidence was that the first defendant read the facility letter quickly and indicated that he was happy to sign it there and then.

[99] More importantly he stated that the bank's overall aim was to determine a strategy ahead of the next charging period which was three months later. He had a concern about the asset values which it held as security and the need for up-to-date valuations was discussed. He pointed to the credit response to a paper he provided on 5 November 2008, signed on 12 November 2008 which acknowledged the importance of obtaining up-to-date property values.

[100] The first defendant made much of the fact that the facility letter of 9 September 2008 confirmed an increase in facilities to £1,290,156.00 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 by both Mr Lindsay and Mr O'Hara. The initial mistake was made by Mr Lindsay. He explained that when he looked at the loan limit on the bank's internal system the limit was set at £1.27m which was out of line with the limit which had actually been approved - £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. When Mr O'Hara examined the file of papers relating to the first defendant's account he noticed that this happened and he 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 loan 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 first defendant in his evidence.

[101] I was totally satisfied by the explanation given by Mr Lindsay and Mr O'Hara. The first defendant's intense focus on this issue was an unwarranted and unnecessary criticism of the conduct of the bank.

[102] In terms of the overall atmosphere at the meeting on 19 November it was the first defendant's case that Mr O'Hara was "generally supportive" and would "assist in progressing the project". Mr O'Hara presented a different picture in that he stressed the purpose of the discussions was to explore repayment options on the loan. He indicated that due to the significant downturn in the property market the bank had obvious concerns about asset values which it held as security. Indeed, it was for this reason that Mr O'Hara was seeking up-to-date valuations of the security properties and why the issue of the cost of instructing a quantity surveyor was discussed at the meeting.

[103] As was the case with previous meetings this is reflected in the report prepared by Mr O'Hara on 20 November 2008 after this meeting. Indeed it was common case that the discussion also focused on potential development of Wellington Park. This reflects Mr O'Hara's understanding of the meeting that the bank would not be in a position to process the way forward until it understood the current value of the assets held as security and/or the potential value of them if they were developed. Thus he obtained credit approval of a £10,000 increase in loan facilities to cover the cost of obtaining professional valuations. The report clearly outlines 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.

[104] Mr O'Hara places considerable importance on this report as a contemporaneous written account which demonstrates his thinking at the time of these meetings. In that report it is expressly noted 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 makes it clear that the first defendant himself was proposing an alternative strategy namely selling his own dwelling house at Wellington Park, Belfast. The credit report also contains the following:

> "… The borrower has also proposed development and sale of his own PDH (standing for private dwelling house) … which would clear our debt and leave the borrower an unencumbered site at Lisburn Road and also at Barnfield …"

The importance of these entries from the plaintiff's perspective is that it demonstrates the first defendant was exploring other means of repayment as he was

well aware that the bank had given him no commitment to the development of the Lisburn Road property.

[105] As a consequence of the credit paper the loan was extended and a further facility letter was sent by Mr O'Hara to the first defendant 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. There were a number of telephone conversations between him and Mr O'Hara during January 2009. It appears that these focused on the requirement for further valuations although the first defendant says at this stage he became suspicious of the bank's behaviour as he could get no definite confirmation as to when funds would be released for the building work he envisaged for the premises. Mr O'Hara's recollection of these telephone conversations was that the first defendant was reluctant to obtain valuations as he felt that they would provide "cautious" values due to the downturn in the property market. He was emphatic that the first defendant did not ask when funds would be released and in any event the bank had not agreed to provide development funding. As far as he was concerned the issue simply did not arise.

[106] In fact the valuations being sought also proved to be contentious and they were not in fact obtained until May 2009. The next meeting between the parties took place on or about 11 February 2009. A Mr Raymond McCormick attended with Mr O'Hara as Mr McCormick was taking over management of the first defendant's account. At this meeting the first defendant alleges that Mr McCormick was aggressive and negative. What is clear was that Mr McCormick was conveying the message to him that the property at Lisburn Road should be marketed for sale. Mr O'Hara for his part reiterated the importance of the first defendant obtaining revaluation of the assets which would be crucial in determining the way forward. According to the first defendant he maintained his view that the property should be developed and in the course of this meeting referred to the agreement he says he had with Shauna Burns. The first defendant says that Mr McCormick simply responded to the effect that the bank had no appetite to lend any further money but, according to Mr O'Hara, with the addition that the bank had never agreed to lend money to develop the property.

[107] Again, the credit report after this meeting is relied upon by the bank. After the meeting Mr McCormick wrote a report to credit which had been approved on 18 February 2009. The report refers to the meeting and the fact that the first defendant had again proposed repayment options. These were summarised as:

> "(a) Planning permission would be obtained for the Derriaghy property, followed by the sale of that property at £1m plus;
>
> (b) There would be re-development of the Lisburn Road property from an onward sale of six

apartments and clear residual debt from rentals and commercial units;

(c) Re-development would take place at the Wellington Park property into nine apartments which could be sold on."

[108] The report stated that Mr McCormick had told the first defendant that the plaintiff was not looking at any additional funding and that the plaintiff's short term requirement was to assess its current position in relation to LTV. Mr McCormick went on to say in his report "… I am advised and he (the first defendant) has agreed to have fresh PV's (professional valuation) undertaken on lots 1 and 2 (Lisburn Road and Barnfield Road) and we will then re-assess".

[109] This report clearly supports the version of events put forward by the plaintiff. It also demonstrates that the bank was in discussions with the first defendant to explore repayment options. It runs contrary to any suggestion that the bank had given a commitment in relation to development funding. The fact that Mr O'Hara was supporting revaluations may well have given the first defendant some hope that the loan could be repaid in a way which would leave open the opportunity for redevelopment of the Lisburn Road premises.

[110] Whilst these valuations were awaited there were on-going discussions between the parties and in particular between the first defendant and Mr O'Hara. In his affidavit evidence the first defendant suggested that in the course of these discussions Mr O'Hara had asked about the possibility of developing Wellington Park and that he had asked him how much it would cost to complete the development. He avers that he responded to Mr O'Hara by referring him to the facility letter of 28 February 2008 in which the bank had already confirmed funding of £340,000 in relation to Wellington Park. He asserted that on the basis of that agreement he had drawn down funds to pay for planning application and fees and committed to the development. He suggested that the bank was trying to renege on this agreement. In response Mr O'Hara points out that the "bank approval" had long expired as the offer made to the first defendant in February 2008 had not been taken up by him. He also points out that in fact the first defendant did not draw down funds to pay for the planning application and fees in respect of this work as evidenced by the statement of account for the period February 2008 to March 2009.

[111] Mr O'Hara indicated that after Mr McCormick's report on 18 February 2009 he resumed management of the account and he reported to the plaintiff's credit department on 2 April 2009 indicating that the valuations had not yet been received. The sanctioner noted that "we require certainty on our assets value before we can firm up on a strategy". This indicates that obtaining professional valuations was still important to determine the next step for the plaintiff. It was also noted that any option involving development finance was not considered a viable option by the plaintiff's credit function. After the report was sent off Mr O'Hara wrote to the first

defendant on 4 April 2009 outlining the importance of providing the valuations, requesting a net worth statement from him and stating that if valuations were not obtained then the plaintiff could not consider further interest roll up and that the facilities would be in default.

[112] It was the first defendant's evidence that this letter came as a shock to him as it did not reflect the tenor of the verbal discussions they had been having. Mr O'Hara says that this letter was entirely consistent with the conversations he had been having and stressed again the importance of obtaining up-to-date valuations which had been raised at his very first meeting on 19 November 2008.

[113] In any event valuations were obtained in relation to the properties in May 2009 from a Mr Neal Morrison of Myles Danker. Although the bank had released Wellington Park from its securities Myles Danker provided a valuation for Wellington Park on 6 May 2009. On 12 May 2009 Myles Danker provided a report and valuation in relation to the premises at Lisburn Road as being between £715,000 to £800,000. A second report valued Barnfield Road between £175,000 to £470,000. These valuations clearly demonstrated that the plaintiff was under secured.

[114] The first defendant accused Mr O'Hara of exercising an improper influence over Mr Morrison in respect of his report. He points out that the reports were provided directly to Mr O'Hara and that Mr O'Hara and Mr Morrison knew each other well. This was refuted strongly by Mr O'Hara. He points out that the valuation was undertaken on foot of a clear letter of instruction. He admitted knowing Mr Morrison but only on a professional basis. When the first defendant was asked to provide valuations he was given a list of valuers from which he could choose. From the list provided to him the first defendant did not have a preference. He accepts that he did recommend Myles Danker but he never spoke to Mr Morrison nor did he try to influence his valuation in any way. He points out that Mr Morrison would be well aware that he had independent duties as a valuer uninfluenced by either of the parties.

[115] In any event the implications from the bank's point of view arising from the valuations were clear and Mr O'Hara prepared an updated note to credit and the matter was earmarked for transfer to the Global Restructuring Group (GRG) in the bank which did not occur until December 2009.

[116] The first defendant suggests that some time in June 2009 Mr O'Hara contacted him by telephone telling him that he had good news for him and that he had got the money sorted out for the development of Wellington Park. Mr O'Hara says this is simply not true and that he would not have contacted any borrower of the bank to confirm a facility was in place unless he had obtained approval from the bank's credit department for such a loan. Quite simply he says that this did not occur.

[117] With the exception of the alleged aggressive behaviour of Mr McCormick up until this point the first defendant characterised his meetings with the bank as

positive. Certainly there was no suggestion of any disagreement or acrimony in the discussions. It is common case that this changed on 3 July 2009 when he contacted Mr O'Hara about an issue concerning payment of legal fees. At this stage he expressly made his growing annoyance clear to Mr O'Hara and accused the bank of a failure to honour its agreements. He accused the bank of reneging on promises and assurances that had been given to him and he felt that the bank were working behind his back to liquidise his family and his assets. Mr O'Hara says that because of the gravity of the charges he made a note of the conversation and expressly asked the first defendant to put his concerns in writing. The first defendant's account of this suggestion was that "John O'Hara threatened to note the conversation, put it on my file and 'use it against me'".

[118] In any event no letter was received by way of follow up. Thereafter Mr O'Hara had little contact with the defendant. After the matter was referred to GRG in December 2009 the first defendant had meetings with a Ms Fiona King and a Mr Charles Sung and whilst there were discussions about how the matter might be resolved these did not come 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 premises.

[119] To date none of the monies lent to the first defendant have been repaid.

LEGAL PRINCIPLES

[120] There is no dispute as to the applicable legal principles.

[121] The starting point must be that when the parties to an agreement commit that agreement to writing it is those written documents which create, define and express the mutual obligation of the parties. A person who signs a document knowing that it is intended to have legal effect is normally bound by its terms. Whilst acknowledging that fundamental principle it is also clear that oral representations can have legal consequences for parties in the context of a contractual arrangement.

[122] In Carlyle v Bank of Scotland [2015] UKSC 13 the Supreme Court considered a dispute between a bank and a customer. The appeal before the Supreme Court concerned oral discussions between a property developer and his bank about funding a development at Gleneagles. The central issue in the case was whether, on an objective assessment of what the parties said to each other, the bank intended to enter into a legally binding promise to advance sums in the future to fund not only the purchase of two development plots but also the construction of a house on each plot.

[123] In that case the court at first instance found that an oral representation from a representative of the bank to the pursuer was capable of giving rise to binding legal consequences between the parties.

[124] In Carlyle the bank lent Mr Carlyle funds to purchase a development plot at Gleneagles in Perthshire. Mr Carlyle stated that he depended on bank finance – not only for the purchase of the plot – but also for its development. This is because there was a "buy back" clause in the sale contract, entitling the vendor to repurchase the site at its original price, if it had not been developed by 31 March 2011. His case was that he had clearly stated he required funding for both elements of the proposed purchase; the purchase of the sites and then funding for the subsequent development. Time was of the essence because of the buy-back clause. The bank lent Mr Carlyle monies for the purchase of the plot but denied there was any agreement to provide finance for the further development.

[125] The loan was not repaid and when the bank sought repayment of the monies Mr Carlyle defended the action and counterclaimed for damages. His defence relied solely upon an "oral commitment" from the bank.

[126] At the hearing of the initial action no evidence was called by the bank but an employee of the bank who had been assistant director of commercial banking confirmed that Mr Carlyle had been told on various occasions that funding for the development would be advanced. She knew of the buy-back clause and was aware that the bank would need to fund the development costs. She stated that there was a general understanding there would be development funding at some level, but that the details had to be worked out. In her credit submission to headquarters she had commented that the bank would be approached for future development funding but she had not submitted a request for development funding before the purchase of the plots. The Lord Ordinary found in favour of Mr Carlyle and the case was appealed successfully to the Inner House who overturned the original decision because on a proper objective analysis the telephone conversations relied upon by Mr Carlyle were insufficient to establish that the bank was under any legal obligation until a written loan agreement was in place.

[127] On appeal the Supreme Court affirmed the decision of the Lord Ordinary but a reading of the decision makes it clear that this was on the basis that the Court of Appeal had not been entitled to substitute its views on the findings of fact which had been made by the Lord Ordinary. Indeed the tenor of the Supreme Court judgment suggests that it would also have found in favour of the bank but for its refusal to substitute its views on the determination of fact reached by the trial judge unless it found the decision to be wholly wrong. However, it was clear that the Court came to the view that, depending on the finding of fact made by the court, an oral representation could, in circumstances like this, have legally binding consequences.

[128] There is also ample authority for the proposition that a contract may not be enforced if it was induced by misrepresentation. See McBrearty v AIB Group (UK) Plc [2012] NIQB in which McCloskey J summarised the relevant legal principles concerning misrepresentation. At paragraph [45] of the judgment he says:

"… the arguments of both parties focussed with some emphasis on one of the more recent reported cases belonging to this field, Peekay Intermark v Australia and New Zealand Banking [2006] EWCA Civ 386. There are certain noteworthy features of the leading judgment of the Court of Appeal, delivered by Moore-Bick LJ. Firstly, His Lordship recorded that in any case where misrepresentation is claimed, the starting point must be to determine whether the defendant did in fact make the statement on which the plaintiff relies: see paragraph [23]. His Lordship then distinguished between words more properly described as a description of a proposed investment than a true representation of fact: see paragraph [24]. Next, the judgment draws attention to the personal characteristics of the individual to whom the relevant statement was made: an experienced investor (paragraph [25]). His Lordship then noted the decision in Redgrave v Hurd [1881] 20 Ch. D 1, to the effect that where a person induces another to enter into a contract by misrepresentation, it is no answer to say that the representee had the means of discovering the truth. Referring to the decision in Assicurazioni Generali –v- Arab Insurance Group [2002] EWCA Civ 1642, Moore-Bick LJ acknowledged the principle that while a misrepresentation is capable of being corrected, any asserted correction must be efficacious (my gloss) and correction will always be a question of fact: see paragraph [36]. Where correction is canvassed by the Defendant, actual discovery of the truth by the Plaintiff must be established. His Lordship noted that a series of decisions made crystal clear that where it falls to the court to decide whether a person has been induced by misrepresentation to enter into a contract, this will always be a question of fact: see paragraph [40]. Moreover, where reliance is placed on documents, the content and presentation thereof will normally be a material factor: see paragraph [43]. Thus the principle that a person who signs a document knowing that it is intended to have legal effect is normally bound by its terms, irrespective of reading or comprehension, is but a general rule and, even where applicable, the contract duly executed may be rescinded if induced by fraud or misrepresentation: see paragraph [43]. Finally, His Lordship noted the category of cases which have

> given rise to the principle that where one party to a contract misrepresents to the other the content or effect of the document intended to embody their agreement, the former is precluded from enforcing the contract in accordance with its terms: see paragraph [44]."

[129] In McBrearty there was a conflict between the documentation issued by the defendant bank and oral representations which were allegedly made by the bank to the plaintiff before arrangements were finalised among the parties. In McBrearty the court as a matter of fact found that assurances and representations had been made, and relied on, and the plaintiff succeeded on the basis of a composite agreement which had been broken by the defendant or in the alternative through the prism of negligent misrepresentation.

[130] In another Northern Ireland case Walsh v Bank of Scotland [2012] NIQB 36 Weatherup J granted an injunction restraining the defendant bank from taking any steps to enforce facilities that had on paper expired, by reason of assurances given by the relationship manager and plaintiff at the time the short term facilities were created that the facilities would be converted into long term borrowings.

[131] The plaintiff did not contend that all the terms and conditions of the facility were to be disregarded; it was his case that only one term was in conflict with the facilities which had been discussed between him and the bank manager namely that the term of the loan could and would be extended. As set out in Weatherup J's judgment:

> "Mr Walsh received a facility letter and was surprised that it provided for only a 3 year term. He queried the 3 year term and explained that such a term would not be acceptable. Mr Walsh says that he was told by Mr McDonald that it was the bank's emerging lending policy to lend on shorter terms and that he was assured by Mr McDonald that he would be able to renew the short term loan to a longer term facility in default of the timely disposal of the property if market conditions then proved favourable. Mr Walsh states that he knew, as did the bank, that without such an assurance he would not have proceeded with the investment."

[132] In addition to potential arguments based on collateral contract or misrepresentation the first defendant also relies on the principle of estoppel.

[133] The principle of equitable estoppel is clearly set out in Chitty on Contracts Volume 1 paragraph 4-087 in the following way:

> "For the equitable doctrine to operate there must be a legal relationship giving rise to rights or duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of the relationship; on the intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is nevertheless, not 'inequitable' for the first party to go back on his promise."

[134] In looking at the issue of estoppel I bear in mind the cautionary words of Lord Kerr giving the opinion of the Privy Council in Capron v Government of Turks and Caicos Island and Another [2010] UKPC where he warned against:

> "… undisciplined recourse to the principle as a ready panacea for real or imagined grievances …"

[135] Lord Kerr cited the comments of Lord Walker in Yeoman's Row Management Limited v Cobbe [2008] UKHL 55:

> "Equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in Muschinski v Dodds (1985) 160 CLR 583, 615-616:
>
> > 'Under the law of (Australia) – as, I venture to think, under the present law of England – proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party "ought to win" and "the formless void of individual moral opinion"'."

[136] Finally, the defendants rely on the "unfair credit relationship" provisions of the Consumer Credit Act 1974 (as amended) (sections 140A and 140B). These provisions provide the court with powers to vary the credit and security relationships between parties should it find the relationship between them to be unfair.

CONSIDERATION OF THE APPLICABLE LAW AND THE EVIDENCE

[137] If the defendants can establish a defence on the basis of breach of contract, misrepresentation or estoppel it is clear that such defences are relied on as a shield rather than a sword. Even on the first defendant's case it cannot sensibly be suggested that the bank should be compelled to lend him money to complete development of the premises. There simply is insufficient certainty to establish such a proposition. There is no agreement as to the exact nature of the development, the cost of the development, the terms upon which any such development would be funded to include the period of any loan, the interests rates applicable to any loan or the security required for any such loan. Rather the defendants say that the bank is not entitled to seek recovery of the monies or enforce the charges because in effect the first defendant relied on misrepresentations made by the plaintiff which induced him into entering into the banking and security arrangements.

[138] A striking feature of all the cases to which I have referred is the extent to which they are fact specific. In truth the resolution of this case depends on the determination of the central conflict of evidence between the bank and the first defendant as to whether representations or assurances were made to him by Ms Burns that the bank would provide funding not only for the purchase but also for the redevelopment of premises. The key issue is whether I find that the representations alleged were made by or on behalf of the plaintiff and whether these were relied upon by the defendants when entering into the banking or security arrangements. If I find that no such representations were made then clearly the defence falls.

[139] 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 and Ms Burns – although I accept that other evidence is relevant on this issue. 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.

[140] I return to the starting point in terms of determining what was the agreement between the parties. The terms of the loan advanced to the first defendant are set out in a series of facility letters which have been signed by him. On the key issues they could not be clearer. The sole purpose of the loan was to provide for the

purchase of the premises. The loan was repayment on demand but to be reviewed at a later period usually one year from the date of the facility letter. The loan was to be secured by legal charges on the premises and on the Barnfield Road lands. There was no reference at all to development funding.

[141] The first defendant says that he was made express and specific promises and assurances by Ms Burns that development funding would be provided and that this was integral to the arrangement between the parties. He goes further and says that he was expressly told by Ms Burns that he could ignore the terms of the facility letter.

[142] In considering this issue I have considered the probability of these representations being made by Ms Burns. Ms Burns is a chartered accountant and a Fellow of the Chartered Institute of Accountants. After qualifying she worked for KPMG and then a number of banks in Australia before joining the Ulster Bank in 2001. At the time of her dealings with the first defendant she was a senior manager in the bank.

[143] It is clear from her evidence and from all the documentation in the case that she did not have authority to lend money to customers. Her role was to work with customers and where appropriate apply for credit facilities. The decision as to whether or not to grant credit was performed by a separate function of the bank. Credit applications were subject to critical analysis by the credit function of the bank and before authority was given to lend, queries were regularly raised and conditions imposed on any lending permitted.

[144] If the first defendant is correct then Ms Burns made an open ended offer to provide funds to complete a development which had not even received planning permission. This was an undefined amount for an undefined period and without any security. This has to be seen in the context where clearly there was a concern about a loan for the mere purchase of the premises which resulted in the requirement of the security at Barnfield Road. Furthermore having obtained authority to lend to the first defendant on the terms set out in the facility letter it is suggested that at a meeting on 19 April 2006 Ms Burns told the first defendant that he could ignore the repayment term and that she continued to assure him that the bank would not demand repayment of any of the money until the development was completed notwithstanding the express terms of the letter.

[145] In truth I find such a proposition unlikely but the matter does not end there. I listened carefully to the evidence given at the hearing and applied anxious scrutiny to the documentation relating to the dealings between the parties.

[146] I am 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. In my view they provide a clear contemporaneous account of their approach and thinking at the relevant time. What emerges from the initial credit application

which formed the basis of the decision to lend to the first defendant is that Ms Burns was seeking credit solely for the purpose of the purchase of premises at 124-126 Lisburn Road. Given that no deposit was being paid for the purchase there was a clear concern about obtaining adequate security for the loan. In my view the importance of obtaining Barnfield Road as a security is essential to the understanding of this case. I note that this was not referred to at all in the first affidavit submitted by the first defendant. Throughout their dealings the first defendant repeatedly stressed the value of the Barnfield Road lands and indicated his intention to sell those lands, which under the terms of the facility letter would be used to repay the loan. This fundamentally undermines the suggestion made by the first defendant that there was no other vehicle for repayment of the loan other than the sale of the developed unit or from rental income generated by those units.

[147] The subsequent credit applications required by changing circumstances (for example the requirement to increase the facility after the price of the premises increased) demonstrates the careful way in which Ms Burns and her successors dealt with this loan.

[148] I do accept that the parties did discuss the re-development of the premises. Clearly this was part of the first defendant's plan. A successful application for planning permission would enhance the value of the property which would be important from the bank's point of view. Equally it is clear that Ms Burns saw an opportunity to provide further funding in the event that the first defendant did develop the premises. However I am satisfied that as per the credit reports in this case she explained to the first defendant that any funding for this would require a separate arrangement. As to what did take place at the meeting on 19 April I consider it significant that the first defendant highlighted issues he wanted to discuss at that meeting after he received the facility letter. It is clear from his own evidence that he went through that letter carefully and highlighted matters of concern to him. Significantly he did not highlight the absence of any facility for the development of the premises. Equally in the course of the hearing and after some interlocutory issues the first defendant provided unredacted copies of diary entries which refer to his dealings with the bank. Again nowhere in those entries does he raise a concern or issue or refer to development funding in terms of the loan facilities provided by the bank.

[149] It may well be the case that the first defendant has elevated the discussion about potential development funding into a firm commitment in an attempt to evade his legal obligations to repay his loan.

[150] The courts are all too familiar with cases involving imprudent lending by banks to borrowers who were unduly optimistic about the increasing value of property only to find themselves hopelessly exposed after the "property crash" in 2008. To a large extent the first defendant has been the victim of the massive reduction in property values. However, it seems to me that on the face of it this was a credible loan facility. Whilst the first defendant undoubtedly got involved in a

bidding war to purchase the premises, they were located on a busy and generally profitable location for commercial premises. More importantly the bank had received confirmation from the first defendant's accountants of the potential value of the Barnfield Road lands. In truth had those lands been sold as the first defendant had indicated to the bank would happen the likelihood is that the loan would have been repaid and indeed the first defendant may well have been in a position to obtain credit for re-development of the premises.

[151] 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. She categorically denied that any such meeting took place. However, on the basis of the bank's own documentary evidence I am satisfied at the very least that Ms Burn's assistant Sarah Lamont met with the first defendant and the builder on 23 May 2007. The fact that the room was booked for four people suggests that Ms Burns did attend this meeting. This of course was after the facility letter of August 2006 upon which the first defendant had drawn the funds to purchase the premises. The issue of a meeting with Mr Shirazi was first raised in the first defendant's affidavit of 12 August 2014. He averred that Ms Burns had a meeting with John Casey, Kavi Shirazi and himself during which they confirmed the cost of the build would be up to £1m. In response to this Ms Burns averred in a replying affidavit that she had no recollection of meeting Mr Casey to discuss the loan and did not believe that this happened. She was unaware of the alleged date or place of the meeting but she averred that she definitely did not meet the three men together and agree the build out costs.

[152] In her oral evidence she disputed attending any meeting whatsoever with Mr Shirazi.

[153] On the basis of the material presented in the course of the trial it would appear that there was not a meeting as alleged between Ms Burns and Mr Casey, Mr Shirazi and the defendant. However I have come to the conclusion that there was a meeting between Ms Burns, Mr Shirazi and the first defendant. It may well be the case that Ms Burns has simply forgotten about such a meeting.

[154] Overall I was left with the impression that Ms Burns was keen to obtain authorisation for the loan as she felt it represented good business for the bank but only on the basis of the securities sought by the bank. Equally, I have formed the impression that she was alive to the possibility of a future loan in the event of the re-development of the premises and that she saw this as a potential opportunity for further business. This would explain why she would have agreed to meet the builder.

[155] Having considered all the evidence on this issue I simply do not accept the evidence of the first defendant that Ms Burns assured him that money would be

provided for the redevelopment of this site and that there would be no question of repayment until such times as the development was complete. I do not consider that any hopes Ms Burns may have had for the opportunity to provide development funding in the future led her to making the representations and assurances alleged by the first defendant. I accept her evidence that she would not and did not give such assurances.

[156] I have come to the conclusion that had the first defendant truly believed that the purpose of the facility was not confined to purchase but extended to the provision of development funding that he would not have signed the facility letter in the form presented to him. The first defendant was familiar with the style and content of a loan for development purposes as he had obtained such a facility in 2004 for his premises at Wellington Park. It is significant that this issue was not one of the matters identified by the first defendant to raise with Ms Burns when he received the facility letter.

[157] In relation to the dispute concerning the ownership of Barnfield Road I accept Ms Burns evidence that the first defendant represented to her that he owned these premises at the first meeting in January 2006. I accept her evidence that she only found out about this difficulty when it was raised by C & H Jefferson solicitors. I believe that if she had been told this she would have said so in the credit report. I am confirmed in this view by the contents of the accountant's report which was sent at Ms Burns' request by the first defendant which identifies the Barnfield Road lands as being one of the properties to be currently developed. The land at Barnfield Road was described as part of the first defendant's "net worth". Indeed, the contents of that accountant's report reinforced what the first defendant had said to Ms Burns at their first meeting in terms of his net worth and was clearly designed to demonstrate he had adequate resources to repay the loan for the purchase of the premises.

[158] Mr Simpson correctly points out that Mr Stanfield on behalf of C & H Jefferson was actually informed by a Mr Damien Long, a Business Executive from Ulster Bank Ltd, that the property was in the first defendant's sister's name although he had a power of attorney in an email dated 20 April 2006. However, I am satisfied that Ms Burns was not the source of that information.

[159] In any event this matter was rectified before any loan facility letter was issued and accepted by the first defendant.

[160] However, it convinces me that the first defendant was keen to "put his best foot forward" and present himself as a person of significant net worth because he understood this would be required for the purposes of the loan facility. The truth is that in relation to Barnfield Road that the first defendant "held on" for too long and for too high a price by which time the market had turned and other issues had arisen in relation to the lands.

[161] In terms of the other bank witnesses it is clear that they are secondary to the main issue in the case but in my view they support the evidence on behalf of the bank. Firstly, even on the first defendant's case it is not clear that any of the subsequent people dealing with the account made any representations about re-development funding. The height of the allegation made against them is that Ms Burns assured him they would "honour all previous commitments". The steps taken by each of the subsequent managers of this account reinforce the system that was in place with a careful and detailed credit report required before any changes or renewal of the facility could be provided.

[162] What I do take from the evidence is that the first defendant clearly envisaged and discussed the sale of various properties he owned including the Barnfield Road lands, Wellington Park and indeed the premises with a view to repayment of the loan. This clearly suggests that he was not reliant upon development funding as the only possible means of repaying the loan to purchase. Both Mr Lindsay and Mr O'Hara were adamant that they did not consider that any arrangement for development funding was in place and indeed this would have been clear from their consideration of the documentation. There was nothing in the first defendant's evidence of his meetings with them that would suggest otherwise.

[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.

[164] It is correct to say that Mr Simpson in his forensic cross-examination demonstrated some deficiencies in the facility letters but on the main issue this was of no assistance to the first defendant.

[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. The plaintiff is entitled to rely on the legal charges which secured the original loan, subject to the issues that arise in the second action.

THE CONSUMER CREDIT ACT

[166] Section 140A of the Consumer Credit Act 1974 (as amended) provides:

> "(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is

> unfair to the debtor because of one or more of the following—
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

[167] Section 140B sets out the court's powers if it determines that there exists such an unfair relationship.

[168] Is there such an unfair credit relationship in this case which would justify exercising the court's powers under 140B? The question of whether the relationship here is unfair to a large degree turns on the same questions of fact that have informed my views on the issues of misrepresentation and estoppel.

[169] The context of the loan agreements is important. They were expressly stated to be for "business" purposes. The first defendant presents himself to the bank as a "property developer" who had a high net worth and who described property development as his "main business". He was a graduate who had successfully ran and sold a business. He had obtained development finance in the past.

[170] In the course of his discussions with the plaintiff it is clear that he had access to professional advisors.

[171] There were regular on-going meetings between the parties and a series of facility letters setting out the terms of the loans.

[172] I have already indicated that I do not accept that the bank made the representations relied upon by the first defendant in his defence of the action.

[173] Dealing expressly with the terms of section 140A of the Act I do not find the relationship between the parties to be unfair. Had I accepted the first defendant's evidence as to the assurances and representations made by the bank the wide

empowering scope of sections 140A and 140B may well have provided a basis upon which to reject or alter the relief being sought by the bank. However on the facts as I have found them this does not arise and in the circumstances the provisions of the Act are of no assistance to the defendants.

THE SECOND ACTION

[174] When Mr Ian Stanfield of C & H Jefferson became aware that even though the first defendant had a power of attorney in respect of the affairs of the second defendant he advised that the plaintiff should obtain a third party legal charge from her in respect of the Barnfield Road lands.

[175] Due to the requirements of Etridge the plaintiff required that the second defendant be given independent legal advice before executing the proposed charge.

[176] At that time she was travelling overseas and Mr Stanfield sought on behalf of the plaintiff confirmation from an USA attorney that she had been given independent legal advice in line with the requirements of Etridge.

[177] On 10 May 2006 Mr Stanfield e-mailed a draft third party legal charge to the USA attorney Patrick Saboorian. He highlighted the relevant case law and informed Mr Saboorian that he would need to provide confirmation on his headed notepaper that he had fully explained the nature of the third party charge and the practical implications thereof to the second defendant.

[178] On 16 May 2006 Mr Saboorian e-mailed Mr Stanfield a letter dated 10 May 2016 on Saboorian and Associates headed notepaper confirming that he was qualified to advise in relation to a third party charge and the principles stated in Etridge.

[179] The second defendant signed the third party charge and her signature is witnessed by the third defendant. She confirms in handwriting that she was independently advised by Patrick Saboorian.

[180] On 27 July 2006 Mrs Saboorian e-mailed Mr Stanfield stating:

> "It is hereby confirmed that this office has fully explained all terms and conditions of the enclosed third party charge to our client in accordance with the laws of Northern Ireland as stated in Royal Bank of Scotland Plc v Etridge [2001] All ER (Commercial) 1061.
>
> Ms Esmaeili acknowledges the obligations and prior to signing the said charge has become fully aware of all consequences."

[181] Through her pleadings the second defendant has claimed she agreed to grant the third party charge on her understanding (through her USA attorney, Patrick Saboorian) that:

(a) The plaintiff had agreed to provide funding to the first defendant for the purchase and re-development of the Lisburn Road premises.

(b) The Barnfield Road lands would only be used in the event that the planning/construction goals for the Lisburn Road premises were not met or the value of the Lisburn Road premises upon completion would be less than the borrowed amount.

(c) The plaintiff had agreed to a five year period during which the first defendant would complete the re-development of the Lisburn Road premises.

[182] The US attorney claimed this information was given to him by Mr Stanfield of C & H Jefferson. Mr Stanfield completely denies he made any such representations.

[183] Proceedings were issued against the second defendant by issue of an originating summons on 24 August 2012. She entered a memorandum of appearance to the originating summons but took no further step in either the second action or the action against the first defendant. The action was listed for hearing on 16 October 2013 and the case opened before Deeny J. At this hearing she did not participate in the proceedings and pleaded no defence.

[184] My understanding is that the case was announced as settled before Deeny J but that subsequently the purported settlement broke down and the matter was relisted for trial.

[185] On or about 23 June 2014 the second defendant's now solicitor entered a notice of change of solicitor.

[186] In or around September 2014, the plaintiff discovered that the Barnfield Road lands had been transferred into the ownership of the third defendant by the second defendant for "natural loving affection" (sic).

[187] I heard evidence from Mr Stanfield and from Mr Saboorian (by way of video link) in the course of hearing. Mr Stanfield was clear in his evidence that he had not made the representation suggested by Mr Saboorian and that specifically he did not have any telephone conversation with him.

[188] He had retained all his notes and records in relation to the charge and there was no record of any such telephone call or discussion.

[189] In his oral evidence he indicated that he recalled the transaction clearly because of his frustration in dealing with the first defendant's former solicitor and the delays that arose as a result.

[190] In terms of speaking with solicitors outside the jurisdiction he described such occasions as rare in his experience and therefore memorable. He recalled a few specific cases during his career in which he had spoken to lawyers outside the jurisdiction and could remember the facts of the cases clearly.

[191] In terms of this particular case he knew the area of California where Mr Saboorian worked and thought he most definitely would have recalled if he had a conversation with him.

[192] He pointed out that arrangements would have been necessary for such a telephone call given the time differences and that this would have been done by his secretary presumably by e-mail. He indicated that his file notes were complete and there were no records of any telephone call or any e-mails to arrange such a call. He was adamant that he had no conversation with Mr Saboorian.

[193] Perhaps most importantly of all it is clear that Mr Stanfield could not have provided the information which Mr Saboorian claims was relayed. Mr Stanfield had been provided with a copy of the facility letter dated 4 May 2006. It was clear form this that the plaintiff was offering to lend the first defendant funds to purchase the Lisburn Road premises. Security over the Barnfield Road lands was required to secure that loan. There was no reference in the facility letter to development funding nor was that his understanding. Again there was no reference to the first defendant being permitted five years to develop the property nor does any such condition appear in the terms of the facility letter which was provided to him.

[194] In contrast to Mr Stanfield, Mr Saboorian had not retained any file notes relating to the transaction. He was vague in his recollection about the matter. He could not tell the court when he had been given instructions or to whom the second defendant may have spoken in his offices. He could not remember whether she had signed the third party charge in his offices or whether he had sent them on for her to sign in Tehran. Specifically there were no documents relating to any discussion with a Mr Stanfield about which Mr Saboorian said he was "fairly certain" took place. He was under the "impression" that the transaction related to "development finance". There is nothing in Mr Saboorian's e-mail referring to any phone call or discussions or that the third party charge was in some way linked to and only payable if there was a "shortfall after the development of Lisburn Road property was completed". If there had been such a discussion then this should have been referred to in the third party charge.

[195] There was also a lack of clarity about whether or not this matter was discussed with the second defendant in English or in Farsi.

[196] Even if Mr Saboorian genuinely believes the third party charge was to be security for finance development I am satisfied that this information did not come from Mr Stanfield or from anyone in the bank. It may have well come from his client via the first defendant.

[197] In any event I make it clear that I fully accept the evidence of Mr Stanfield. His evidence was clear, compelling and concise. It was supported by his detailed written records. I do not accept that he made the purported representations to Mr Saboorian.

[198] There is no misrepresentation which in any way vitiates or undermines the terms of the third party charge.

THE TRANSFER

[199] The third party charge is clear in its terms – the written consent of the bank was clearly required prior to the second defendant parting with possession of the Barnfield Road lands. Clause 10 states:

> "… Nor shall the mortgagor part with possession of the mortgage property or any part thereof without the consent in writing from the bank."

[200] No such consent was sought from the plaintiff and no such consent was granted.

[201] The date of the application for transfer, 20 August 2013 post-dated the issue of proceedings by the plaintiff against the first and second defendants. The third defendant is a BHD student and there is no suggestion that he is not fluent in English. It does not appear that the second or third defendants used the services of a solicitor when purporting to transfer the lands.

CONCLUSION

[203] I am satisfied that the plaintiff has a valid third party legal charge over the Barnfield Road lands executed by the second defendant having taken independent legal advice. I am satisfied that the plaintiff is entitled to enforce this security and is entitled to an order for possession in respect thereof.

[204] In relation to the transfer I have come to the conclusion that it was a deliberate act to try to deprive the plaintiff of a security on which it was entitled to rely. I agree with Ms Simpson's submissions that it reflects poorly on all the participants. I am satisfied that the transfer has no valid legal effect which in any way vitiates the third party charge.