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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2014 No. 287284

BETWEEN:

ULSTER BANK LIMITED

Plaintiff;

-And-

BARTLEY FINNEGAN

and

MAIREAD FINNEGAN

Defendants.

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MR JUSTICE DEENY

[1] In this action the plaintiff seeks to recover monies due and owing to it by the defendants on foot of two outstanding loan accounts in the joint names of the defendants. The amount sought on the writ was £512,347.80. In his skeleton argument on behalf of both defendants the first defendant acknowledged that sum as due. However, the plaintiff's senior counsel Mr Frank O'Donoghue QC, who appeared with Mr David Dunlop, in opening the action, claimed only £351,453.16 as the debt had been reduced by sales of part of the underlying security. Interest is running at £22.05 per day.

[2] The action was commenced before me on Tuesday 2 February 2016 and ran until Wednesday 10 February, with intervals. Mr Bartley Finnegan appeared on his own behalf and on behalf of his wife. They had signed a notice pursuant to Order 67 saying they would act in person. He had provided a skeleton argument, creditable for a lay person, on 30 January 2016, in response to the plaintiff's skeleton argument.

[3] It transpired in the course of the first morning that the Finnegans' solicitor and counsel had only withdrawn from representation of them the previous

Thursday. There had been a joint consultation arranged. Rather than bearing fruit it concluded with the Finnegans' solicitor and counsel, as Mr Finnegan told the court, withdrawing from the case. Having learnt that, I asked Mr Finnegan whether he did feel able to proceed with the case given that he had only recently found himself in the position of dealing with it in person. He said he was "100% sure" that he did want to go on. Mr Finnegan in the event did conduct the case on behalf of himself and his wife in a confident and articulate fashion. He had, as I have said, written a creditable skeleton argument and later provided oral and written closing submissions. The case ran as long as it did, in part, because the court allowed him overnight to prepare his cross-examination of the two bank witnesses and his closing submissions. The plaintiff bank through its counsel provided a written closing submission on Tuesday 9 February to Mr Finnegan to which he replied on Wednesday 10 February i.e. they gave up the last word. Mr Finnegan then sent a further three page document dated 12 February. In all the circumstances I decided to receive this document but directed it be sent to the plaintiff's solicitors. Their senior counsel then responded with a two page document of 22 February. I am satisfied that neither he nor his wife, who did not appear, was prejudiced as to the outcome of the case by the late withdrawal of their legal advisors. Counsel had drafted pleadings in the case at an earlier stage. I have taken into account the submissions made by both parties even if not expressly referred to herein.

[4] I will add a word more. Mr Finnegan expressly disagreed with one matter pleaded in the defence and counterclaim at 17(d), eschewing the suggestion of a possible misrepresentation set out therein. His skeleton argument went somewhat beyond the pleadings. There was no application to amend but Mr O'Donoghue expressly said that he was not taking any point about that or other pleadings. I have therefore sought to address the defence in the widest terms.

[5] The defendants, in their written submissions helpfully summarise what their defence was, the essence of the case, which Mr Finnegan repeated a number of times during the hearing. I quote paragraph 2 of their skeleton argument in its entirety:

> "The defendants are disputing the grounds on which the plaintiff terminated their Term Loans and changed the said to Demand Loans allowing the plaintiff to demand the said amount (£512, 347.80)."

It is the circumstances in which the Finnegans changed from owing the undisputed sums involved under a facility letter of 5 December 2009 by way of Term Loans to the situation where those loans changed to Demand Loans under a facility letter of 15 March 2011 that required to be determined. The defendants say this was done by unlawful pressure in the extremity placed upon them. The plaintiff denies that. This judgment will seek to concentrate on that central issue.

[6] The court is grateful to counsel and Mr Finnegan for their oral and written submissions. It is also grateful to Mr Cole of Messrs Diamond, Heron, solicitors for

the plaintiff for the trial bundle prepared. The authenticity of all the documents in the trial bundle and their admissibility was expressly accepted by both sides. Certain other documents did come to light on the plaintiff's part during the hearing but I am satisfied that there was nothing suspicious about that or that it prejudiced the defendants in any way.

[7] The defendants have been clients of the Ulster Bank in County Tyrone for some 18 years. As recorded at trial bundle (TB) 43, Mr Finnegan had attended a grammar school but had not proceeded to third level education. He had a family farm but he and his wife had also engaged in a number of businesses. One of those had been a meat distribution business. TB 43 records, tactfully in the light of later information, "there was a fairly serious issue over his business dealings several years ago, which was resolved." The Finnegans had sold off several building sites on their land on a phased basis. They had a number of buy to let investment properties in the mid-Ulster area but also Bulgaria and, said Mr Finnegan, London. He and his wife had operated a furniture business "Lost Ark" but this had ceased trading by 2007.

[8] In his evidence Mr Finnegan said that he had signed dozens of facility letters with the bank over the years. He did not dispute the facts of the borrowing for two purchases in 2007. I observe that that proved an inopportune moment to buy property in Northern Ireland. The debt now owing, as acknowledged by the Finnegans, is the shortfall between what they borrowed for their two acquisitions in 2007 and the prices achieved when those two properties were sold. The Finnegan's contention is that if they had 15 year loans they would not have had to sell the property in recent years but could have held on until 2022 and, in their estimation, have been in a position to repay the loans in full.

[9] The two loans regarding the purchase at Killyneill, as I shall call it, and the Moy, as it was referred to in the hearing, were the subject of a facility letter sent out by the bank on 24 August 2007. It emanated from the then manager of the Fermanagh and West Tyrone Business Centre of the plaintiff at Enniskillen, Mr Paul Crossley. I pause to say that Mr Finnegan had said he had always had a good relationship with this manager. He contends that his difficulties arose when he was transferred to Mr Noel Loughran in 2010.

[10] The facility letter sent out by Mr Crossley of 24 August 2007 is important. Loan A, of £250,000, which we know was to be used to buy Killyneill was a Demand Loan to be repaid in full "on 31 August 2007 if not already demanded by that time". Loan B was for £450,000 for the "sole purpose of purchase of Diamond House, Moy, near Dungannon". By Clause 7 it was made available on an interest only basis for a period of two years. "This is to then the [sic] restructured to be repaid over a 13 year period, if not already demanded by this time. This facility will be reviewed on 31 August 2007". It is important to note that at Clause 3 this is expressly described as a Demand Loan. It was to be interest only. But if not already demanded during that period it would then become a term loan, although not so described. This letter

was signed by Mr and Mrs Finnegan and there is a note to say that it was received by the bank on 12 September 2007.

[11] A facility letter of 17 January 2008, again from Mr Crossley to the Finnegans and signed by them refers to both these loans again and refers to them again as Demand Loans but with the same facility for converting the Moy loan, not the other loan. Why the new facility letter? At TB104 one finds that the overdraft on Mr and Mrs Finnegan's current account at the Clogher branch is increased to £150,000. It was stated, at TB 78 to be £100,000 at 24 August 2007 only five months before.

[12] A facility letter of 27 February 2009 does not appear to have been signed by the Finnegans. What Mr Finnegan relies on as the cornerstone of his defence is a facility letter of 4 December 2009 (TB146-158). It is his contention that the relationship between the bank and he and his wife should be based on this letter and not on the subsequent facility letter they signed in 2011. At TB146 one sees that the overdraft facility on the Clogher branch of the bank has now increased to £200,000. Clause A5 Repayment begins as follows:

> "While amounts drawn under facility A are repayable on demand at any time at the bank's absolute discretion, in the absence of such demand the facility will remain available until 30 November 2010 prior to which date it will be reviewed."

Term Loan B is the loan for the purchase of farmland at Killyneill outside Dungannon, County Tyrone. It remains at £250,000 but is now described as a Term Loan. Clause B5 Tenor reads:

> "Facility B is a term facility to be repaid on or before December 22."

Clause B7 Repayment begins as follows:

> "The borrower shall repay the facility with interest by monthly payments of £1832.73."

B9 is headed Acceleration and refers to Clause 7.

[13] It is clear therefore that this Killyneill loan has therefore been converted by the bank to a Term Loan extending until December 2022. This letter is again issued under the name of Mr Paul Crossley although the Fermanagh and West Tyrone Business Centre is now located at Omagh according to the heading of the notepaper. The copy in the bundle is not actually signed by the Finnegans but it is accepted by the bank that they did agree it.

[14] Facility C is the loan of £450,000 for the purchase at the Moy in 2007. It too is now described as a Term Loan. Clause C5 Tenor reads:

> "Facility C is a term facility to be repaid on or before December 22."

C7 Repayment opens:

> "The borrower shall repay the facility with interest by monthly payments of £3298.51."

It can be seen therefore that the parties have now converted both these loans, by agreement, into Term Loans but the Finnegans must now make payments monthly not only of interest, at a rate of 1.5% over Libor, but must also make capital repayments. Again Term Loan C has an Acceleration clause which refers to Clause 7 of the agreement.

[15] At TB 150 one finds:

> "<u>TERMS AND CONDITIONS APPLICABLE TO THE FACILITY."</u>
>
> Under 'Paragraph 1. Security' one finds the following.
>
> "The facility together with interest and all other liabilities connected with the facility shall be secured by way of:
>
> (a) The existing security, held by the bank for the borrower's liabilities (the '**Existing Security**') which includes, without limitation:
>
> - First legal charge over Land Certificate Folio No. 34850 County Tyrone re two acres at Knocknacloy and Carrowbeg, Dungannon Middle, County Tyrone pledged by Bartley Finnegan.
> - First legal charge over Land Certificate Folio No. 11863 County Tyrone re 28 acres at Knocknacloy and Carrowbeg, Dungannon Middle, County Tyrone pledged by Bartley Finnegan.
> - First legal charge over Land Certificate Folio No. 11599TY re 11 acres at Knocknacloy and

Carrowbeg, Dungannon Middle, County Tyrone and Land Certificate Folio 11589 County Tyrone re 13 acres at Carrowbeg pledged by Bartley Finnegan.

- First legal charge over Diamond House, The Square, Moy, Dungannon pledged by Bartley and Mairead Finnegan.

- First legal charge over 2.5 acres of land at Killyneill Road, Dungannon, pledged by Bartley and Mairead Finnegan.

And such other Security which the bank shall have taken at any time past or present."

[16] As I am considering this facility letter it is appropriate to address the Acceleration Clause 7 in the facility letter which was later put to Mr Finnegan by counsel for the bank. As indicated above, it clearly applies to the two loans the balance of which the bank is now seeking to recover.

> "In connection with the Term Loan(s), if:
>
> (i) the borrower fails to pay any sum to the bank on the due date, in the currency and in the manner provided for in this letter;
>
> (ii) the borrower defaults in the performance of any other obligation, covenant, term or condition contained herein or in the documents referred to under Security (detailed herein) and such default is, in the absolute discretion of the bank, capable of remedy and continues unremedied for five business days;"

I need not set out (iii) although it might conceivably be relevant. Later paragraphs are certainly relevant and read:

> "(xii) the borrower stops or threatens to stop payment of its debts or ceases or threatens to cease to carry on its business or any part thereof material to the borrower;
>
> (xiii) the borrower is deemed unable to pay its debts within the meaning of Article 242 of the Insolvency (NI) Order 1989 or any statutory modification or re-

> enactment thereof or if the borrower commences negotiations to reschedule the whole or any part of its indebtedness which it would or might otherwise be unable to pay when due;
>
> (xiv) any event occurs since the date of this facility which in the bank's opinion amounts or would with the passage of time amount to a material adverse change in the business, affairs, future prospects, financial position or assets of the Borrower;
>
> (xv) any security (or any part of it) given under or referred to in this facility letter or in respect of the facility is not or ceases to be or is alleged by any person not to be a valid, enforceable, effective and continued security or if the bank receives legal advice to that effect …"

All these sub-paragraphs relating to acceleration, some 20 in number, are followed by the following part of the clause:

> "then at any time thereafter the bank may by notice to the Borrower terminate its obligations to make the facility available and declare the facility together with all accrued interest and other monies payable hereunder immediately (or in accordance with such declaration) due and payable in full. This is without prejudice to the bank's other rights under this facility letter."

[17] It is the bank's contention, that even if, contrary to its submission, the Finnegans were not bound by the facility letter of 15 March 2011, the bank would have been perfectly entitled under a number of these sub-clauses to call in these two loans because of the events that subsequently occurred. This is their "fall-back position".

[18] As Mr Finnegan said on 2 February and repeated a number of times there was no dispute about the monies owing or about any of the documents in the bundle. The dispute between him and the bank arises, in his submission, with a change of personnel on the part of the bank in mid-2010. I will turn to that in a moment as there the principal evidence is that of Mr Noel Loughran of the bank.

[19] Before doing so it is right to mention several matters which occurred in the course of the opening of the action by Mr O'Donoghue. In the course of an exchange I note that, at 11.30 am on 2 February, (as recorded on the digital audio system,) Mr Finnegan said that while he normally met the bank for review in or around

November that did not happen in late 2010 but the bank put it back until March 2011.

[20] In the course of the opening Mr Finnegan reiterated that his dispute was being coerced into signing Demand Loans in March 2011 in place of the Term Loans which he and his wife previously enjoyed under the facility letter of December 2009.

Evidence for the Bank

[21] The plaintiff called Mr Noel Loughran. At the commencement of his evidence he sought to rely on a file on which he had flagged a number of pages. The file was just a trial bundle but as Mr Finnegan was unhappy about one aspect of it when he looked at it I ruled that Mr Loughran should use a fresh copy of the trial bundle so that there should be equality of arms between him and Mr Finnegan when he came to give evidence.

[22] Mr Loughran is a relationship manager at the Mid-Ulster Branch of the Ulster Bank in Cookstown. He had worked for the plaintiff since 2002 having previously worked for the Bank of Ireland. In or about May 2010 there was a restructuring of the bank which led to Mr Finnegan's accounts, with others, moving to the Business Centre at Cookstown. Mr Loughran became aware of the Finnegan's account because they regularly appeared on an Excess List for exceeding their overdraft limit, which had by then reached £200,000. He sent them a reminder of the need to keep within the account. The copy of the letter in question of the 28 June 2010 had been generated on 7 January and thus bore that date. He had some telephone conversation with Mr Finnegan in August or September 2010. Mr Finnegan had a buyer for a site and required the release of deeds. He wanted to split the proceeds of the sale with the bank. Mr Loughran agreed to look into the possibility of that with Credit Function, a central part of the bank in Belfast who would take a fresh look at such propositions.

[23] When Mr Loughran came to carry out the annual review of the Finnegan's affairs (TB 140 FF) he moved the assessment on them to "low quality exposure". He carried out this task with his colleague Mervyn Leighton.

[24] He sent to the first defendant a form entitled "Farmers' Assets and Liabilities" for Mr Finnegan to complete. This was returned, signed by Mr Finnegan, on 2 November 2010. Mr Loughran then added two figures to the form. The original was provided to the court. The two figures added by Mr Loughran are clearly in a different ink from the completion of the form by and large by Mr Finnegan. Under the heading 'Section 8 bank' Mr Loughran noted a loan account of £235,596. Under the same section with the rubric 'FDL outstanding' he noted £424,067.

[25] It is convenient to note at this moment that Mr Finnegan was highly critical of the addition of these figures. Mr Loughran later accepted that at least the second

one was incorrect as it was referring to the loan for the Moy which could not properly be described as "FDL" ie Farm Development Loan. But they do record monies that were outstanding by Mr and Mrs Finnegan at the relevant date and were therefore relevant to the bank's assessment of the credit worthiness of the defendants at this time. I am satisfied there was nothing sinister about Mr Loughran writing in the figures on the form. At TB 191 Mr Loughran made an estimate of "Farmer's repayment potential". This deals with the farm business of Mr Finnegan and the loans which he and his wife had borrowed to purchase property and their overdraft. It does not deal with the mortgage on their dwelling house which was held by a different part of the Ulster Bank nor with some further buy to let mortgages which again were elsewhere in the Ulster Bank. But even on the accounts that were the responsibility of Mr Loughran he was able to identify that the Finnegans had obligations to repay £70,548 per annum on overdraft interest and term loans but their total income was only likely to be £30,200. Therefore, there was an annual shortfall of £40,348. This was obviously a worrying situation to him. He concluded (TB 141) that there was a risk to the bank of a loss of £467,000 i.e. amount of debt exceeding value of secured assets.

[26] TB 142 is of importance. It was written not earlier than 2 November and not later than 19 November 2010. One finds the following:

> "Update
>
> Following meeting with RMT and BF the position is as follows:"

[27] Contrary therefore to Mr Finnegan's memory recorded at [19] there was a meeting between him and the bank, as is stated twice on that page in November 2010. I am satisfied that this memorandum made close to the time is accurate. At the meeting Mr Finnegan was pointing out that the security which the bank thought it had was not in fact what it enjoyed. He was using this as a bargaining counter to try and keep some of the proceeds of the sale of a site despite the bank's claims upon him.

[28] Mr Loughran then invited a forensic review of the bank's security by Messrs Diamond, Heron, solicitors. In the event it transpired that the security referred to above of 28 acres was not in place.

[29] It is clear that that was not the only aspect of the bank's paperwork that was imperfect in that at that stage they were unable to find the facility letter of 2009 which I have set out above - see TB 145. 3:30pm on Tuesday 2 February was one of the occasions on which Mr Finnegan restated that he did not deny anything in the 600 pages in the trial bundle.

[30] Mr Loughran said that negotiations with Mr Finnegan were prolonged. At one point he asked to speak to Mr Loughran's superior who was Ms Sharon Burns who had a discussion with him.

[31] By January 2011 the bank established that their security had the one defect noted above at [28]. At TB 212 the significant level of risk to the bank was noted. At TB 219 it was noted that there was a total direct exposure of £856,236. At TB 20 on 2 February 2011 Mr Neil Rodgers of the bank, following receipt of information from Mr Loughran noted the following:

> "It is accepted that the customer is in a <u>precarious</u> financial position, that he can no longer meet capital repayment commitments, <u>resulting in his request to revert</u> <u>to interest only</u> and that asset sales are the only way forward to secure satisfactory debt repayment."
> (Authorial underlining throughout).

[32] This is part of the contemporary evidence that Mr Finnegan by then was no longer able to keep up the payments of capital as well as interest as foreshadowed in the earlier calculation of Mr Loughran. Counsel drew the attention of his witness and the court to TB 235. This was an exchange of emails between Mr Loughran and Mr Finnegan. I shall set it out in full. At 11:36 on 17 January 2011 Mr Loughran emailed as follows to Mr Finnegan:

> "Bartley, I enclose a copy of your facility letter which outlines security details. If you have any further queries, please do not hesitate to contact me."

Mr Finnegan replied on the same day at 18:22:

> "so noel after 6 months of asking you to confirm exactly what deeds you hold and to confirm that these deeds are held and located by ulster bank and can be produced on demand you send me a copy of my facility letter OH SO IMPRESSED BY YOUR EFFICIENCY !!!!!!!!!!!!!!!!!!!
>
> wonder what Shauna YOUR BOSS will think of that or someone further up the management of your bank.
>
> Please reply ASAP with the info I requested 6 months ago as a matter of urgency and do not try to fob me off with a facility letter again.
>
> Bartley"

[33] This is illustrative of the relationship between the two men at this time. It would not suggest that Mr Finnegan was cowed or intimidated by Mr Loughran. There is a series of further emails and exchanges at this time by which the bank was seeking to improve their security and to discuss a way forward with Mr Finnegan. It is fair to say that he continued to bargain hard on his own behalf. The lengthy email from him to Mr Loughran of 4 February 2011 at TB 245 clearly shows this to be the case.

[34] This email is also important for assessing the contention of Mr Finnegan that he was able to pay his debts at that time and had never missed a payment and only agreed to the conversion of his loans into demand loans under extreme pressure. Paragraphs 4 and 5 of the email of 4 February read as follows:

> "4; £800K INT ONLY FACILITY TO REDUCE TO £500K ON OR BEFORE O1/03/13 BY MEANS OF ASSET DISPOSAL OF LAND AND/OR SITES AT CARROWBEG AND KILLYLIS ROAD.
>
> 5; £500K TO REVERT TO INT AND CAPTIAL AT LIBOR PLUS 2% FOR 15 YEAR LOAN THIS LOAN TO BE FIXED AT 15 YEARS AND NOT ANNUALLY REVIEWED."

[35] It is hard to dispute the later contention of counsel for the bank that this clearly showed that Mr Finnegan was agreeing to the loans ceasing to be interest and capital at that time but becoming interest only with reversion to being term loans at a later date after reduction of the debt to £500,000.

[36] Paragraph 7 of that email is also relevant:

> "INT PAYMENTS TO BEGIN ON 01/03/11 AND FIRST OF EACH MONTH THEREAFTER WITH NO TERM LOAN PAYMENTS FOR 15/02/11."

[37] This paragraph bears out the contention of Mr Loughran that it was Mr Finnegan who was anxious to sign the new facility letter by 15 March 2011 to avoid him being in breach of his facilities by failing to make the capital repayments due of more than £5,000 on that day. Their annual repayments before the conversion to Demand Loans on these two loans alone was £61,647.12, far in excess of any rent received. The conversion to interest only was something that was acceptable to the bank in principle with reversion to capital and interest subject to their various requirements as to sale of sites and perfection of security being complied with. It is right to record that Mr Finnegan's email of 4 February 2011 at, it appears, 18:15 in answer to Mr Loughran's email of the same date of 13:45 expressly begins:

> "noel i can accept your proposal and will agree to some of your requests which i don't like but to show my commitment of sorting this i will."

[38] For completeness I record the email from Mairead Finnegan to Mr Loughran of 20 January 2011 recording that she felt excluded from all matters:

> "Therefore, I am currently seeking legal advice as I feel I was given no financial advice regarding loans and drawing down of monies. I want to sort this matter out in a realistic way and I feel Ulster Bank must have some moral duty to help us resolve this. I look forward to your earliest reply."

A subsequent letter from the bank addresses this TB 254, 21 January.

[39] At TB 250-256 one sees continuing negotiations between Mr Finnegan and the bank. A facility letter was sent out to him but was not signed. It was followed by more negotiations. What is clear from that letter of 14 February 2011 to be found at TB 222 is that both the loans on which the bank now sues were stated to be Demand loans. The bank indicated that if the Finnegans were unwilling to sign these terms in the facility letters they should make alternative proposals.

[40] With regard to the reason for the Finnegans agreeing to convert the demand loans to term loans the witness drew my attention to an email at TB 256 in which Mr Finnegan writes, on 20 January 2011, to Mr Loughran as follows:

> "noel after speaking to my accountant he felt you should be willing to change my term loans to interest loans only at the current interest rate thus reducing my monthly payments and giving me the opportunity to repay my overdraft.
>
> any chance of a reply soon.
>
> regards
>
> bartley"

[41] This document is of importance. Mr Loughran says that he had advised Mr Finnegan to consult his accountant. Having done so the accountant obviously agreed with the assessment of the bank that Mr Finnegan's income did not allow him to make the monthly capital repayments which he had agreed to make in December 2009. This is at odds with the case later made by the defendants.

[42] A note of 11 March 2011 at TB 64 is contemporary evidence that Mr Finnegan was still negotiating with the bank about the terms of the facility letter. He was still using as a bargaining chip the fact that the 28 acres of agriculture land which he owned had not been made the subject of an effective security by the bank.

[43] On 15 March 2011 a new facility letter was prepared by the Mid-Ulster and Fermanagh Business Centre of the bank at Cookstown. It is addressed to "Dear Bartley and Mrs Finnegan". It is to be found at TB 267. As before it begins with an overdraft facility for them on the Dungannon branch of the bank in the sum of £200,000. But this facility was to reduce to £150,000 upon receipt of site sale proceeds by 15 June 2011. Other documents show that the sale proceeds were in the sum of £70,000 rather than £50,000 but that the Finnegans were to be allowed to retain £20,000 of those proceeds.

[44] At TB 268 we now find that the Killyneill loan is expressly stated, as in February, to be a demand loan and repayment, under Clause B7, is now interest only. Likewise Demand loan C relating to the Diamond House at the Moy, then in the sum of £416,500 is the former term loan. There is no longer a requirement to repay capital but only, pursuant to Clause 6 7, interest. The security is set out again including the new security over the 28 acres at Knocknacloy and Carrowbeg which Mr Finnegan is to contact his solicitor about. At page 278 we find the signatures of Mr and Mrs Finnegan with the date 15 March 2011.

[45] Before returning to the issue of the signing of the facility letter I observe that things did not go well for the Finnegans thereafter. They had hoped to sell the Killyneill land for £210,000 but the purchaser could only raise £160,000 which the bank agreed to accept. There was therefore a significant loss to the Finnegans.

[46] I need not deal with the examination in chief of Mr Loughran about the acceleration clauses at this time. Suffice it to say that his evidence was that some tenants departed from the property at the Moy causing a rental void for some time and that the other trading relating to the farm and Christmas trees did not go well. It was his evidence therefore that the bank could have invoked the acceleration clause in any event.

[47] The cross-examination of Mr Loughran by Mr Finnegan was adjourned to the following day, 3 February. Mr Finnegan found it easier to refer to himself in the third person for the purposes of the cross-examination. He elicited from Mr Loughran, as mentioned above, that on his initial ("high level") review he did not know whether the loans were term loans or demand loans because he did not have the facility letter of December 2009 but this was later located.

[48] Mr Finnegan asked why he would change from term loans to demand loans. Mr Loughran said that Mr Finnegan asked to do so because he could not afford full repayments. If he was paying interest only he would have reduced payments. The bank agreed to that. In exchanges Mr Finnegan accepted that he had sent the email

of 20 January 2011 requesting that after he had spoken to his accountant. Mr Loughran said that he had advised that.

[49] Mr Loughran acknowledged that Mr Finnegan had met "all requirements to date" as he had recorded at TB 179 which would have been on 1 February 2011. Mr Finnegan drew attention to the following sentence on that page:

> "It is also recognised that prior to transfer to current RMT [Relationship Management Team] the customer's expectations and the bank's unwillingness to allow the position to continue unaddressed has been poorly delivered."

Mr Loughran said that had the previous relationship manager delved into the Finnegans' affairs the bank may not have agreed to the increases that had been allowed to them in overdrafts. He acknowledged that could be a criticism of his predecessor. They were of the same rank within the bank.

[50] Mr Finnegan's questions were, understandably perhaps, somewhat confused at times but Mr Loughran remained calm and patient in dealing with them. He pointed out in answer to questions that he did not increase the amount that was lent to the Finnegans. He said reducing the payments to interest only was in the best interests of the Finnegans as it gave them the best opportunity to continue without the bank calling the loans in. Mr Loughran said, in answer to a question from the court, that a facility with interest only could not be a term loan. The term loan required there to be payments of capital as well as interest. Subsequently, Mr Finnegan was able to point to correspondence from another part of the bank in which it appeared that he did have buy to let mortgages which were interest only but repayable at a future date. I take this into account. However, Mr Loughran said that whatever about mortgages from that side of the bank interest only loans were always demand loans on the business side of the bank in which he was placed. (I observe that the documents bore this out.) He considered in early 2011 that it was highly likely that Mr Finnegan would default if they had not agreed to that.

[51] Mr Loughran acknowledged that there were very few manuscript notes on the files relating to his dealings with Mr Finnegan but that is because they would be incorporated in the computer record.

[52] Mr Loughran said that facility letters were only sent out to Mr and Mrs Finnegan when the bank thought that they had agreement. Thus they believed the Finnegans had agreed to revert to demand loans with interest only in February 2011 as indeed they subsequently agreed to in March 2011. Mr Finnegan put to Mr Loughran several times his point that if the Finnegans, as he referred to the defendants, were in financial distress why did they service all the payments and continue to do so for a further 20 months after March 2011. Mr Loughran replied that they only serviced the interest payments after February 2011 and that was

largely from the overdraft. He ceased to be responsible for the account after 14 June 2011. There is a certain amount of cross-examination about the acceleration clauses which I think I need not set out in detail. Mr Finnegan legitimately argued, without referring to the Latin tag contra proferentem that as the clauses had been drafted by the bank if they are ambiguous they should be construed in favour of him and his wife.

[53] It seemed to me after quite a prolonged cross-examination that Mr Finnegan had not really put his case to the principal witness for the bank. I invited him to do so. He put to Mr Loughran that he had said he was not signing the demand loans and that Mr Loughran had said you have to sign them or the bank will sell your properties. This was on 15 March 2011. Mr Loughran pressured him. In reply Mr Loughran said this was not correct. Demand loans were never raised on that day. The queries in the lead-up to that occasion were interest rates, security and timing. The earlier facility letter in February also had demand loans. It was absolutely untrue that he had pressured Mr Finnegan. Mr Finnegan then said, before repeating his case as above that Mr Loughran had said that he was "on your side Bartley". Mr Loughran agreed he might have said that.

[54] Mr Finnegan claimed that at the end of this meeting on 15 March he used 'a few choice words' to Mr Loughran and walked out. His words were 'way worse than abusive – no man would forget them'. Mr Loughran could not recall anything of that kind. He did not recall any walk out.

[55] Mr Finnegan claimed that he, Mr Loughran, reported this to his superior who asked Mr Finnegan to apologise subsequently to Mr Loughran, which he did. Mr Loughran said he did not remember any apology or phone call.

[56] I pause there to say that I do not find this very persuasive. I was left with the impression that Mr Finnegan was saying to Mr Loughran now what he might have wished he had said at the time rather than a genuine memory – a species of esprit d'escalier.

[57] In re-examination Mr Loughran confirmed that the facility letter of 15 March 2011 was signed by both Mr and Mrs Finnegan. He believed he had witnessed them as they attended on that day to sign the letter to make sure they were not liable to make a capital repayment that day. Mr Finnegan, from the Bar so to speak, expressed disbelief at that.

[58] Mr O'Donohue QC took his own witness to the defence entered on behalf of the Finnegans. The particulars of the defence were sent out at paragraph 17. The following allegation was at 17(c).

> "Unlawfully and in breach of contract, on a date unknown to the defendants the plaintiff unilaterally

> converted the £250,000 and £450,000 term loans into loans payable on demand."

This was not a case put by Mr Finnegan to Mr Loughran and nor did he make it out in the subsequent evidence. At paragraph 17(d) of the defence one finds the following first sentence.

> "At a meeting which took place in or about mid-late 2010 between the first defendant and Noel Loughran, servant or agent of the plaintiff, the said Noel Loughran told the first defendant that his term loans were now demand loans."

It is convenient to observe that Mr Finnegan resiled from any suggestion of misrepresentation by the bank or Mr Loughran. As pointed out above he initially denied that there was such a meeting, contrary to his counsel's pleading.

[59] The second sentence of 17(d) reads as follows:

> "The said Noel Loughran further threatened the first defendant that unless the defendants sold some of their assets in order to reduce the indebtedness to the plaintiff, the plaintiff would call in all of the loans and would sell all their properties including their own dwelling-house and would proceed to have them adjudicated bankrupt if necessary."

Mr Loughran emphatically said that was not said and there were no threats. He also pointed out that he was not responsible for the mortgage on the "dwelling house" over which he had no control. It was held by another part of the bank.

[60] It is also right to observe that Mr Finnegan does not seem to have at any time alleged in the lengthy hearing of this matter that Mr Loughran had threatened to make him bankrupt and yet his counsel, no doubt on instructions as Mr O'Donoghue submitted, put that in the defence and counterclaim.

[61] With regard to the allegation made towards the end of the cross-examination Mr Loughran had never heard before the suggestion that he had issued threats to Mr Finnegan on 15 March.

[62] I asked about Mrs Finnegan and whether she had ever been advised to get separate advice. Mr Loughran thought not because the borrowing was joint and several and in March 2011 the bank was easing the payments being required from the defendants; he had therefore no reason to expect them to be unhappy about this. Mr Finnegan then asked to cross-examine further although not entitled to do so, I allowed him to do so, as a litigant in person. In fact nothing further arose. At that

stage Mr Finnegan said that he would be quite happy to conclude the case without giving evidence. However I had to caution him that while he was not obliged to give evidence and could indeed take that course that if the only evidence was that of the plaintiff the outcome was fairly inevitable. He then said he would "take the box."

[63] The hearing on Thursday 4 February began by dealing with a matter Mr Finnegan had raised the day before. He said that he would prove the wrong-doing of the bank by adducing other evidence to show that the bank had converted other people's term loans into demand loans. The court was then told on the 4th that he had produced letters relating to close relatives of his who had been clients of the bank and who had had a conversion of their loans at about the same time. Mr O'Donohue, while querying the relevance of this material, was willing to have his next witness deal with it if she could be allowed time to look into the dealings with the relatives of Mr Finnegan in the bank's own records. I indicated that it appeared to me that the bank was entitled to that. Mr Finnegan then said he would withdraw this evidence and that he did not need it.

[64] In the interval some further documents had come to light on the part of the bank. They are now to be found at pages TB 387 N, O and P. I admitted those which did not appear to be controversial and gave Mr Finnegan a further opportunity to cross-examine if he so desired because of that. In the event he had in fact thought of further questions himself overnight and cross-examined at some length. In the course of that Mr Loughran denied that Mr Finnegan had been pressured on 15 March 2011 but on the contrary he was keen to sign so he would not have to make the capital repayments.

[65] The paucity of bank statements was raised, as the court had raised it earlier. Mr Loughran showed eg at page 269 that the practice was agreed between the parties that the interest would be debited from the current account.

[66] Mr Finnegan cross-examined as to whether Mrs Finnegan attended the meeting asking Mr Loughran to describe her. He acknowledged that he could not do so but said, albeit as hearsay, that his colleague on maternity leave recalled both of them. Mr Finnegan said that he would not call his wife but would put in a letter from her. In the event he did not do so.

[67] Mr Finnegan put to Mr Loughran additional letters that he had from the Ulster Bank Ltd showing that he had a house mortgage with them and four buy-to-let mortgages that were for a term of years but appeared to be interest only (TB517-519). Mr Loughran said, 'well that might be the case in retail banking but it was not done in commercial banking'.

[68] The bank then called Mrs Clare Elizabeth Armstrong as a witness. She was also a relationship manager with Ulster Bank and had been with them in one capacity or another for some 25 years. She succeeded Noel Loughran in managing

this account in June or July 2011. She was taken through a search of the documents she had authored or been familiar with. That included at TB387A a note which read:

> "Terms loans → demand. When change?"

She believed that arose from a query from Mr Finnegan on a note of hers dated 24 January 2012. Mr Finnegan was asking for the loans to go back onto terms but she said that she explained to him that if he wanted that he would have to resume capital repayments which he did not want to do. The March 2011 letter was replaced by a facility letter of 28 February 2012 (TB346). This was not signed. Mrs Armstrong dealt with the continued relationship with the Finnegans which involved the sales of assets belonging to the Finnegans to reduce the debt. Mrs Armstrong said she was the author of a "Conclusion/Recommendation" to be found at TB 359, 360 and which was dated 31 May 2012 at TB 360. It is worth quoting the first and second paragraphs of that recommendation.

> "Purpose of report is to provide updates since last renewal report.
>
> FL was issued on 28 Feb and despite chaser letter and several phone calls a signed copy has not been received. RMT spoke with BM (sic) today and he advised that he could not afford the monthly reductions of £735 proposed and would therefore not be signing the FL. RMT stressed that he had proposed making monthly repayments at review meeting in order to reduce debt however he now says that unless this was done on a term basis he was not prepared to sign FL. RMT queried how this would make a difference to affordability on a monthly basis and he said if it was on term he `would find the money'."

BM there would appear to be a misprint for BF, Mr Finnegan. FL is facility letter. RMT is Relationship Management Team.

It can be seen therefore that Mr Finnegan was indeed trying to reinstate the term loans but the bank, consistent with the earlier evidence, was saying that term loans involved some measure of capital repayment which Mr Finnegan is quoted as saying he could not afford, even in the sum of £735 per month. The defendants' obligation had been £5,122 per month.

[69] Mrs Armstrong also recounted meeting with a Mr Barry Creed, a solicitor in the Republic of Ireland, who was advising Mrs Finnegan in particular. Mr O'Donoghue refers to this meeting and the letters of Mr Creed as showing no allegation of extreme pressure or duress was made in the course of the written or oral exchanges between the solicitor and the bank. Mr Finnegan confirmed at 13:05 on 4 February that Mr Creed was a family friend of his wife. At no stage did the

solicitor complain of duress having been applied to the Finnegans. Mr Finnegan interjected to say that he was attending a psychiatrist at this time and he did not meet Mrs Armstrong with Mr Creed (which seems to be correct). The solicitor nevertheless, according to Mrs Armstrong, said he was acting for both the Finnegans. No distinction was made between them. Mrs Armstrong went through the various dealings with the bank and satisfied me, although the sums were not in fact disputed, that the bank's claim as opened by counsel was correct. Mr Finnegan began to get into difficulties with his payments rather earlier than he had remembered. It is not necessary to go through this in detail. Suffice it to say that by 22 November 2012 the Relationship Management Team were seeking authority to issue 60 day re-bank letters to the Finnegans i.e. inviting them to move to another bank and use that bank to pay off their debts to the Ulster Bank. Such a letter was sent. A letter was also sent on 26 November 2012 warning that they should not issue cheques that would not be met.

[70] There was a further letter from Mr Creed of McDermott Creed and Martyn (TB379) of 23 January 2013. Again there was no complaint in it of pressure on Mr Finnegan by Mr Loughran. In the events the monies claimed for remain outstanding.

[71] That completed the evidence for the bank. The court did not sit on the Friday owing to a bereavement of counsel, with which Mr Finnegan was quite happy as it allowed more time for him to prepare for the hearing on Monday 8 February and Wednesday 10 February.

[72] The cross-examination of Mrs Armstrong resumed on Monday 8 February. Mr Finnegan put to Mr Loughran: "why would the Finnegans sign?" She said that Mr Finnegan had asked for interest only facilities which she could see from his file and from his emails. Loans could go back to term loans after asset sales. It was clear that even the repayments that were subsequently made were not sustainable, on assessment by the bank. His stock was down. His overdraft had increased. Mrs Armstrong was asked about and drew attention to the letter of the bank at TB254 replying to Mrs Finnegan's earlier letter. That letter of 21 January 2011 asked in what way Mrs Finnegan did want to be communicated with.

[73] Messrs McDermott, Creed and Martyn, solicitors then acting for the Finnegans forwarded to the bank a report from a Dr Pradeep Chadha, Consultant Psychiatrist of 11 June 2012. That refers to Mr Finnegan complaining "that he had been doing considerably well until 2 years ago when he started to get letters from a bank looking for money that he owed them. He did not have the money to pay them." There does not appear to be any complaint of extreme pressure in that letter but a reference later on to him having difficulties in his business. At one point in the course of Monday 8 February Mr Finnegan seemed to deny that Mr Creed was acting for both Mr and Mrs Finnegan as Mrs Armstrong averred. But when challenged with a letter to that effect he withdrew that contention.

[74] I do not think it necessary to go into any further detail about Mrs Armstrong's letter, save that I should mention TB382, 383. That is a letter from Mrs Armstrong of 25 January 2013 to Mr Barry Creed in which she expressly says:

> "We did not request that the family home be sold. This is not subject to a charge to ourselves but rather to Ulster Bank House Mortgages with whom you indicated you were liaising with separately."

[75] There was no re-examination of Mrs Armstrong following this extended cross-examination. That completed the case for the plaintiff.

[76] Mr Bartley Finnegan then gave evidence on his own behalf and that of his wife having been sworn as a witness. He complained of the unlawful pressure upon him. He said the plaintiff had admitted that all the loans were serviced, but see above. He said that he had helped to perfect their security. He discussed the benefit he was to receive from the sale of the first asset. He contrasted his dealings with Mr Loughran with those of Mr Paul Crossey, his predecessor. He complained of Mr Loughran filling in the figures on the farmer's form, referred to above. He averred that the departure from the Diamond House in Moy of the tenants from Barnardos and Doctors Health did not impact adversely because the property was re-let at a higher rent to individual tenants. He referred to the exchanges of emails in early 2011 at TB219, 220; 235-237 and 245/246. One has to say that the tenor of these emails is clearly showing negotiations being robustly conducted by Mr Finnegan rather than the bank dictating to him. Indeed, prompted by TB298, he said that "we were arguing and twisting and fighting with Noel Loughran and Clare Armstrong and they would not commit beyond 6 months". He denied that his wife had attended the bank on 15 March 2011 to sign the facility letter. She signed it at home that night in their house. She had never met Noel Loughran he said. Contrary to the indication previously given he did not have a letter from her with regard to that.

[77] Mr Finnegan was cross-examined by Mr David Dunlop, junior counsel for the bank. He elicited from Mr Finnegan that he had appeared before the Crown Court in England some years ago and had been sentenced to 6 months' imprisonment. This was for breach of regulations with regard to the sale of meat. I do not seem to have been given the date of that conviction. In case it is not admissible on foot of the Rehabilitation of Offenders Order I propose to disregard it and any further reference to Mr Finnegan's past.

[78] Counsel took Mr Finnegan through some earlier parts of the trial bundle drawing his attention to the fact that he was borrowing more in the period leading up to 2011. In particular his overdraft had doubled from £100,000 to £200,000. Mr Finnegan said there was no issue with that. Mr Dunlop put to him that this was because his various businesses were not profitable. He pointed out the loss on the accounts to be seen for the year ending 5 April 2009 at TB192 which Mr Finnegan acknowledged. TB193 shows the results of a rental loss in the same period. Mr

Finnegan's answers to these points were two-fold. If so why did the bank lend him money? That was just one bad year.

[79] Mr Finnegan confirmed that both of them had signed the letters. They had had an opportunity to read them. They had signed dozens of facility letters before.

[80] Mr Finnegan acknowledged (TB150) that the bank's security was less than they had thought it was but asked was that his responsibility or theirs? That is an example of an increasing trend on his part to answer the questions of counsel, which I considered proper and reasonable, with further questions on his part. Counsel took him over examples of the defendants exceeding their overdraft limit. He acknowledged that he did go over the limit a number of times but he said that the fact that it had happened eight times showed 'no problem. Businesses often did that.'

[81] He denied that the Lost Ark furniture business had been unsuccessful but admitted it had been wound up although, he said, paying its debts. When counsel pointed out, from TB191 that he was running at a loss of £40,000 a year Mr Finnegan said it would be very different if unencumbered buy-to-let properties were taken into account. Mr Dunlop asked why at that period was he exceeding his overdraft and increasing his overdraft if that was the case. Mr Finnegan's answer was confused but he said that it might have been five holidays or it might have been buying cars or whatever, he couldn't remember, he would have to search but it was done with the bank's consent.

[82] I pause to say that Mr Finnegan's evidence became both evasive and garrulous in response to counsel's questions.

[83] It is not necessary to go into every detail of the cross-examination. Much of it had been presaged in Mr Loughran's own cross-examination. I do note that he admitted that Mr Loughran had advised him to see an accountant in early 2011. He admitted that the defect in the security gave him a negotiating handle. Mr Finnegan repeated that the bank was saying that they would sell his assets to reduce his debts and that Mr Loughran told him to change from term loans to interest only.

[84] Counsel put to him TB230, an internal bank record of February 2011.

> "BF is currently repaying £65K pa to the bank. He advises that he can no longer afford repayments under current structure and accepts that asset disposal required."

Mr Finnegan said yes to that.

I pause there to ask if that is the case as the defendant therein accepted how he can be maintaining his defence. He was cross-examined further in the course of which

he said he had no dispute with any of the documents, with anything in black and white. He was taken to a note of 11 March 2011, TB264 ff. With a degree of reluctance he agreed that the headings there were indeed agreed by him and in effect the same as the letter of 15 March which he signed a few days later. He was taken through a number of documents relating to interest rates and admitted that a series of those were to the benefit of the Finnegans rather than the bank. He confirmed that he and his wife had signed the March 2011 letter, he said at home. He accepted that he had not been deceived or misled about the letter but he had signed it under "so much pressure". He then said to counsel and the court that Noel Loughran said to him (at the meeting on 15 March 2011): "Bartley sign those facility letters". Mr Finnegan says he said "you know I am not signing the facility letters". Mr Loughran allegedly said "I am a farmer's son I am on your side". Mr Finnegan repeated that he was not signing the facility letters. Mr Loughran then said if you don't sign you will be out of facility and the guys (in the bank) will sell your property. And he then signed them.

[85] Pausing there it can be seen that that was different from the earlier pleaded case or the case put by Mr Loughran. He then went on to add that it took him quite a while to persuade his wife which again was a new contention. He was taken to his defence to which I have adverted already to some degree.

[86] His evidence resumed on 9 February. Mr Finnegan admitted that in November 2010 that he had a demand loan with the bank for the overdraft in the sum of £200,000 which he was not in a position to repay. But he denied this rendered him in breach of his obligations to the bank.

[87] Counsel put to him TB245. Mr Finnegan seems to have had no answer to the point that paragraphs 4 and 5 on that email of his of 20 February 2011 implied that the term loans were to cease and only be resumed after payment down of debt. Mr Finnegan claimed that the various meetings were hot and heavy.

[88] Counsel taxed him about his belated claim that Mr Loughran had said that he too was a farmer's son etc. Mr Finnegan replied he could not say on oath which meeting that was at in 2011. He may have said it was in March but there were two meetings in March. At one of them he had used the choice words. He was told to apologise for those by Mr N Walsh.

[89] I pause there to say that he had earlier said it was a Mr Clements who was involved in that matter. Counsel put to him that his skeleton argument did not reflect the evidence that Mr Finnegan was now giving.

[90] Counsel pointed out that the correspondence which Mr Finnegan himself had disclosed showed that he was ready to complain about another branch of the Ulster Bank making an error. But there was no complaint about "unlawful pressure" on the part of Mr Loughran. Mr Finnegan admitted: "no, I didn't complain about that."

[91] At the conclusion of this cross-examination I gave Mr Finnegan the opportunity to supplement anything he had said as if he was being re-examined. He then referred to the pages, mentioned above at TB517-519 showing that another branch of the bank did have interest only term loans it would appear. He complained that the Ulster Bank had been bailed out by the tax payer but there was no bail out for Bartley Finnegan. How could anyone be so stupid as to change to demand loans from term loans? He then indicated he would not call other evidence.

[92] I then adjourned the matter overnight, Mr Dunlop providing Mr Finnegan with a written note of the bank's closing thus waiving the last word to which the plaintiff was entitled.

[93] The court asked about the position of Mrs Finnegan who never appeared during the trial. Mr Dunlop pointed out that counsel and solicitors had been acting for her until just before the trial started. No distinct case had been made out on her part. She was a joint borrower not a guarantor. She had made no claim of pressure on behalf of her husband. Mr Finnegan said he was not here to get out of the loans. When asked expressly by me about Mrs Finnegan he said he would not start to say that she knew nothing or any such escapade. That completed the hearing of the matter.

The Law

[94] The plaintiff's case here is a simple one for money due and owing. The defendant's defence and counterclaim is much more uncertain. In the defence, signed by experienced junior counsel, one finds the following allegation at paragraph 17(c):

> "Unlawfully, and in breach of contract, on a date unknown to the defendants the plaintiff unilaterally converted the £250,000 and £450,000 term loans into loans repayable on demand."

Mr Finnegan did not point at any time to a term in the contract that was breached by doing this. That would appear to point therefore to a claim of conversion but clearly the tort of conversion does not apply here and although the term is used again at paragraph 20 of the defence it must be intended merely to mean that the plaintiff unlawfully changed the loans from term loans to demand loans. The defendants had no property 'converted' by the bank.

[95] No case of undue influence, unconscionable conduct, breach of the Financial Services and Market Act or breach of fiduciary duty was advanced at any stage by Mr Finnegan. I am not aware of any evidence to support such a case. As to the last I respectfully agree with the statement of Millet LJ in Bristol and West Building Society v Mothews, [1998] Ch. 1, cited in the Law Commission Report Fiduciary Duties of Investment Intermediaries, Law Com No. 350, 3.18. "A fiduciary is

someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence." That was not the case here.

[96] Paragraph 17(d) of the defence and counterclaim might have been open to the interpretation of an allegation of misrepresentation but Mr Finnegan expressly eschewed that when it was raised with him. Nor does it accord with the evidence. Nor was it his case that the change in loans was done behind his back which might also be an implication in the defence.

[97] The case that was made is that the term loans were converted to demand loans with the agreement of the Finnegans but that that agreement was secured by allegedly extreme pressure. In ease of the Finnegans, although not expressed in this way by them, I will therefore treat this as a case of a defence by economic duress with the counterclaim based on the same.

[98] For those purposes I set out the helpful summary regarding duress to be found at Chitty on Contracts Volume 1, 32nd Edition 8-003:

> "A contract which has been entered as a result of duress may be avoided by the party who was threatened. It has long been recognised that a threat to the victim's person may amount to duress; it is now established that the same is true of wrongful threats to his property, including threats to his goods, and of wrongful or illegitimate threats to his economic interest, at least where the victim has no practical alternative but to submit. In each case the wrongful or illegitimate threat must have had some causal effect on his decision to enter the contract, but the causal requirements may differ between the different kinds of duress."

[99] As wrongful or illegitimate threats have been found to be valid grounds for avoiding a contract entered into it follows logically that they can be valid grounds for avoiding a variation of a contract, such as occurred here between the bank and the Finnegans. It then falls to determine whether that variation was in truth obtained by wrongful or illegitimate threats.

Conclusions

[100] Having set out the evidence in the case fully above I am enabled to set out my conclusions in the matter in reasonably summary form. It seems to me that the defendants' case here clearly fails for a variety of reasons.

[101] An essential foundation of any claim of economic duress is that wrongful threats were made to coerce Mr Finnegan and his wife into changing the terms of their loans. The evidence for that must be found from the oral testimony and the contemporaneous documents. Mr Finnegan's oral testimony was not persuasive. I have concluded that he is an unreliable witness. Although articulate and superficially plausible it seemed to me that he did not think carefully before making statements of fact but said what he thought was best for his case. His answers were often confused and evasive in cross-examination e.g. [81] above. I was not impressed by his demeanour.

[102] Such assessment of reliability and demeanour made by a judge who has had a good opportunity of seeing a witness over a number of days is clearly of value and importance and often sufficient to decide a case. In this case it is borne out by a textual examination of what he said. There are repeated inconsistencies in his accounts of matters. For example, he claimed quite firmly that he had no meeting with the bank in the autumn of 2010 but that the bank had put it back until March 2011. He had to resile from that later because it was clear that there had been such a meeting. See [19] and [27] above.

[103] He claimed that he had abused Mr Loughran at the end of the meeting on the day he signed the facility letter with a "few choice words" for which he was later told to apologise by another employee of the bank. The first time he made this assertion he said it was Nigel Walsh who told him to do that but when cross-examined he claimed it was Bob Clements. I do not believe him in that regard and that evident inconsistency points to his unreliability.

[104] In contrast I found Mr Loughran and Mrs Armstrong, the witnesses for the bank to be careful and honest witnesses. That is not to say that every recollection of Mr Loughran about every conversation is necessarily precise, given, in particular, the lapse of time. But I am quite satisfied from his demeanour and from examining his evidence against the written record that he was telling the truth about the relationship with Mr Finnegan. I find that he did not threaten to sell the defendants' home if he did not sign the documents. His side of the bank did not hold the mortgage on the home.

[105] I observe that a lender is entitled to warn a borrower that if they do not make the payments agreed under a loan then the lender is entitled to enforce the security against the borrower. That would not constitute an unlawful or wrongful threat at law. But in fact here the origin of the change from term loans to demand loans was clearly coming from Mr Finnegan and not from the bank.

[106] The evidence for that is clear. The Finnegans' financial position was worsening in the years leading up to the new facility letter of March 2011. Their overdraft had doubled from £100,000 to £200,000.

[107] The analysis by Mr Loughran following the questionnaire "Farmers assets and liabilities" showed that the likely income of the Finnegans fell some £40,000 per annum short of their obligations to make interest and capital repayments on their loan to the commercial side of the Ulster Bank. While Mr Finnegan claims that the picture would have been different if one took into account his dealings with the other part of Ulster Bank, he did not adduce the necessary evidence to demonstrate that. Indeed, as his dwelling house presumably did not deliver an income but undoubtedly had a substantial mortgage on it this claim by him was inherently unlikely.

[108] Somewhat inconsistently with that argument he later claimed that that year was one bad year. But again there is no evidence to show any improvement in the fortunes of the Finnegans. As their income had fallen and was not keeping pace with their obligations it was natural for them to try and reduce their obligations. I am satisfied that that is what the defendants did. That is the only rational explanation of Mr Finnegan's e-mail of 4 February 2011 i.e. that they wanted to remove the capital repayments so as to reduce their monthly outgoings.

[109] I accept Mr Loughran's evidence that he encouraged Mr Finnegan to speak to his own accountant about this matter. That he did so is evidenced by the defendant's e-mail of 20 January 2011 at [40] above:

> "noel after speaking to my accountant he felt you should be willing to change my term loans to interest loans only at the current interest rate thus reducing my monthly payments and giving me to the opportunity to repay my overdraft."

This really could not be clearer. The Finnegans had a good reason for wanting to cease making capital repayments. It is quite clear from the exchange of e-mails as well as from the oral evidence of Mr Loughran that the Finnegans understood at that time that that meant switching from term loans to demand loans. It may be, as Mr Finnegan said, that on some earlier occasion another section of the bank extended interest only term loans to him and his wife but I accept the clear evidence that that was not the practice on the commercial side of the bank with which he was dealing.

[110] It is quite clear that Mr Finnegan was not a person who was cowed and bullied into submission to agree to something against his interests by the bank's employees. His language is often robust as in the e-mail of 17 January 2011 quoted at [32] above. As he admitted himself he was arguing and fighting his corner with the bank to the best of his ability. That included taking advantage of the fact that their security was somewhat less than perfect.

[111] The second defendant, Mrs Finnegan, consulted a family friend who was a solicitor in the Republic of Ireland. That gentleman, Mr Barry Creed, met with

Mrs Armstrong of the bank and wrote several letters on behalf of the Finnegans. At no stage did he make the case that the term loans had been converted to demand loans unlawfully or contrary to the wishes of either defendant. That in itself really renders wholly incredible the belated case being made by Mr Finnegan. Similarly a report of a consultant psychiatrist of 11 June 2012 was furnished through those solicitors. Dr Pradeep Chadha refers to the bank looking for their money but again does not refer to any complaint of extreme pressure having been applied to Mr or Mrs Finnegan in this regard.

[112] I am satisfied that no wrongful or illegitimate threats were made to the Finnegans. I reject that case. They changed to demand loans to avoid capital repayments.

[113] Given that finding it is not strictly necessary to rule on the bank's fall-back position but for completeness I shall say a word about it. Even under the term loans previously agreed between the parties it is likely that the bank could have availed of clause 7 (xiii) and other sub-clauses set out at [15] and [16] above to demand repayment in the changed circumstances prevailing in the Finnegan's affairs by March 2011 or soon thereafter. However, I expressly reserve my position on whether they could have done so on the basis that the property values of the security held had fallen as part of a general fall in the market. It might be unconscionable for a lender to seek to enforce such a clause against a borrower who was in fact servicing his loans on the terms agreed with the lender.

Second defendant

[114] I will, out of caution, address expressly the position of the second defendant although there are a number of references to her elsewhere in this judgment. She did not appear at the trial but, as counsel for the defendant pointed out, was represented by counsel and solicitors until a few days before the hearing. She also signed the necessary form pursuant to Order 67 that she would act as a litigant in person. She and her husband were still living together and I have no reason to doubt his statement that he was acting for her as well as himself. At one point he said he was going to put in a letter from her but in fact he did not do so.

[115] She signed the facilities letter. On the balance of probabilities I find that she did sign it in the bank with Mr Finnegan. I say that because the Finnegans had an interest in ensuring that the letter was signed on the date in question so that they were not liable to make the not insubstantial capital repayments due on that date. If, as Mr Finnegan alleged, somewhat belatedly, in evidence, she had not been there and he had taken the letter home for her to sign then they would have been in default of that repayment because the bank would only have got the letter the following day. But in any event it is not disputed that she did sign it.

[116] I have refreshed my memory of my own judgment in Ulster Bank Limited v Geraldine O'Neill [2014] NICh 29, a decision which was upheld by the Court of

Appeal in Northern Ireland: [2015] NICA 64. Leave to appeal to the Supreme Court was refused both by that court and the Supreme Court. A case of that kind has not been pleaded here by learned counsel nor argued before me.

[117] The fact of the loans to the Finnegans has never been disputed. The loans are not secured on the home of Mr and Mrs Finnegan. She was involved in at least one of the businesses they ran i.e. the furniture business and to some degree it would appear in all of them. As Mr Finnegan said, see [79] above, she had signed dozens of facility letters over the years. It is to his credit that he did not seek to avail of any disingenuous ground on her behalf. The loan here would appear to be in the normal course of events as envisaged by the House of Lords in Moore's case in Royal Bank of Scotland plc v Etridge (No. 2) 2 [2002] AC 773.

[118] I refer to the dictum of Lord Bingham at paragraph 2.

> "It is important that lenders should feel able to advance money in run of the mill cases with no abnormal features, on the security of the wife's interest in the matrimonial home in a reasonable confidence that, if appropriate measures had been followed in obtaining the security, it will be enforceable if the need for enforcement arises."

That applies with even greater force to two commercial loans like this for the acquisition of property by way of investment or speculation.

[119] For all these reasons and the other reasons advanced by counsel for the defendant I conclude that the bank is entitled to judgment against the second defendant as well as the first defendant in the sum of £351,453.16 with interest at £22.05 per day from 2 February 2016.