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

Delivered: **03/05/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

BANK OF IRELAND (UK) PLC

Plaintiff;

AND

JOHN CRAWFORD, GEOFFRY WILSON AND JOSEPH DONALDSON

Defendant.

Master McCorry

[1] By writ of summons endorsed with a statement of claim issued 20.05.2011 the plaintiff bank claims £1,595,092.92, which includes a sum of £12,933.09 due and owing by the defendants on a overdrawn current account (Account 1) and the sum of £1,582,129.00 due and owing on foot of a loan account (now held under Account 2). The first defendant is a chartered accountant in private practice, who also engaged in what is broadly described as property development. The second and third defendants are ostensibly successful businessmen operating in separate and

unrelated businesses. By facility letter dated 09.11.2006 the plaintiff advanced to the defendants the cash sum of £1,500,000, repayable on demand or in the absence of demand by 10.11.2007, including provision for interest to be added to the loan amount up to a loan maximum of £1,575,000. The purpose of the loan was to enable the defendants to jointly purchase land for development at Parkgate Avenue, Belfast. The defendants drew down the loan on 13.11.2006 and on the same date executed a partnership mandate. The current account was opened on 10.11.2006 with the intention that interest payments on the loan would be charged to that account. By a second facility letter dated 18.02.2009, the plaintiff offered to the defendants, who accepted, new terms for the loan, which provided that the loan was repayable on demand, and in the absence of demand, by 30.09.2009. By letters dated 17.05.2011 addressed to each defendant, the plaintiff demanded repayment of the sum of £1,594,647.83. At the date of issue of the present application the total amount due and owing was £1,623,140.91. The first defendant has entered an appearance (09.06.2011) but has not served a defence. The second and third defendants have entered an appearance (25.05.2011) and served a defence and counterclaim (23.09.2011), with a more recent amended defence and counterclaim served in draft. Pleadings closed after service of a Reply and Defence to Counterclaim on 09.11.2011.

[2] By summons dated 01.12.2011, the plaintiff sought summary judgment against the defendants, and each of them, pursuant to Order 14, with interest at 8% per annum and costs. It is that application which falls to be determined by this court. The first defendant has not responded to the summons and has taken no part in this application. The second defendant filed a detailed responding affidavit on 16.01.12 which has been adopted by the third defendant, and added to with respect to himself, in his affidavit of the same date. Essentially the second and third defendants raise the same two limbed defence to this application and the action generally. The first limb is that the loan is vitiated by undue influence perpetrated by the first defendant on the second and third defendants, of which undue influence the plaintiff had actual or constructive notice. The second limb alleges breach of contract by the plaintiff or/and breach of a duty of care owed to them by the plaintiff.

[3] The factual background to the case arises from the acquisition in late 2006 of land at Parkgate Avenue, Belfast, for development purposes, a short time before the collapse of the property market in the summer of 2007. It is perhaps otiose to state it, but with the benefit of hindsight this was not venture which was destined to be successful. The purchase price of the property was £1,750,000, to which the second and third defendants each contributed £125,000, whilst the first defendant contributed nothing. The balance of £1,500,000 was covered by the loan. The second and third defendants, each a successful businessman in his own right, were clients of the first defendant in his professional capacity as a chartered accountant.

[4] On any version of the facts presented to this court to date, the first defendant was the primary initiator and driving force behind the venture. It was he who identified the site for purchase, made the initial approach to the First Trust Bank for funding, before shifting his attention in November 2006 to the plaintiff bank, with whom he carried out the negotiations on behalf of all three defendants. He arranged their attendance with the plaintiff's solicitor for the signing of the necessary documentation, and it is noted that the letter of offer of facility was addressed to Aiken Crawford Accountants, the accountancy firm in which the first defendant practices. Similarly on the Credit Application dated 06.11.2006, the first defendant is named as the sole contact and again his practice address is given.

[5] Considerable insight into the plaintiff's management of this loan application is found in the application documents, beginning with the Credit Paper Memorandum. Under the heading: "4. Key Credit Risks" it states: "Development appraisal shows good expected profit resulting in ability to refinance/fund further development the developer has significant experience in this area." Under the heading "5. Background/Promoters" it states:

> "John Crawford is an accountant in Lisburn who has carried out similar transactions over the last few years and has been very successful. He particularly has completed developments on the Causeway End Road in Lisburn through Crawford Homes Ltd and Somerton Ltd…. He is

> independently wealthy and I have listed his personal assets on the personal net worth statements."

In respect of the second defendant it notes:

> "Joseph Donaldson is a customer of John Crawford, he owns and runs a very satisfactory company Environmental Fabrications Ltd, which made a NP of £250K last year. A personal NW statement is attached."

For the third defendant it provides:

> " Geoffrey Wilson is also a customer of John Crawford and he runs a very satisfactory Architectural Salvage co from the Hillsborough Road in Dromore. JC has confirmed NP for last year of £1m. Also the customer has substantial investments, through property sites, cash and other investments. See NW Statement attached."

Under the heading "9. Relationship" it is noted:

> "This is an excellent opportunity to develop a relationship with a customer of high net worth and a great deal of experience. It is also a good opportunity to fund a customer who to date has had a very sound relationship with the First Trust Bank."

When one moves on to a subsequent credit application dated 04.12.2007 the same information, in the same format, is repeated.

[6] A number of conclusions can be drawn from the information disclosed by these documents. The first is that so far as the plaintiff was concerned the driving force behind the venture was the first defendant and he was the one with experience in property development. The second is that the plaintiff was keen to enter a business relationship with the first defendant and the second and third defendants appear to have been regarded in very much a subsidiary light. The third is that the plaintiff was aware that the second and third defendants were customers of the first defendant and that he carried out the negotiations on behalf of all three. The fourth is that the information available to the plaintiff, including that relating to the second and third defendants, was apparently provided by the first defendant, with no apparent direct contact between the plaintiff and the second and third defendants. In addition the plaintiff would have been aware that the first defendant was putting up

no money of his own to match the £125,000 each contributed by the second and third defendants. Taking this all together, the second and third defendants argue, placed the plaintiff on at very least constructive notice, if not actual notice, of the possibility of undue influence.

Applications for Summary Judgment Under Order 14

[7] Paragraph 14/1/2 of The Supreme Court Practice: 1999 Edition, states that the purpose of Order 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. The test which the court applies is that set out in National Westminster Bank plc v Daniel et al [1993] 1 WLR 1453 wherein Glidewell LJ, quoted with approval Ackner LJ in Banque de Paris et des Pay-Bas (Suisse) SA v De Naray [1984] 1 Lloyd's rep 21 where he said:

> *"It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant having a real or bona fide defence."*

Glidewell LJ went on to conclude:

> *"I think it right to follow the words of Ackner LJ in the Banque de Paris case, or indeed those which amount to much the same thing (as I see it) of Lloyd LJ in Standard Chartered Bank v Yaacoub: is there a fair or reasonable probability of the defendants having a real or bona fide defence? Lloyd LJ posed the test: is what the defendant says credible? If it is not, then there is no fair or reasonable probability of him setting up a defence."*

[8] Order 14, rule 3-(1) provides:

"Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim or the part of the claim to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against the defendant on the claim or part as may be just having regard to the nature of the remedy or relief claimed."

The onus rests with the plaintiff to satisfy the court that there is no defence to the claim. A convenient summary of the correct approach to be adopted by the court is found at paragraph 11.49 of BJAC Valentine's Civil Proceedings The Supreme Court, where he states:

"The Defendant need only raise a reasonable doubt about the plaintiff's entitlement to judgment, assuming all facts in his favour, or that serious questions of fact or law are involved. Obviously an Order 14 hearing is rarely an appropriate forum for resolving issues of fact, but if the result of the action depends on an issue of pure law, even if complex or highly debateable, it should be fully investigated and determined under Order 14."

Therefore, what this court must do is consider, assuming all facts in the second and third defendants favour, and with the onus on the plaintiff to show that there is no defence, whether there a fair or reasonable probability of the defendants having a real or bona fide defence in the action.

Undue Influence

[9] On the basis of the factual background which the court is assuming in their favour, as summarised at paragraph [6] above, the second and third defendants firstly seek to raise a defence based on undue influence exercised by the first defendant, of which the plaintiff had notice. For the purpose of this application only,

plaintiff's counsel conceded that there arguably had been undue influence exercised by the first defendant over the second and third defendants, but contended that even if this undue influence was established it did not afford the second and third defendants a defence to the plaintiff's claim, and even if it did afford them a defence, it would not cover the capital sum claimed but would be limited to interest only.

[10] In the 30th edition of Chitty on Contracts at 7-056, undue influence is defined in the following terms:

> *"The equitable doctrine of undue influence is a comprehensive phrase covering cases in which a transaction between two parties who are in a relationship of trust and confidence may be set aside if the transaction is the result of an abuse of the relationship. The transaction may be set aside if the claimant shows that the other party obtained it by abusing the relationship; this, as we shall see, is often termed actual undue influence, but it is probably better to refer to such cases as ones in which undue influence is actually proved. A transaction may also be set aside in the absence of direct proof if Claimant shows the existence of relationship of trust and confidence with the other party and that the transaction is one that calls for explanation. Then it would be presumed that the transaction was the result of undue influence unless the presumption is rebutted."*

At paragraph 7-104 under the heading "Undue influence by a third person" which is the situation which is alleged to arise in this case: Chitty states:

> *" Where one party seeks to avoid a contract on the ground of undue influence by a third person, it must appear either that the third person was acting as the other party's agent, or that the other party had actual or constructive notice of the undue influence."*

[11] It is clear therefore that in the present case, where it is not alleged that any undue influence was exercised by the plaintiff itself, to establish a defence based on the doctrine, the second and third defendants must show either that the first defendant was acting as an agent for the plaintiff, or the plaintiff had actual notice of

undue influence, or constructive notice. Whilst not abandoning a defence based on agency, counsel for the second and third defendants did not, I think correctly, actively argue the agency point, instead concentrating upon actual or constructive notice of undue influence.

[12] Lord Nicholls of Birkenhead, in a judgment to which I will return below, observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at paras [6] and [8],

> *"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused …"*
>
> *"… [It] arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."*

Citing the above paragraphs in Etridge, Lord Millett in National Commercial Bank (Jamaica) Ltd v Hew [2003] UKPC 51 at paragraphs [29] and [30] states:

> *"Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them.*
>
> *Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And, secondly, the influence generated by the relationship must have been abused."*

It was not argued by the plaintiff's counsel that the relationship between the first and the second and third defendants was not a relationship capable of giving rise to the necessary influence. I take the view, for the purpose of this application, that the relationship between a chartered accountant and two of his professional clients, with whom he engages in a business venture in an area in which he has greater experience than they, to which he contributes no money of his own, and where he conducts the negotiations on their behalf, is capable of giving rise to the necessary influence.

[13] The question then arises, whether it is necessary for the persons alleging undue influence, having established that the relationship was capable of giving rise to undue influence, to prove that in fact it had been exercised. This question goes to the heart of what the doctrine of undue influence actually says, and the consequences where the issue is raised.

Looking at the basic principles Lord Nicholls in Etridge at paragraph [13] and [14] states:

> *"Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.*
>
> *[14] Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.*

And at paragraph [16]

> *"Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term "presumption" is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of res ipsa loquitur is invoked. There is a rebuttable evidential presumption of undue influence."*

[14] In fact therefore, what the doctrine of undue influence does is give rise to a rebuttable evidential presumption, the analysis of which by Lord Scott in Etridge at

paragraph [219] is, particularly in the context of an Order 14 application for summary judgment, enlightening. He states:

> *"The presumption of undue influence, whether in a category 2A case, or in a category 2B case, is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption. In a case where there has been a full trial, however, the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In an appropriate case the presumption may carry the complainant home. But it makes no sense to find, on the one *854 hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If, on the other hand, the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another. The presumption is, I repeat, an evidential presumption. If it applies, and the evidence is not sufficient to rebut it, an allegation of undue influence succeeds."*

[15] The context of the present case, where it is not alleged that the plaintiff bank exercised undue influence itself, but rather was arguably on notice, actual or constructive that a relationship existed between others, which was capable of giving rise to a possibility of undue influence being exercised by one against another, is not at all unusual. However, the more common situation where this arises is in relationships of a more personal nature, for example husband and wife, and typically in a guarantor type of situation. That is the main thrust of the House of Lord's judgments in the Etridge cases, where it considered the approach adopted, and the principles established in the case of Barclays Bank Plc v O'Brien [1994] 1 A.C. 180 (HL). Essentially what O'Brien established is that whilst the law imposes no obligation on one party to a transaction to check whether the other party's concurrence was obtained by undue influence, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he ought to have known that the other's concurrence had been procured by the misconduct of a third party. This gives rise to competing interests between the bank and those raising

undue influence; and what O'Brien decided was where the balance of those competing interests lay. On the one side, there is the need to protect a wife against a husband's undue influence. On the other side, there is the need for the bank to be able to have reasonable confidence in the strength of its security. Otherwise it would not provide the required money. The problem was to find the course best designed to protect wives without unreasonably hampering the giving and taking of security. The solution was to set out the steps a bank should take to ensure it is not affected by any claim the wife may have that her signature of the documents was procured by the undue influence or other wrong of her husband. This solution involved **putting the bank on inquiry** (my emphasis). Lord Nicholls considered the question of the threshold when the bank is put on enquiry at paragraph [14]

> *"44 In O'Brien the House considered the circumstances in which a bank, or other creditor, is "put on inquiry". Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said [1994] 1 AC 180, 196 :*
> *"Therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction."*
> *In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts".*

[16] The plaintiff in the present case argues that the Etridge principles apply only to relationships such as that between a husband and wife or in a guarantor type situation and not to commercial relationships between experienced businessmen such as in this instance. I think however that the situation is not quite so clear cut as that, Lord Nicholls at paragraph [87] stating:

> *"87 These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the O'Brien principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as "put on inquiry" in every case where the relationship between*

the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor."

However , he goes on to say:

> *"88 Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.*
> *89 By the decisions of this House in O'Brien and the Court of Appeal in Credit Lyonnais Bank Nederland NV v Burch [1997] 1 All ER 144 , English law has taken its first strides in the development of some such general principle. It is a workable principle. It is also simple, coherent and eminently desirable. I venture to think this is the way the law is moving, and should continue to move. Equity, it is said, is not past the age of child-bearing. In the present context the equitable concept of being "put on inquiry" is the parent of a principle of general application, a principle which imposes no more than a modest obligation on banks and other creditors. The existence of this obligation in all non-commercial cases does not go beyond the reasonable requirements of the present times. In future, banks and other creditors should regulate their affairs accordingly. *815"*

[17] I do not read this to mean that Lord Nicholls entirely rules out the application of the principles of undue influence, and the resultant placing of a bank on enquiry, in every commercial situation, but rather that the threshold at which an institution such as a bank would be required to make inquiry is higher, perhaps depending upon the circumstances of a particular case, much higher, than for example in a domestic situation. I must remind myself at this point that it is not the role of this court to try this issue but simply to ask whether, taking the facts in the defendant's favour, the second and third defendants raise a reasonable doubt as to the plaintiff's entitlement to judgment. With this in mind I am guided by that passage from the judgment of Lord Scott, in Etridge, at paragraph [219] already quoted at [14] above where he states:

> *" It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the*

undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption."

He does not suggest, as counsel for the second and third defendants contends, that in no circumstances can an issue such as undue influence ever be dealt with in the course of an application for summary judgment. Clearly there are cases where it can; where for example the facts do not give rise to any realistic prospect that there could be a finding that the necessary relationship exists, so that the defendant cannot credibly argue that it has such a defence. However, given that undue influence is essentially an evidential doctrine, and given the inherent dangers of dealing with evidential issues in applications for summary judgment, the court must proceed with caution. Adopting such an approach in this case, and given the assumed facts in the second and third defendants favour, I cannot be satisfied that there is no fair or reasonable probability that they may have a defence based on undue influence in this instance.

[18] However, the matter does not rest there. Even if the second and third defendants establish that the presumption of undue influence by the first defendant over the second and third defendants arises, and the plaintiff fails to rebut that presumption, does this mean that the plaintiff cannot obtain judgment against the second and third named defendants in respect of a sum of money advanced to them and the first defendant, by way of a loan, which now requires to be repaid. There is more than a suggestion of unjust enrichment in such an outcome. To put it another way, what is the effect of a finding of, or failure to rebut the presumption of, undue influence on a transaction in circumstances such as in the present case? That issue was addressed by Lord Millett in Hew v National Commercial Bank (Jamaica) Ltd at paragraphs 44 and 45

"[43] **……..** *Where a transaction is obtained by undue influence, it must be set aside ab initio; and this requires a mutual accounting with mutual restitution by both parties. Where the transaction is one of guarantee this presents no difficulty. A surety incurs a liability but obtains no benefit. It is sufficient to set aside his liability; there is nothing*

for him to disgorge by way of counter-restitution. But where the transaction is one of loan the position is very different. It would not be just simply to set aside the loan; this would leave the borrower unjustly enriched. The proper course is to set aside the contract of loan and require the borrower to account for the moneys received with interest at a rate fixed by the court. Since the effect is merely to vary the rate of interest, it is not surprising that it is rare for the borrower himself to challenge the transaction.

[44] The judge dismissed the bank's claim and ordered it to repay Mr Hew the amount of all repayments which he had made to the bank. This would leave Mr Hew unjustly enriched to the extent that he retained the benefit of the drawings he had made on the account. He should have been required to repay these with interest at a rate fixed by the court."

[19] In this case plaintiff's counsel argues that even if the second and third defendants successfully raise a defence based on undue influence, this does not mean that they do not have to repay the loan, but rather that they are required to account for the money received, with interest, and the relief they obtain is limited to the interest owed on the loan, which he stated to be a sum of £332.411, as of the date of hearing. I have to say that there is considerable merit in this argument insofar as it relates to the ultimate outcome in the case. Indeed to approach the consequences of a defendant establishing undue influence in any other way would inevitably result in an outcome which unjustly enriches the borrowers who would not have to repay the loan. If this is correct then undue influence does not provide a full defence to the plaintiff's claim, but rather one limited to the interest and charges paid by the second and third defendants, in this case £332.411.

[20] However, there may be difficulties in adopting this approach at the interlocutory stage, where there has not been a trial of the action. I return again to what the doctrine of undue influence actually does. It is an evidential presumption which turns on the court's assessment of evidence of a relationship to establish if it is capable of giving rise to a presumption of undue influence, at which point the onus shifts to the party alleged to have exercised, or to have been on notice of, undue influence, to rebut the presumption. Clearly that is something which requires a trial and cannot be adjudicated upon on the basis of affidavit evidence. On the other hand, if the approach set out by Lord Millett in Hew v National Commercial Bank (Jamaica) Ltd is correct, and for the reasons already stated I believe it is, then the

most that undue influence can do, even after a trial, is to relieve the borrower of the requirement to repay the accrued interest and charges, but not the principal sum. Therefore, for the purposes of this application for summary judgment, I find that the there is a fair and reasonable probability of a defence based on undue influence on that part of the plaintiff's claim which relates to accrued interest, namely £332,411, but not in respect of the principal sum.

Duty of Care and/or Breach of Contract

[21] I turn then to the second limb of the second and third defendant's purported defence and counterclaim, which itself has two branches, the first is that the plaintiff is in breach of a duty of care which it owed to the second and third defendants; and the second is that the plaintiff was in breach of terms implied into the banker customer contract by the Banking Codes. The second and third defendant's starting point in relation to the first is the Supply of Goods and Services Act 1982. It provides at Section 12(1):

> In the Act a "contract for the supply of a service" means, subject to subsection (2) below, a contract under which a person ("the supplier") agrees to carry out a service.

Section 13 provides:

> " In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

[22] It would be difficult to argue that the service provided by the plaintiff in this case was not, in a general sense, a service covered by the 1982 Act, and therefore that there is an implied term that the plaintiff in providing the service would exercise reasonable care and skill. However, this broad statement gives rise to a number of questions. Firstly, precisely what service or services is a bank providing where it offers a loan to a borrower? Secondly, in the context of a bank providing a loan to

finance a commercial venture such as in this case, what would represent reasonable care and skill, or to put it another way, what duty if any is placed upon a bank in this sort of situation? Given the facts of this case as accepted for the purposes of this application, logically for the second and third defendants' to succeed it would have to be a duty of care to provide advice, and certainly it was not argued that any other duty arose. I therefore return once more to the judgment of Lord Millett in National Commercial Bank (Jamaica) Ltd v Hew at paragraphs [13] and [14]:-

> *" [13] The legal context in which this question falls to be decided is well established. In Banbury v Bank of Montreal [1918] AC 626 at 654, Lord Finlay LC said:*
>
>> *'While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business … If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently.'*
>
> *[14] It is, therefore, not sufficient to render the bank liable to Mr Hew in negligence that Mr Cobham knew or ought to have known that the development of Barrett Town with the borrowed funds was not a viable proposition. It must be shown either that Mr Cobham advised that the project was viable, or that he assumed an obligation to advise as to its viability and failed to advise that it was not. Their lordships have examined the transcripts of the trial with care, and have failed to find any evidence to support any such finding."*

[23] In relation to a failure to advise a customer, Warne & Elliot: *Banking Litigation* (1999 edn.) p 28 states:

> *"A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given"'*

[24] If a bank is held to be under a duty to advise the next question is as to the nature and type of advice which the bank ought to have given? Warne and Elliott quote Lord Millett at paragraph [22] of National Commercial Bank (Jamaica) Ltd v Hew where he states:

"It may well have been foolhardy of Mr Hew to embark on the project without obtaining estimates of the likely costs and cash flow forecasts; but the bank was under no duty to advise him against such a course. It may have been unwise of Mr Cobham to have lent the money without insisting on being provided with such estimates and forecasts and without having conducted a feasibility study of his own. But, as Mr Cobham explained, any such study would have been for the bank's protection, not Mr Hew's. The reason he did not call for such a study is that he did not think that the bank's interests required it; the bank had sufficient security to support a much larger loan than anything that was contemplated at the time. This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound."

This simple analysis is particularly useful in that it shows the difficult position in which a bank, acting primarily as a lender, can find itself from the very nature of the transaction taking place. What may look like a safe loan for a lender to provide may not be a safe loan for a borrower to take. This highlights the need for clarity in terms of the duty to advise which a bank undertakes, if any, and why the law must be cautious about implying terms which include the duty to advise, into the contract between the borrower and lender.

[25] In Murphy v HSBC plc [2004] EWHC 467 (Ch), Silber J, the plaintiff's case was that the Bank was under a duty to exercise reasonable care in the provision of advice to them in respect of the acquisition of an hotel in relation to its financial viability, the terms of the loan that had to be taken out by the claimants from the Bank and the provision of insurance. They sought to argue that a duty of care arose under a number of headings including lines of authority following on from the principles enunciated by the House of Lords in Hedley Byrne & Co v Heller and Partners Limited [1964] AC 465 and Caparo Industries Plc v Dickman [1990] 2 AC 605, and under the principles of voluntary assumption of liability (see Henderson v. Merrett Syndicates Limited [1995] 2 AC 45). These arguments were rejected by Silbury J who went on to say at paragraph 99

"I should add that if Mr. Grantham's submission was correct and the Bank owed these claimants a duty of care, this could have very far-reaching consequences as it would

mean that a Bank might well be regarded as having assumed responsibility to and owing a duty of care to a customer in every case in which a customer, who seeks to borrow from a bank, makes it clear to the bank manager first that he has not carried out a survey on the property to be charged, second that he has no idea about its condition and third that he does not know anything about any of the financial aspects of the loan transaction. My provisional view is that the Bank would only owe a duty of care if it did something more in relation to the customer to show that it was not merely looking after the Bank's own interests, but that additionally that it was positively prepared to assume responsibility to the customer. In the present case, with the claimants having their own independently instructed accountant and lawyer, there is no indication that such a responsibility was accepted or that there was sufficient proximity between the parties to meet the threefold test referred to in Caparo ….."

At 101 he similarly rejected the plaintiffs' contention that the Bank owed them fiduciary duties.

"I am unable to accept that contention. It is settled law that "on the fact of it a relationship between a banker and a customer is not a fiduciary relationship" (per Lord Woolf CJ in Bank of Scotland v. A Ltd ([2001] 3 All ER 58, 65 [25]). The basic banking transaction of lending is not fiduciary in nature and so in the ordinary course of events, a bank which lends to a customer does not owe the customer a fiduciary duty. The mere fact that the claimants trusted the Bank does not give rise to a fiduciary duty when, as in the present case, first the claimants had their own paid advisors, second the claimants had freely chosen to enter into contracts of loan and insurance with the Bank when they could have gone elsewhere to obtain those services and third, the Bank were not the paid or the unpaid advisors of the claimants but merely a lender of money to them. In any event, the claimants as intelligent citizens would have been aware that those with whom they placed insurance received commission as otherwise they would have no interest in obtaining insurance business. Thus, there can be no question of a secret profit being made by the Bank."

[26] At paragraph 2-005 of their 1999 edition Warne and Elliott, discussing the duty to advise, observe that "somewhat different considerations apply when the transaction in question is a transaction between the bank and the customer rather than a transaction the customer has entered into with a third party using the proceeds of a loan or other facility the bank has provided. Here there may be greater scope for imposing on the bank a duty to advise." In the present case however the transaction for which the loan was requested and advanced, was indeed a transaction between the defendants and the vendor of the land. The circumstance in which the defendant's find themselves is not the fault of the plaintiff in failing to advise them with respect to entering into such a venture, but rather is due to a catastrophic and unfortunately largely unforeseen collapse in the property market,

which happens for a variety of reasons to have particularly affected the market in this jurisdiction. In short, in the absence of any agreement between the plaintiff and the second and third defendants, whereby the plaintiff would provide advice to them, then following the long established approach of the law and its reluctance to impose such a duty to advise upon banks, it does not seem to me that a duty of care to advise arises at common law in this case, which would engage section 13 of the Supply of Goods and Services Act 1982. Can it be argued that because of the circumstances of this case, a duty of care arises which has been breached? I can find no basis for making such an argument which has a reasonable prospect for success, especially in the context of a commercial relationship which consisted solely of the defendants, who were not established customers of the bank, approaching it for a loan for the purchase of land for development purposes

[27] I turn then to the second argument raised by to the second and third defendants, namely the breach of contract argument which turns on whether or not the undertakings provided under the Banking Codes are implied terms of contract, which the plaintiff has breached. As the relationship between banker and customer is based on contract, (See Foley v Hill (1848 2 HL Cas 28.) a party seeking to rely upon the Bankers Code as the foundation for a cause of action or defence would, it seems to me, have to show that the terms of the Code have become implied terms of that contract. From 1992 most banks and building societies in the United Kingdom have recognised a common code of practice (now known as "The Banking Code") which governs their relations with their "personal customers". The latest edition of the Banking Code defines a "personal customer" as: "Any person who is acting for purposes which are not linked to their trade or profession." All editions of the Code since the third have contained a number of "Key Commitments" that are addressed directly to the customer and expressed in unequivocally promissory language. Warne and Elliott, writing in 1999, at 2-006 note:

> *"….. The question whether such "promises" have contractual effect has not been tested in the courts, but it is difficult to avoid the conclusion that, subject to the usual rules governing the incorporation of terms, those banks which are parties to the code*

__may now__ (my emphasis) owe their personal customer a contractual duty to advise in the circumstances covered by the "key commitments".

[28] It seems to me that the defendants in this case are not really personal customers of the plaintiff. None of them had any prior dealings of a personal banking nature with the plaintiff. They have no current accounts other than that opened to facilitate interest payments. Indeed the present relationship is based solely on the request for, and granting of, a commercial loan for commercial purposes. The "Banking Code" would not therefore appear to be applicable in this case, but there is a second code, The Business Banking Code, which may apply. Like the Personal Banking Code, this Business Banking Code also contains a number of key commitments in promissory terms, very similar to those in the personal Banking Code, including a requirement to advise on the suitability of particular products.

[29] The March 2005 edition of the Business Banking Code provides:

> "1.1 This is a voluntary code which sets standards of good banking practice for banks to follow when they are dealing with **business customers** in the United Kingdom.
> Business customers includes sole traders, partnerships, and limited companies with annual turnover of under £1 million, as well as associations, charities and clubs with an annual income of under £1 million.
>
> 2. Our Key Commitments to You.
> We promise that we will act fairly and reasonably in all our dealings with you by meeting all the commitments and standards in this Code. The commitments are shown below."

The first question which arises concerns the description of the Code as a voluntary one. Does that mean that adoption of the Code by a particular bank is voluntary, or does it mean that compliance with the undertakings provided for in the Code by a bank which has adopted it is voluntary? It seems to me that the proper interpretation

is the first because if it is the second then in practical terms the undertakings provided by the bank are meaningless. If this is correct then logically a bank which adopts the Code binds itself to comply with the undertakings provided, which of itself suggests that there must be some sanction for dealing with non-compliance. It does not however follow from this that the undertakings provided become implied terms of contract, but rather leave the bank open to an adverse finding in a particular case by the Banking Ombudsman, or other regulatory body, and whatever sanctions are available to that office. I will return to this below.

[30] Setting aside that issue for the moment, what commitments does a bank bound by the code actually make? Couched in terms beginning "we will", the bank provides a series of undertaking as to a range of matters including: clarity of advertising, information about the account or service chosen, regular statements and information of changes in interest rates, and terms and conditions. It undertakes to "deal quickly and sympathetically with things that go wrong and consider all cases of financial difficulty sympathetically and positively". Section 3.1, under the heading "Helping you choose products and services which meet your needs", includes: "give you clear information explaining the main features of the services and products you tell us you are interested in". Section 3.4 states: "Once you have chosen an account or service, we will tell you how it works". Section 3.6 undertakes that "When you open a business account, we will ask you to tell us who can sign on your account and who you have given us permission to deal with. We will explain your rights and responsibilities including, if it applies to you, **joint and several liability** (my emphasis) when you open an account with others". As a general observation it seems to me that some of these undertakings
are more capable of becoming binding implied terms of contract than others.

[31] Counsel for the second and third defendants points out that in this case the plaintiff did not explain the concept of joint and several liability to them, and by that failing alone is in breach of the code. The affidavit evidence of the second and third defendants is that they never met directly with the plaintiff bank, except to attend along with the first defendant at the plaintiff bank's solicitors for signing of the

documents. For the purposes of this application I must take that as being an accurate account of what occurred, which means that the plaintiff bank did not explain the concept of joint and several liability to the second and third defendants when clearly it applied to them. The plaintiff might conceivably argue that such advice was contained within the documentation, but no such documentation was exhibited and no such argument was raised at the hearing. That brings us to the crux of the question namely, what is the effect of such a failure and does it constitute a breach of an implied term of contract?

[32] The second and third defendants cite the decision of Coghlin J in Payne & Cooke v Ulster Bank Ltd. [2003] NIQB 67, a personal banking case, where he found:

> *"(4) The Code of Practice "Good Banking" published in December 1991 and adopted by the defendant set out the standard of good banking practice to be observed by banks when dealing with personal customers in the United Kingdom. The Code was effective from 16 March 1992. The governing principles of the Code are set out at paragraph 1.4 and include:*
>
>> *"(b) That banks … will act fairly and reasonably in all their dealings with their customers;*
>>
>> *(c) That banks … will help customers to understand how their accounts operate and will seek to give them a good understanding of banking services."*
>
> *Paragraph 4.4 of the same Code provided as follows:*
>
>> *"4.4 Banks … will tell customers the interest rates applicable to their accounts, the basis on which interest is calculated and when it will be charged to their accounts. … Banks … will explain also the basis on which they may vary interest rates."*
>
> *In taking the foregoing into account, I have come to the conclusion that, in the circumstances of this particular case, the defendant bank did owe a duty of care to the plaintiffs in relation to the Farm Development Loan."*

[33] Use of the term "in the circumstances of this particular case", suggests that in other circumstances Coghlin J might have come to a different conclusion, and very importantly, he does not expressly say that the undertakings in the Banking Code are implied terms of contract. The circumstances of that particular case were firstly that

the personal Banking Code applied; and secondly that it involved a small agricultural business which was a long standing client of the defendant bank, where the allegation was that the bank had suggested a form of facility which was not in the plaintiff's best interests. It is a factual background which is very different from the present case, where parties with no previous relationship with the bank approached the bank for a loan to finance a land development project.

[34] Keeping that distinction in mind, if the Business Banking Code applies in the present case, and it was not argued that it did not, then the plaintiff falls down on one undertaking at least, namely that relating to joint and several liability. However, that still raises the question of the precise status of the Code and the undertakings provided within it. As I have already found that aside from under the Banking Code no duty of care to advise arises, in order to afford the second and third defendants a defence the Code must, I think, give rise to binding contractual terms implied into the contract which result in a duty of care. In Payne and Cooke v Ulster bank Limited Coghlin J in 2003 held that in the circumstances of that action a duty of care did arise. Warne & Elliott writing in 1999 anticipated that those banks which were parties to the code might now owe their personal customer a contractual duty to advise in the circumstances covered by the "key commitments. What is glaringly missing however is any more recent authority, aside from Payne and Cooke, to suggest that Warne and Elliott's expectations have been met. Counsel referred me to no other recent authorities, and it is noteworthy that Paget's Law of Banking (12th edition) at chapter 7, writing in 2003, dealing with the relationship of the banker and customer, including the Banking Codes, is silent on the issue of whether or not the key commitments in the Banking Codes might give rise to a contractual duty to advise. In Murphy v HSBC in 2004 the events which gave rise to the case occurred before the Business Banking Code was launched in 2002 and therefore the issue whether or not the undertakings in the Code were implied terms of contract was not raised or addressed.

[35] The personal Banking Code has been in operation since 1992 and the Business Banking code has been in place since 2002. These documents and the commitments

contained in them are now well established on the personal and business banking landscape. The relationship between banker and the customer is based on contract with an historical reluctance shown by the courts to interfere with the basis of that relationship as is demonstrated by the preponderance of the authorities cited and considered in this case. Were the undertakings and commitments contained in the Codes to assume the status of implied terms of contract, that would represent a significant departure from the well-established position, and given that significance, and the implications for banking practice generally, would inevitably have produced a body of case law at the highest level.

[36] Whilst it did not apply at the time when the events giving rise to this action occurred, it is useful to note the terms of the March 2008 edition of the Business Banking Code, as illustrative of the way the Code has been developing. Paragraph 1.2 provides "As a voluntary code, it allows competition and market forces to encourage higher standards for the benefit of customers." Paragraph 1.4 states: "You can check which banks follow the Code by contacting the Banking Codes Standards Board, the independent organisation which monitors how well banks are meeting the Code." Paragraph 16.2 provides: The Banking Code Standards Board monitors banks and building societies to make sure they keep to the Code. It cannot deal with customers' complaints but can provide information on the standards that banks and building societies must meet". Paragraph 15.6, which deals with the handling of complaints, provides that in the first instance the customer pursues the complaint through the bank's internal complaints system or has resort to the Financial Ombudsman's Service, which is a "free independent service which might be able to settle complaints between a bank or building society". There is a wealth of information available on-line about the operation of the Codes provided by various bodies, in particular the Financial Services Authority, which it appears has arranged for the Banking Code Standards Board to monitor compliance, as is now reflected in the most recent editions of the Codes.

[37] My understanding of such of this material as I have read is that the Codes are precisely what they say they are, namely voluntary codes to which the banks which

subscribe to them commit themselves to complying with the terms contained therein, compliance being policed by the Banking Codes Standards Board, and with the option of pursuing complaints to the Ombudsman. There is nothing to suggest that the undertakings provided in the Codes give rise to binding terms implied into the contract which forms the legal basis of the banker-customer relationship. In the circumstances I am not satisfied that as the Codes have developed the undertakings they contain have taken on the status of implied terms of contract anticipated by Warne & Elliott in 1999. Therefore, for the purposes of this application for summary judgment, I do not find that the there is a fair and reasonable probability of a defence being available to the second and third defendants based upon liability imposed by terms implied into the banker-customer contract by the Banking Codes.

[38] The plaintiff is therefore entitled to summary judgment pursuant to Order 14 on the capital sum and interest, save for that portion of the claim relating to interest or charges, in respect of which the second and third defendants have established that they have a viable defence based on undue influence, which for the purposes of this application the plaintiff sets at £332,411.00. I give leave to the second and third defendant's to defend the action with respect to that part of the sums claimed, with judgment in respect of the balance to the plaintiff. Insofar as the first named defendant is concerned, he took no part in these proceedings, the defence based on undue influence would not be available to him in any event, and the plaintiff is therefore entitled to judgment in respect of the entire sum against him.

I will hear counsel at their convenience on the issue of costs.