Neutral Citation No. [2014] NIMaster 1

Ref: **2014NIMaster1**

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

Delivered: **07/02/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

DEVON & CORNWALL SECURITIES LIMTED

Plaintiff

and

1. JOHN CRAWFORD ARMSTRONG

2. ADELINE MARIE ARMSTRONG

Defendants

MASTER ELLISON

1. This is an application by the defendants to stay and set aside an order for possession dated 25 January 2011 made by Deputy Master Minnis and to be allowed to defend and counterclaim in respect of the plaintiff mortgagee's application for possession of land now comprising agricultural land in the sole registered ownership of the first defendant in Land Registry Folio 663 County Fermanagh. The remainder of the land subject to the possession order comprised a building site the title to which had been registered in the joint ownership of the defendants in Folio FE 86197 County Fermanagh before the order for possession was made, but was later sold by the defendant for £50,000 the net proceeds having then been paid to the plaintiff in reduction of its mortgage debt. There is no dwelling on the land which is farmed by the first defendant.

2. The order for possession was made pursuant to a registered charge created by a deed of charge dated 6 May 2009 executed by both defendants in the plaintiff's favour, which secured an advance of £100,000 and interest at one per cent monthly which is expressed as a "discounted" rate for prompt payment, increasing to the "standard rate" of 1.5 per month in the event of default. The ostensible purposes of the advance as stated in the loan application were "to redeem machinery agreements and purchase more agricultural machinery". The affidavit and oral evidence about the actual purpose and use is somewhat confusing but I am satisfied that the great majority of the advance monies was spent on debt consolidation. The first defendant initiated the negotiations some eleven months before completion of the mortgage, which at one stage involved a proposed advance of £200,000, by telephoning an unlicensed broker, a Mr Harvey Richmond, in response to an advertisement in a farming journal. As at the date of swearing of the affidavit which grounded the plaintiff's application for possession, 7 December 2010, the amount then remaining due under the mortgage was stated to be £112,102.53 and the amount of instalments in arrears £12,102.53, the last payment having been made on 12 May 2010.

3. The plaintiff's order for possession now only relates to the agricultural land, which extends to over 50 acres. The defendants are however challenging the validity and enforceability of the mortgage contract in its entirety. Broadly, they are claiming that:-

   (i) contrary to the forms and procedures followed by the plaintiff and to a declaration of business purpose signed by the defendants themselves for the ostensible purpose of exemption under section 16B of the Consumer Credit Act 1974 (the 1974 Act), the registered charge and the mortgage contract constituted a consumer credit agreement regulated under that Act and a charge securing that agreement;

   (ii) the business declaration by the second defendant was a nullity and the agreement and charge were unenforceable against her as she had no part in the business for which the loan proceeds were used and no benefit from the

advance and was acting under undue influence exerted by her husband when she signed the declaration and the charge deed;

(iii) as the plaintiff did not take appropriate steps, including endeavouring to ensure that the second defendant received the benefit of independent legal advice, the plaintiff was therefore fixed with notice of the undue influence.

(iv) not only had the plaintiff failed to follow the prescribed forms and procedures for the regulated agreement, but also the broker who introduced the business to the plaintiff was not licensed for the purpose, meaning that section 149 of the 1974 Act applied and these factors rendered the entire loan and charge completely unenforceable;

(v) Moreover, whether or not the loan agreement was a regulated consumer agreement under the 1974 Act, it was by reason of asset-based lending, the use of an unlicensed mortgage broker, the unfair terms of the mortgage contract and subsequent acts of the plaintiff the subject of an unfair credit relationship within the meaning of sections 140A and 140B of that Act.

4. The plaintiff contends essentially that there was no regulated consumer credit agreement, no undue influence and no unfair credit relationship and that the allegations and arguments of the defendants are unsustainable.

5. After hearing the evidence of the defendants and that of a recently retired solicitor, Mr John Whittington, who had been a principal in the firm Falls and Hanna at the time of and advised the defendants as to the mortgage contract (and, out of an abundance of caution prior to reserving my decision, the examination-in-chief of the broker Harvey Richmond as he lives some distance from this jurisdiction), I am satisfied on all of the material before me that it is neither necessary nor appropriate to receive further evidence.

6. I have concluded that the testimony of the defendants was demonstrably unreliable on a number of material points, to the extent that, for that and other reasons I shall explain in this judgment, no further evidence is necessary for me

to determine this matter.

7. I start by mentioning that the second defendant's oral testimony included statements to the effect that not only was she unaware of the possession proceedings in advance of the hearing of the plaintiff's application for possession, but that the order for possession which on its face required to be served personally on her was not served on her at all.

8. However that may be, her account of the meeting, and the account of her husband the first defendant as to the same meeting with Mr Whittington at his firm's office on 22 April 2009, were significantly fictional. Unlike the defendants Mr Whittington was a very credible witness notwithstanding some failings in the advice which he proffered to them about the mortgage contract. Both defendants were firmly adamant that Mr Whittington at no time spoke to Mrs Armstrong separately from her husband. Mr Whittington was certain that he had done so, albeit only for a few minutes, while Mr Armstrong was left in the front office. He was equally certain that he spoke to her separately by phone later on the same day, primarily to reiterate his warning that he believed the mortgage terms were very unfair and a "very bad deal". I have no hesitation in believing Mr Whittington's version. Moreover the first defendant in his affidavit made reference to Mr Whittington having described the dual interest rates to be charged as "a bit high", whereas in fact the solicitor had described them as "ridiculous" and "very unfair". In his oral evidence Mr Armstrong denied that Mr Whittington advised that it would be unwise to enter into the mortgage. The second defendant took pains in the early stages of her oral testimony to stress that she had considerable difficulty remembering the details and was unfamiliar with legal terminology. However on re-examination she purported to recall with remarkable swiftness, consistency and confidence (in response to a lengthy series of questions from her counsel) the numerous topics – put to her in leading terms by her counsel - on which, she responded, Mr Whittington did not proffer any advice. She had every opportunity but consistently failed to indicate that Mr Whittington expressed his views of the proposed mortgage transaction in strong,

negative and doubtless memorable terms (his evidence as to the meeting being corroborated by apparently contemporaneous jottings and an attendance note prepared shortly thereafter). He did not mince his words when criticising the proposed terms of the mortgage into which both defendants nevertheless insisted on entering and explained key details of the mortgage commitment including the amount secured, the dual interest rates, the interest-only payments and the open-ended "term" of the proposed mortgage contract. I fully accept his evidence that the second defendant "had an input" into the meeting and that, from his initial separate discussion with her, he had satisfied himself that she was already aware of what the meeting was about and advised her at that separate meeting that to enter into the mortgage transaction would be contrary to his advice.

Allegation of Undue Influence

9. However it is also clear that Mr Whittington did not advise Mrs Armstrong that she should seriously consider seeking independent legal advice or take other protective steps (save the relatively short separate meeting and the telephone conversation with her later on the same day and his explanation of the mortgage terms) in line with the directions for practitioners contained in the important judgment of the House of Lords in Royal Bank of Scotland v Etridge (No2) [2001] UKHL 44. Moreover while advising that because it was a commercial mortgage the defendants would not have the protection of the 1974 Act, he failed to point out that the provisions about unfair credit relationships in that Act might nonetheless afford them some protection should they be able to make out such a case. His understanding at the time was that the defendants were both involved in the farming business and he pointed out in his oral evidence that given that the first defendant was a part-time lorry driver he would have assumed that his wife was actively involved in helping him in that business.

10. In her judgment in Welsh v Bank of Ireland (UK) Plc [2013] NI Master 6, Master Kelly explained most helpfully (in dealing with an application to set aside a statutory demand) the core minimum requirements imposed on lenders and solicitors by the Etridge judgment of the House of Lords as follows:-

"The applicant's grounds for disputing the debt are founded on the principles of *The Royal Bank of Scotland v Etridge (No 2)*. The *Etridge* case, which was made up of a number of appeals, sought to address the vexed issue of husband and wife surety cases by setting out the circumstances when a lender is put on inquiry; and establishing core minimum requirements that lenders and solicitors must follow to ensure that they can rebut any presumption of constructive notice of undue influence; and for solicitors to avoid an action in negligence. While the focus of *Etridge* is the scenario of husband and wife borrowers, it is essential to note that the House of Lords extended these principles to all guarantees by individuals where the relationship between the guarantor and principal debtor is non-commercial. At paragraph [44] Lord Nicholls addressed the issue of circumstances when the bank is put on inquiry, the concept of which finds its origin in the case of *Barclays Bank plc v O'Brien* [1993] 4 ALL ER 417, [1994] 1AC 180, [1993] 3 WLR 802), and was central to the issues for consideration in *Etridge*. Lord Nicholls states at paragraph [44] of *Etridge*:

> "{in O'Brien's case}. 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 set is 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:
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> > "Therefore, in my judgment a creditor is put on inquiry when a wife stands 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."

Lord Nicholls goes on to state at paragraph [54]:

> "… the furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned."

Lord Nicholls then addressed the scenario where once put on inquiry a lender is unwilling to explain the implications of a transaction directly to the wife, but wishes to protect itself by relying on the wife being independently advised by a solicitor. At paragraph [79] Lord Nicholls sets out the core minimum requirements that a lender should take in those circumstances. These he described as a modest burden on the lender. These core minimum requirements are that the lender should:

> (i) Ask the wife directly for the name of her acting solicitor.
> (ii) Communicate directly with the wife, informing her

that for its own protection the lender requires written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained the nature of the documents and the practical implications thereof.

(iii) Inform the wife that she should be unable to dispute that she is legally bound by the documents in the future once she has signed them upon receipt of legal advice.

(iv) Ask the wife to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband. Advise her that if she wishes, the solicitor may be the same as the one acting for her husband in the transaction.

(v) If a solicitor is already acting for the husband and the wife, ask the wife if she would prefer that a different solicitor act for her regarding the lender's requirements.

(vi) Not proceed with the transaction until the lender has received an appropriate response directly from the wife.

(vii) Provide the wife's solicitor with the financial information needed to advise the wife of the entirety of the financial transaction. This information will include the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility and the amount and terms of any new facility.

(viii) Disclose any unusual feature of the contract between the lender and the borrowers which makes it materially different in a potentially disadvantageous respect from what the wife might naturally expect.

(ix) Send a copy of the husband's loan/mortgage application form to the wife's solicitor if it was made solely by the husband. Obtain the consent of the lender's

customer to the circulation of this confidential information. Without this consent, the transaction will not be able to proceed.

(x) Inform the wife's solicitor if the lender believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will.

(xi) Obtain a written confirmation to the effect of the advice from the wife's solicitor.

[18] At paragraphs [64] to [68] and paragraph [74] Lord Nicholls stated that the core minimum requirements of independent legal advice are that the solicitor should:

(i) Have a discussion with the wife at a face-to-face meeting in the absence of the husband.

(ii) When accepting instructions to advise the wife, assume responsibilities directly to the wife, both at law and professionally.

(iii) Explain the nature of the documentation and the practical consequences these will have for the wife if she signs them.

(iv) Use suitable non-technical language.

(v) Point out the seriousness of the risks involved.

(vi) State clearly that the wife has a choice.

(vii) Check whether the wife wishes to proceed. To this extent, she should be asked whether she is content that the solicitor should write to the bank confirming that he has explained the nature of the documents to her and the practical implications they may have for her.

(viii) Obtain any necessary information from the bank. If the bank fails to provide that information for any reason, the solicitor should decline to provide the confirmation

sought by the bank."

11. The importance of compliance by lenders and solicitor with the core minimum Etridge requirements as cited above cannot be over-emphasised. The following extracts from Snell's Law of Equity (32nd Ed., 2010), chapter 8, set out the key principles of undue influence as they relate to the second defendant's claim that it applies in the present case:-

> "Although the doctrine of undue influence was sometimes extended beyond influence to include coercion, the essence of undue influence is influence, not coercion.
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> …
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> Because of the broad spectrum of conduct which may amount to undue influence it is often difficult to distinguish between permissible forms of persuasion on the one hand and undue influence on the other. It has been said that the line between them is regulated by considerations of public policy, but, equally, people will not be saved from their own folly. The following description has been given of the dividing line:
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> > "the critical question is not whether or not the persuasion or the advice, in other words, the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence. The donor may be led but she must not be driven and her will must be the offspring of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say `This is not my wish but I must do it'".
> >
> > …

(c) The two presumptions

In many cases C cannot point to any overt acts or statements from which the court can make direct findings of undue influence and may have difficulty establishing affirmatively that the transaction between the parties was caused by domination or complete ascendancy. Even if C is, therefore, unable affirmatively to prove undue influence, undue influence may be presumed upon proof of (1) a relationship falling within a particular class or involving a history of undue influence and (2) a transaction which excites suspicion or calls for explanation. Although in *Barclays Bank plc v O'Brien* it appeared to be suggested that proof of (1) alone was sufficient to give rise to the presumption that exercise of undue influence by one party over another (and, in particular, husband over wife) caused entry into the transaction, this suggestion has now been rejected. There are, therefore, potentially two presumptions, not one: a presumption that C was subject to undue influence, and a presumption that the influence caused C's entry into the transaction. Once the presumptions have been raised, the onus then shifts to D to satisfy the court either that C was free from D's influence altogether or that the transaction was not affected by any dependence by C upon D. If the parties are found to presumed to be in a relationship of undue influence and D is unable to provide a satisfactory explanation for a suspicious transaction then the court may draw the inference that C was induced to enter into the transaction by undue influence and the legal burden of proof is discharged.

In the absence of a relationship of influence falling within one of the recognised categories (discussed below), the conventional understanding of the doctrine was that C had to prove affirmatively the existence of a relationship of influence and that, upon such

proof, a presumption of undue influence was raised. The value of calling this situation a "presumption" has been doubted in the House of Lords. Where evidence is given of the history of a relationship as well as the transaction itself there is no room for any presumption from a history of undue influence that the influence persisted at the time of the transaction. A presumption is only needed in the absence of evidence. Thus, in cases involving de facto relationships of influence (outside the recognised categories) where evidence must be given of the relationship as well as the transaction itself, there is no need, or room for any presumption. Nevertheless, courts have, on a number of subsequent occasions, continued to refer to a "presumption" in cases of a de facto relationship of influence and reiterated the point that the presumption of undue influence is a matter of public policy.

(d) Proving and presuming a relationship of undue influence in non-established categories

The legal burden of proving that a relationship of undue influence existed at the time of the relevant transaction rests on the claimant. Traditionally, a relationship of undue influence could be proved in two ways. First, by adducing positive evidence of a relationship of ascendancy on the particular occasion such that C was acting under D's direction without any independent thought. Secondly, by the court "presuming" that a previous relationship of ascendency had continued until the relevant transaction. The former method of proof was described as "actual" undue influence and the latter was seen as a species of "presumed" undue influence. As we have seen, the distinction between such "actual" and "presumed" undue influence is now in doubt in cases where the relationship does not fall within an established category. But, in any event, it is clear that both situations involve proof of a relationship of influence which

goes beyond the level of influence which can be countenanced as legitimate. Further, in those cases traditionally described as involving a "presumption" of undue influence where the relationship of influence does not fall within an established category, actual proof of a history of influence is still required: there is normally no substitute in this branch of the law for a "meticulous examination of the facts" to determine whether the relationship exists.

…

(7) SPOUSES. The relationship between husband and wife or between one partner and another does not give rise to the rule that this is a relationship of influence. The reason is that although equity could see the potential for influence in sexual or family relationships:

> "upon principle, it is clear that business could not go on if in every transaction by way of gift by a wife to her husband the onus were on the husband to show that the wife had had independent advice; such a position would render married life intolerable."

The law recognises that trust and confidence is a facet of almost every relationship of this kind. Circumstances of illness or dependency, or a background of trust and confidence in relation to the family's financial affairs may give rise to a relationship of influence in a particular case. Transactions between spouses may also be avoided if affirmative proof of undue influence in the particular transaction is adduced and the jurisdiction probably extends to consent orders in matrimonial proceedings".

(Emphasis added.)

12. In the present case there is no credible evidence that undue influence was a factor in the second defendant's decision to enter into the mortgage transaction. The facts are not altogether unlike those in Etridge, to which Lord Nicholls refers as follows in paragraph [221] of his judgment:-

> "In the present case, the judge's conclusion that there had been no actual undue influence was reached after considering all the evidence. There was evidence of the relationship between Mr and Mrs Etridge. Their relationship was, as one would expect of a married couple living together with the family income being provided by the husband's business activities and with financial decisions affecting the family being taken by the husband, a relationship of trust and confidence by her in him. But there was no evidence of abuse by Mr Etridge of that relationship, or of any bullying of Mrs Etridge in order to persuade her to support his decisions. Both the transactions under attack had been entered into in part in order to provide finance for the purchase of the Old Rectory and in part to obtain financial support for Mr Etridge in his business enterprises. Both had elements disadvantageous to her and elements that were to her advantage. To draw a distinction between the two charges as to inferences of undue influence that might be drawn was, in my opinion, unreal. In my view, the judge's conclusion that there had been no undue influence was well justified on the evidence. That conclusion should have been an end of the case".

13. In fact the second defendant's case is somewhat weaker than that of Mrs Etridge in that Mrs Armstrong on her own evidence was the primary "breadwinner" and the "worrier" in her family. Given that I do not accept her portrayal of herself as a submissive farmer's wife whose independence of judgment was at all material times vulnerable to the wishes of her husband, I am not satisfied that in executing the mortgage documents she was nothing more than an instrument

of her husband's will or that he in some other way exerted undue influence over her. I refer in this context to the ruling of the Court of Appeal in Etridge [1998] 4 All ER as set out at the end of the following extract from paragraph 8-026 of Snell (albeit I do not find that there is any relationship or presumption of undue influence in the present case, the following being quoted by way of added emphasis and out of an abundance of caution):-

> "Even if a court finds that there is a relationship of undue influence (by proof or presumption) and a suspicious transaction which gives rise to a presumption that the undue influence caused entry into the transaction, the element of causation can be rebutted by proof that there was no undue influence in relation to the transaction itself. If this is proved the claim must be dismissed.
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> The question of whether a presumption of causation is rebutted is a question of fact to be determined on all the evidence. In order to rebut the presumption it is not sufficient to show that C understood what he or she was doing and intended to do it. The problem is not lack of understanding but lack of independence in relation to that transaction.
>
> > "The gift or transaction will be set aside, unless it proved to have been the spontaneous act of the donor or grantor acting in circumstances which enable him to exercise an independent will and which justify the court in holding that that the gift or transaction was the result of a free exercise of his will."
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> In the case of gifts, the presumption may be rebutted by affirmative proof that:
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> > "the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding

> that the gift was the result of a free exercise of the donor's will."

Put more shortly, D must establish that the gift was made as a result of `full, free and informed thought about it'. The presumption will not necessarily be rebutted because the initial idea came from C. Nor will it be rebutted because C was also induced to enter into the transaction as a result of a mistake for which D was not responsible. Nor will it be rebutted automatically where D is able to prove affirmatively that he was not guilty of any overt acts of wrongdoing. However, in the case of a commercial transaction it is not necessary to prove that it was voluntary in the same way as a gift since reluctance to enter into a guarantee or security:

> "is not necessarily indicative that any improper pressure is being brought to bear. If the reluctance of the proposed surety is over-borne it may be because she has yielded to the external exigencies of the situation. Far from indicating the presence of improper pressure, such reluctance may show that she knew what she was doing and did it because she thought that it was the right thing to do.'
>
> ...
>
> Legal advice is only one way to rebut the presumption. Since a presumption is just a standardised inference, circumstances other than the receipt of legal advice can show that the presumption ought not apply. So in some cases the presumption has been rebutted where C did not receive legal advice at all but the circumstances were such to rebut any inference that the relationship of

influence was a factor in the entry into the relevant transaction."

(Emphasis added.)

14. The second defendant entered into the transaction reluctantly but with her eyes open. (This is consistent with Mr Whittington's opinion that at the meeting with him in April 2009 he did not have the impression that her husband "was dragging her along with him".) For example, she conceded in cross-examination that it was "possible" that she had "prevailed upon" her husband to reduce the amount borrowed from £200,000 to £100,000 (albeit she firmly denied the affidavit evidence, untested by cross-examination, of the broker Mr Harvey Richmond that she spoke to him by telephone to that end). This concession on her part, like Mr Whittington's evidence, undermines her testimony that she did not know in advance what the meeting with Mr Whittington in April 2009 was about, stating she thought it was perhaps "something to do with a will". Moreover she also conceded in cross-examination that she would have "derived a benefit" from the mortgage transaction as it meant that her husband had "more money available" as a result and more money would therefore have come into their home. She further stated during cross-examination as a background for the borrowing that "we had weddings coming up" (in addition to her husband's existing indebtedness and the fact that he was building sheds on the farm).

As I have mentioned much earlier in this judgment, her testimony during cross-examination, as in examination-in-chief and in her affidavit evidence, as to the meeting in April 2009 with Mr Whittington is not credible generally: to the point where she denied being able to recall that this solicitor had advised the defendants not to accept the offer, stating that she found it "very hard to recall – it was quite a while ago". Not only is Mr Whittington's evidence utterly at odds with her implication that the meeting was a distant, mundane and forgettable event, but her own concession I have just mentioned that she may have prevailed upon her husband, in advance of that meeting, to reduce the level of borrowing is equally at odds with that implication. She further conceded that at

the time of the meeting she would have been "fully aware" of the first defendant's credit history – another point more consistent with Mr Whittington's evidence than her own account of the meeting with him. These weaknesses in her evidence and her husband's equally fictitious account of that meeting and his admissions that he had lied to a former counsel and this court on two different occasions and topics (the first about a cheque that had not cleared re an application for a stay of eviction, the second about concealment of mail from his wife) have implications for the other reliefs sought by the defendants.

The Defendant's claim that the mortgage was a regulated consumer credit agreement

15. The defendants claim that the loan agreement, by reason of the second defendant's evidence that she plays no part in the farming business, was neither for nor predominantly for the purposes of a business engaged in by both defendants as envisaged by the exemption provisions of section 16B of the 1974 Act. The second defendant is in my view estopped under established equitable principles of promissory estoppel from asserting that the mortgage agreement is exempt under section 16B. She signed two successive declarations of business purpose (with a gap of some four months in between) and, given my findings as to her evidence in other respects and that she was not subject to any undue influence, I am not in a position to assume or even accept that she did so with innocent and unknowing intent. I think she probably knew essentially what she was doing when she signed the business declaration and ought not to be permitted to resile from its effect, the plaintiff having relied upon the representations in the declaration to its detriment.

16. The loan and charge transaction appear in any event to be exempt from regulation under the provisions of section 16C of the 1974 Act. Section16C reads as follows:-

"**Exemption relating to investment properties**

(1) This Act does not regulate a consumer credit agreement if, at the time the agreement is entered into, any sums due under it are secured by a land mortgage on land where the condition in subsection (2) is satisfied.

(2) The condition is that less than 40 per cent of the land is used, or is intended to be used, as or in connection with a dwelling –

(a) by the debtor or a person connected with the debtor, or

(b) in the case of credit provided to trustees, by an individual who is the beneficiary of the trust or a person connected with such an individual.

(3) For the purposes of subsection (2) the area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys.

(4) For the purposes of subsection (2) a person is "connected with" the debtor or an individual who is the beneficiary of a trust if he is –

(a) that person's spouse or civil partner;

(b) a person (whether or not of the opposite sex) whose relationship with that person has the characteristics of the relationship between husband and wife; or

(c) that person's parent, brother, sister, child, grandparent or grandchild.

(5) Section 126 (enforcement of land mortgages) applies to an agreement which would but for this section be a regulated agreement.

(6) Nothing in this section affects the application of sections 140A to 140C."

17. Counsel for both defendants contend that it was not the intention of parliament for credit agreements to be exempt from regulation under the 1974 Act because they are secured by mortgages of agricultural land. They argue that to exclude loan agreements secured on such land from that protection would be controversial and outwith the intended purpose of section 16C, which section was originally intended to exempt only agreements secured on buy-to-let investment properties and that, accordingly, the court should refuse to apply what appears to me to be the plain meaning of the language of the section. While the section's headnote in referring to "investment properties" arguably generates a degree of ambiguity, I see no compelling reason why loans secured on farmland should be included in the legislative framework for regulated consumer agreements but loans secured on buy-to-let housing excluded from it. That appears to me to have been the view taken by the legislator to judge from the language of the section. Both activities, farming and letting out properties, generate business income and are sources of livelihood and the farmland and housing involved include the homes of many individuals. As I perceive all of the additional grounds of exemption introduced by or under the 2006 Act they were enacted largely to achieve a proper balance between the rights and duties of creditors and those of debtors given the two most significant aspects of that Act, namely (a) the abolition of the monetary ceiling (which had been £25,000) above which credit agreements could not be regulated, and (b) the unfair credit relationship provisions, which provisions are potentially much more onerous for creditors than the somewhat problematic provisions they replaced regarding extortionate bargains.

Allegation of an Unfair Credit Relationship

18. I turn now to the claim of the defendants that an unfair credit relationship subsists. Section 140A(1) and (2) of the 1974 Act provides as follows:-

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

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)".

(Emphasis added.)

19. The court therefore has a duty to take into account such matters as it considers relevant ("including matters relating … to the debtor") when assessing the fairness of the relationship between the creditor and the debtor. If the court finds that the credit relationship is unfair, it has sweeping powers under section 140B(1) which reads as follows:-

"(1) An order under this section in connection with a credit agreement may do one or more of the following –

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or

by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made between any persons."

Where a creditor or surety alleges that the relationship between the creditor and debtor is unfair to the debtor, the onus is on the plaintiff to satisfy the court that the credit relationship is fair in the particular case: section 140B(9).

20. Although by reason of section 140B(9) the burden of proof shifts to the lender when an unfair relationship is pleaded or claimed, the Court may refuse to exercise such a statutory discretion where the borrowers have failed to bring their claim with due probity and good faith. I refer to the judgments of His Honour Judge White in First National Securities Ltd v Bartram [1980] CCLR 5 and of Mr Justice Foster in A Ketley Ltd v Scott [1981] I.C.R. 241 (both relating to the exercise of the statutory discretion under the "exorbitant bargain" provisions

which, as I have just explained, the Consumer Credit Act 2006 replaced by sections 140A to 140C of the 1974 Act). In Bertrand His Honour Judge White concluded his judgment as follows:-

> "Weighing all the factors I have no hesitation in finding that the credit bargain was not extortionate within the meaning of s.138 of the Consumer Credit Act 1974. The challenge under that Act cannot on the facts of this case, be sustained. It follows that I have no power to reopen the transaction.
>
> I would finally add that even if I had found this particular bargain extortionate, I would not have been prepared to exercise the discretion I would then have had to reopen the credit agreement. The Act provides in s.139 that where a credit bargain is extortionate the Court `may if it thinks just' reopen the agreement. In most cases this is not likely to present a difficulty for the policy of the Act is clearly such that if a credit bargain is extortionate it will normally be just to give relief.
>
> In this case, however, not only was there excessive delay but the agreement in respect to which the relief was being sought had in the first place been founded on deceit. In not every case where there is misrepresentation will a Court refuse relief. It is a question of balancing the gravity of fault on both sides. Where, however, as here the credit was obtained by a gross and deliberate deceit it would be quite unjust as well, in my judgment, as being contrary to public policy, to grant the statutory relief.
>
> For these reasons the application is dismissed".
>
> (Emphasis added).

In Scott Foster J similarly concluded his judgment in the following terms:-

> "In my judgement the rate of interest charged was not extortionate

> within the meaning of section 138 in all the circumstances of the case. But even if I am wrong in this conclusion, the court can reopen the bargain under section 139 – and I quote - `if the court thinks just'. In this case I do not think that the court should do so, for the following reasons: (a) Mr Scott failed, on the application form, to disclose his overdraft with the bank. (b) He never disclosed the guarantee up to £5,000 which he had given to some of his companies. (c) He failed to disclose that he had given a legal charge to his bank to secure his overdraft which, if registered first, would have given it priority. (d) He failed to disclose the valuation of £24,000 given to him in August 1978. It was a professional valuation. But he put in the application form a value of £30,000. In view of these four deceitful acts I would not be prepared to reopen the transaction. In the answer to the inquiry I shall declare that the interest payable under the said legal charge should remain".

I see no reason why the same approach should not be taken where a court finds that the applicants are deliberately endeavouring to mislead it as to the facts. I also refer to my own judgment in Melbourne Mortgages plc v Berry (2013) NI Master 3 in which, in most exceptional circumstances, the court's discretion to revise the terms of an unfair mortgage contract was used notwithstanding the borrower's deceit as the lender had itself been deceitful by misrepresenting the broker's commission.

21. In the present case the plaintiff has exhibited what appear to be the full terms of the mortgage contract to its grounding affidavit. I have read numerous non-status or sub-prime mortgages. The terms of the plaintiff's mortgage are not dissimilar to those of other non-status mortgages. The plaintiff's mortgage terms do however have the very unusual feature in that they stipulate no repayment term: it is open-ended save for a typical range of acceleration provisions requiring full payment to be triggered by default (for an unreasonably brief period of 14 days), insolvency, death and so forth. I can see

how the "open-ended" nature of the loan would have rendered this mortgage a superficially attractive proposition to borrowers unable to raise credit at less expensive rates elsewhere because, like the first defendant, they had adverse credit ratings. Mr Armstrong was having trouble paying a number of lenders, including I believe those secured against the home of the defendants, at the time of the mortgage to the plaintiff. I have already found that the second defendant was all too aware of the risks of joining in the mortgage, both before and after her meeting in April 2009 with Mr Whittington, but went along with the plan reluctantly as her own economic fortunes (and ultimately the security of her home) were inextricably linked with those of her husband. In the course of her oral evidence she repeated a number of times a claim that she did not at any material time actually know that she enjoyed the benefit of a one-half share in the building site included in the mortgage. However that claim sits uneasily with the evidence of her husband, who claimed he had intended to use the house to be built on the site as their retirement home: it would be strange indeed for him not to have told his wife of such an intention. Certainly, as I have indicated, both defendants were responsible for a number of relevant deceits. Mr Armstrong admitted under cross-examination having lied to his former counsel Mr Bernard, who appeared for him in an application for a stay of eviction, about a payment he alleged he was making or had just initiated by concealing the fact that the necessary cheque had not cleared. He further admitted that that he had been lying to this court in denying that he had intercepted mail addressed to his wife including letters from the plaintiff and its solicitors about the mortgage arrears and the possession proceedings. On the other hand, Mrs Armstrong's claim not to have seen any of the many letters addressed to both defendants or her solely from the plaintiff or its solicitors seems somewhat suspicious given that her husband was a part-time lorry driver at all material times and she was a practice nurse working only 20 hours per week. As I have stated, I do not believe any of their factual evidence so far as it conflicts - which it does, on a number of important points - with the testimony of Mr Whittington.

22. Mr Whittington advised the defendants that for a number of reasons it would be very unwise for them to accept the terms of the mortgage, but they both insisted that they wished to proceed. I believe they did so and thereby knowingly accepted the interest only open-ended "term", the very high interest rates on a dual rate basis and the significant penalty for repayment precisely because they needed money quickly and hoped it could be repaid out of the sale of a building site or sites or a mortgage on less onerous terms in due course. The plaintiff is correct in claiming its method of business and its mortgage terms are plain and transparent. I do not endorse any asset-based lending, where the lender does not satisfy itself that the borrower can repay. On its website, however, the plaintiff makes very clear that such asset-based lending is exactly what it does. Prior to the Downturn many defaulting borrowers appearing before me avoided repossession or a forced sale of their homes by taking out asset-based mortgage advances and I would have often found myself using the court's statutory discretion to adjourn the proceedings to facilitate them in thereby redeeming the mortgage in default (the mortgagees in which may or may not have had due regard at inception to a perceived ability to maintain payments). The history giving rise to the present case is not dissimilar, save that neither of the parcels of land comprised in the plaintiff's charge included a dwelling – and the mortgage is therefore outside the scope of F.S.A and O.F.T. regulation - and one of the parcels has been sold already. Indeed given the very low annual profits, if any, earned by the first defendant by his farming of the agricultural land it cannot really be described as a source of livelihood save inasmuch as he was able to sell off building sites which had been part of his farm. The hopes and expectations of the defendants in taking on this mortgage commitment have been confounded by their subsequent inability to sell a site or sites at prices sufficient to redeem their mortgage debt. The terms of the mortgage are robust in a number of respects, but arguably that is mitigated somewhat by the transparency of the plaintiff's approach. Given also that both defendants knew what they were doing and were warned of the risk they were taking, I am bound to conclude that an unfair credit relationship does not subsist. This conclusion is

arrived at notwithstanding allegations by the defendants of prejudice caused by the involvement of Mr Richmond, an unlicensed mortgage broker and by the plaintiff's insistence on inclusion of the building site in its security, and allegations of oppressive conduct by letter and an intimidatory phone call on the part of the plaintiff and its English solicitors in the context of these proceedings, which allegations at their height cannot outweigh the implications of the defendants' untruthful evidence and misjudgement and the lack of merit of their claims given my findings of fact.

23. The order which I make will be to dismiss the applications of the defendants. The plaintiff will be allowed its costs of the proceedings before me save those disallowed, the latter to include those of and incidental to a hearing which had to be adjourned because of a misunderstanding on plaintiff's counsel's part as to its purpose and as a result of which I also made an order for costs in favour of the defendants. As the issue of costs relating to an unsuccessful appeal by the plaintiff was in terms reserved to me by Mr Justice Burgess who otherwise disposed of the appeal, I will hear submissions as to those.