Neutral citation No: [2013] NIMaster 3

*Judgment: approved by the Court for transmission (**s**ubject to editorial corrections)*

Delivered: *21 January 2013*
Transmitted by email: *18 February 2013*

2008/45826

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

MELBOURNE MORTGAGES LIMITED

Plaintiff;

and

GERARD BERRY

Defendant.

MASTER ELLISON

[1] This is an application by summons issued on 29 February 2012 to set aside an order dated 22 October 2008 for possession of the defendant's home ("the dwelling"), the title to which is registered in a Land Registry freehold folio. The order for possession was originally suspended upon terms as to payment, which terms were varied by an order dated 24 February 2009, and the plaintiff was on 9 March 2011 granted leave to enforce the

possession order because of the defendant's failure to comply with its payment terms. The defendant is by the same summons counterclaiming for relief under sections 140A and 140B of the Consumer Credit Act 1974 ("the Act ") on the basis that an unfair credit relationship subsists between the parties.

[2] The proceedings were issued pursuant to an "Unregistered Credit Agreement" incorporating a charge dated 12 December 2006 ("the charge") by the defendant in favour of Prestige Finance Limited ("Prestige") over the dwelling to secure the payment of the principal sum of £102,500 with interest stated to be at "a flat annual rate" of 9.90 per cent and an Annual Percentage Rate stated to be 15.4 per cent. The loan was in the sum of £100,000 to which were added the "Broker's fee" of £2,000.00 and the "Legal and documentation fee" of £500, the loan being obtained to discharge arrears of over £4,000 due on the first mortgage to Progressive Building Society (then securing approximately £15,000) and to fund the defendant's involvement in a seaweed processing and marketing project which failed before it got off the ground. By an assignment dated 15 September 2007 Prestige assigned to the plaintiff its interest in the charge for the remainder of the mortgage term of twenty years. The plaintiff is therefore the successor in title of the original lender Prestige and claims as such.

[3] The monthly instalment at inception of the charge and currently is £1,272.71, most of which comprises interest, and as at 22 May 2012 the arrears of instalments were stated to be £21,935 and the amount remaining due under the mortgage £137,969.

[4] At the hearing of this matter on 13 December 2012 Mr Keith Gibson of Counsel appeared for the plaintiff instructed by Wilson Nesbitt Solicitors and Mr Valentine of Counsel appeared for the defendant instructed by James L Russell & Sons Solicitors. I am obliged for their submissions and skeleton arguments.

[5] The defendant is relying on the following in its application:-

(a) The defendant puts the plaintiff upon strict proof that the charge deed was delivered to the lender in accordance with the principles set out in the judgment of the Chancery Judge Mr Justice Deeny in Santander v S1 and S2 [2012] NICh 16; [2012] 6 BNIL. The charge deed is signed by Wilson Nesbitt Solicitors "on behalf of" Prestige and that signature is dated 12 December 2006 but the deed is not executed by that company.

(b) The plaintiff paid to Mr Desmond McKittrick, the defendant's broker who was also his prospective business partner (together with a William McBurney in the failed seaweed project) a secret commission of £3,075 in addition to the disclosed commission of £2,000 mentioned on the face of the charge. It is argued that this, together with other allegations of mis-selling, gives rise to an unfair credit relationship and entitlement to relief under sections 140A and 140B of the Act and indeed renders the charge voidable or void. In Halsbury's Laws of England at Volume 1, at paragraph 90, it is stated as follows (so far as relevant):-

> "90. Effect of non-disclosure. In all other transactions with the principal, the agent must disclose every material fact which is or ought to be known by him, if it would be likely to operate upon the principal's judgment. If this cannot be done, the fairness of the transaction is immaterial and it is voidable …. ".

The defendant further argues that, assuming that the secret commission also amounts to a bribe, the credit agreement and charge may actually be void. In that respect Mr Valentine relies on paragraph 91 of the same volume of Halsbury's Laws where it is stated:-

> "… The principal is entitled to treat the transaction entered into as void ab initio".

(c) There is an open discretion in the case of registered land, as in the present case, to withhold or postpone the delivery of possession to the mortgagee ("the court thinks it proper to exercise the power"): Land Registration Act (Northern Ireland) 1970 Schedule 7 Part I paragraphs 5(2) and (3).

(d) Under section 140B of the Act the court can "require the creditor … to repay (in whole or in part) any sum paid by the debtor …. by virtue of the agreement …; require the creditor to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement; reduce or discharge any sum payable by the debtor; otherwise set aside (in whole or in part) any duty imposed on the debtor … by virtue of the agreement or any related agreement; alter the terms of the agreement or of any related agreement …". Moreover section 140B(9) provides that where the debtor in proceedings under sections 140A and 140B "alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary". The defendant contends that the plaintiff has not discharged this reverse burden of proof.

(e) The plaintiff engaged in asset-based irresponsible lending in contravention of proper practice and guidelines promulgated by the Office of Fair Trading and (in the context of mortgage transactions regulated under the Financial Services and Markets Act 2000, which does not apply to the charge) the Financial Services Authority. There was no proper assessment of the borrower's ability to repay the loan and in effect Prestige relied on the defendant's statement of

his income only along with the value of the dwelling. Prestige made no searches or enquiries to ascertain the affordability of the loan, did not discuss affordability with him or seek corroboration of his Statement of Income or inquire as to the defendant's other debts and outgoings generally.

[6] For its part the plaintiff claims, in response to the defendant's insistence on it proving the delivery of the deed, that as the deed had come into the plaintiff's presence "*a fortiori*, it must have been delivered, handed or presented to the plaintiff". I accept that that, together with the dated signification of acceptance on Prestige's behalf by its solicitors at the foot of the charge, should be enough to constitute delivery. The plaintiff further argues (much less soundly) that the secret commission paid to the broker did not amount to a bribe and, while the broker "may well find himself personally liable … it does not affect or impinge upon the contractual relations as between the plaintiff and defendant". The plaintiff makes a number of other points contrary to the defendant's claim that an unfair relationship subsists – not least of which are that the defendant was a relatively sophisticated person who had a profession (he is a substitute teacher and part-time farmer) and that he deceived the plaintiff by making a number of representations to the effect that his income was approximately £40,000 per annum or £3,333 per month. Indeed in the loan application form he unequivocally represented his current actual gross income to be £3,333 monthly. The defendant did not appear to me to be quite as vulnerable as he claimed. (In this connection I observe that one of Prestige's representatives recorded that he was a "very precise" individual.) Indeed he spent some four weeks deliberating and discussing the mortgage product with employees of Prestige before signing the credit agreement and charge and repeated by telephone his representation that he earned £3,333 a month at least two times in this period.

[7] I have carefully read the defendant's affidavit evidence and listened to his oral testimony. I am satisfied from the palpably unsatisfactory and ever-shifting nature of his evidence on the subject that he did indeed deceive Prestige and that his true income at the time of the representations and for the purpose of a mortgage transaction was well below half of the level he claimed to receive (albeit it was due to be enlarged momentarily by a pension lump sum of around "£25,000" – in the event £22,000 - in the year following completion of the charge). I am also satisfied that had he revealed the plain truth about his actual income from part-time farming and substitute teaching, the prospect of a mortgage advance of some £100,000 repayable by monthly instalments of over £1,200 would have greatly diminished the likelihood that Prestige would have agreed to the mortgage transaction. The plaintiff makes much of the argument that the defendant should not, by reason of an exercise of the court's discretion in his favour, be seen to profit from his deceit – a view with which in any normal circumstances I could agree without any qualification whatsoever.

[8] However, the plaintiff in its contentions seems blind not only to acceptable standards of due diligence and good practice in properly scrutinising the financial circumstances of potential borrowers on the security of their homes, but also to the fact that its predecessor in title, Prestige, itself appears on the evidence to have been guilty of a very significant deceit, namely by representing on the charge and in the course of earlier telephone conversations between the plaintiff's employees and the defendant that the broker's fee was £2,000, when the truth of the situation was that the broker's fee was £5,075 – as evidenced by a completion statement from Prestige to the broker Mr McKittrick a copy of which was exhibited to the defendant's second affidavit. On this point, the cases about insurance brokerage fees relied on at the time of hearing by Mr Valentine as Counsel for the defendant did not really address the facts of the present case, particularly as none of the authorities used by him to illustrate

the vulnerability of agreements induced by the payments of undisclosed commission involved a positive act of deceit as to the amount of commission over and above its non-disclosure. However, supplemental skeleton arguments were permitted in lieu of closing submissions and in his (which, through no fault of Counsel or his instructing solicitors, I only received when I was about to announce this judgment orally) Mr Valentine relied on a very material judgment of the Court of Appeal in England and Wales, namely Hurstanger Limited v Wilson [2007] 4 ALL ER 1118, [2007] EWCA Civ 299. I shall revert to that decision shortly.

[9] The normal position where a mortgage has been entered into because of a fraudulent representation is summarised at paragraph 37-030 of Snell's Equity (32nd Edition, 2011) where it is stated (so far as relevant):-

> "As a general rule, if a party to a mortgage transaction is induced to enter into it by reason of the misrepresentation of the other party, the innocent party is entitled to have the transaction set aside. This will generally be so whether the misrepresentation is fraudulent or innocent. Such person may in addition or in the alternative be entitled to damages."

Moreover the normally relevant principles about rescission (which is not sought in this case) are explained in the following extract from paragraph 7-053 of Snell:-

> "Similarly, a principal may also rescind a transaction entered into with a third party where his or her agent has received a bribe or secret commission from the third party in connection with the transaction. It is no defence to the person paying the bribe or secret commission to show that he or she believed the fiduciary had informed the principal, if that did not in fact occur, but the third party must be aware of the fiduciary's interest.
>
> And a principal may rescind a transaction which he has entered into with a third party, if, unknown to the principal, his fiduciary also acted for the third party in relation to the transaction (thereby acting with a conflict between duty and duty), and the third party was aware of the double employment.

> The principal is entitled to rescind if he neither knew of, nor consented to, the payment made to his fiduciary in breach of fiduciary duty. …
>
> Rescission is available even if the transaction has been executed, and even where the property has changed in value. However, rescission is unavailable where the principal has affirmed the transaction with full knowledge of the fiduciary's interest.
>
> Rescission is only possible where restitution in integrum is provided. Both sides of the transaction must be undone. Thus, for example, where a mortgage transaction involved a breach of fiduciary duty by solicitors, their clients (the mortgagors) could rescind the mortgage but only upon repayment of the loan."

[10] That said, I find myself having to adjudicate on a situation where I am satisfied on the balance of probabilities that each of the parties to the mortgage was induced by the dishonesty of the other to enter into the transaction and make substantial payments as a result. Whatever the merits of the other arguments raised in these proceedings (had one at least of the parties to the charge acted with due probity), the dominant principle which I am required to apply in this case is that fraud unravels everything. In this situation of moral and equitable equivalence in a particular case (broadly speaking, and subject to my later comments about the gravity and wider potential impact of Prestige's misconduct) it is necessary to try to arrive at a fair and appropriate degree of balance between the parties (and in so doing, given the reciprocal frauds, "re-ravel" to a certain extent).

[11] In these thankfully exceptional circumstances it would not be appropriate or fair to regard a dishonest borrower as entitled to, in effect, set aside the transaction or for the court to use its powers under section 140B to disengage the mortgage by reason of Prestige's fraudulent representation and the payment by Prestige to Mr McKittrick of £3,075 by way of a secret commission or bribe. (In this regard, I record that under cross-examination the broker Mr McKittrick appeared to develop amnesia when asked whether it was Prestige's

standard practice to pay him secret commission in this way and of this order of magnitude – moreover, unsurprisingly given the level of his remuneration for what seemed to be very little effort, this gentleman said that apart from one occasion when he used another mortgage company, it was his invariable practice to use Prestige when arranging second mortgages for his clients and he added, troublingly, that many of the brokers in this jurisdiction used Prestige for second mortgages.) Similarly, the plaintiff should not be seen to profit by the fraudulent deceit on the part of its predecessor, Prestige. Prestige appears to me to have gained the defendant's business by its misrepresentation and that of Mr McKittrick who dealt with the defendant and witnessed the defendant's execution of the charge without correcting to him the untruth that his fee was £2,000. On balance (and notwithstanding my inability to accept much of his other evidence) I believe the defendant's oral evidence that had he known the true order of magnitude of the broker's commission he would probably have looked elsewhere.

[12] In Non-Status Lending – Guidelines for Lenders and Brokers - November 1997 OFT 192 and the prefatory Note by the (then) Director General of Fair Trading Mr John Bridgeman, which apply to this mortgage of a dwelling, there is much of relevance to the conduct of Prestige and Mr McKittrick - who despite having had no formal contractual relationship with Prestige, I find to be an associate of the lender for the purposes of sections 25 (2), (2A) and (3) (fitness for licence) if not sections 140A and 140B of the Act. I read the following passages from The Director General's Note (so far as relevant):-

> "The guidelines apply to **secured lending to non-status borrowers** – those with impaired or low credit ratings and who would find it difficult generally to obtain finance from traditional sources on normal terms and conditions. The guidelines highlight some of the main practices in this market which I consider to be deceitful or oppressive, or otherwise unfair or improper, within the meaning of section 25(2)(d) of the Consumer Credit Act, and which would be

likely to lead me to take regulatory actions against those involved.

…

These (include) failure to assess ability to pay, offers of inappropriate and sometimes catastrophic loans, and failure to explain that high brokerage fees could be charged and deducted from the loan.

…

In September 1991 the Office published a report entitled *Unjust Credit Transactions.* This made a number of recommendations aimed at reforming and developing sections 137-140 of the Consumer Credit Act, including replacing the concept of an 'extortionate credit bargain' with that of 'unjust credit transaction', and adding as factors in determining whether a transaction was unjust whether it involved excessive (as opposed to grossly exorbitant) payments and the lender's care and responsibility in making the loan including the steps taken to find out and check the borrower's creditworthiness and ability to meet the full terms of the agreement. The report noted that there was particular concern about abuses affecting the secured lending market where non-status borrowers – those with poor credit-worthiness – were induced to borrow on excessive or oppressive terms against the security of their homes without regard to their ability to repay the loan. The report identified examples of practices which would point towards an unjust credit transaction. These included … limited or no enquiries about income, preoccupation with the value of the security rather than the borrower's credit-worthiness ('equity lending'); brokers' or other advance fees, often substantial, which were not fully disclosed or explained; … and increasing interest when a loan was in arrears … They also included breaches of the broker's duty to act in the best interests of the borrower; … irregular documentation including failing to give or misquoting interest rates and APRs; …

I express strong concern regarding such practices, and warned that firms risked losing their consumer credit licences if they were found to have misled borrowers or to have behaved unfairly. I also express concern about certain other practices including … the charging of high up-front fees and commissions which were not properly disclosed to the borrower; and the failure of brokers to disclose that they were tied to a lender and so could not offer best advice about a loan".

(Emphasis by underlining added.)

[13] I also refer to the following extracts from the OFT Guidelines themselves under "General Principles", "Transparency – lender to borrower", "Transparency – broker to borrower", and "Brokers and lenders" in respect of the misrepresentation and non-disclosure of full commission, the broker's duties to the borrower and as an associate of the lender in the present case, and the reference on the face of the charge to a "flat" rate of interest (which I understand to mean interest charged on the original amount advanced throughout the mortgage term without facility for reduction of the level of instalments by reason of part repayments of principal).

> **"General Principles**
>
> 6. There are a number of general principles underlying these guidelines, of which the following are the most important:
>
> There should be transparency in all dealings with potential and actual borrowers, with full and early disclosure and explanation of all contract terms and conditions and all fees and charges payable.
>
> …
>
> Brokers should disclose at the outset their status with regard to the borrower and the lender, and the extent of the service offered to the borrower, together with any brokerage fee or commission payable by the borrower or the lender.
>
> …
>
> Contract terms and conditions should be fair, and should be written in plain English to ensure as far as possible that borrowers understand the nature of the loan agreement and their rights and responsibilities under it.
>
> There should be responsible lending, with all underwriting decisions subject to a proper assessment of the borrower's ability to repay and taking full account of all relevant circumstances.
>
> …

Transparency – lender to borrower

…

13. The contract documentation should indicate clearly the APR, the amount of initial repayment, and the number and frequency of subsequent payments. Inclusion of an annual flat rate of interest should be avoided, as this may be misleading to borrowers.

…

15. Any customer booklet or leaflet should warn that the broker or other intermediary may not be in a position to give unbiased advice if they are tied to the lender or are paid a fee or commission by the lender. It should encourage the borrower to notify the lender if the broker engages in unacceptable practices or misleads the borrower in any way. It should indicate that the broker may charge the borrower a brokerage fee, as part of the agreement between them. It should make clear that any such fee is not a condition of the loan, but that the borrower may choose to pay the fee out of the proceeds of the loan, in which case the lender will (at the borrower's request) disburse the fee to the broker.

16. The contract documentation and any customer booklet or leaflet should set out clearly any other fees or charges payable by the borrower. They should explain the purpose and nature of the fee, the basis of calculation, the amount due, when and how payable, and to whom. They should also indicate if any commission or other payment is payable by the lender to the broker and should explain the purpose and nature of any such commission and the basis of calculation.

Transparency – broker to borrower

17. Brokers and other intermediaries should make clear to the borrower at the outset their status with regard to the borrower and the lender, and the extent of the service they are offering. They should disclose if they are tied in any way to a particular lender, the nature and extent of any such tie (including any right of first refusal), and the implications of this for the broker's role with regard to the borrower. This is regardless of whether there is any formal agreement between the lender and the broker. … If there is provision for the broker to receive 'volume overriders' or other commission from the lender in respect of the total volume or value of business brought to the lender over a given period, or for the

lender to provide financial or other support to the broker in return for the broker promoting the lender's products, this is liable to accentuate a conflict of interest on the part of the broker, and should be disclosed to the borrower.

18. Brokers should give advice to borrowers which is suitable and appropriate to the needs and circumstances of the borrower. Where the broker is unwilling or unable, for any reason, to consider all relevant product types and sources available on the market, and to offer the product which best suits the particular needs and circumstances of the borrower, this should be made clear to the borrower. The broker should act in the best interests of the borrower, and in accordance with the duty of reasonable care implicit in the relationship between them. …

19. Brokers should disclose, both orally and in writing at the outset, the existence of any brokerage or other fees payable by the borrower. They should explain clearly the purpose and nature of the fee, when and how payable, and to whom. They should indicate the basis on which the fee will be calculated, and the amount due if known. If the amount of the fee is not fixed at the outset, either in absolute terms or as a percentage of the loan, the broker should indicate the factors which will determine its calculation, together with the likely amount of the fee. The borrower should have as good an idea as possible of the likely liability. The borrower should be notified in writing of the actual amount of any fee before entering into the loan agreement, and preferably before the loan application is submitted to the lender.

20. Brokers should disclose, both orally and in writing at an early stage, the existence and nature of any commission or other payment payable by the lender, and of any other reward available from the lender. They should explain clearly the implications of any such commission for the broker's role with regard to the borrower. This is in order that the borrower is clear as to any potential conflict of interest on the part of the broker. The Office would encourage brokers to disclose the amount or likely amount or percentage figure of the commission, since such transparency will help to reassure borrowers that they are receiving appropriate advice from the broker. Where this is not done, the broker should disclose the factors which will determine its calculation, including whether it will be a percentage of the loan or a fixed sum, and whether it is intended to reflect the actual costs incurred by the broker in arranging the loan or is linked to the total volume or value of business brought to the lender over a given period. All such disclosures

should be made in writing before the borrower enters into the loan agreement, and preferably before the loan application is submitted to the lender.

…

Brokers and lenders

31. The actions of brokers and other intermediaries involved in marketing a lender's products can jeopardise the lender's fitness to hold a consumer credit licence, as well as that of the broker. Section 25(2) of the Consumer Credit Act makes clear that the fitness of a licensee can be brought into question by the actions of any of its employees, agents or associates (whether past or present), and section 25(3) defines 'associate' for these purposes as including a business associate. A broker may be a business associate of a lender if the broker is tied to the lender (for example, through a right of first refusal agreement), or has an ongoing relationship with the lender, or frequently does business with the lender. This is a matter of fact and degree. It is not necessary for the purposes of determining that an association exists that any formal agency relationship should exist between the lender and the broker.

32. Lenders should take all reasonable steps within their control to ensure that brokers and other intermediaries marketing their products comply with all relevant statutory requirements, and with these guidelines, and do not engage in business practices which are deceitful or oppressive or otherwise unfair or improper (whether unlawful or not). This applies particularly where the broker may be regarded as a business associate of the lender.

…."

(Emphasis added.)

[14] As regards the principles of responsible lending, "flat" interest rates and the stringent terms of the charge about part repayments of capital (on which it is, but should not be, silent) and the brevity of the period of default before the lender is stated to be entitled to possession, I read the following extracts:-

"Underwriting

> 38. Lenders should comply at all times with the principles of responsible lending. All underwriting decisions should be subject to a proper assessment of the borrower's ability to repay, taking full account of all relevant circumstances including the purpose of the loan, the borrower's income, **outgoings**, employment, age, state of health and previous credit history, and details of any other mortgages or loans or any life assurance cover or payment protection insurance. The aim should be to ensure that the borrower does not take on a commitment which they are unlikely to be able to fulfil.
>
> …
>
> 40. Lenders should take all reasonable steps to verify the accuracy of information provided on or in support of the loan application. …
>
> If a lender fails to check the borrower's ability to repay a loan secured on the borrower's property, this will be irresponsible lending.
>
> **Contract terms**
>
> …
>
> 45. The agreement should allow the borrower to make partial repayments of capital at any time in order to reduce the level of future repayments.
>
> …
>
> 47. Lenders should not seek to repossess the borrower's property except as a last resort."
>
> (Emphasis added.)

[15] It is clear from the passages I have quoted from these key OFT Guidelines that Prestige by its misconduct and that of its associate (the broker Mr McKittrick, who was supposed to be acting as agent for the borrower only) was in clear breach of the obligation not to deceive the borrower and to fully disclose the true amount of commission. Prestige also appears to be in breach of proper practice in charging "flat" interest on the mortgage and in not allowing partial repayments of capital.

[16] In Hurstanger v Wilson – the case which only came to my attention on the morning of oral judgment and which fortified me further in the firm view I had already formed - Lord Justice Tuckey on behalf of a unanimous Court of Appeal of England and Wales summarised the legal implications of deceit such as that engaged in by Prestige and Mr McKittrick in the present case (starting this passage with a reference to the scarcely relevant practice with respect to insurance brokerage fees) in paragraphs 36, 37, 38 and 39 as follows:-

> "[36] There is some doubt as to whether the agent's duty of disclosure requires him to disclose to his principal the amount of the commission he is to receive from the other party. At para 6-084 Bowstead (in Bowstead and Reynolds on Agency (18th edition 2006)) says:
>
> > 'where [the principal] leaves the agent to look to the other party for his remuneration or knows that he will receive something from the other party, he cannot object on the ground that he did not know the precise particulars of the amount paid'.
>
> …
>
> Here I think the requirement is more special. Borrowers like the defendants coming to the non-status lending market are likely to be vulnerable and unsophisticated. A statement of the amount which their broker is to receive from the lender is, I think, necessary to bring home to such borrowers the potential conflict of interest.
>
> [37] There is nothing about any of this which should come as a surprise to any lender or broker working in the non-status lending market. In November 1997 the Office of Fair Trading (OFT) issued revised guidelines which told such lenders to:
>
> > '15…warn that the broker or other intermediary may not be in a position to give unbiased advice if they are tied to the lender or are paid a fee or commission by the lender.
> >
> > 16. The contract documentation and any customer booklet or leaflet should … indicate if any commission or other payment is payable by the lender to the broker, and should explain the purpose and

> nature of any such commission and the basis of calculation
>
> …'
>
> [38] Obviously if there has been no disclosure the agent will have received a secret commission. This is a blatant breach of his fiduciary duty but additionally the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe.
>
> [39] But 'the real evil is not the payment of money, but the secrecy attending it' (Chitty LJ in the leading case Shipway v Broadwood [1899 1QB 369, [1895-9] All ER Rep Ext 1515) …"
>
> (Emphasis added.)

[17] Deceit by the borrower inducing the plaintiff to provide him with credit will normally bar a reopening of the credit agreement: see the judgments of His Honour Judge White in First National Securities v Bartram [1980] C.C.L.R. 5 and of Foster J in A Ketley Ltd v Scott [1981] I.C.R. 241. However I find it necessary in light of the reciprocal frauds in this case to revise the credit agreement's terms and those of the charge.

[18] I am driven to the conclusion that the appropriate course is to set aside the possession order and declare that an unfair credit relationship exists. I find that the relief afforded under section 140B of the Act should be, primarily, a revision of the terms of the mortgage (with effect from its inception) so that the interest on the principal of £102,500 (at the outset) should be reduced to the judgment rate of 8 per cent per annum simple interest as if a judgment for the principal (but without costs) had been pronounced on the date of the charge, 12 December 2006. I emphasise that I am not revising the interest rate with a view to facilitating payment by the defendant but am doing so to deny the plaintiff an unjust profit from Prestige's deceit. In my view Prestige appears the more culpable of the parties to the

charge, the defendant's deceit having been that of a private individual whose misrepresentation, while serious, is of a lesser order of gravity than that of a lending institution with many mortgagor borrowers on its books, many or most of whom may not know the true extent of the commission paid to their brokers, and in its control (most likely) many complicit brokers in receipt of secret commission. Had the defendant acted with due probity, or had the plaintiff's predecessor acted with due probity, I would have dealt with this matter quite differently. The defendant has paid a total of approximately £61,000 to Prestige and the plaintiff and this must of course be taken into account when computing the balance now due. The mortgage contract will require that the outstanding principal and accumulated interest at 8 per cent may be repaid (with simple interest on the reducing principal only) by monthly instalments over the remainder of the period of 20 years from 12 December 2006. The interest penalties for early redemption and the (implicit) bar on making partial payments of capital will be removed from the mortgage contract, as will the capacity of the plaintiff to charge flat or compound interest or default charges (however described, other than any legal costs which are properly incurred in the future). The period after which, in the event of default in payment, the outstanding balance would become due and the plaintiff would be entitled to apply for possession will be extended from 14 days to 70 days. I will direct the taking of an account as to the balance now due and an inquiry as to the precise method and timing of computation of instalments, their commencement date and the amount of the current monthly instalment.

[19] There will be no order as to costs save that the plaintiff's costs of and incidental to these proceedings will be disallowed and the costs of the account and inquiry reserved (albeit I am provisionally minded to deal with those costs in the same way as those of the current proceedings). The time for the filing any notice of appeal will be 28 days from the

transmission of this judgment in written form by email attachment to the solicitors for the parties.