Neutral Citation No. [2013] NICA 72

Ref: **STE9028**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered: **27/11/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

SWIFT ADVANCES PLC

Plaintiff/Respondent;

and

MICHAEL GERARD McKAY

Defendant/Appellant.

Before Morgan LCJ, Coghlin LJ and Stephens J

STEPHENS J (delivering the judgment of the court)

Introduction

[1] On 29 June 2010 Swift Advances plc, relying on a "deed of charge/mortgage" dated 31 January 2007, obtained from the Chancery Master an order for possession of a dwelling house belonging to Michael Gerard McKay. On 28 January 2013 Deeny J dismissed Mr McKay's appeal and affirmed the order of the Master. Mr McKay now appeals to this court contending that the loan agreement which gives rise to the debt, and which the mortgage secures on the property, is a regulated agreement within the terms of the Consumer Credit Act 1974 and accordingly unenforceable without the leave of the court. If it is a regulated agreement then it is common case that an order for possession should not have been made and that the case should be remitted to the trial judge to consider the issue of enforceability.

[2] Mr McKay entered into three loan agreements with Swift Advances plc. The first agreement dated 31 January 2007 was a regulated agreement. The second agreement dated 17 April 2007 purported to be a self-standing unregulated agreement rather than a modification of the first agreement. Part of the money lent under the second agreement was used to discharge the first agreement which purportedly came to an end. The third agreement dated 28

September 2007 also purported to be a self-standing agreement rather than a modification of the second agreement. Again the same procedure was followed in that part of the money lent under the third agreement was used to discharge the second agreement which purportedly came to an end. If either the second agreement or the third agreement is a self-standing agreement then the third agreement upon which Swift Advances plc relies is not a regulated agreement. However, if the second agreement is a modification of the first agreement and if the third agreement is a modification of the second agreement then by virtue of Section 82(3) of the Consumer Credit Act 1974 the third agreement is a regulated agreement.

[3] The issue for determination by the learned trial judge was whether the second and third agreements, whilst purporting to be self-standing agreements, were in fact both modifying agreements. It was the contention of Mr McKay that the reality of the second and third agreements was that the amount of money being lent was increased and that this was a variation of the amount of the loan in the first agreement. Accordingly, that the second and third agreements were modifying agreements. It was the contention of Swift Advances plc that there being a contract in existence, on each occasion a new contract was substituted for it between the same parties so that the earlier contract was discharged by the repayment of the earlier loan by Mr McKay to Swift Advances plc. That this was not a case of varying or supplementing the earlier agreements but that it was a case of novation. The learned trial judge held that the second and third agreements were self-standing agreements and that the first and second agreements had been discharged. Accordingly he held that the third agreement was not a regulated agreement.

[4] Mr Gowdy appeared on behalf of Mr McKay, the appellant, and Mr David Dunlop appeared on behalf of Swift Advances plc, the respondent. We wish to acknowledge our gratitude for the carefully prepared and constructive submissions advanced by counsel on behalf of both parties. In particular, we would wish to acknowledge the commitment of Mr Gowdy who for a substantial period during the conduct of this litigation provided professional services to Mr McKay as part of the Bar's pro bono scheme.

[5] The appeal was heard on Wednesday 6 November 2013. On 11 November 2013 the Appeals and Lists Office received a 4 page letter in the form of an affidavit which had been sent by Mr McKay personally rather than by his solicitor. We have considered the contents of that document together with the documents attached to it. We consider that it does not add to the issues in the appeal. Insofar as it raises issues outside the notice of appeal dated 7 March 2013 no application has been made to amend the notice of appeal and we consider that it is in any event too late to make any such amendment.

Factual background

[6] No oral evidence was given before Deeny J. There was no dispute between the parties in relation to a substantial body of primary facts which we take from the agreed documents.

[7] On 28 December 2006 Mr McKay completed an application form for a loan of £25,000. That application was on a form prepared by his brokers who were known as "Loans-Made-Simple." He stated that the loan was for the purpose of home improvements.

[8] In an income affordability letter dated 6 January 2007 Mr McKay stated that he was a self-employed bricklayer though in these proceedings he has averred that he was a developer.

[9] On 6 January 2007 Mr McKay signed a number of documents including a loan agreement entitled:

> "Fixed-Sum Loan Agreement Regulated by the Consumer Credit Act 1974 secured on … (his home)."

This document when it was signed by Swift Advances plc on 31 January 2007 became the first agreement. The loan was for a period of seventeen years and was to be repaid in 204 monthly repayments. The first agreement recorded the right of Mr McKay under the Consumer Credit Act 1974 to settle the agreement at any time by giving notice in writing and paying off the amount he owed under the agreement which might be reduced by a rebate. Clause M provided that:

> "You may end this agreement early by giving us notice in writing. If this agreement is settled you must pay us the outstanding balance. If you end the loan early or if the property is repossessed and we or our solicitor or agent have to deal with ending the legal charge, we will charge a reasonable fee for this service. We will include the fee in the amount you must pay to settle the agreement."

The agreement also provided for specified amounts to be payable for every £1,000 borrowed if Mr McKay settled the agreement early. The exact amounts depended on what loan period had passed when early settlement was made.

[10] Clause G of the first agreement enabled Swift Advances plc to extend the loan period. It provided that:

> "We may at our absolute discretion agree to a request by you to increase the remaining period of the loan. If

> we agree to this we will give written notice to you and will recalculate your monthly payments to ensure that the actual balance and interest is repaid within any new loan period."

[11] The first agreement did not contain any provision enabling Swift Advances plc to increase the amount of the loan.

[12] On 31 January 2007, the same day as Swift Advances plc granted the loan and signed the first agreement, Mr McKay executed a deed of charge/mortgage. It secured "the amounts owed under this deed and the agreements". It defined the agreements as meaning:

> "(a) The credit agreement or mortgage offer letter between you and us and signed by you when you signed this deed ("the Credit Agreement").
>
> (b) Any future changes to the credit agreement or mortgage offer letter.
>
> (c) Any future credit agreement or mortgage offer letters between you and us."

Accordingly, if there were any further credit agreements between Swift Advances plc and Mr McKay those would also be secured under the mortgage. The mortgage was a second charge on the property there being a first charge in favour of Mortgage Business plc.

[13] The loan amount under the first agreement was £27,895.00 from which Swift Advances plc deducted £2,500 being "your broker's fee to Loans-Made-Simple" and a £395.00 loan administration fee. The broker's fee was 10% of the sum to be received by Mr McKay. The total deductions amounted to £2,895. Swift Advances plc enclosed with its letter of 31 January 2007 to Mr McKay his "net cheque for the sum of £25,000."

[14] On 31 January 2007 Swift Advances plc also sent a letter to Mr McKay's brokers, Loans-Made-Simple, which recorded the payment to Stirling Group Limited of the brokers' fee of £2,500 and commission payable by Swift Advances plc to the brokers at 1% on the total loan facility of £27,895, an amount of £278.95.

[15] On 13 March 2007 an entry was made on Swift Advances plc's computer system recording that a letter was sent to the broker, Loans-Made-Simple:

> "giving redemption figure without charges for *further advance purposes only*" (emphasis added)

Accordingly, at this stage Mr McKay, having received the first loan, wished to increase the level of borrowing and in order to achieve that Swift Advances plc was indicating that the first agreement was to be redeemed.

[16] Mr McKay then changed brokers from Loans-Made-Simple to Funding Network Ltd and on 20 March 2007 Mr McKay applied to Swift Advances plc for a further loan. One of the reasons for the change of brokers related to the amount of fees to be charged by Loans-Made-Simple. In contrast to the fees charged by Loans-Made-Simple in relation to the first agreement the fees subsequently charged by the new broker, Funding Network Ltd, were less than 10% of the sum to be received by Mr McKay.

[17] On 27 March 2007 Swift Advances plc received a call from the new broker "regarding a (further advance) for applicant." They informed the broker that the settlement figure to redeem under the first agreement was £28,878.45. Again there was a connection between obtaining a further advance and redemption of the earlier agreement.

[18] On 10 April 2007 it was recorded on Swift Advances plc's computer system that:

> "Unable to create new (further advance) as this one is currently on system, spoke with TC he advised IT will need to delete original; aborted (further advance) in order for me to create mine."

It was also recorded that a memo was sent to the Broker:

> "to confirm the current requirements for this application as listed above. Please be advised there should be no title insurance on this as is a further advance and a Credit Agreement must be re-issued as such from our disk. Any queries please call me."

[19] On 11 April 2007 it was recorded on Swift Advances plc's computer record that:

> "Called brokers spoke with Eddie, he confirmed Lynette is not in today I advised of O/S requirements ran through our disk – how to create a (further advance). Eddie will re-issue correct C/A with no title insurance charge and request OAS letter from App."

[20] On 13 April 2007 Mr McKay signed a loan agreement entitled:

> "Unregulated Credit Agreement – Capital and Interest Repayments secured on … (his home)."

This document when it was signed by Swift Advances plc on 31 January 2007 became the second agreement. It provided that Swift Advances plc would take from the total loan amount various fees together with "any other deductions you have asked us to make." The loan was to be repaid in 300 monthly repayments. The second agreement also enabled Mr McKay to end the agreement at any time by giving notice in writing and paying Swift Advances plc. This right was contained in clause M of the second agreement. That clause was in different terms to clause M in the first agreement. It provided that:

> "1) You can end this agreement at any time by giving us notice in writing. If this agreement is settled you must make the payment as set out below.
>
> 2) The amount you must pay will consist of:
>
> a) The actual balance calculated as it will be 28 days after the date we receive your notice.
>
> b) Any fees charged.
>
> c) Additional interest calculated as a percentage of the actual balance shown at a) above (which in this case would be 4% of the balance outstanding).
>
> 3) If you end the loan early or if the property is repossessed and we or our solicitor or agent have to deal with ending the legal charge, we will charge reasonable fees for this service and add those fees to the amount you must pay to settle the loan.
>
> 4) When we receive your notice, we will write to tell you the amount you must pay to settle the loan, worked out in line with 2) and 3) above. The agreement will end if we receive that amount within 28 days from the date of our letter to you. "

[21] Clause G of the second agreement enabled Swift Advances plc to extend the loan period. It was in the same terms as clause G in the first agreement.

[22] The second agreement did not contain any provision enabling Swift Advances plc to increase the amount of the loan.

[23] On 17 April 2007 the loan was approved and signed by Swift Advances plc. It was recorded on Swift Advances plc's computer system that:

> "Further advance taken out. New agreement number 67255."

It was also recorded that:

> "This is a further advance. Old agreement number 63539."

[24] The loan amount under the second agreement was £112,150 from which Swift Advances plc deducted:

> "(a) Your broker's fee to Funding Network Loans Limited of £2,000.
>
> (b) Redemption of second mortgage to Swift Advances plc of £28,878.45; and
>
> (c) Loan administration fee of £150."

The total deductions amounted to £31,028.45. This left a balance of £81,121.55 out of the loan amount of £112,150. Swift Advances plc enclosed with their letter of 17 April 2007 to Mr McKay "your net cheque for the sum of £81,121.55". The broker's fee was less than 10% of the amount received by Mr McKay which is in contrast to the amount charged by Loans-Made-Simple.

[25] Swift Advances plc sent two further letters on 17 April 2007:

a) The first was to Barclays Bank plc which is an associate company of Swift Advances plc. There is no evidence that this letter was sent to Mr McKay or to his brokers. It is stated in bold and in capitals on that letter "NEW A/C NO 67255/MVB/M2 THIS AGREEMENT REPLACES AGREEMENT 63539/McK." It also contains the instruction "Redeem 2nd Mortgage Swift Advances plc £28,878.45."

b) The second letter was to Funding Network Loans Limited, the brokers for Mr McKay. It records a number of matters including the payment of the brokers' fee of £2,000 plus commission of 1%. The commission is a separate and additional payment by Swift Advances plc to Funding Network Loans Limited. The amount of commission is £832.72 which is

not 1% of the total loan amount of £112,150 but is closer to 1% of the net balance of £81,121.55.

[26] In processing Mr McKay's second agreement an operator, who has not been identified by Swift Advances plc, entered "C", which indicates a loan regulated by the Consumer Credit Act, on to the front screen of the computer record in response to the prompt "CCA?" which is a prompt as to whether the Consumer Credit Act applies. If the second agreement modified the first agreement, then the entry "C" in response to the prompt was correct. If the second agreement was a self-standing agreement, then the operator ought to have entered "N" which indicates an unregulated loan.

[27] On 5 September 2007 it was recorded on Swift Advances plc's computer record that:

> "Received call from Funding Network regarding a (further advance) – checked account all okay. Advised broker.

It was also recorded that:

> "the Broker has confirmed they have the applicant's authority to obtain a further advance, so okay to provide redemption figure".

Again there was a connection between obtaining a further advance and redemption of the earlier agreement.

[28] By letter dated 5 September 2007 Swift Advances plc informed Funding Network Loans Limited that the redemption figure under the second agreement was £114,729.45. It also stated that the regulation type of the existing loan is Consumer Credit Act regulated.

[29] On 7 September 2007 Mr McKay signed an application for a further loan from Swift Advances plc. His brokers remained Funding Network Ltd.

[30] On 25 September 2007 Mr McKay signed a document entitled:

> "Unregulated Credit Agreement – Capital and Interest Repayments secured on … (his home)."

This document when it was signed by Swift Advances plc on 28 September 2007 became the third agreement. It provided that Swift Advances plc would take from the total loan amount various fees together with "any other deductions you have asked us to make." The amount of credit was recorded in that agreement as £189,729.45 but added to that was the brokers' fee of £3,000, a loan

administration fee of £150 and a title indemnity fee of £30 to give a loan amount of £192,909.45. The third agreement provided that the loan was to be repaid in 300 monthly repayments. The third agreement also enabled Mr McKay to end the agreement at any time by giving notice in writing and paying Swift Advances plc. This right was contained in clause M which was in the same terms as clause M of the second agreement. Clause G of the third agreement enabled Swift Advances plc to extend the loan period and this clause was in exactly the same terms as in the first and second agreements. Further, as in the first and second agreements, the third agreement did not contain any provision enabling Swift Advances plc to increase the amount of the loan.

[31] On 27 September 2007 it was recorded on Swift Advances plc's computer record that:

> "Broker issued correctly with additional £30 title insurance but our system cannot cope with this. The net loan increased by £30 so the figures are correct. Unreg Loans are okay to proceed."

[32] The loan was approved and signed by Swift Advances plc on 28 September 2007. On that date it was recorded on Swift Advances plc's computer record that:

> "this is a further advance. Old agreement number 67255 and further advance taken out. New agreement number 75074."

It was also recorded on Swift Advances plc's computer record that:

> "Further advance taken out. New agreement number 75074."

[33] The loan amount was £192,909.45 from which Swift Advances deducted:

> "(a) Your brokers fee to Funding Network Loans Limited of £3,000;
>
> (b) Redemption of second mortgage to Swift Advances plc of £114,729.45; and
>
> (c) Loan administration fee of £150. "

The total deductions amounted to £117,879.45. This left a balance of £75,030 out of the loan amount of £192,909.45. They enclosed with their letter of 28 September 2007 to Mr McKay "your net cheque for the sum of £75,030.00."

[34] Swift Advances plc sent two further letters on 28 September 2007:

a) The first was to Barclays Bank plc which is an associate company of Swift Advances plc. There is no evidence that this letter was sent to Mr McKay or to his brokers. It is stated in bold and in capitals on that letter "NEW A/C NO 75074/PRE/M2 THIS AGREEMENT REPLACES AGREEMENT 67255/McK." It also contains the instruction "Redeem 2nd Mortgage Swift Advances plc £114,729.45."

b) The second letter (212) was to Funding Network Loans Limited, the brokers for Mr McKay. It records a number of matters including the payment of the brokers' fee of £3,000 plus commission of 1%. The commission is a separate and additional payment by Swift Advances plc to Funding Network Loans Limited. The amount of commission is £781.80 which is 1% not of the total loan amount of £192,909.45 but is closer to 1% of the net balance of £75,030.00.

[35] In processing Mr McKay's third agreement again an operator, who has not been identified by Swift Advances plc, entered "C" on to the front screen of the computer record in response to the prompt "CCA?"

[36] Mark White, the Risk Manager, employed by Swift Advances plc, states that the entry "C" made by the operator on both the occasion of the second agreement and the third agreement was in error. There is no suggestion that Mr White identified or made an enquiry of the operator or operators and accordingly his conclusion that it was in error is from his analysis of the documents and the correct inferences to be drawn from that analysis.

[37] As a result of "C" being entered on the computer system the computer generated documents and correspondence in accordance with a regulated agreement. It is common case that in correspondence Swift Advances plc referred to the second agreement and the third agreement as regulated agreements. For instance the letter dated 5 September 2007 referred to the second agreement as regulated. Also the Litigation Department by letter dated 3 June 2008 to Mr McKay gave a default notice to him under Section 87(1) Consumer Credit Act 1974. That letter referred to:

> "Agreement dated 31 January 2007 Reference Number 63539 and *Modifying* Agreement dated 17 April 2007 Reference 67255 and *Modifying* Credit Agreement dated 28 September 2007 Reference 7507."
> (emphasis added.)

The judge's conclusions

[38] The learned trial judge found that second and third agreements were self-standing agreements. The reasons, which he held were not all of equal weight and were not all necessary to reach his final conclusion, were that:

a) The second agreement clearly says it is an unregulated credit agreement.

b) The second agreement does not state it is modifying, varying or supplementing the first agreement. It does not expressly refer to the first agreement in any way.

c) The second agreement does not contain a requirement that the monies advanced be used, in part, to discharge the loan under the first agreement. The judge considered this leant against a suggestion that it varied the first agreement.

d) The financial limit under the Consumer Credit Act 1974 at the relevant time was £25,000. The loan under the second agreement was for £110,000. The judge inferred that the lender and Mr McKay's mortgage broker would be aware of the £25,000 limit and felt an accidental modification was unlikely.

e) The appellant relied on certain documents containing nomenclature helpful to his submissions but the judge stated these were not contractual documents and that subsequent misdescriptions could not alter the legal nature of the second agreement. He added that the same applied to the third agreement. The judge then referred to a document (and others supporting it) in which, on the date the second agreement was entered into, there was a clear statement that this was a new account and that it "replaces agreement 63539-McKay".

f) The judge stated that the fact the same charge was used for all the agreements was a neutral point as it included a provision that it could cover future credit agreements.

g) The wording of the first agreement expressly described itself as regulated by the Consumer Credit Act 1974. It permitted extensions of time but did not allow for supplementary loans on foot of it or a variation of the loan amount. The judge said a clear reason for this was because the credit given (£25,000) was the maximum for a regulated loan under the Consumer Credit Act 1974.

h) The judge was of the view that the amounts advanced under the loan agreements went against the argument that the later agreements were modifying agreements. He said that if the initial loan was the maximum

regulated loan of £25,000 (as in the present case) and the second agreement was for a loan of, say, a further £10,000, this would have the character of a supplement. However, he added that, in the present case, the second agreement was for a loan of four times the amount of the first loan.

[39] As can be seen from paragraph [38] (e) the judge also held that the descriptions by Swift Advances plc of the second and third agreements as regulated agreements were erroneous misdescriptions.

The appellant's submissions

[40] The appellant asserts that the learned trial judge failed properly to consider all the facts and circumstances of the case and placed too much reliance on the form of the documents created by the respondent. The appellant refers to the learned trial judge's conclusions and contends that:

(a) The judge erred in looking at the label of the agreements rather than the substance. The respondent's internal records dealing with the processing of the agreements link the second agreement to the first agreement, describing it as a "further advance".

(b) To rely on the fact that the second agreement and the third agreement do not state they are modifying, varying or supplementing the first agreement is to look at the form or label of the transactions rather than at their substance. This would provide an easy means for evasion of section 82(2)-(3) of the Consumer Credit Act 1974.

(c) The fact that the second agreement did not contain a requirement that the monies advanced by it be used in part to discharge the loan under the first agreement flies in the face of the commercial reality which was that the respondent only intended to expose itself to the total of the second agreement rather than the total of the first agreement and the second agreement. The appellant states the same point applies to the third agreement.

(d) The fact that the sums advanced exceeded the financial limit under the Consumer Credit Act 1974 is not persuasive as section 82(3) expressly recognises that the modifying agreement may not be regulated. Therefore, it is asserted that the legislation recognises an agreement outside the financial limit may take effect as a modifying agreement.

(e) The appellant says that the documents in which Swift Advances plc described the second and third agreements as regulated

agreements cannot be ignored. Also that the documents in which Swift Advances plc stated that the second agreement replaced the first agreement is not inconsistent with the second agreement being a modifying agreement as section 82(2) of Consumer Credit Act 1974 provides that a modifying agreement is treated as revoking the first regulated agreement.

(f) The appellant says that the use of the same charge is entirely inconsistent with the respondent's contention that the second agreement discharged or redeemed the first agreement and that the third agreement discharged or redeemed the second agreement. It is argued that if the second agreement wholly discharged the first agreement, the charge dated 31 January 2007 would have been redeemed.

(g) The appellant contends that to place reliance on the fact that the first agreement did not allow for supplementary loans or for variations of the loan amount is to look at the form of the agreement. It is argued that the substance of the second agreement and the third agreement shows that the appellant received a 'top up' net balance and that the purpose of the loans under the first agreement and the third agreement was the same, i.e., for home improvements. The appellant contends, therefore, that the third agreement falls squarely within the situation described in paragraph 35.62 of Goode *Consumer Credit Law and Practice* that "*a separate agreement by way of top-up of the original advance and to be used for the same purpose would seem to constitute a modifying agreement even if not provided for by the original agreement*".

The respondent's submissions

[41] The respondent contends that section 82 of the Consumer Credit Act 1974 is only applicable if the "modifying agreement" varies or supplements an earlier agreement. The respondent submits that the second agreement completely replaced the first agreement and/or the third agreement completely replaced the second agreement, therefore, section 82 is not relevant in the present case. It relies on the clear and unambiguous wording of the loan agreements. It is argued that the methodology through which each agreement was negotiated and put in place makes it clear they were "new" agreements.

Legal principles

[42] A modifying agreement is an agreement which varies or supplements an earlier agreement, section 82(2) of the Consumer Credit Act 1974. There are exceptions set out in section 82(2A) & (2B) providing that an agreement is not a

modifying agreement even though it varies or supplements an earlier agreement but those exceptions do not apply on the facts of this case.

[43] A modifying agreement in respect of a regulated agreement is itself a regulated agreement even if the modifying agreement is not otherwise a regulated agreement, section 82(3) of the Consumer Credit Act 1974. On the facts of this case the second and third agreements would not otherwise be regulated agreements as they were for amounts in excess of £25,000.

[44] There is no dispute that the first agreement was an earlier agreement within the meaning of section 82(2).

[45] The question as to whether the second and third agreements are modifying agreements is a mixed question of fact and law.

[46] Professor Roy Goode Q.C. in issue 42 updated in August 2013 of "Consumer Credit Law and Practice" distinguishes a modifying agreement from a self-standing agreement. A modifying agreement supplements or varies an earlier agreement. At paragraph 35.61 Professor Goode considers the meanings of "supplements" and "variation":

> "An agreement 'supplements' an earlier agreement if it adds to it, whilst a variation covers any change, whether by addition, modification or deletion, and thus includes a supplementary agreement. "

Professor Goode then addresses the essence of a modifying agreement:

> "The essence of a modifying agreement is that *it merely alters or adds to the earlier agreement but does not terminate or replace it*." (emphasis added)

[47] Section 82 contains the distinction between supplementing and varying an earlier agreement on the one hand and terminating, replacing and novation in respect of an earlier agreement on the other. Section 82(2) sets out the statutory effect that a modifying agreement has once it has been established that it is a modifying agreement. So once it is established that there is a modifying agreement then it "shall … be treated as (a) revoking the earlier agreement, and (b) containing provisions reproducing the combined effect of the two agreements." It can be seen that the statutory effect is that there is a deemed novation. However, first it has to be established that it is a modifying agreement as opposed to, for instance, a novation. Professor Goode addresses this at paragraph 35.63 where it is stated:

> "So although a novation cannot be a modifying agreement within CCA 1974, s 82, the effect of the

> modifying agreement is to produce a deemed novation and a notional refinancing."

[48] Professor Goode then contrasts variation with novation in paragraph 35.12:

> "A variation preserves the original agreement but amends it in one or more particulars. A novation, on the other hand, is a contract which entirely replaces the original agreement."

He illustrates in the same paragraph the difference between variation and novation in the context of rescheduling of payments in contrast to refinancing and discharging an original debt:

> "Similarly a rescheduling of the payments in relation to the same goods would normally be a variation and not a novation and this would be so even if new goods were added. *But … if there were not merely a rescheduling of payments but a refinancing, the new advance being applied in discharge of the original indebtedness, this would be a novation, not merely a variation."* (emphasis added)

[49] That contrast between variation and novation can also be discerned in paragraph 35.62 which considers the nature of a self-standing agreement. In that paragraph it is stated that:

> "… a self-standing agreement neither varies nor supplements the existing agreement but is entirely separate. It is relatively easy to distinguish such an agreement from a variation of the original agreement but harder to tell whether the new agreement is a true stand-alone or is to be treated as 'supplementing' the earlier agreement. A typical borderline case arises where a mortgage is taken to secure both a contemporaneous regulated agreement and a subsequent agreement. Is the latter to be treated as supplementing the earlier agreement so as to constitute a modifying agreement? Probably not, if the only link between the two agreements is they are secured by the same mortgage. By contrast, an agreement for the making of a further advance as provided by the original agreement supplements the original agreement and is thus a modifying agreement; *a separate agreement by way of top-up of the original advance and to be used for the same purpose would*

> *seem to constitute a modifying agreement even if not provided for by the original agreement*; and a new agreement which provides additional security for the obligations assumed under the original agreement is clearly a modifying agreement."(emphasis added)

Accordingly Professor Goode draws a distinction between a *top-up* on the one hand in paragraph 35.62 and *refinancing with the new advance being applied in discharge of the original indebtedness* on the other in paragraph 35.12. The first is a modifying agreement and the second is not but rather is novation.

[50] There is another illustration of the contrast between variation and novation provided by Professor Goode in one of the examples set out at paragraph 35.81. That example is:

> "A building society advances £30,000 for the purchase of a house secured by a mortgage on the house. The agreement and mortgage provide for further advances. Subsequently, when the outstanding balance has been brought down to £4,000, the building society makes a further advance of £10,000 for the purchase of an annuity, such advance being repayable over a shorter period and at higher interest than remains applicable in relation to the earlier advance. The modified agreement is a multipart agreement, the part providing for repayment of the advance for the house purchase is exempt and the part relating to repayment of the advance for the purchase of the annuity is regulated. *If the further advance had been made under an entirely separate agreement and was not covered by any provision for further advances in the original agreement, the later agreement would not be a modifying agreement at all."* (emphasis added)

[51] These are all useful illustrations of the line to be drawn between variation and novation. At common law the distinction depends on the intention of the parties. The aim is to give effect as far as possible to the intention of the parties. In *Samuel (Professionally known as Seal) v Wadlow* [2007] EWCA Civ 155 Toulson LJ reviewed the authorities as to the correct test to apply to distinguish novation from a supplementary or varying agreement. He referred to the variety of expressions formulating the correct test which are contained in the speeches of the House of Lords in *Morris v Baron* [1918] AC 1 and stated that:

> "41 … in *British and Benningtons Limited v NW Cachar Tea Company Limited* [1923] AC 48 Lord Sumner, at 67,

> collected the various phrases used (in *Morris v Baron*) and said that the question was whether the common intention of the parties was to abrogate, rescind, supersede or extinguish the old contract by a substitution of a completely new self-contained or self-subsisting agreement, containing as an entirety the old terms, together with and as modified by the new terms."

[52] In discerning the common intention of the parties one turns to the documents which are in evidence. However, the function of the court is to determine the real intention and in some circumstances the documents may be a "pretence" and in such circumstances the court gives effect to the reality underlying the pretence. In *Street v Mountford* [1985] AC 809 at 825. a case concerning a document which was entitled "licence agreement" as opposed to a tenancy , and which contained a declaration that the "licensee" understood that the agreement did not give her a tenancy protected under the Rent Acts, Lord Templeman said:

> "Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts."

In *A.G. Securities v Vaughan & others* [1990] 1 AC 417, another case which concerned a question as to whether a document created a licence or a tenancy in circumstances where the Rent Acts protected a tenant but not a licensee, Lord Templeman, referring to what he had said in *Street v Mountford,* stated that:

> "It would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word "pretence" for the references to "sham devices" and "artificial transactions.""

As with the Rent Acts, so also with the Consumer Credit Act 1974. The court is concerned to give effect to the purpose of the Consumer Credit Act 1974 and to be vigilant that consumers are not deprived of protections by a document that is a pretence. However, the scheme of the Consumer Credit Act 1974 is somewhat different to the Rent Acts. The Consumer Credit Act 1974 does not afford protection to debtors in relation to all loans irrespective of the amount of the loan. The applicable limit at the time was £25,000.

[53] The approach to be taken on an appeal against a decision on the facts was considered by this court in *Murray v Royal County Down Golf Club* [2005] NICA 52. In that case Kerr LCJ stated that:

> "The burden of showing that the judge was wrong in his decision as to the facts lies on the appellant and if the Court of Appeal is not satisfied that he was wrong the appeal will be dismissed – *Savage v Adam* [1895] W.N. (95) 109 (11). But the court's duty is to rehear the case and in order to do so properly it must consider the material that was before the trial judge and not shrink from overruling the judge's findings where it concludes that he was wrong – *Coghlan v Cumberland* [1898] 1 Ch 704."

[54] Findings of primary fact are to be distinguished from inferences from primary facts, see *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC at 761, 762. In that case Lord Denning stated:

> "True it is that, by the time the case reached the Court of Appeal, the primary facts were all ascertained, and the only issue was what was the proper conclusion from those facts. So the court was right to review it, but still it should give proper weight to the judge's view. Since *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, the Court of Appeal no longer takes refuge in that most unsatisfactory formula:
>
> > 'Although we should not have come to the same conclusion ourselves, we do not think we can interfere.'
>
> If the Court of Appeal would not have come to the same conclusion themselves, it does what the Court of Appeal ought to do—what it is there for—it overrules the decision. But, short of that, it should accept the conclusions of fact of the tribunal of fact."

Conclusion

[55] We consider that it was correct to infer that the descriptions in the documents by Swift Advances plc of the second and third agreements as regulated agreements were erroneous misdescriptions. There is evidence that the individual or individuals in Swift Advances plc who were negotiating the second and third agreements considered that they were unregulated agreements. Both the second and third agreements were headed unregulated credit

agreements. The letters dated 17 April 2007 and 28 September 2007 from Swift Advances plc to Barclays Bank plc stated that these were new agreements replacing earlier agreements. There is reference in the computer records to "new" and "old" agreements. There was reference to an unregistered loan in the computer records. The letters containing the reference to the second and third agreements being regulated were computer generated. In such circumstances we consider that whilst the entry of "C" in response to the prompt "CCA?" was shoddy and reflects adversely on the standards applied by Swift Advances plc, it was appropriate to infer that the descriptions were erroneous misdescriptions.

[56] We consider that the correct inference was that there was similar slipshod use of terminology by Swift Advances plc when in its letters of 17 April 2007 and 28 September 2007 it instructed Barclays Bank plc to "Redeem 2nd Mortgage … ." The inference from the communications between Swift Advances plc and Mr McKay is that on each occasion Swift Advances plc intended to instruct Barclays Bank plc to redeem the earlier loan rather than the mortgage.

[57] After the first agreement and then subsequently after the second agreement Mr McKay wished to obtain a further advance. On both occasions Swift Advances plc wished to lend further monies. The sequence is that on each occasion Mr McKay requested a further advance and, in association with that request, information was provided to him by Swift Advances plc as to the amount necessary to discharge the earlier loan. It was the intention of both parties that the earlier loan would be discharged in the event that there was a further advance and that the parties would enter into a new agreement. Mr McKay was then provided with and signed the new agreements, that is the second and then the third agreements, which were self-contained agreements both of which permitted Swift Advances plc to take from the total loan amount any deductions he had asked them to make. On entering into the second and third loan agreements Swift Advances plc then deducted the amount necessary to redeem the earlier loans and through their associated company, Barclays Bank plc, those loans were in fact discharged. The parties achieved exactly what they both intended to achieve, namely the discharge of the earlier agreement and the formation of a new self-standing agreement.

[58] We agree with the contention on behalf of the appellant that the commercial reality was that on each occasion part of the monies advanced under the second and third agreements would be used to discharge the earlier loan. However that is evidence of the common intention of the parties to abrogate, rescind, supersede or extinguish the old contract by the substitution of a completely new self-contained or self-subsisting agreement.

[59] The loan amount in the first agreement was £27,895. The loan amount in the second agreement was £112,150. This could not be described as a "top up" but rather was financing on a different scale with the new advance being applied in discharge of the original indebtedness.

[60] We also note that the terms of the second agreement differed from the first in that the term of the loan was increased from 17 years to 25 years and the second agreement contained more onerous provisions in respect of early repayments. The differences between the first and second agreements were not confined to the amount of the loan or to differences necessarily dependent on the different standard terms and conditions being used.

[61] Mr McKay called in aid the fact that the amount of commission paid by Swift Advances plc to the broker was calculated not on the total amount of the loan but on the amount by which the loan increased. This, he contended, supported his submission that the substance of the second and third agreements, and all that the parties in reality intended to do, was to increase the amount of the loan. However, just as Mr McKay was free to negotiate and enter into an agreement with his broker as to the amount of fees, so also was Swift Advances plc free to negotiate the basis upon which they paid commission. We do not consider that the calculation of commission on the amount of the further advance alters the nature of the transaction which the parties intended to, and did, enter into.

[62] We do not consider that the documents were a "pretence." The parties achieved exactly what they intended to achieve. The Consumer Credit Act 1974 was not evaded as it was perfectly legitimate to enter into an unregulated agreement where the loan amount exceeded £25,000.

[63] The parties intended to, and did, discharge the earlier agreements and entered into new self-standing agreements. That did not amount to a pretence. Accordingly, the third agreement upon which Swift Advances plc relies was an unregulated agreement.

[64] We dismiss the appeal and affirm the order of the judge.