**Neutral Citation No. : [2011] EWHC 1432 (Ch)**

**IN THE HIGH COURT OF JUSTICE** **Appeal Nos. CH/AP/397 & CH/AP/398**
**CHANCERY DIVISION**
**BIRMINGHAM DISTRICT REGISTRY**

**Before HHJ Simon Barker QC**
**(sitting as a judge of the High Court)**

**B E T W E E N:**

**(1) JOHN DOMINICK JAMES MAHON**
**(2) CLAIRE ELIZABETH MAHON**

**Appellants**

**-and-**

**FBN BANK (UK) LIMITED**

**Respondent**

**Representation :**

**The First Appellant appeared in person, other than on the morning of 4.11.10**

**Mr S Uddin, solicitor advocate of Hamstead Law Practice, appeared for the Second Appellant, and for the First Appellant on the morning of 4.11.10**

**Miss C Johnson, counsel instructed by Goodman Derick LLP, appeared for the Respondent**

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**JUDGMENT**

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I direct that pursuant to CPR PD39A para 6.1 no tape recording shall be made of this judgment and that copies of this version as handed down shall stand as authentic and be treated as the official transcript

Appeals and applications before the court

1 By these appeals, John Mahon (JM), and his wife, Claire Mahon (CM), appeal against orders made by DJ Crowley in the Walsall County Court on 7.5.10.

2 In matter number 1360 of 2009, DJ Crowley (1) dismissed JM's application to set aside a statutory demand and bankruptcy notices, (2)

refused permission to appeal, and (3) ordered JM and CM to pay the costs of JM's and CM's applications, summarily assessed in the sum of £12,496.73.

3 In matter number 1361 of 2009, DJ Crowley made the equivalent order against CM. I should make clear that £12,496.73 is the aggregate liability for costs in both applications and that JM and CM are jointly and severally liable in that amount.

4 On 4.6.10, HHJ Cooke gave JM and CM permission to appeal. The stated reason was that it is arguable that the DJ was wrong to seek to make findings of fact on contested evidence at a hearing of an application to set aside a statutory demand. On 7.7.10, HHJ Cooke made a further order staying DJ Crowley's costs orders pending determination of the appeal.

5 After a series of adjournments, the appeals were finally listed for hearing for one day on 4.11.10. At that hearing, JM and CM were represented by Mr S Uddin, a solicitor advocate, and the respondent, FBN Bank (UK) Ltd (FBN), was represented by Miss Johnson, of counsel. In the course of the hearing, a conflict of interest between JM and CM caused Mr Uddin to cease acting for JM but, with JM's consent, continue acting for CM.

6 At the outset of the hearing on 4.11.10, the parties agreed that there were in effect five matters before the court :

(1) JM's and CM's appeals against DJ Crowley's orders refusing to set aside statutory demands;
(2) JM's and CM's appeals against DJ Crowley's orders in relation to, alternatively applications to remove, bankruptcy notices;
(3) JM's and CM's applications in respect of charging orders founded on DJ Crowley's costs orders;
(4) FBN's application to strike out JM's action challenging the guarantees as having been procured by misrepresentation; and,
(5) JM's application for permission to appeal against the order of DDJ Prigg, made on 16.8.10, dismissing an application for pre-action disclosure with costs, summarily assessed in the sum of £6,920.75.

The party's representatives agreed that if the statutory demands are set aside (2), (3) and (4) follow; that if the statutory demand appeals fail, (2) and (3) follow and (4) is to be considered; and, that in either event (5) required separate consideration.

7 These matters were heard on 4.11.10, 8 - 9.11.10, 21.12.10, and 25.2.11. Over the course of the adjournments between these hearings, a substantial body of further evidence and submissions was prepared and filed for the next hearing date. I am conscious that 3 months have passed since the final hearing before me in this matter, and I apologise to the parties for this delay.

8 On 21.12.10, it was clear that there would not be time to conclude the set aside appeals, but there would be time to hear and decide the application for permission to appeal against the order of DDJ Prigg. I refused permission to appeal, ordered that payment of the summarily assessed costs be stayed in the meantime pending further order on the remaining matters, and reserved the costs of the hearing on 21.12.10 for later determination.

Background

9 JM is a residential property developer and has worked full time as such for over 25 years. Before that, JM was a senior officer in the Fire Brigade and a part time builder and residential property developer.

10 At the material times, JM conducted his property development through Criccieth Homes Ltd (C); all ongoing and planned development projects were in Kent, outside the M25 ring; JM was the sole director of C; and, CM was the sole shareholder and company secretary.

11 During the hearing on 4.11.10, I was told that no dividends have ever been declared by C; that CM is not an employee of C and has not received any benefit from C; and, that CM has taken no active part in the management or administration of C. CM accepts that her signature is on formal documents as company secretary, but she says that she would not have known what she was signing and that she relied upon her husband and C's accountants when signing any document as secretary. C went

into administration in February 2009 and has been in liquidation since February 2010.

12 CM says that she is a full time housewife, with 3 children of/near teenage years; that she works part time from home as a cake baker and decorator; and, that her earned income from this source is below the level of the income tax personal allowance.

13 The family home is in CM's sole name and subject to a mortgage. In February 2008, JM estimated its value to be in the order of £450k subject to a £80k mortgage. During the hearing before me, JM's estimate was said to be based on a valuation by Frazer Wood, estate agents. I was also told that in late 2010 the home was worth considerably less than £450K and, after taking into account a 2nd mortgage, was subject to mortgage liabilities totalling £190k.

14 Some of this background is common ground, or at least not disputed. I observe that it is not inherently improbable. However, it is not for me to make any findings of fact on this appeal, and I set it out as background provided by JM and CM.

15 In 2007, C had one substantially completed, part sold and part let residential development project (The Old Flour Mill) then being financed by a £300K facility with HSBC. In or by November 2007, C was looking to raise further finance for this and other projects. Evidently, there were discussions with HSBC, Bank of Ireland, and FBN. As a result, JM's preferred course was for C to borrow from FBN. JM's evidence is that this was because of representations made and assurances given by Tim Holt (TH), FBN's Business Development Manager. In particular, TH is said to have represented to and assured JM that FBN was experienced in and interested in establishing banking relationships with property developers and in funding residential and commercial development projects, which are to be distinguished from buy to let or traditional property lending. JM says that without that representation and assurance he would not have progressed matters with FBN on behalf of C, or sought further financing from FBN, or contemplated giving, much less have given, a personal guarantee to FBN.

16 There is documentary evidence of meetings, negotiations and arrangements between FBN and C, by JM. In addition, JM and Keith Roberts (KR), at the time an employee of C, have made statements about discussions and meetings with TH. It seems that KR's wife was company secretary of FBN at the material times and and effected the introduction.

17 There is no evidence of any meeting, discussion or communication between FBN and CM, whether on behalf of C or on her own account, at any time prior to the execution of the guarantee.

18 The first meeting between FBN and C occurred on 28.11.07 at FBN's premises and was attended by TH for FBN and JM and KR for C. TH made an attendance note. Having resisted requests and an application for production of this note, FBN introduced it on 8.11.10 as evidence of CM's active involvement in C and, therefore, in opposition to her undue influence argument. The note records that JM told FBN that C was formed "by the husband & wife team" of JM and CM; but, there is no other reference in the note to any active involvement by CM. In terms of FBN's interest, the note records FBN's expression of interest in (1) developing a business relationship with C; (2) taking over existing borrowing facilities at circa £300K; (3) possibly extending such facilities, initially restricting lending to 70% funding for land/property and development costs with interest charged at 1.75% above Bank of England base rate (BoEBR) plus lending fees of 1% at the outset and 1% at exit; (4) possibly lending the further 30% for additional security and at doubled fees; and, (5) after at least one successful development progressed through to conclusion, considering the possibility of equity type participation lending.

19 FBN's follow-up letter, dated 29.11.07, confirmed that FBN "are interested in developing a business relationship with [C]"; requested information; set out proposed security, interest, and fee terms; and, indicated a willingness to consider equity participation after at least one successful conventional deal. By letter dated 7.12.07, JM confirmed that such terms were acceptable and requested that exit fees be revisited.

20 By 12.12.07, FBN had received copies of valuations prepared by Strutt & Parker (The Old Flour Mill £850K, land at Mongeham and 'Skippers' £475K, realistically £900K with hope value, and rising to £2M with planning permission), copies of C's accounts, and further information from its accountants. TH's analysis and internal report was positive and noted that he sought a review meeting with Michael Barrett (MB), FBN's Head of Risk, with a view to making a credit proposal.

21 By letter dated 20.12.07, TH notified C that FBN would offer a loan of £500K, providing a £200K springboard, a 1% arrangement fee and a 2% interest margin (no reference being made to any base rate different from BoEBR). By a formal offer letter of the same date, the interest term was expressed differently (1% below FBN's mortgage base rate), and certain conditions precedent and special conditions, events of default, and representations and warranties by C were also set out. JM has said that he understood the "springboard" to evidence FBN's commitment to developing a relationship with C in connection with its property development projects. This letter was signed as accepted by JM for C on 24.12.07.

22 In early 2008, JM had further discussions with TH about funding for the purchase of property at 57 Coombe Valley Road, Dover, Kent (Powell Print). The request for finance was initiated by JM and responded to by an e-mail from TH, dated 4.1.08, which suggested a fee of £10K because FBN's interest rates were so low as not to yield a profit. On 30.1.08, JM and KR had another meeting with TH at which other projects (Mongeham / Skippers) as well as Powell Print were discussed. On 31.1.08, TH sent JM an e-mail stating that FBN agreed in principle to a closed bridging loan for Powell Print, subject to security, undertakings as to proceeds of sale, and – as "[FBN] will make nothing from the interest charge" – a fee "mooted" at £10K.

23 By letter dated 21.2.08, FBN made a formal offer, open until 22.3.08, of a further £600K bridging loan for a maximum of four months, with interest at 1% below FBN's mortgage base rate, a 2% arrangement fee and a £40K exit fee, all to be rolled up with the existing £500K loan, producing a total facility of £1.1M. The security requirement included a personal guarantee

from JM and CM together with a statement of assets and liabilities. This offer letter was signed and accepted on behalf of C by JM and dated 25.2.08.

24 It does not appear that any separate and independent letter was sent to CM about becoming a guarantor prior to or at the time of the offer letter.

25 Evidence as to the issue and signing of the guarantee document appears from e-mails and correspondence exhibited to a witness statement of MB. The following appears to be the chronology :

13.3.08 JM emailed TH asking whether there were any other documents for signature. TH's reply included "… I presume that … you and your good lady have signed the Guarantee";

14.3.08 FBN's solicitors, Goodman Derrick LLP (GD), e-mailed documents for signature including a letter of guarantee from JM and CM to C's solicitors, Pengelly & Rylands (P&R), with a copy to JM and to TH. In the text of the e-mail, GD said "I should emphasise that the personal guarantee must be signed in the presence of a solicitor, who should witness the signatures and provide me with written confirmation of having explained to the signatories the effect and meaning of the guarantee so that the same was clearly understood by the signatories";

14.3.08 JM e-mailed P&R stating that CM could only be at P&R's offices between 13.00 and 13.30 on the following Monday (17.3.08);

17.3.08 JM and CM attended at P&R's offices and signed the guarantee;

18.3.08 P&R wrote to GD in relation to the documentation and stated, in respect of the guarantee "I confirm that I explained the effect of the Guarantee to [JM] and [CM] when I went through the

Guarantee with them yesterday, and witnessed their execution of it".

26 In a witness statement dated 27.11.09, CM states that FBN did not contact her directly prior to her signing the guarantee and further that she did not have the opportunity to seek independent legal advice.

27 In a document incorrectly dated 2.3.09[1] and headed skeleton argument but in fact containing CM's further evidence, CM stated that (1) on 17.3.08 she was driven to C's solicitors by JM, a round-trip of 500 miles taking some eight hours; (2) CM and JM had a hurried conversation with C's solicitor, lasting possibly five minutes; and, (3) JM was in the room at all times and CM felt she had no option but to sign the document.

28 The guarantee is a 6 page 23 clause document. No reference has been made to its terms during the hearing before me, other than to point to the execution page. Both JM and CM signed in the presence of C's solicitor on 17.3.08. The rubric for the witness' signature states only that the witness must be a qualified solicitor/lawyer.

29 In early April 2008, the loan was drawn down. Very shortly thereafter, and, JM says, unknown to him at the time, TH left FBN. On or about 17.6.08, JM had a meeting at FBN about financing Mongeham/Skippers. By letter dated 24.6.08, FBN referred to the planned development as "exciting", but continued "We have looked carefully at your proposal with our credit officers and for several reasons we do not think we will be able to provide the financing required. The major reason is our lack of deep and recent experience in the type of finance and its fit with our core business. Allied to that is the current financial climate, which is not conducive to this type of development".

30 The stated "major reason" is said by JM to flatly contradict the underlying basis upon which C was induced to and, in fact, did enter into a banking relationship with FBN and he was induced to give the guarantee to FBN. At this point, I should note that there is evidence of offers from Bank of

[1] s/be 2.3.10

Ireland and JM says that FBN, by TH, effectively scuppered any possibility of his remaining a customer of HSBC (the basis for which is referred to below).

31 In or about early July 2008, C exceeded its borrowing terms and is said to have remained in default. On 2.10.08, FBN sent a letter to JM and CM making a formal demand under the guarantee claiming payment of £1,173,832.96 to include capital, interest and exit fee.

32 A year later, on or about 9.10.09, FBN served statutory demands on each of JM and CM.

Statutory demands and applications to set aside

33 Apart from the addressee details, the demands are in identical terms. The sum demanded is £1,269,419.81 comprising the following elements :

| | |
|---|---|
| Loan a/c | £500,000.00 |
| Loan interest 4 – 17.9.09 (4%) | £ 767.12 |
| Current a/c | £724,681.83 |
| Overdraft interest 2-17.9.09 (12.5%) | £ 3,970.86 |
| Exit fee | £ 40,000.00. |

34 The demands make passing reference to the security held stating that credit will be given upon realisation in respect of the principal debt, and further that no security is held for JM's and CM's personal debt pursuant to the guarantee.

35 On 23.10.09, JM and CM issued applications to have the statutory demands set aside.

36 JM's grounds were set out in a 9 page affidavit with a lengthy exhibit, and have since been supplemented by statements dated 14.4.10, 19.5.10, 7.11.10, and 19.11.10. In addition, JM has submitted a number of skeleton arguments and, for the purposes of the hearing on 4.11.10, Mr S Uddin also prepared a skeleton argument on behalf of JM and CM.

37 Drawing on all of this material, the grounds of JM's challenge to the statutory demand may be summarised as follows :

(1) Misrepresentation : FBN misrepresented the true position in relation to its banking business and its desire to develop a residential property development based banking relationship with C. JM seeks rescission of the guarantee and/or damages, which are at large, subject to a minimum claim of £14,500 (which I assume was selected by reference to the scale of issue fees);

(2) Undue Influence : (perhaps alternatively expressed as an economic tort) : FBN exerted influence or acted unlawfully by writing to HSBC in January 2008, without JM's / C's permission or knowledge, to tell HSBC that FBN was taking over C's banking, thereby terminating any possibility of a continuing relationship with or further finance from HSBC;

(3) Undue Influence : FBN exerted influence by (a) requiring a guarantee as a term of a facility to be drawn by 22.3.08, but not providing the terms of the guarantee until 14.3.08 and not providing an adequate opportunity to consider the same; and (b) not informing JM that TH was leaving / had left FBN prior to making funds available on or about 3.4.08;

(4) Failure to specify security / Valuation : at the time of the statutory demand, FBN had security which it failed to specify in the statutory demand and/or which equalled or exceeded the value of the debt;

(5) Overcharge of interest by in excess of £100,000 : the calculation of this sum is set out in JM's witness statement dated 7.11.10;

(6) Failure to collect rent in respect of tenanted flats at The Old Flour Mill : JM contends that rent should have been but was not collected as from February 2009 and credit should be given at the rate of £40K pa;

(7) Other grounds : even if none of these matters on its own is sufficient to warrant setting aside the statutory demand, taken in the round, or aggregated, and bearing in mind that the next step, if the demand is not set aside, is a bankruptcy petition, the court should set aside the demand so that these matters may be resolved in an appropriate forum, which is not insolvency proceedings.

38 CM's grounds for seeking to have the statutory demand against her set aside are :

(1) Undue Influence : exerted by JM and not counteracted by FBN;
(2) Reliance on JM's grounds.

39 There is also a substantial body of evidence served and filed on behalf of FBN, including 5 witness statements made by MB over the period 5.2.10 to 17.12.10, a witness statement by FBN's solicitor, Nicholas Cook of GD, and short statements by LPA Receivers, Graham Gould and Denise Ford.

Principles

40 The court's approach to considering an application to set aside a statutory demand is regulated by Rule 6.5 of the Insolvency Rules 1986 (IR). So far as relevant IR 6.5 provides :

(3) On the hearing of the application, the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.

(4) The court may grant the application if—

(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or

(b) the debt is disputed on grounds which appear to the court to be substantial; or

(c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the court is satisfied, on other grounds, that the demand ought to be set aside.

(5) Where the creditor holds some security in respect of his debt, and Rule 6.1(5) is complied with in respect of it but the court is satisfied that the security is under-valued in the statutory demand, the creditor may be required to amend the demand accordingly (but without prejudice to his right to present a bankruptcy petition by reference to the original demand).

(6) If the court dismisses the application, it shall make an order authorising the creditor to present a bankruptcy petition either as soon as reasonably practicable, or on or after a date specified in the order.

41 IR 6.1 concerns the form and content of a statutory demand and IR 6.1(5) provides :

> (5) If the creditor holds any security in respect of the debt, the full amount of the debt shall be specified, but—
> (a) there shall in the demand be specified the nature of the security, and the value which the creditor puts upon it as at the date of the demand, and
> (b) the amount of which payment is claimed by the demand shall be the full amount of the debt, less the amount specified as the value of the security.

42 A set aside application is not a trial, and there is no jurisdiction to make binding findings of fact or a substantive determination of issues on the merits. This is emphasised by the language of IR 6.5(4) under which the discretion is permissive and the tests do not envisage a final determination. The court is engaged in a summary process requiring consideration and some evaluation of the available evidence, but not a conclusive or final determination.

43 Although the court may give directions under IR 6.5(3), there is no automatic requirement for disclosure; and, oral evidence would be unusual, except to the extent that litigants in person may be allowed the indulgence of supplementing their written evidence by oral statements during the hearing.

44 As is implicit in IR 6.5(3), fresh evidence may be admitted up to and during the hearing. The exercise of this procedural discretion will be governed by the court's duty to comply with and further the overriding objective (the CPR being generally applicable to insolvency proceedings), and although an appeal, unconstrained by the Ladd v Marshall[2] criteria.

45 IR6.5(4) confers a discretion on the court, which is, of course, to be exercised judicially, that is in accordance with established principles of law, having regard to the circumstances of the case, and also bearing in mind the CPR. Sub-rules (a), (b) and (c) address particular grounds for the exercise of the discretion. Subparagraph (d) provides a residual

[2] [1954] 1 WLR 1489

ground, expressed openly and without qualification (save that "other grounds" obviously means that (a), (b) and (c) as individual grounds are excluded from or fall outside (d)).

46 First instance decisions to the effect that subparagraph (d) is designed to deal with procedural flaws in a demand and inappropriate for consideration of substantive matters have been criticised by the Court of Appeal, Budge v A F Budge Contractors Ltd [1997] BPIR 366, in which extensive reference was made to the Court of Appeal decision in Re a Debtor [1989] 1 WLR 271.

47 In Budge, Peter Gibson LJ, with whom Balcombe and Hutchison LJJ agreed, observed that it is "quite impossible to foresee all the circumstances which may arise and which may justify the proper application of that subparagraph. But … there is no point in setting aside a statutory demand for defects in the statutory demand which are not so substantial as to leave the debtor truly perplexed by its contents … [or … to require a creditor] to litigate his claim that he is owed money by the debtor, if it cannot be foreseen that there will be any ground on which the creditor will be denied his claim were the matter to be litigated".

48 In a sentence, and drawing on the judgment of Nicholls LJ, as he then was, in Re a Debtor [1989] 1 WLR 271, p.276, in addition to the above, the discretion under IR6.5(4)(d) is properly invoked and exercised in any case in which the court is satisfied that it would be unjust to allow the creditor to proceed to the next step, namely to present a bankruptcy petition.

49 Allegations of undue influence in the context of a guarantee to a bank given by a wife in respect of business lending to a husband or his company and where the wife raised a defence that the bank was on notice that her concurrence in the transaction had been procured by her husband's undue influence were the subject of appeals in eight cases considered by the House of Lords in 2001 and decided together under the lead name RBS v Etridge (No.2) [2001] UKHL 44.

50 Where a wife is a guarantor of lending to her husband or a business, the first task is to ascertain whether the guidance in Etridge is applicable to the lender/bank. In the ordinary course, there is no presumption of undue influence. There is a degree of sensitivity to the facts. However, the test is set at a very low level so that it should be a straightforward matter to decide. The short answer is, "[q]uite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts"[3]. To which I would add, that this is all the more so where the wife is not known to the lender/bank and is volunteered as a surety by the husband.

51 Thus, and by way of example (1) where the loan is to or for the benefit of the husband or his business, as distinct from a joint loan to or for the benefit of both the husband and the wife, the bank is "put on inquiry". That is so even where the wife is a shareholder and/or an officer (director or secretary); (2) where the wife's interest and/or involvement is substantive rather than titular, if she is an active participant in managing the company's affairs and is rewarded by remuneration for her work and/or dividends or interest for her investment, the loan may well be equated with a joint loan; but, (3) where the financial arrangements with the bank are negotiated by the husband and the wife plays no part in those negotiations but is asked to become surety for the debts of her husband or the business, the bank should be aware of the vulnerability of the wife and of the risk that her agreement might be procured by undue influence or misrepresentation on the part of the husband, and is "put on inquiry"[4].

52 The guidance given in Etridge, applicable for the future, ie for transactions as from 12.10.01, may be summarised as follows :

(1) a bank must take appropriate steps to bring to the wife's attention the risks of standing as surety;

(2) a bank will satisfy this requirement if it insists that the wife attends a private meeting with a representative of the bank, at which she is told of the extent of her liability as surety, warned of the risk she is running, and urged to take independent legal advice;

[3] Etridge Lord Nicholls #44, see also #49; and see Lord Hobhouse #110.
[4] Etridge Lord Scott #147

(3) in exceptional cases, the bank, to be safe, has to insist that the wife is separately advised;

(4) if so, the solicitor should explain the reason for his involvement (namely, to counter any later allegation of undue influence or failure to understand the transaction and its implications) and obtain the wife's agreement to his so acting for and advising her;

(5) this explanation and, if the wife so agrees, the advice given should be at a face-to-face meeting, in the absence of the husband, and in suitably non-technical language. Before giving advice, the solicitor should obtain from the bank any information needed;

(6) the solicitor need not act only for the wife, as cost and the familiarity of a family solicitor are important factors. The solicitor's legal and professional duties, assumed when accepting instructions to advise the wife, are owed to her alone;

(7) before acting, the solicitor should consider whether there is any conflict of duty or interest and what is in the best interests of the wife. The solicitor is not the bank's agent and in the ordinary case the bank is entitled to proceed on the assumption that the solicitor has done the job properly; and,

(8) the core minimum advice to be given and involvement of the solicitor is :

(a) to explain the nature of the documents and the practical consequences for the wife if she signs them (she could lose her home and she could be made bankrupt);

(b) to explain the seriousness of the risk involved (which involves (i) an explanation of the purpose, amount and principle terms of the new facility, (ii) an explanation that the bank may increase the facility or change its terms or grant a new facility without reference to her, (iii) an explanation of her liability under the guarantee, (iv) discussion of the wife's means, the value of any property being charged, and whether she or her husband have other assets with which to make repayment if the transaction guaranteed fails);

(c) to explain that the wife has a choice and that the choice is hers alone (which involves discussion of the husband's and the wife's present financial circumstances, including present indebtedness and facilities);

(d) to ascertain whether the wife wishes to negotiate with the bank (eg as to the order of call upon securities and/or a specific lower limit for her exposure) and, if so, whether she wishes to do so directly or through the solicitor; and

(e) to check whether the wife wishes to proceed and, if so, to obtain her authority to write to the bank confirm the explanation she has been given.

53 For the purposes of this appeal, which concerns a guarantee post-dating Etridge and does not follow a trial or involve findings of fact, the relevant principles of law to be extracted from Etridge and woven into the approach to be taken when considering whether to set aside a statutory demand may be summarised as follows :

(1) the question whether the transaction (guarantee) was brought about by the exercise of undue influence is a question of fact where the burden of proof at any trial will rest on the wife (CM) who claims to have been wronged;

(2) at a summary pre-trial hearing (set aside application or appeal therefrom) before disclosure and without the benefit of oral evidence, credible evidence that the wife placed trust and confidence in her husband (JM) in relation to the management of her financial affairs, coupled with a transaction which calls for explanation, will normally suffice to meet the 'arising rebuttable evidential presumption of undue influence' so that the bank may be treated as having been "put on inquiry";

(3) in reaching this point, the court should (a) have in mind that there may be inherent reasons why the transaction is or might well be for the wife's benefit eg supporting the family business, ensuring the family income, raising a loan for joint /her benefit etc, and (b) consider whether the wife does set out or assert a case of real impropriety in relation to the way in which her involvement in the transaction (signature on the guarantee) was procured which has a real prospect of success/ is genuinely triable;

(4) in so doing, the court should consider the extent to which, if at all, this presumption is contradicted or undermined by other available evidence,

(5) when considering whether the allegation of undue influence is contradicted or undermined by the other available evidence, the court should note the general proposition that the bank (FBN) is "put on inquiry" whenever a wife offers to stand surety for her husband's debts;

(6) If the bank is to be treated as "put on inquiry", the court should then consider whether there is evidence that the bank has complied with the guidance given in Etridge;

(7) if so, the court should consider whether that evidence contradicts or undermines any case of undue influence to the extent that (a) there does not appear to be a claim equalling or exceeding the debt or a substantial ground for disputing the debt (IR6.5(4)(a) or (b)) or (b) the court is not satisfied that the demand based on the transaction (guarantee) should be set aside (IR 6.5(4)(d)).

54 By 17.3.08 (the date of the guarantee in question), the Etridge benchmark, setting the core minimum practice to be followed, had been operative for some 6½ years. If "put on inquiry", or to be treated as such, the onus of justifying any departure from this practice would fall on the bank seeking to rely on the guarantee against the wife.

Consideration of and decision on CH/AP/398

55 At paragraph 21(c) of his judgment, DJ Crowley found that CM signed the guarantee "to achieve expanded funding"; for my part, I am far from clear that, even if it was appropriate to reach a conclusion as to CM's motivation for signing the guarantee, there is any evidence before the court to justify such a conclusion. Certainly, none was drawn to my attention during the lengthy hearing before me.

56 The import of paragraph 23 of DJ Crowley's judgment is that CM raised undue influence as a late afterthought and her case was extremely weak. DJ Crowley noted that GD had asked P&R to explain the guarantee and that P&R had replied that the guarantee had been explained, and further that CM said only that she was seen by P&R with JM and felt unable to raise questions. DJ Crowley had Etridge in mind (his judgment paragraph 10(b) and elsewhere), but JM and CM appeared before DJ Crowley as litigants in person and it is does not appear that he was referred to that

authority by them in any detail, or with anything approaching the care that Mr Uddin took when citing and analysing Etridge before me. DJ Crowley concluded that FBN took all steps that were reasonable and appropriate in the circumstances. He therefore concluded that CM had failed to prove undue influence and further that FBN had met the duty set out in Etridge by Lord Nicholls at paragraph 54 (his judgment paragraph 24(h) and (i)).

57 Miss Johnson submits that the court should uphold DJ Crowley's reasoning and conclusion. She submits that CM had a role in C; that FBN knew that; and that, accordingly, FBN was not "put on inquiry" and FBN's dealings in relation to the guarantee were entirely appropriate.

58 In particular, and by reference to the speech of Lord Hobhouse in Etridge at paragraph 103 ("He who alleges actual undue influence must prove it"), Miss Johnson submits that DJ Crowley exercised the discretion under IR 6.5(4) correctly and entirely in accordance with principle. In addition, Miss Johnson cautions me against speculating about what might have occurred and contends that the evidence of CM is so sparse and so weak that her case would have no realistic prospect at a trial.

59 Miss Johnson reminds me that, at the material times, CM was the sole shareholder in and company secretary of C. But, that is not enough to free FBN from " inquiry". Indeed, circumstances of this sort are expressly addressed by Lord Nicholls at paragraph 49 of Etridge. Whether a wife's shareholding represents a minority, 50% or 100% stake in a small private company is not a telling factor; what matters is the substance of any relationship between the wife and the business or company and the extent, if any, of her knowledge of and involvement in that business or company.

60 By a supplemental witness statement made by MB and introduced during the hearing on 8.11.10, MB exhibits a company search obtained on 5.11.10 (which obviously did not inform FBN's thinking or decision making in 2008) to show that CM was a director between 2.2.95 and 14.2.07, and also copies of The Old Flour Mill and Powell Print charges in favour of FBN which CM signed as company secretary, as required by FBN's standard form charge (these are dated 3.4.08, also after the execution of the guarantee).

61 At paragraph 54 of Etridge, Lord Nicholls states that a bank has only to take reasonable steps to satisfy itself that the wife has received a meaningful explanation of the proposed transaction, so that if she goes ahead, she does so with her eyes open as to its basic elements. Miss Johnson relies on this passage and submits that FBN discharged this obligation, as evidenced by the 14–18.3.08 exchange between GD and P&R.

62 However, at paragraph 56 of Etridge, Lord Nicholls makes clear that he will spell out what is expected later in his speech. This is done at paragraph 65[5].

63 On behalf of FBN, GD did not ask P&R to meet this core minimum requirement, and, by reference to P&R's response to GD, it is difficult to see how GD could reasonably have concluded that such requirements had been undertaken. No further enquiry was made of P&R, and neither FBN nor GD had any direct communication with CM. GD's e-mail to P&R of 14.3.08 and P&R's reply of 18.3.08 do appear to confirm that adherence to the Etridge core minimum requirement was neither sought nor met.

64 For example, FBN did not ask P&R to ensure that CM was seen separately, no confirmation to that effect was given, and the guarantee was one document for execution by JM and CM in the presence of the same witness. There is credible evidence of only a short meeting of insufficient duration to cover the ground required by Etridge.

65 Reviewing, but not repeating, the background and evidence referred to above in this judgment in the context of the Etridge guidance, CM raises a realistic case or a genuinely triable issue that (1) FBN was "put on inquiry" and (2) the steps taken by FBN in securing CM's signature on a joint guarantee with her husband fell short of those identified as the core minimum requirement in Etridge.

66 It is unnecessary, and would be inappropriate, to describe CM's case any more strongly. Suffice to say, it appears to me that the debt the subject of

[5] Summarised at paragraph 52(8) above of this judgment

the statutory demand addressed to CM is disputed on substantial grounds, namely that acceptance of liability under the guarantee was procured by the undue influence of JM in circumstances which - if established at a trial - would render the debt unenforceable. Further, this is a case where the only way in which the discretion under IR 6.5(4) may be exercised judicially is by setting aside the demand. Accordingly, by rejecting the application to set aside the demand, DJ Crowley erred in law and failed to exercise the discretion judicially.

67 I therefore reject Miss Johnson's submissions, allow CM's appeal against DJ Crowley's order, and set aside the statutory demand against her.

68 In consequence, CM's appeal in relation to, or application to remove, any bankruptcy notice affecting her and her application to set aside an interim charging order adverse to her interests also succeed. CM's appeal against DJ Crowley's costs order against her is also allowed.

69 In addition to this undue influence point, CM raises the same points and issues as JM and relies on the matters he advances. These points and issues are considered in the context of JM's appeal.

Decision on CH/AP/397

70 This appeal is more complex. Although it may be broken down into a number of different constituent parts or elements, with each being allocated to one or more subparagraphs of IR 6.5(4), these parts or elements may also be drawn together for consideration on the basis that in aggregate they constitute other grounds satisfying the court that it should exercise the discretion to set aside the statutory demand against JM. First, however, the matters raised by JM should be considered in turn.

71 By reference to the language of IR 6.5(4), the questions for a court are :

(1) does JM raise a dispute as to the debt which appears to fall within any of subparagraphs (a), (b) or (c), and /or, by reference to (d), does JM raise other grounds which satisfy the court that the demand ought to be set aside?
(2) If so, should the court exercise the discretion to set aside?

On an appeal, the additional question may arise that, even if the judge erred in law, should his exercise of the discretion conferred by IR 6.5(4) be overturned as falling outside the permitted exercise of the discretion in the particular circumstances?

72 DJ Crowley analysed JM's case (his judgment paragraph 9) and found that :

(1) In relation to IR 6.5(4)(a), apparent claim exceeding the debt : JM (and CM) had, on the day of the hearing, prepared or issued a claim challenging the enforceability or "seeking the cancellation" of the guarantee and claiming damages. However, no particulars of claim were available, and JM was therefore unable to satisfy the court as to the nature of the claim and its legal basis (his judgment paragraph 22). On the basis of findings made by the court, this claim was rejected as being highly speculative and questionable, not raising a genuinely triable issue or a case with a real prospect of success (his judgment paragraph 24(f)), and therefore not having the appearance of a claim equalling or exceeding the amount of the debt (his judgment paragraph 24(g));

(2) In relation to IR 6.5(4)(b), apparent dispute on substantial grounds : JM had failed to prove that there was a representation, as opposed to "mere extravagant enticement" or a commitment to an ongoing financial package; the actual terms were as documented and JM signed the offer letters of 20.12.07 and 21.2.08 (his judgment paragraph 20 (a) and (b)); although FBN accepted that residential development projects fall outside its usual lending remit, express statements to the contrary were "puff" or "an exaggeration on [TH's] part to secure business", but the terms of the contractual arrangements were as set out in writing and accepted by JM (his judgment paragraph 21). As to undue Influence : pressure was not exerted by FBN to secure signatures on the guarantee; the guarantee was a normal precaution required to address the risk to FBN of increased financial exposure; there was no threat or attempt to dynamically change the working relationship (his judgment paragraph 20(c)). In other words, these circumstances did not give rise to a claim in misrepresentation or undue influence having any real prospect of success;

(3) In relation to IR 6.5(4)(c), apparent security and IR 6.1(5) not complied with or value of debt equalled/exceeded : the demand failed to comply with IR 6.1(5), but JM had failed to establish that he suffered any prejudice (his judgment paragraph 24(c) and (d)); in any event, such failure had not prejudiced JM; JM had failed to discharge the burden which fell on him to prove that the value of the security exceeded the full value of the debt (his judgment paragraph 19); moreover, the debt in fact exceeded the value of the security (his judgment paragraph 24(e));

(4) IR 6.5(4)(d) Satisfactory other grounds : no other basis is put forward (his judgment paragraph 24(j)).

73 For the purposes of considering this appeal, and as DJ Crowely recognised in his judgment, JM's arguments formulated under the headings misrepresentation and undue influence, overlap and may be expressed under either or both of IR 6.5(4)(a) and (b).

74 It appears from DJ Crowley's judgment that he reached a conclusion that (1) TH may well have made the statements attributed to him by JM; (2) having regard to FBN's own evidence (MB's statement), those statements may have been inaccurate; (3) they may also have been "extravagant enticement of new business"; but, (4) they remained "puff", because the terms agreed were as set out in the offer letters signed by JM. Implicit in this approach are conclusions that (1) all prior statements on behalf of FBN were of no legal effect, and (2) the offer letters accurately contained all terms of the banking arrangement.

75 To this, Miss Johnson adds : FBN at all times held to its side of the arrangements and was entitled to act as it did; moreover, the application that FBN rejected was for equity funding and the discussions for such funding were, at all times, on the basis that, first of all, at least one conventional deal had to be seen through. In addition, Miss Johnson submits that even if there had been a misrepresentation, it did not cause any loss, because C's insolvency was caused by the failure to complete the sale of Powell print.

76 In my judgment, a "mere extravagant enticement of new business" to the effect that a bank is experienced in residential property development and

wishes to develop a banking relationship made orally and confirmed in writing to a prospective customer which conducts such business as its principal activity is arguably more than "puff", and is arguably (has the appearance of) a representation having legal effect.

77 Where the bank says later to the (by then) customer who claims to have transferred his banking relationship in reliance thereon that (1) such relationships are not part of its core business and (2) in so far as property investment is part of its business at all, that is confined to a specific and different geographical area for specific categories of customers, it is realistically arguable that the representation was an actionable misrepresentation. It may also be arguable that such a representation became an implied term of any banker/customer contract or arrangement which has been broken.

78 This may be all the more so if, as JM alleges occurred here, the bank also acts in a way which might inhibit or undermine an ongoing banking arrangement with another bank.

79 In this case, there is credible evidence that FBN, by TH, represented that it was experienced and interested in banking relationships with residential property developers operating in the geographical area identified by JM (Kent) in the course of a meeting to encourage JM to transfer C's banking relationship to FBN, and that this was confirmed in writing. It is also arguable that that was not the true position at the time, and that the true position was and is as appears from FBN's letter of 24.6.08. This apparent discrepancy is emphasised by FBN's chief executive's report to the 7th AGM (also in evidence) in which he says "Our core business remains that of Trade Finance", "We have also developed our private banking business which primarily provides mortgages for 'buy to let' property", and ""UK Property – We provide finance for property investment within the M25 area of London meeting the needs of African and UK property investors".

80 JM submits that this is sufficient to found a claim in negligent misrepresentation, or possibly breach of an implied term of a contract, having a real prospect of success and which a court cannot determine at a set aside hearing, is not suitable for determination at the hearing of a

bankruptcy petition, and should properly be determined at a trial, as to which proceedings have been issued, or, if the parties agree, some other appropriate alternative dispute resolution process. The key point made by JM is that the invocation of insolvency processes is not appropriate.

81 By reference to the material to which I have been referred, JM's contention that FBN induced C to enter into banking arrangements and JM to become a guarantor by an actionable misrepresentation appears to me to be realistically arguable and genuinely triable.

82 Miss Johnson submits that even if that is so (which is emphatically denied by FBN), there are insuperable causation difficulties. As already noted, Miss Johnson submits that any loss in question is that of C and is confined to Powell Print. However, I do not accept that Powell Print necessarily, or by any means, encapsulates or represents the loss or damage caused to JM as a result of such arguable misrepresentation.

83 Miss Johnson points out that neither the administrator nor the liquidator of C have advanced, much less initiated, any such claim. That is not a telling point because it ignores FBN's position as a creditor during the C's administration and the fact that a liquidator would require significant funds or backing to investigate and advance such a claim.

84 However, reviewing the claim against FBN in the light of the background stated above and the evidence to which I have been referred, I cannot say that the value of JM's claim appears to equal or exceed the amount specified in the demand. That is not to say that it appears to be either nominal or insubstantial.

85 Taking IR 6.5(4)(b) as the viewing lens, misrepresentation remains for consideration supplemented by undue influence issue. In a nutshell, the alleged undue influence is that JM was afforded insufficient time to consider the terms offered by FBN. However, it should be borne in mind that JM signed the facility offer letter on 25.2.08, some 3 weeks before receiving the guarantee and he made no contemporaneous request for an extension of time to consider the terms and implications of the guarantee when it was received.

86 However, it does appear to me that the misrepresentation issue may properly be said to raise a dispute as to liability under the guarantee which appears to be substantial.

87 In addition, there appear to be genuine grounds for challenging (1) the interest calculation, a significant part of which is rolled into the sum identified as Current a/c in the demand, and (2) the failure to collect or take into account the right to collect rent in respect of let flats at The Old Flour Mill.

88 As to interest, in submissions JM made a number of points about rates and amounts of interest which are arguable in the sense that they give rise to a genuinely triable issue. JM puts the interest overcharge at some £100K; this seems to me to be too high, but there is strong evidence of misapplication of rates and of overcharge. The essence of JM's argument is that interest was always discussed by reference to BoEBR, but has been charged at a variety of FBN's own rates with no or no adequate explanation as to the method of calculation or variation from BoEBR. However, without more, the interest dispute would not justify setting aside the statutory demands.

89 JM also complains of a failure to collect rent. JM maintains that there are 6 let flats at The Old Mill which ought to generate income of £40K pa but that as from February 2009 no rents have been collected or, if rent has been collected, no credit has been allowed to C or against any guarantee liability. Whether this is a complaint that may properly be laid at FBN's door is far from clear. Again, without more, the rent issue would not justify setting aside the statutory demands.

90 IR 6.5(4)(c) Apparent Security and IR 6.1(5) / Valuation : I agree with DJ Crowley that FBN's admitted failure to specify the security held by C does not appear to have caused JM prejudice. JM was fully aware of the security provided to FBN and its likely value.

91 As to valuation, JM acknowledges that the Strutt & Parker valuations originally provided to FBN in January 2008 are not a reflection of current

market values either at the time of the statutory demand or at the time of the hearing.

92 In his evidence dated 19.11.10, JM provides a Strutt & Parker update for The Old Flour Mill of £680K to which JM says it is appropriate to add the capitalised value of ground rents, which he says may fairly be taken at £55k (supported as a reserve price advised by Clive Emson auctioneers), and the riverbank the subject of a separate registered title which JM values at a minimum of £35K and potentially up to £500K. In addition, there is the value of Powell Print, which JM contends should be taken at the contract price for the sale to Alan Dowling, namely £683K. However, there is cogent evidence that this contract was subject to unfulfilled conditions precedent and unenforceable; I make no finding in relation to that contention, but I observe that it is not without considerable force. The value placed on Powell Print by the LPA Receiver is £450K, albeit this value is not accepted by JM.

93 The range of values provided by JM's valuations is upwards of £1.4M. However, it is unrealistic to regard JM's value of Powell Print as more than speculative for present purposes. Taking account of the LPA receiver's value, the aggregate value is upwards of £1.2M.

94 Alternative valuation evidence has been introduced for FBN indicating a materially lower overall value. Reports have been commissioned by FBN from Caxtons, these value The Old Flour Mill Timber Section at £450K, the riverbank at £2K and Powell Print at £250K, with the ground rents being assumed correct at £55K. This produces an overall valuation of £757K, which Miss Johnson urges me to accept, for a number of reasons including the fact that no properties have been sold. MB observes in his witness statement dated 17.12.10, that an offer of £300k had been received for Powell Print. JM counters FBN's valuation evidence by pointing to a lack of evidence as to efforts made to market or achieve a sale or engage local agents.

95 At this stage no findings are to be made. However, it does appear that there is credible valuation evidence to support a realistic aggregate value of the security in excess of £1M and in the order of £1.2M.

96 As to this, Miss Johnson submits, that does not equal or exceed the amount of the demand and therefore fails to meet the IR 6.5(4)(c) requirements. This is strictly correct. However, the debt claimed in the demand appears to have been miscalculated by overcharge of interest and there also appears to be a realistic basis for claiming that an allowance should be made for uncollected rent.

97 By reference to IR 6.5(4)(d), the question arises whether there are other grounds sufficient to satisfy the court that the demand ought to be set aside? In my judgment, the court is not precluded from approaching this ground this by considering the various issues and grounds advanced under subparagraphs (a), (b) and (c) in aggregate and together with any other grounds.

98 It does appear to me that as to subparagraph (a) there is a seriously arguable claim of a value which is more than merely nominal value (ie materially more than £14.5K); that as to subparagraph (b) the debt is disputed on apparently substantial grounds, and that there are substantial issues as to the calculation of interest and other allowance to be made; that as to subparagraph (c) there is security of substantial value. In addition, the demand against CM has been set aside and in order to progress matters further against CM, FBN will have to instigate proceedings or agree some other dispute resolution process with her.

99 It seems to me that, taken as a whole, JM has raised grounds sufficient to satisfy the court that the demand against him ought to be set aside. In reaching this conclusion, I would add that I bear in mind the passage from the judgment of the Court of Appeal in Budge referred to above and that I am satisfied that insolvency proceedings are not the appropriate means by which to resolve the various matters raised by JM and CM.

100 DJ Crowley records in his judgment that no argument was advanced before him under IR 6.5(4)(d) and so he did not have to consider the exercise of a discretion on this basis.

101 That being so, it falls to me on this appeal to consider that exercise afresh. Having regard to the requirement to exercise any discretion judicially, I consider that the just determination of this application requires

me to exercise the discretion by setting aside the statutory demand against JM. I so to exercise the discretion with the equivalent result as in CM's appeal.

102 I invite submissions on the precise form of the order to be made, and await any application for costs.