IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
SITTING AT BOURNEMOUTH & POOLE DISTRICT REGISTRY

Claim No. 2BS30501

Bristol District Registry
Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Friday, 8th February 2013

Before:

HIS HONOUR JUDGE McCAHILL QC

Between:

NATIONWIDE BUILDING SOCIETY

Claimant

-v-

DUDSBURY DEVELOPMENTS

1st Defendant

MR. RAYMOND JOHN WATTON

2nd Defendant

MRS. LESLEY JAYNE WATTON

3rd Defendant

Counsel for the Claimant:

MR. BRAD POMFRET
Instructed by Kuit Steinart Levy LLP

Counsel for the 2nd Defendant:

MR. GAVIN HAMILTON
Instructed by Lawrensons Solicitors

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

1. THE JUDGE: There are before the court today two applications. The first in time is an application by the claimant for summary judgment against the defendants in relation to monetary advances made by the claimant largely to Mr Watton, the second defendant or his company, Dudsbury Developments Limited, the first defendant. That application for summary judgment was largely triggered by the home made defence, which Mr Watton himself had prepared without the benefit of legal advice. The application for summary judgment once made triggered an application by the defendants, that is the first and second defendants, for permission to amend their defence in the form which counsel has settled. In turn, the claimants have resisted the application to amend arguing that taking those amendments even at their highest they do not provide any real prospect of success individually or cumulatively for any of these defendants.

2. There have been a number of hearings before District Judges, this matter having started its life in Manchester before it was transferred to Bristol and on one of those hearings a consent order was made against the third defendant, Lesley Jayne Watton, who, as her name suggests, was once married to the second defendant, Raymond John Watton, in the sum of about £850,000. Mrs Watton, if I may use that name, is present in court but has taken no part in these proceedings although she has been invited to say anything that she wanted to say.

3. There have been very acrimonious divorce proceedings, I am told, between Mr and Mrs Watton who, I infer, no longer wishes to be addressed by the surname Watton but unfortunately I do not know any other name by which to refer to her. In the course of those proceedings, as matrimonial proceedings, a freezing injunction, which I am told still exists, has been obtained by Mrs Watton against her former husband and in the last week or so lengthy proceedings have taken place in London relating to the matrimonial finance ancillary relief proceedings consequential upon their divorce. Those proceedings were ones were Mr Watton, I am told, represented himself and he has prayed in aid his involvement with the need to prepare for those proceedings as justifying or explaining why he has not got to as much detail as perhaps he would like to have done in responding to the claimants' evidence in support of their application for summary judgment. Having said that, a detailed witness statement had been put in by Mr Watton, I think in July of this year, a few days before the day on which an application for summary judgment was to be heard. It was then adjourned to enable the amended defence to be formulated with the assistance of solicitors and counsel who have been involved and in December 2012, Mr Hagen(?) on behalf of the claimants filed a detailed witness statement answering or purporting to answer the allegations made against the claimants by Mr Watton in his witness statement, dated 13th July 2012. At 1.29 am this morning, there was sent by those representing Mr Watton to the court a second witness statement by Mr Watton, which I have read, which purported to answer Mr Hagen's observations in his witness statement, dated 21st December 2012. The reason for the delay has been given as Mr Watton's need to concern himself with those divorce proceedings which have only recently concluded.

4. There was some uncertainty, having regard to the two different applications and the potential effect of the application to amend on whether the application for summary judgment would be pursued, as to whether or not today's case would be concerned

solely with the defendants' application to amend their defence and counterclaim. The skeleton arguments on behalf of the claimants implied that the court should go ahead and deal with the summary judgment application in the event of the defendants' application to amend being unsuccessful whereas Mr Hamilton's skeleton argument rather implied that that application for summary judgment was not before me today. Having had the opportunity yesterday to have time to read the papers in this case, that uncertainty between the parties became readily apparent to me and I caused a message to be sent out to both sides to say that I would be dealing today with both applications, since such an approach is entirely a proportionate one and consistent with the overriding objective. Indeed, I was not even meant to be the judge who was trying the case today, it was meant to be before District Judge Britton(?) who was unavailable and hence it is that I have come in to deal with the matter later in the day, but having had the chance to prepare for it yesterday and hear the most helpful and able arguments from counsel this morning, which reinforced their equally able and helpful arguments in their written skeleton arguments, both of which I have read.

5. So I confirm that I have read Mr Watton's most recent witness statement and during the course of the proceedings today, I have had handed to me what became pages 74A and 74B of the application bundle, namely a letter from Peter McDonna(?) who was Mr Watton's mortgage broker and Mr James Clayson(?), he worked as a consultant for Mr Watton and his company and both those letters are concerned with what I will call the economic duress argument in relation to one of the properties, the framework for which I shall turn to shortly. That explains the procedural matters and why we are here today dealing with these two applications.

6. The factual background to the case is painfully familiar. It represents Mr Watton who at one stage had created an empire of property with a gross value at least of, I am told, £16m but who has fallen prey to the triple problems created by the credit crunch in which we currently live, those triple problems being an inability to sell property, an inability to borrow money as easily as before and for the combination of those two and enhance disability over meeting interest repayment obligations and other trading expenses as capital was not only diminishing in value but was locked up and often secured to banks.

7. The case concerns what I may call four separate developments, which for sake of simplicity, we have referred to as Starwood(?), Sandycotes(?), Oakdale(?) and Church Road. Starwood was, in fact, purchased by the first defendant, Dudsbury, a company controlled by Mr Watton. The financial facilities in relation to the other three had been provided to Mr Watton personally. The confounding factor is that Mr and Mrs Watton had given personal guarantees to the claimant in relation to the financial facilities afforded by the claimant to the first defendant, Dudsbury Developments Limited, and that judgment entered against Mrs Watton was a compromise in relation to her liability under the guarantee for monies loaned to Dudsbury in relation to the development at Starwood.

8. The claimant was not the original financier of Mr Watton and his company, in relation to these four properties. The Bank of Ireland had previously provided the finances to Mr Dudsbury and to Mr Watton, in relation to each of these four properties and it appeared that it was expedient for Mr Watton and Dudsbury to refinance those transactions and it has been suggested to take advantage of the attractive facilities which were being offered by Salt, the predecessor and now part of Nationwide

Building Society. Mr McDonna of John Charcol, the well-known mortgage brokers, acted for Mr Watton and Dudsbury in its quest for new or better facilities and that is how it came about that – I will call them 'the claimant' – came to be the providers of finance to Mr Watton and his company in substitution for the Bank of Ireland. The original arrangement was that the claimant would take over the provision of finance to Dudsbury Developments Limited in relation to Starwood, guaranteed by the personal guarantees of Mr and Mrs Watton and also in relation to the personal advance to Mr Watton for Sandycotes and Oakdale and those financial arrangements were made in 2007. Later in 2007, around about November, the one financial relationship which did remain between Mr Watton and the Bank of Ireland, namely the development at Church Road, was coming up for review. This review was triggered by the fact that the term of the loan was coming to an end and the implication seems to be that the Bank of Ireland wanted out of its commercial arrangement with Mr Watton. However, it was not only a desire, for whatever reason, to change the provider of finance which brought Church Road and the potential of an additional financial package to the claimant, Mr Watton had had a statutory demand served on him by the Revenue for a sum around £300,000, £300,000 or £350,000 and he plainly was unable to meet that without further financial facilities. The Church Road transaction – and I remind everybody that up until November 2007, this was being dealt with by the Bank of Ireland – was not only a loan granted by the Bank of Ireland for the development of Church Road secured on Church Road, but the Bank of Ireland had also as part of the Church Road facility, taken security over what has been referred to as the 'Old Phillips Site', otherwise referred to as 'Land at Axminster'. That was owned by Mr Watton in his personal capacity and had the benefit of some planning permission which he had hoped either to improve upon or to exploit in better times. So it is important to emphasise that the Bank of Ireland held security not only over Church Road but also the land at Axminster in relation to the facility and the only one which it was still holding in favour of Mr Watton for the Church Road development.

9. It is necessary at this stage to go back and look at that Church Road facility because although it is the last one in time it, in a sense, represents one of the more factually potential complex arguments in the case because it is Mr Watton's contention that although the land at Axminster had been given as security to the Bank of Ireland on the Bank of Ireland's facility for Church Road, it had not been Mr Watton's intention to provide the land at Axminster as security to the claimant for the replacement facility which he was seeking in relation to Church Road. It is Mr Watton's case and to a certain extent supported by the letters from Mr McDonna and Mr James Clayson to which I have referred, that on 28th November 2007, there was a fundamental change of tack by the claimant such that whereas previously they had not asked for security over the land at Axminster, they were now insisting upon doing so. The suggestion being that they had delayed so long in making that requirement that against the pressure of the Revenue demand and the need to generate more money, Mr Watton had lost the opportunity which previously he had to go to the Woolwich Building Society to obtain funds, which had been offered to him earlier in that month and was constrained to give into the claimant's demand to have the land at Axminster secured in favour of the Nationwide as part of taking over the Church Road facility. In essence, it is Mr Watton's position that they had him over a barrel, it was too late to go anywhere else, he had no alternative beyond facing ruin or agreeing to giving them a security which had never previously, as far as he was concerned, been open and available to the claimant. The consequence of that for him, it has been argued, is that he has had therefore taken away from him and encumbered in favour of the bank, an asset which

should have been unencumbered once the Bank of Ireland was paid off and free for him to use either to satisfy any money that he might otherwise owe to the Bank by selling it, or, by implementing the planning permission or amending it to have a different project which would have produced profit or a greater value than that which has been obtained. As I understand it, the land at Axminster has not been sold.

10. The Law of Property Act receivers were put in by the claimant either in 2009 or at the latest in early 2010 in relation to these properties. Starwood has been sold by the receivers as indeed has the land at Oakdale. The land at Axminster, as I have indicated, has not been sold and if my memory serves me correctly, all the properties in Church Road have been sold except for one flat.

11. In essence, the points which the defendant seeks to make in relation to the claimant's claim for the monies owing on each of these four transactions can be summarised this way. In relation to each of the four transactions he does not accept the computer generated account and prefers an estimate which he himself has made as reflecting the state of accounts between the parties. So at the very least, he has argued, there should be no judgment for any specific sum today apart from an interim payment because he has not been able to verify the account and the account has not been certified by the claimant even though it was attached to the particulars of claim, which would itself contain a declaration of truth and has featured in the bundle and has been generated by the claimant's computer system. There was evidence before me which has indicated that there is no reason to believe that that system has malfunctioned. So that is a point made in relation to all four loans, the defendant does not accept the accuracy of the figures and he should be given the opportunity to check them.

12. The second general point that is made is to say that in relation to the sale by the receivers of the property at Starwood, that was a sale at an under value because it was sold on an investment basis to an investment purchaser rather than selling the properties to individual purchasers of the individual flats. In relation to Oakdale, again, it is said that the property could have been sold for a better price. So there is a sale at an under value argument advanced in relation to Starwood and Oakdale. It has not been developed in relation to the land at Axminster because that land has not been sold. It is said in relation to the land at Axminster that there was a development potential which has been lost because that property has been wrongly locked up in a security which it should not have been. In relation to the land at Sandycotes, sorry, forgive me, when I talked about Oakdale, the second property which was sold was Sandycotes... So the properties which have been sold are Starwood and Sandycotes. The land at Axminster has not been sold and all the property at Church Road has been sold bar one flat.

13. So those are the general allegations which apply across a number of the properties. In each case the account is challenged and in relation to Starwood and Sandycotes, the suggestion is that the property was sold at an under value and in relation to the land at Axminster, there has been a loss of opportunity to develop or implement the asset because the planning permission has been allowed to relapse and also because it was wrongly kept out of the grasp of Mr Watton by duress, being made an integral part of the re-finance of Church Road.

14. There are then specific arguments which come in in relation to individual properties. In relation to the Starwood property, which of course is owned by the first defendant,

all the arguments there which would be open to Dudsbury Developments who are not represented here today, would be open of course to Mr Watton and for that matter, Mrs Watton as a guarantor of Dudsbury's liability to the claimant. So Mr Watton is entitled to avail himself of all the arguments which Dudsbury could have used but those arguments are, as I have indicated, that the account is not agreed, that there has been a sale at under value by up to £400,000 and that there is a need for more detailed evidence into the circumstances surrounding the sale before it can be determined whether or not it was at the appropriate level. Moreover, it is argued on behalf of Dudsbury that the mere fact that it was a sale by a receiver is not a knockout blow which guarantees the claimant success. So those are the arguments that Dudsbury would have been developing and indeed Mr Watton would be developing, as Dudsbury, in relation to Starwood. But in addition, he adds the following in relation to his position as guarantor, namely that: in relation to Starwood, which had been defined originally as a marketing loan which would run for 12 months being the period within which it had been envisaged the properties would all be sold off, by the time the year was coming to an end the market had dived and it became apparent that the properties simply could not be sold on the open market in a conventional way of selling off each flat to a number of individual purchasers.

15. By early May 2008, with the prospect looming of the debt not being met by the capital value of the properties sold and with then an obligation to service the interest on the monies which had been advanced, it is plain that an agreement was reached between Mr Watton and the claimant that they would let tenants in to the Starwood development and the rent which the Starwood development would produce would help to service the interest on the Starwood loan. It was originally argued by Mr Hamilton on behalf of Mr Watton and Dudsbury, that the change from a marketing loan, which should have ended at the end of 12 months with the sale of all the properties on the open market to individual purchasers, to putting tenants in and culminating in the sale of them as investment properties to an investment company inevitably reduced the value of the property, hence the sale at the under value argument but moreover, it constituted a variation of the principal agreement between the principal debtor, Dudsbury, and the claimant lender, such that that variation had the potential to discharge the guarantors because that was not the obligation which they had guaranteed and it is a proposition well-known of law that a guarantor is discharged from liability where the principal creditor and the principal debtor have changed to the prejudice of the guarantor the obligations in the head contract and thereby altered the obligations of the guarantor, or potentially had done so. However the rule that a guarantor would be discharged by such a variation is subject firstly to the terms of the guarantee contract which often do provide that notwithstanding a variation of the grant of an indulgence, the guarantor shall not be discharged as indeed clause 5.4 of this guarantee did and alternatively, even if the contract did not provide such a clause the guarantor is not discharged by a variation where the guarantor both knew of and approved that variation. Of course, Mr Watton was the alter ego of Dudsbury Developments Limited and the transition from selling them as individual properties to letting them to service the interest was a decision made plainly with his knowledge and consent, such that, and indeed more in the second point than the first point, Mr Hamilton on behalf of Mr Watton has conceded that he cannot argue that Mr Watton has been discharged from his liability by virtue of that change of loan or marketing strategy because it must have proceeded upon the knowledge and consent of Mr Watton. However, were it necessary for me to say so, I had considered the alternative argument and it seemed to me that the wording of the facility letter with this

reference to net annual value for renting plainly envisaged that the property might be let and suffice it for me to say that even if I were not of the view that Mr Watton had known of and consented to it I would nevertheless have held that as a matter of construction of the guarantee agreement, clause 5.4 was *(inaudible)* to cover what did happen here and prevent the discharge of Mr and Mrs Watton from their liability under the guarantee. So the guarantee liability argument I am afraid fails and one is left with the arguments about Starwood.

16. I will therefore deal now with the generic arguments which are applicable to the state of the account and to sales at under value. In relation to the account, I have already indicated that the account – and there is a separate account for each of these four properties – was annexed to the particulars of claim, which itself contained a declaration of truth. Moreover, the evidence which has been put before me by Mr Hagen, on behalf of the claimant ,in his witness statement responding to Mr Watton's querying whether the account was accurate states that there is, effectively, this is a computer generated system and there is no reason to believe that there is any fault in it. Moreover, Mr Watton's answer to the account that he needs to investigate it more is not satisfactory because he has had that material for months and months and months and months and moreover, he has had the ability to check the debit and credit entries on each of those four accounts since they would be matters coming in and out of his accounts. The highest point which he really can put it is his own calculations contained in his first witness statement but they are not calculations which highlight inaccuracies and mathematical computation by the claimant, they simply seek to put up his estimate against the claimant's detailed figures without really engaging with why and where and how any error has manifest. It seems to me therefore, that even though the matter has not been put before me as a certificate from the claimant, which I think the security transaction permits to be definitive, nor do I have a witness statement from the operator of the computer system to say there is no malfunction. Where the documentation is put before the court accompanied by statements on oath that the material is accurate or there was no reason to believe it is inaccurate and the only answer to that is the defendant's own estimate, which is only an estimate, without any reference to anything which might cause one to think that an entry is wrong or there has been any computation error, it seems to me that the highest that one can say the defendant's contention is, is mere assertion and a court dealing with an application for either permission to amend to allege that point, or summary judgment to resist the claim based on it, is entitled to more than mere assertion or some more material with which to assess the substance of it. I regret to say that nothing has been put before me which would cause me to doubt the accuracy of the figures which have been advanced by the claimant in relation to each of the four transactions.

17. However, it is not just that in reality. Were I wrong in doing so it seems to me that in concluding that way, that there would be absolutely no answer to an interim payment being ordered by me, if it were otherwise appropriate to do so. Although that would beg the question, what would be the amount of the interim payment. However, Mr Pomfret on behalf of the claimant has said it would stand by the figures set out in the particulars of claim and would not seek to increase them by the lapse of time between the issue of proceedings and now but it seems to me that with the interest running on the colossal sums involved in this case, any computation error which might be thought to exist would be more than adequately compensated for by that concession. One would have the situation where really the interim payment, if one were to be ordered, would be virtually the same as the amount claimed at the bottom of

the account, in any event. So, on that alternative basis, it seems to me the defendants would be no better off but I prefer to base my decision on the basis that at the highest, mere assertion has been advanced by the defendants and that woefully fails to engage with what the court is entitled to expect if there is to be a serious arguable or real prospect of successfully challenging those figures. It seems to me that that applies across all four loans.

18. I turn therefore to the figures or to the matters of under value. Here the suggestion in relation to Starwood is that although the defendants have not put in any valuation evidence of their own to challenge the material which has been put before me on behalf of the claimant, it is said that the defendants do not have to do so because there is contained within the claimant's own evidence, the seeds of an argument of a sale at an under value. That is because the valuers, the independent valuers instructed by the Law of Property Act receivers, who were themselves valuers but who chose to have an independent valuer to advise them as to marketing and value, the valuers, Rutland, engaged by Scanlans the LPA receivers accepted that there would be a 15 to 20 per cent discount, about £400,000, reflecting the change of the lettings and the fragmented way in which that estate was now to be looked at and its impact on a prospective purchaser. So, basing himself on that concession made within the claimant's own evidence, Mr Watton points to that and says:

> "Well there is at least £400,000 of which I should be given credit for or at least the court should conclude there is a real prospect of success of establishing, on the basis of the claimant's own figures, even though I have not put any in myself".

I am not persuaded that that argument gives rise to any prospect of success at all, let alone one which could be characterised as a real prospect of success. Why is that? Well the answer is that the proposed purchaser, PPC Commercial, had been introduced to the LPA receivers by Mr Watton himself. That is not a complete answer but it sets the backcloth for the consideration of the allegation. Moreover, it was a sale not by the claimant, it was a sale by the LPA receivers and again it is commonly known and it is a proposition of law that where the sale is by a receiver, the mortgagee who put the receiver in is not liable for any under value sale or liable for the manner in which the receiver has gone about realising the asset, unless the mortgagee has interfered with the receivership. Here, the defendants say that short of the full process of disclosure and inspection and cross-examination, one would never know whether or not there had been that interference which would entitle the defendants to complain about the manner in which the property was sold and to look to the claimant as opposed to the receiver for compensation for that sale. The defendants, as I have indicated, therefore have put forward no grounds for believing that the claimant interfered with the sale to a purchaser whom the defendant himself had introduced. I have been taken by Mr Pomfret, counsel for the claimant, through the correspondence, which had been put in the bundle albeit coming from the claimants but there was nothing in there which remotely would get anywhere near a threshold for interference. So it seems to me that this is a classic case of a sale by an LPA receiver for whom the mortgagee, here the claimant, is not and cannot be held liable. However, it does not end there because when one looks at the steps which were taken to realise the money one sees that considerable care was taken to do the best that could reasonably be done in all the circumstances. The LPA receivers themselves, chartered surveyors and valuers, did not rely upon their own view of the situation but engaged Rutland independent valuers

to go and value it for them. That culminated in an offer being made on 31st March 2010 by PPC Commercial for the Starwood development of £1.85m. On 1st June 2010, that was then reduced by PPC by £200,000 to an offer now, subject to contract of £1.65m, again from the same company whom Mr Watton had introduced. The valuation by Rutland which took place valued the property at £1.6m; that is not the receivers but the independent valuers instructed by the receivers and finally in December 2010, because there was a tenant in the Starwood development who was not paying his rent and there may be difficulty getting him out, PPC knocked another £5,000 off their previous offer to an offer of £1.595m which was the offer that was accepted and the transaction proceeded on that basis. Now it seems to me that where the letting rather than the selling of Starwood was itself dictated by the collapse in the market and the need for Dudsbury to service its interest after the end of its 12 month period, a strategy with which Mr Watton himself must be taken to have complied and agreed, there is no basis even on the 15 to 20 per cent discount, which is a function of that strategic decision, for blaming the claimant for it. It was quite plain from the emails that before that 12 month marketing loan had expired, Mr Watton was actively involved in letting out the properties. So, in a nutshell, it seems to me he cannot be heard to complain about any diminution in value consequential upon a letting when that was done with his knowledge and consent but in any event, even if he could, it seems to me that in all the circumstances it has been demonstrated that there is no evidence at all of a sale of an under value, in the climate in which they were, where the market has been tested and where there has been an independent valuation. This is not a case in which Mr Watton has produced any evidence himself to support the contention and in my judgment there is no prospect whatsoever of a successful challenge on the grounds of a sale of an under value against the claimant, even if one were dealing with a case in which the sale had been by the claimant but this is a sale by an LPA receiver, where there is no warrant at all for concluding, and no evidential base for assuming or inferring that there had been any improper interference by the claimant in that marketing decision. Therefore, for those reasons it seems to me that there is no argument against the claimant's claim in relation to the Starwood transaction .

19. I turn then to deal with the Sandycotes loan, the second loan. That is a claim in which the amount that is claimed is £107,719.23, as at 7th September 2011. In contrast with the claim in relation to Starwood, which was for £859,846.25. Sandycotes, of course, is a much smaller site and here, again, the defendant has raised the point about the account being not verified, which I have already dealt with and also a separate claim for a sale at an under value. The problem here is that the sale was not only to a buyer who had been introduced by Mr Watton to the LPA receivers but it was a sale at a price which he himself, Mr Watton, had negotiated, £450,000 or thereabouts. It seems to me that that really is a hopeless claim to criticise the claimants and hold the claimants liable for, even if there had been no LPA receiver but again this is a case in which the sale is by an LPA receiver with absolutely no evidence at all to support the proposition that there had been either a sale of an under value based upon evidence advanced by Mr Watton himself or that there had been any interference or intermeddling by the claimant in the conduct of the sale or its marketing by the LPA receivers. I should also point out at this stage that even if all that I have said thus far were wrong, the facility letters and/or the security documentation which were applicable to each of these loans contained a clause 8.1.1, the effect of which was to deny Mr Watton and Dudsbury any right to set off against the claimant any cross claim which it might have in diminution or extinction of any other liability under these loans that the defendant or Dudsbury had to the claimant; that is except as required or

permitted by law. That is a fairly conventional provision and it seems to me that there is nothing in law which would require any such set off to be recognised. At the highest, it might result in a judgment for the claimant being stayed pending the trial of a counter claim on terms but those terms would conclude whether the counter claim had any prospect of success and whether there was still a shortfall even giving full weight to any such counter claim. So clause 8.1 would also represent a significant obstacle to the claimant(?) in resisting judgment in relation to Starwood and to Sandycotes.

20. Turning then to the third property, which is Oakdale, where the sum claimed is £980,892.83. That sum is as big as it is because if my memory serves me correctly, Oakdale has not been sold and therefore we have not got the problem of a sale at an under value, we have, if my understanding of the skeleton argument and the evidence is correct, simply got the contention that Mr Watton does not admit the amount and cannot verify it any further, without sight of the documentation. I am not aware Mr Hamilton, of any other cost claim specifically geared to that and so I have dealt, I hope, with that over-arching point at the beginning of this judgment which is the only point relied upon in relation to resisting the claim at Oakdale. It has no prospect of success in my judgment at all and certainly no real prospect of success.

21. I turn then to what has been the argument which has taken up most of the time because it is an argument which does have an element of fact in it and where Mr Watton's contention derives some support from the letters at 74A and 74B from Mr McDonna and Mr Clayson. But it is going to be necessary, therefore, to track this a little through the correspondence. It will be remembered that in relation to Church Road this is the last transaction between the claimant and the defendants because it was the last loan to come across from the Bank of Ireland to the claimant. The background to this coming across of the loan in November 2007 was that the fixed term of the Bank of Ireland facility was coming to an end and moreover, Mr Watton needed cash to meet the statutory demand by the Inland Revenue for a sum around or in excess of £300,000. It will also be remembered that the facility which the Bank of Ireland had given to Mr Watton for the Church Road development involved that bank taking the security on both Church Road and the Old Philips site at Axminster. I have already indicated that the contention of Mr Watton was that it was never intended that when the claimant granted a facility in substitution for the Bank of Ireland, it should have a charge over the land at Axminster. So how then did that proposal in relation to the Church Road facility develop?

22. At page 378 in the bundle is a series of emails going from Mr Tomlinson, Andrew Tomlinson, of the claimant, both internally to other members of staff of the claimant but also between Mr Tomlinson and Mr McDonna on behalf of Mr Watton. Mr McDonna, of course, is the broker and is the agent of Mr Watton. It is possible to take this up at page 380, an email from Judith Brown of the claimant to Andrew Tomlinson also of the claimant:

> "I have not heard anything from Ray's broker yet in connection with phone number/addresses for Ray. Can you follow this up urgently and get me some contact details for Monday, please".

(The judge just checks with the court staff that it is convenient to carry on with the judgment which is confirmed)

On 1st November 2007, Mr Tomlinson replied to that saying:

> "Broker was meeting with Ray yesterday. They have arranged a further equity release on his portfolio but he should have an excess of £1m to play around with. As discussed the other day, RW *[that is Mr Watton I presume]* was anticipating us reclaiming a direct debit but I understand under *(inaudible)* this is not something we can do. Will chase both broker and client today and provide an update as soon as I am able. Several other pressing items on my desk."

Then again on 1st November, now at 9.21, Mr Hagen wrote to Mr Tomlinson:

> "Andrew, as you are also aware we have issues in obtaining compliance with all the conditions on his marketing loan. I authorised a letter to be sent yesterday which did not get posted, advising client that we will insist on interest being paid on all loans if he does not comply. Letter not yet sent due to issues over DD, direct debit, being recalled but I think that you need to take this into account as well in your discussions with the client broker. I am discussing this with Dave Harrison this morning to get a total view of all accounts."

There is then a letter from Mr Tomlinson again on 1st November, now at 5.30 in the evening to Mr Hagen and to Judith Brown, these are all internal documents:

> "Alan, I will provide a full report by Monday in line with DG's request, however update in the meantime. Client apologises for arrears. Anticipated that we would reclaim DD, however, now short on cash. Liquidity issues are due to the fact that he is developing out three sites and only has development funding in place for one (anticipated that re-finance by a broker on existing portfolio would be sorted out to meet bill costs as they fell due, liquidity issues of various lenders resulted in offers not progressing). Mail returned as no longer living at that address due to property being sold. Will provide update address in writing. Client to provide all missing conditional papers by next week, I have requested for Monday. On liquidity front, has proposed either additional releases of equity from our current assets, low LTV(?), whilst funding sorted out or has completed development at Church Road, Bournemouth, comprising 14 two-bedroom apartments. Currently has finance outstanding with Bank of Ireland, £2.05m, five sold and contracts exchanged *[he then gives the details of those sales]* Value of remaining flats £2.148m, in addition to which he has a site at Axminster owned for eight years, which has detailed planning for 20 flats, value £850,000 unencumbered. Total security £2.998m, loan requested £1.499m, 50 per cent LTV. So to repay remaining Bank of Ireland debt and cover ongoing bill costs on two sites, IR bill £350,000 due on 14th December. Reason for the delay in providing signed off accounts as accountant has been negotiating with the Inland Revenue *[and then it continues]* Can we sit down and talk through us doing a short term marketing loan on Church Road. He knows he will have to pay through the teeth but it gets him out of the hole he has on the liquidity front short term and sorts out our arrears situation."

So that is what was being said by Mr Tomlinson on 1st November. The question really is where did the information come from that was being bandied around internally within the claimant? It comes from, it must come from information supplied to the

bank and on 8th November 2007 – I acknowledge that this is after what I have been talking about but plainly those emails indicate there had been some contact on 1st November – Mr Tomlinson receives from Mr McDonna, the mortgage broker acting on behalf of Mr Watton, valuations of properties in Church Road and indicating:

> "The total security of Church Road is £1.9m but Ray needs £350,000 for tax bill and £2.05m for Bank of Ireland. Therefore total sales revenue from existing sales is £1.187m, assume agents fees leaves £1.16m, total to pay Bank of Ireland equals £2.4m, sales then leaves £1.24m to find. If we throw in Axminster site, £900,000, the site has outline planning permission for 21 units and Ray is trying to uplift, therefore the total security would be £2.804m, £2,804,900 and Ray would want 50/60 per cent if possible, that is loan to value."

So it is quite plain, it seems to me that Mr McDonna, despite the contents of his letter is putting forward security amounting to £2.8m on a 50 per cent loan to value ratio when he wants to find £1.24m and the security is £2.8m, that is entirely consistent it seems to me with a deal being offered by the broker for Mr Watton, of the Axminster land forming part of the security and indeed reproducing to a certain extent exactly the same position as that which obtained with the Bank of Ireland. So I emphasise that is the 8th November 2007. Mr Watton had, in the meantime, gone looking at the beginning of November for alternative finance and at pages 293 to 296 in the bundle, we find finance facilities in relation to a few of the Church Road properties from Woolwich Mortgages totalling £960,000. But £960,000 did not meet his needs and therefore the Woolwich finance could not be regarded as a full alternative to what was sought to be negotiated from the claimant and therefore in my judgment, the argument that the defendant had been led up the garden path and it was too late to go back and resume the facilities against the deadline which confronted him, was not really a complete answer because it did not meet £900,000, his need to pay the Revenue and to get the Bank of Ireland off his back. But even if that were available, it seems to me quite consistent with everything I have read that the deal was going to be that both the land at Axminster and the Church Road property would form security and it seems to me that the high water mark of Mr Watton's argument to the contrary such that he would argue there is a real prospect of success, is the evidence of Mr McDonna and Mr Clayson and his own evidence to the effect that he was given ten minutes to make his mind up on 28th November, by Mr Tomlinson, to allow the Axminster land to form part of the security. He did not want to do so and metaphorically he had the gun pointed to his head at a time when he was really up the alley with nowhere else to go and so he had to sign. Now not only is Mr McDonna's statement in his letter slightly concerning because it contained the reference that there was no mention previously that this was needed to secure the facility, a reference to the Axminster land, whereas Mr McDonna's own letter and memo of 8th November plainly showing it was being thrown in or being contemplated but secondly it is difficult to see how the ratios work on a 50:50 without both lands going in. Therefore, it seems to me that even if there were an insistence on the part of Mr Tomlinson that the Axminster land was to be thrown in I cannot see how it could be thought to have been a last minute development since on 8th November that is what was being envisaged on a 50 per cent loan to value ratio.

23. Mr Hamilton has argued that there must be out there somewhere a letter, a facility letter of 28th November, showing that the intention was originally only to acquire

Church Road as the security. He acknowledges he has got no evidence for that but merely says that if there was to be that discussion which took place on 28th, there should presumably have been a facility letter on the table. But, despite the time since these transactions, Mr Watton has not produced it and since it was only a late arrival as a suggestion in Mr Watton's second witness statement, there has been no time for the claimants to check and double check their documentation. Moreover, it seems to me that given the extent of material which has been put into the bundles, had there been such an earlier document, one might have expected to see it because at the time the bundle was compiled, there was no reason for the claimant to believe that this argument would ever be developed so had no reason to conceal it. So I am afraid it is not a promising start where the argument is constructed upon an inference of a document, which the claimant surely had, if it ever existed and it seems to me really to fall far short of the mark of what one would expect to find before one got the glimmer of a real prospect of success. So it seems to me, therefore, that there can be, looking at it in the round and not substituting the view of the trial judge but looking at it through the prism of the right test if us there a real prospect of success, that there is not, in my judgment, any real prospect of success of being able to contend that the Axminster land was introduced at the last moment, despite t hose letters, which have been undermined by the email of 8th November, that it was a last minute development when one looks at the documentation. Now it may be said that Mr Watton did not know anything about that because this correspondence was involving his agent. I find that hard to understand because he is an experience property developer and it was his back which was against the wall. An assertion that he did not know seems to me to run radically in the face of an experienced businessman whose empire was about to collapse and he was looking through his broker to find a solution to his present problems.

24. However, even if I was wrong in all of that and there were pressures applied by the late introduction of the Axminster land, it does not, in my judgment, begin to approach the necessary threshold of suggesting that that was illegitimate pressure. My attention had been taken to the authority on this particular matter and, in particular, to the *CTN Cash and Carry case v Gallahead*, where, although the court accepted that there might be circumstances where bringing economic pressure to bear lawfully could constitute the relevant economic duress and it would be a very rare case where that happened. It seems to me that this is nowhere near such a case. Even if I were wrong in my primary conclusion about whether the access to the land was late arrival or not at the negotiations. What we do know at 28th November is that Mr Watton had missed in relation to Oakdale, the September payment because the direct debit had been returned and that has resonances in the emails that I have referred to already. The missing or the non-payment of the September instalment on Oakdale, which was a capital and interest repayment loan as opposed to a fixed term loan in relation to the others, was an event of default and it was an event of default even though the subsequent two months direct debits were met. Since it was an event of default, Mr Tomlinson was perfectly entitled to say, as he did say, that if the security were not provided the loan arrangements would be put into default and it would not only be a default it seems to me in relation to the Oakdale transaction, it would affect all the transactions because of the terms of each of these facility letters, for example, at page 316, where and this was present in every one, event of default meant (a) the mortgagor fails to pay any sums due under the facility agreement – well that would be a specific agreement for each property so that would bite on the Oakdale transaction; (b) the mortgagor suspends payments if its debts or is unable to pay its debts or is deemed unable to pay its debts

within the meaning of section 123 of the Insolvency Act 1986; and (c) any other circumstances, effect, change or event which occurs or arises, which have a material adverse effect on (i) the ability of the mortgagor to perform its obligations to the lender or (ii) the business assets or financial condition of the mortgagor. Well at this point it must be borne in mind that we are now in the area where the September instalment of Oakdale had been missed, which must have caused concerns across the board and indeed was reflected in the emails. There is a statutory demand of £ 350,000 to the Revenue which plainly Mr Watton acknowledges he has to pay because he says in his witness statement the alternative was bankruptcy and it seems to me that he has also got the Bank of Ireland agreement coming to an end as well. So it seems to me that even if Mr Tomlinson threatened to put them in default and to insist upon the Axminster land, in circumstances where the Axminster land was never there before, that that is legitimate commercial pressure, based upon a true position where there had been a default. Now Mr Hamilton has said to me that it is a bit unfair even if there was technically a default for them to pray that in aid if they had done nothing about it beforehand and had accepted the two subsequent direct debits. That may be something which may be thought to be in different quarters unfair but it nevertheless represents an unwaived event of default, such that what Mr Tomlinson said was true, he was in a position to put Mr Watton in default.

25. So I see nothing, I regret to say, which could be regarded as approaching anything akin to economic duress in relation either to the requirement of the Axminster land, or indeed to threatening to put Mr Watton into default. That being the case, it seems to me that there is no real prospect of success of Mr Watton arguing that the land at Axminster should never have been brought into account at all, or, of suggesting that the documentation, the security documentation, should be amended to exclude it from it. That seems to me also to dispose of the argument about what might Mr Watton have done if the land at Axminster had not been charged. He was not free to deal with it because it had always been understood that he would be charging it but in any event, t here can be no liability against the receivers or the claimant for not implementing the planning permission or for allowing it to lapse. They were in possession and they were entitled to look to their own interests. Moreover, it seems to me that the evidence in favour of what might have happened in relation to exploiting that is fanciful in the extreme and does not get anywhere near the development of a sustainable argument. In any event, it would fall foul of clause 8.1.1, which would preclude any set off and so substantial is the allegation that I could never have granted a stay if the claimant was otherwise entitled to a judgment, based upon the speculative element of what might have happened in relation to the land at Axminster.

26. However, the point does not fall for consideration because the claim in economic duress is bound to fail. That, I think deals with, I hope it does, all the arguments which have been advanced by both sides before me and I simply remind myself that both parties have agreed that although one could look to slightly different formulations for the test of whether or not an amendment should be allowed on merit and the test for summary judgment. They are, effectively, in the context of this case, the same. CPR 24.2 says:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or any particular issues (a) if it considers that the claimant has no real prospect of succeeding on that claim or issue, or (b) if the defendant has

no real prospect of successfully defending the claim or issue and (c) there is no other compelling reason why the case or issue should be disposed of at a trial."

I cannot see any reason, compelling or otherwise, why this case should be disposed of at a trial as opposed to here. I fully acknowledge and I have borne in mind that a trial brings with it all the advantages of disclosure and inspection, of cross-examination of witnesses and that is something which Mr Hamilton has prayed in aid as a justification why this case should go to trial. But that is really no more than the McAuber(?) test that someday something might turn up. It really seems to me that if the defendant is going to advance a case, given the amount of time that has been available, it was open to the defendant to do it and to provide something with which the court can assess the quality of the arguments which would be advanced. So I see no reason outside the test of real prospect of success why there is a compelling reason why the case should otherwise be heard, even if there were no real prospect of success. Fundamentally, the application for summary judgment succeeds on all grounds because none of the arguments raised, individually or cumulatively, raises any real prospect of success, either of resisting the claim or of mounting a cross claim or set off, even if it were permissible to assert it in these proceedings.

(Counsel for the claimant raises the allegation by counsel for the defendant that there was a breach of obligation to sell properties at Church Road for the best price reasonably obtainable.)

27. Well to the extent that that is the case in relation to Church Road, it is caught by my generic and over-arching point in relation to evidence of a sale of an under value. First it is a sale by a receiver and there is no evidence to show any inter-meddling or interfering with it, and secondly there is no evidence really which justifies the conclusion that there was a sale at an under value.

End of judgment

(Counsel to agree an order to be lodged electronically and the claimant would not seek an order for costs.)
