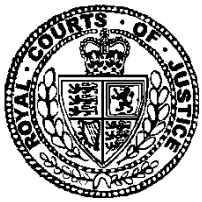

Neutral Citation Number: [2021] EWHC 466 (QB)

Case No: QB-2018-004405

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2021

Before :

MR JUSTICE FREEDMAN

- -

Between :

CREDIT CAPITAL CORPORATION LIMITED

Claimant

- and –

MR EMMIL WAYNE SEESON WATSON

Defendant

-and-

MARKET FINANCIAL SOLUTIONS LIMITED

Part 20 Defendant

- -

Lloyd Maynard (instructed by **Brecher LLP**) for the **Claimant & Part 20 Defendant**
Rosana Bailey (instructed by **Direct Access**) for the **Defendant**

Hearing dates: 23, 26 and 27 October 2020 & 16, 17, 18, 19 and 26 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 2 March 2021 at 10.30am.

II Introduction

1. The Claimant claims that it is owed money under an agreement dated 13 January 2016 to lend £1,475,000 to the Defendant ("Mr Watson"). There is a second agreement dated 31 January 2017 between the Part 20 Defendant ("MFSL") and Mr Watson to lend a further £47,500. Mr Watson denies liability, saying that part of the principal sum claimed is not owing at all. He also relies on the Consumer Credit Act 1974 provisions relating to *unfair relationship* (section 140A and 140B) in order to seek to reduce the sum said to be owed by him to the Claimant, and to give rise to a debt owed by the Claimant to Mr Watson.

2. It is necessary to set out the history and background of this matter. This Judgment will then make findings about the evidence before it. The Judgment will then consider the relevant law and then make findings of fact about the case.

3. The case has a peculiar procedural history of several applications for adjournments. Although the Claimant submitted that there was no need to accommodate the requests of Mr Watson in connection with adjournment applications, the Court has substantially accommodated the same. It has considered them very carefully and allowed considerable time in the adjournment applications which he made. The Court adjourned the trial fixed in a 3-day window beginning 10 March 2020 because it had been fixed in error for a date when Mr Watson's then Counsel was unavailable. By an application on 3 June 2020, Mr Watson applied to adjourn the trial fixed for 15 June 2020 on the basis that he was at "risk of psychosis". Subsequently by a letter dated 9 June 2020 of Dr Kavari, it was stated that the Claimant had sustained a head injury. That evidence led to the judge, Julian Knowles J, adjourning the trial. The

matter came before me on 22 October 2020 on an application by Mr Watson to adjourn the trial fixed for 26 October 2020. The basis of that application straddled different matters and spilled over into 26 and 27 October 2020. I gave a detailed judgment on 27 October 2020 when I adjourned the trial due to arrangements relating to the return of Mr Watson's very unwell mother from hospital to their home and due to the need for Mr Watson to supervise and assist in that move home. That was despite very strenuous opposition from the Claimant and allegations that Mr Watson was simply trying to put off the evil day.

4. The case was then fixed for 16 November 2020. The Court heard an application from Mr Watson for relief from sanctions. The Court gave relief from sanctions. On 17 November 2020, the Court heard an application for an adjournment at the end of the Claimant's case following Mr Watson having attended hospital, but having been discharged without being admitted as in-patient at the hospital. The Court gave a further ex tempore judgment, refusing an adjournment. Mr Watson gave his evidence. In the end, the evidence concluded on 18 November 2020 and final speeches took place on 26 November 2020.

5. In addition to the time given to consider the justice of the case as regards adjournments, the Court accommodated the parties by giving a longer hearing time than was encompassed in the original estimates without any change of circumstances, allowing each party very full opportunities to put their respective cases in cross-examination. In particular, Ms Bailey for the Claimant required a full day for cross-examination of the Claimant's witness, and this was afforded. Mr Maynard thought that he would only require 2 hours for cross-examination of Mr Watson, but in the event, he was afforded considerably more than this.

6. The evidence for the Claimant was given by Mr Zeeshan Khan, the loan manager of the Claimant and the head of recoveries of MFSL. He has been an employee of MFSL since October 2015. No evidence was called from Mr Paresh Shantial Raja who is a director, the shareholder and the controlling mind or one of the controlling minds of the Claimant and MFSL.

III The parties

7. The Claimant is a short-term property-based lending company, lending both to individual and corporate borrowers. The Claimant's directors and ultimate shareholders are Mr Peter and Mr Raja. It offers in particular bridging loans.

8. The Claimant has an associated company, namely MFSL, which was engaged in a managerial role to facilitate the administration of loans. It appears to have the same ultimate ownership and control as the Claimant. It arranged the loan facility which is the subject of this case.

9. Mr Watson says that over the last two decades, he has acquired six properties as investments to provide an income. The properties which he has acquired have been:

(1) 7 Brighton Road, Reading, Berkshire ("7 Brighton Road") in consideration of the sum of £178,000 in 2000 with a mortgage of about 80% of the value of the property;

(2) 15 Bramley Road, London ("15 Bramley Road") in about 2004 purchased for about £460,000 with a mortgage of about 90% of the value of the property;

(3) Gloucester Road, Reading for about £178,000;

(4) 25 St. Mary's Court, Stamford Brook Road, Hammersmith, London W6 0XP ("25 St. Mary's Court") in about 2006 purchased for about £365,000 with a mortgage of about 80% of the value of the property;

(5) 171 Ladbroke Grove, London, purchased for about £398,000 with a mortgage of about 80% of the value of the property;

(6) 16 Heathfield Terrace, London, W4 4JE ("16 Heathfield Terrace") purchased in about 2008 for a sum of £926,000 with a mortgage of about 80% of the value of the property.

IV The relationship between the Claimant and Mr Watson

10. Preceding his approach to the Claimant, Mr Watson had been borrowing from the Bank of Scotland plc, who had called in the mortgage in about 2013/2014. He obtained a bridging loan for a year, and then he took a further advance from a loan and bridging company called Commercial Acceptances Limited ("Commercial Acceptances"). Commercial Acceptances decided not to proceed further with Mr Watson, and he then sought a loan from the Claimant/MFSL to replace the loan of Commercial Acceptances as a bridging finance provider.

11. The Claimant and MFSL say that they were contacted in the first instance by MCIFA Property Finance, a broker, through Rebecca Glenn and Fahim Antoniades, a group director of MCIFA.

12. In about December 2015, a decision in principle was made by the Claimant to lend to Mr Watson. The decision in principle included the following:

> (1) That Mr Watson ought to be prepared to repay the bridging loan by maturity 12 months after drawdown:
>
> "Term of Loan
>
> The Loan shall be for the Loan Term [12 months], which will commence from the date of completion of the Loan. Please note that this is a bridging loan facility, and you must be in a position to repay in full at the end of the Term. You should not assume that the Loan Term will be extended.

(2) That the loan would be an unregulated commercial bridging loan and as such CCC would rely upon Mr Watson's declaration that neither he or a family member would reside at the secured properties:

"Loan Purpose

The Loan is being provided solely for business purposes and by signing this Decision in Principle you declare to us that the Loan is entered into by you wholly or predominantly for the purposes of your business, profession or trade carried on, or intended to be carried on by you. The Loan is therefore exempt from the provisions of the Financial Services & Markets Act 2000 and the Consumer Credit Act l974. You will be required to provide and sign an exemption relating to business purposes declaration before completion. You will therefore not receive the protections afforded by the Financial Services & Markets Act 2000 and the Consumer Credit Act 1974.

You have confirmed to us that the property is not occupied by you or any related person throughout the term of the Loan and will not be until at least after the Loan has been redeemed in full. You will be required to sign a declaration to this effect before completion takes place.

We will rely upon your declarations when completing your loan, and such declarations will be a condition of the lending.

Do not sign this Decision in Principle or any declaration unless your declarations are true.

(3) That the quoted fees and financial particulars would be subject to further confirmation:

Loan Amount and Fees

Please note that the financial particulars in The Summary are, at this stage, estimates only, and are subject to contract.

…

You are advised that the broker or introducer may receive a commission from us for the Loan; this may mean that the broker or introducer is unable to provide impartial advice about the Loan to you.

13. In around November 2015, MFSL received valuations in respect of two of his buy-to-let properties: 16 Heathfield Terrace and 25 St. Mary's Court, showing values respectively of £1.85 million and £650,000. The valuation of PLP chartered surveyors in respect of 16 Heathfield Terrace was dated 16 November 2015 on the basis of vacant possession with "a defined marketing constraint of 180 days". It also noted wet rot in substantial sections of the external joinery and rising damp at lower ground floor level, and that a prospective purchaser would be likely to undertake a full refurbishment. There were also particulars of estate agents in 2015 having suggested that the property be put on the market at £1.85 million and £1.95 million. Mr Watson provided security for the Loan by way of legal charge, a first charge in respect of 16 Heathfield Terrace and a second charge in respect of 25 St. Mary's Court.

14. There was a document entitled Bridging Loan Conditions and Enquiries which referred to the above two properties offered as security for the proposed loan. The Bridging Conditions stated (this is quoted from the summary of the Claimant in para. 13 of the Reply and Defence to Counterclaim) among other things that Mr Watson's solicitors were to confirm that:

    (1) the bridging finance transaction was for commercial purposes only [condition 15];

    (2) all arrears of mortgage accounts would be settled and cleared from the bridging loan advance [condition 16];

    (3) they advised Mr Watson about the contents and effect of the loan and mortgage documentation [condition 22].

15. The gross loan amount was £1,475,000 and the net loan amount after payment of arrangement fees of £29,500 and 12 months of anticipated interest over the next 12 months of £175,230 was £1,270,270. Mr Watson was to pay a sum of £1,560 to MFSL or a company associated to MFSL prior to instructing valuers, being their cost in respect of instructing valuers. The loan term was to be 12 months from completion.

16. The loan was declared as being provided for business purposes and was an unregulated commercial bridging loan. Mr Watson's solicitor was to forward statements for all of Mr Watson's mortgage accounts which were in arrears (understood to be five in all) which would be cleared from the bridging loan advance, said to comprise about £65,000.

17. Mr Watson's solicitor completed and signed the Solicitors' Certificate confirming that they had advised Mr Watson of the contents and effect of the mortgage documentation, and that Mr Watson understood them and was not under any form of duress when the same were executed.

18. The loan was completed on 13 January 2016. The Claimant relies upon the terms of the Loan dated 13 January 2016. Mr Watson admits entering into the Loan and that its terms govern this claim. There will now be summarised some clauses of the Loan Agreement. There will then be quoted more fully some of the salient terms.

19. Under the Loan, the Claimant agreed to advance £1,270,270 to Mr Watson (the "Advance"): clauses 1.2 and 2.1. Mr Watson undertook to repay £1,475,000 (the "Loan Amount") within 12 calendar months from the date of the Loan, being 13 January 2017: clauses 3.1 and 1.4. The Advance was subject to interest of 0.99% per month. Mr Watson agreed to pay 12 months' interest on a capitalised basis, rolled up within the Loan Amount: clause 6.1.1.

20. Sums outstanding as at maturity were subject to interest of 0.99% per month for the next 3 months: clause 6.1.2. If interest in those 3 months was not paid, a default interest rate of 3% applied: clause 6.1.3. Any sums outstanding from month 4 after maturity was also subject to interest at 3% per month. Any interest payable under the Loan that was not paid within 14 days of its due date was capitalised and added to the Loan Amount: clause 6.2.1.

21. There are now set out more fully some of the above and related terms of the Loan Agreement.

> "DEFINITIONS:
>
> In this agreement
>
> 1.1 the 'Loan Amount" means the sum of One Million and Four Hundred and Seventy-Five Thousand Pounds (£1,475,000.00) and any accrued interest and fees;
>
> 1.2 the 'Advance' means the sum of One Million and Two Hundred and Seventy Thousand and Two Hundred and Seventy Pounds (£1,270,270), which represents the Loan Amount LESS twelve months' interest at the Interest Rate and LESS the Entry Fee;
>
> 1.3 the 'Interest Rate' means 0.99%...per calendar month;
>
> 1.4 the 'Redemption Date' means the expiry of 12 (twelve) calendar months from the date of this Agreement;
>
> 1.5 the 'Entry Fee' means 2%... of the Loan Amount;
>
> 1.6 the 'Property' means 16 Heathfield Terrace, London, W4 4JE and 25 St. Mary's Court, Stamford Brook Road, Hammersmith, London, W6 0XP;
>
> 1.7 the 'Legal Charge' means a legal charge of even date between the Lender and the Borrower;
>
> 1.8 'Agreement' means this Loan Agreement;
>
> 1.9 'Minimum Term' means 3 months from the date of the Agreement;

2. AGREEMENT FOR ADVANCE AND MANAGEMENT OF THE LOAN

2.1. The Lender agrees with the Borrower to lend the Advance to the Borrower for business purposes upon the terms, conditions and provisions of this Agreement and, subject to clause 2.2 below all parties hereby agree that the Loan Manager will have full conduct and control of the management and administration of the loan on behalf of the Lender.

3.1 ln consideration of the Advance (receipt of which the borrower acknowledges) the Borrower undertakes to re-pay the Loan Amount to the Lender free from any legal or equitable right of set off on the Redemption Date..."

"5. BORROWER UNDERTAKINGS

ln consideration of the Advance the Borrower takes the following undertakings:

....

5.5 to be responsible for paying the costs of any valuation obtained or required by the Lender and the Lender is permitted to request additional valuations from the Borrower at the Borrower's cost throughout the term of the loan until the Loan is redeemed in full by the Borrower.

5.6 to pay in full all costs incurred pursuant to clause 5.5 promptly."

"6. INTEREST

6.1.1 Payment

The Borrower undertakes with the Lender to pay the Lender interest at the Interest Rate on the Loan amount for the term of the loan (which shall be the period of twelve calendar months commencing on the date of this Agreement and ending on the Redemption Date) and the parties agree that such interest is capitalised and rolled up in the Loan Amount.

6.1.2 After the Redemption Date, interest at the Interest Rate shall be payable monthly on any amount owed - such interest to be payable as well after as before any demand or judgment or

> the administration or liquidation or bankruptcy, death or insanity of the borrower.
>
> 6.1.3 The Interest Rate shall increase to 3% if any amount outstanding remains unpaid after the expiry of three calendar months from the Redemption Date.
>
> 6.2 Capitalisation
>
> 6.2.1 If any interest payable under this Agreement is not paid within 14 days after the due date for payment it shall be capitalised and added to the Loan Amount and bear interest from the due date for payment, such interest to be payable at the Interest Rate...."
>
> 7. COSTS, CHARGES AND EXPENSES AND OTHER LIABILITIES
>
> 7.1 The Borrower undertakes with the Lender to pay to the lender on demand and on a full and unlimited indemnity basis all costs, charges, expenses and liabilities paid and incurred by the Lender (whether directly or indirectly) in relation to this Agreement and the obligations owed under and associated with this Agreement and any associated or collateral security (including all commission, legal and other professional costs and fees and disbursements and VAT on them) together with Interest from the date when the Lender becomes liable for them until payment by the Borrower at the Interest Rate, such interest to be payable in the same manner as interest on the advance."

22. Two further sums were in fact withheld from the net figure given to Mr Watson. These were £14,750 said to be a broker's fee and £26,460 said to be to defray mortgage arrears which Mr Watson had accrued on 15 Bramley Road. These latter sums totalling £41,210 are visible in a final completion statement exhibited to the Reply and Defence to Counterclaim.

23. There was a suite of documents comprising the loan facility. They included the following:

(1) a loan agreement dated 13 January 2016 between MFSL as loan manager, the Claimant and Mr Watson as borrower containing the terms referred to below, with a confirmation of independent legal advice from the solicitor for Mr Watson and a declaration of exemption relating to businesses;

(2) a legal charge relating to 16 Heathfield Terrace with a confirmation of independent legal advice;

(3) a legal charge relating to 25 St. Mary's Court, with a confirmation of independent legal advice.

24. On 13 January 2016, the Claimant advanced £1,243,810 on Mr Watson's behalf, and Mr Watson personally received £1,159,146 as evidenced in a completion statement (albeit he says that he received a sum of £1,159,170) sent by the Claimant's solicitors to Mr Watson's solicitors. This was the contractually agreed amount of £1,270,270, less £26,460. This sum of £26,460 was retained by the Claimant in order to pay arrears due to Bank of Scotland on another of Mr Watson's properties, namely 15 Bramley Road. During the course of these proceedings, the Claimant noted that that payment had not been made. The payment was subsequently credited to the Loan account by an entry of 13 April 2017. It is said that there was also credited all consequential interest (which ought not to have been charged). In a draft judgment, I stated that it should be checked that this has indeed been done on the proper compound basis, and the parties should confirm to the Court that this has been done. I shall return to this below.

25. Following discussion between Mr Watson and the Claimant's Mr Khan, the Loan was extended for 3 months. There was an additional loan agreement dated 31 January 2017 between MFSL as lender and Mr Watson as borrower of a sum of £47,500, with a confirmation of independent legal advice and a declaration of exemption relating to businesses. There was a legal charge relating to 7 Brighton Road, with a confirmation of independent legal advice.

26. MFSL provided Mr Watson with a loan for £47,500 to cover Mr Watson's interest payments due under the Loan until 13 April 2017. Mr Watson made no repayments on 13 April 2017. On that date, the Claimant issued a demand, which remains unsatisfied save for the proceeds of sale of 16 Heathfield Terrace of £1,280,000 on 18 August 2017.

27. The evidence relating to the various attempts to sell Heathfield Terrace other than the purchase which did go ahead, largely corroborated by documents, is as follows:

(1) According to Mr Watson's evidence, prior to March 2017, Mr Watson agreed a sale at a sum of £1,630,000 (there were two communications from estate agents confirming this in March 2017), but the sale did not proceed because of the proposed buyer's related sale.

(2) By an email of 31 May 2017, Mr Watson notified the Claimant that he was placing the property at a Savills' auction with a guide price of £1,500,000 and a reserve price of £1,425,000. This took place on 19 June 2017, and due to a poor demand, the property was withdrawn. There was evidence that there were in attendance representatives of the Claimant, and there may have been discussions with the auctioneer about the removal of the property, but it was said by Mr Khan that there was a low level of interest at the auction and not specifically by reference to 16 Heathfield Terrace.

(3) In an email from Mr Watson's solicitors to the Claimant's solicitors dated 15 June 2017, it was confirmed that a buyer had been found at a price of £1,402,500 which was agreed by Mr Watson with the hope that exchange would follow "either today or tomorrow". The Claimant confirmed that it would agree to release the charge if there was a sale price of £1,400,000. The proposed sale did not take place.

(4) On 17 July 2017, Mr Watson informed Mr Khan of the Claimant that he had found a buyer for 16 Heathfield Terrace at £1,365,000. On the same date, there was a confirmation in writing by Mr Watson's solicitors that proposed purchasers had increased their offer to £1,365,000. Mr Khan refers to this as a second offer at that price. Whether it was one offer or two offers, no sale proceeded.

(5) On 19 July 2017, the Claimant's solicitors wrote to Mr Watson referring to the meeting of 17 July 2017 and saying that the Claimant had found a buyer at £1,285,000 which "you have accepted". Mr Khan referred to the buyer as Prime Haven, and then says that it did not wish to go ahead with the purchase. Mr Khan said a Mr Qureshi was an employee of Prime Haven, but in his statement at para. 29, he said Mr Watson had referred to a "Mr Kureshi (sic) but this name is not known to the Claimant.". Mr Khan was asked questions about Prime Haven including the names of the directors of Prime Haven which he was unable to answer. When Ms Bailey put to Mr Khan that Prime Haven had not yet been incorporated and that when it was, it was on the same day as Inter Property Limited, he was unable to answer this. In respect of a sale to a buyer found by Mr Watson, exchange would have to take place by the end of July 2017 with completion by 11 August 2017, that is prior to the next month of interest would be due. It was confirmed in a letter from Mr Watson's solicitors of 24 July 2017 that the offer of £1,285,000 had been accepted.

28. Mr Watson in his witness statement has given evidence that the Claimant claimed to have found a buyer who were "prominent business people in the Jewish community" who had "real money". Mr Raja advised that a property agent for them would be in contact. Mr Watson had dealings with Mr Qureshi who referred to himself as Asif. He would not identify the buyers by name.

29. At the next meeting with Mr Raja, Mr Watson was informed that his buyer would offer £1,000,000. Mr Raja said that "maybe we can get him to £1.1 million". Mr Watson refused and said that he needed to get £1.5/£1.6 million. He related a conversation at para. 64 of his statement at which Mr Raja was cutting across Mr Watson aggressively with a view to getting Mr Watson to accept the offer. At a further meeting, Mr Raja said that the offer had increased to £1.2 million. When Mr Watson said that he would not accept this, saying that he was not going to give away his property, the reaction was that they had found a very good buyer and it would remove some of his pressure: see the statement at para. 66. Mr Watson said that a sale at £1.63 million was progressing, and he asked why the buyer would not match the sum of £1,402,500 which had been notified by his solicitors: see para. 68. Mr

Watson referred to how he was not permitted to speak to the buyer, but that Mr Raja conducted conversations with the buyer in his presence.

30. Mr Watson expressed concern about the balance, and Mr Raja said that they could work out the balance: see Mr Watson's statement at para. 74. In correspondence at the time, it was apparent that the Claimant would be seeking the balance. For example, in an email dated 18 July 2017 from the Claimant's solicitors to Mr Watson's solicitors, they asked for confirmation how Mr Watson intended to pay the balance shortfall. Mr Watson also says that at meetings with others about the situation, Mr Raja made out that he and Mr Khan were arguing the position of Mr Watson, but they were being outvoted by other people. At no stage did Mr Raja identify that he was in fact the buyer through Inter Property Limited. The evidence in respect of Prime Haven was very unsatisfactory. The following is to be noted:

> (1) Despite Prime Haven being said to have been introduced by the Claimant to Mr Watson, Mr Khan was unable to answer Ms Bailey's questions on the identity of Prime Haven, and Mr Raja who would know, deliberately chose not to give evidence.
>
> (2) There was no evidence to explain why Prime Haven became interested and almost immediately ceased its interest.
>
> (3) There was no evidence before the Court (other than an attempt to introduce it through questions of Ms Bailey to Mr Khan who had no answers) about the corporate name of Prime Haven, its date of incorporation and the identity of its directors and true owners.

31. In his witness statement at para. 81, Mr Watson says that right until the day of completion, Mr Raja was pretending that the other buyer existed. Mr Watson says that the lies were told in order to get the property at a knock down price for himself. At para. 85, Mr Watson said as follows:

> "If not being bullied from pillar to post I could have taken the time to sell the property as a willing seller on the open market and obtained a much better price. If I had known the truth about the buyer I would have known I was being bullied into selling at an undervalue I would not have sold to Mr Raja or his company unless I knew I was getting the proper price. He used his deception to finally cheat me of my property."

32. In the course of his evidence, Mr Watson accepted that he knew that Mr Raja was involved in the purchase of the property. He was referred to an email sent by the Claimant's solicitors to his on 27 July 2017 at 15:38, which said: "My client is in the process of confirming which of their companies the property will be bought by – as soon as this is finalised I will revert". His evidence was that he understood the reference to "their companies" was to a company belonging to Mr Raja and associated with the Claimant. He also confirmed that in any event his solicitors had discovered Mr Raja's involvement with Inter Property Limited by 2 August 2017, from searches they had done. It was on that date that Inter Property Limited was incorporated and the solicitors for the Claimant, also solicitors for Inter Property Limited, informed his

solicitors of the buyer's name. That was more than a week prior to exchange of contracts (11 August) and more than two weeks prior to completion (18 August).

33. This was at variance with the above quoted para. 85 of the witness statement of Mr Watson. When asked why he did not reject the possible purchase when he discovered the fact that Mr Raja was behind the buyer, he said that it was then too late. He was facing the prospect of the property being repossessed, and the interest was mounting on the moneys borrowed. Mr Watson said that by late July 2017, he was committed to the sale and that but for the false information, he might have been able to sell it to an arm's length purchaser. He had lost a critical month of looking for a bona fide purchaser.

34. The sale took place to Inter Property Limited. Exchange of contracts was on 11 August 2017 and completion was on 18 August 2017. The sale price was £1,280,280. This then left a very substantial balance outstanding which has been the subject of compound interest at 3% per month.

V Findings about the oral evidence

35. It is now necessary to make findings about the oral evidence. The only witness for the Claimant was Mr Khan. As noted above, he was the head of recoveries of MFSL from October 2015, who acted as the loan manager for the Claimant. He started that role at about the time when Mr Watson was introduced as a potential borrower. His role appears to have been administrative. He worked with two others in the recoveries department. He was not a director. He referred to Mr Peters and Mr Raja as being directors. He spoke with Mr Raja on a daily basis. Mr Raja had a self-contained office. His evidence was lacking somewhat in two senses. First, he could not speak about the companies prior to his recently having joined MFSL just before the making of the loan. Second, he was not an owner or director role or in a senior management role unlike Mr Raja. When asked to discuss policy matters of MFSL, he was unable to speak to these matters. Particularly when he was asked questions about the purchase by Inter Property Limited and the knowledge which Mr Watson had of Mr Raja's personal involvement with the purchaser, he was very hesitant before asserting that he remembered that he had told Mr Watson about it.

36. Mr Khan was asked why he had given evidence instead of Mr Raja. He said that he was involved in the recovery of the loan. It was put to him that his knowledge was superficial because he was not the chief protagonist. He said that he had full knowledge. Yet it was clear that he did not have full knowledge and that indeed he was not the chief protagonist. Indeed, it was shown of the many contemporaneous documents, a very small number were to or from him. An example of his lack of knowledge included about the auction at Savills and about the attendance of people from the Claimant/MFSL there, leaving the circumstances in which Savills decided not to sell the property unclear. Mr Khan knew very little about the sale of the property at St. Mary's Court which had been undertaken by a receiver. He had no knowledge of what actually occurred in respect of the decision to sell St. Mary's Court and what had become of the proceeds of sale. He gave evidence emphatically

on 16 and 17 November 2020 that St Mary's Court had been sold. This evidence was wrong because St. Mary's Court had not been sold. There is no explanation that was given as to why Mr Khan was wrong. It was submitted on behalf of Mr Watson that Mr Khan was put up to do the bidding and cover up for the absence of Mr Raja. It is certainly established that about this and other subjects, Mr Khan gave answers which were imprecise. He used answers like what we would have done, as if trying to reconstruct something rather than to speak from what he remembered. The fiasco of his evidence as regards St. Mary's Court shows that he is an unsatisfactory witness, whose evidence is to be treated with great caution save where it is corroborated by unimpeachable documentary evidence.

37. Mr Khan claims that after Prime Haven pulled out, Mr Raja said that one of his companies would match the offer of Prime Haven of £1,285,000 and that Mr Raja and Mr Watson shook hands. When cross-examined about this, Mr Khan was very hesitant. He was asked the question more than once by Ms Bailey before he gave his answer to the effect that he remembered that he had told Mr Watson about Mr Raja being behind the purchase. He said he knew nothing about Mr Watson being told about a Jewish buyer.

38. The evidence of Mr Watson also needs to be considered. He was well spoken and articulate in his evidence. However, there were times when he came over as very defensive, particularly when his evidence was being challenged by reference to contemporaneous correspondence. The Claimant repeatedly submitted that the adjournments sought in this case were prompted by a delaying tactics and were therefore not made in good faith. This submission was made due in part to the number of adjournments sought and by a belief that there was nothing in the defence. Thus, when the matter was adjourned in June 2020 due to a collapse of Mr Watson, there was a concern as to whether he could participate in a remote hearing. This led to an elaborate order about his being provided with a computer and having a trial run.

39. When the case was reconvened for October 2020, a further obstacle to the hearing was said to be the health of Mr Watson's mother and her imminent release from hospital. Mr Watson said that he needed to attend her return home due to his being the main carer of his mother. It emerged that the mother of Mr Watson was indeed about to be discharged and that Mr Watson was pivotal to that move and to making the home suitable for the intense medical needs of his elderly and very unwell mother. He also said that when he picked up the computer provided by the Claimant that it was damaged and unusable. The Court was not in a position to reach a judgment as to whether the computer was damaged or not. The case was almost adjourned again in November 2020 due to Mr Watson going to hospital just before he was due to give evidence. There was a concern as to whether he was exaggerating his symptoms: he was not detained in hospital, but he said that he was concerned to return home to look after his mother.

40. The Court is sympathetic to the position of the Claimant in having its ability to prosecute its case repeatedly frustrated. However, the suggestion that Mr Watson was involved in a series of delaying tactics is rejected. Mr Watson has been finding the whole process very stressful combining his own health difficulties, looking after his mother and his difficulty in coping with the stress of the litigation. The Court has no reason to believe that his concerns about his health in May/June 2020 and in October/November 2020 were anything other than genuine. As regards the computer,

the Court is unable to form a judgment as to the source of the difficulties, and hence the Court is unable to treat Mr Watson as to blame culpably for the numerous delays encountered in this case.

41. On the other hand, Mr Watson has been shown in this case not to be a reliable historian as documents have contradicted his case. For example, his case that his broker ceased to be involved in December 2015 (in the context of his case that the Claimant should not have paid the brokerage fee on his behalf) was shown to be false by reference to documents in January 2016 and February 2016 showing their continued involvement, albeit through a different person. Further, Mr Watson's case that he sold 16 Heathfield Terrace to a company owned by Mr Raja believing the purchaser to be a company at arm's length was demonstrated to be wrong. Documents in late July 2017 and early August 2017 indicated that he had discovered the true position about a fortnight prior to exchange of contracts. His oral evidence confirmed that he did have that belated knowledge. This has given rise to concerns about the reliability of his testimony.

VI The evidence that was not called and the law about adverse inferences.

42. Although two lever arch files of papers have been produced for this case, as noted it was clear from the papers that Mr. Khan was a signatory or an addressee in only a small number of contemporaneous documents. Mr. Raja's name features throughout the papers, at the beginning, in the middle and at the end of the narrative, and yet he was not in attendance at the trial. He was not a mere employee, but a person directing the affairs and a part owner of the Claimant and MFSL. As regards the matters in this case, he was, in my judgment, the chief protagonist of the Claimant and MFSL.

43. There was no satisfactory evidence to explain the absence of Mr Raja as a witness. There were serious allegations against him. Some of them had appeared in the pleadings, and it was not only in the witness statement of Mr Watson that they were made. In my judgment, where there is an allegation which raises a case to answer (e.g. the allegation that Mr Raja pretended that there was a particular buyer as a front for his own purchase), there is a possible inference from his failure to give evidence. The law about adverse inferences is set out in the case of *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324. In that case, Brooke LJ derived four principles from previous case law:

> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

44. The Claimant submits that these principles have been explained or qualified by the following:

(1) The court's discretion to draw adverse inferences is not exercisable unless it finds a party before it has not adduced any or any necessary evidence on an issue it is required to determine: per Lord Lowry in *R v IRC ex parte TC Coombs & Co* [1991] 2 AC 283 at para. 300, cited in *Wisniewski*, "…if the silent party's failure to give evidence [or the necessary evidence] can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

(2) Since fraud is improbable, "cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not" per Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122 at para. 55;

(3) Establishing a prima facie case in fraud requires more cogent evidence to be produced than a bare assertion. In the context of the BSB Code of Conduct, the evidence has to be reasonably credible material to establish an arguable case of fraud.

45. In the instant case, despite the fact that Mr Watson has not been found to be an entirely satisfactory witness, there is nonetheless a case to answer as regards the allegation of what Mr Watson called a 'fake buyer'. It is said on behalf of the Claimant that evidence was called by Mr Khan, and particularly that he was present at the meeting where there was said to be reference to the Jewish buyer. In my judgment, that is not an answer in this case in that the evidence of Mr Khan has been very unsatisfactory. I reject his statement that there was no reference to a Jewish buyer at that meeting, and prefer the evidence of Mr Watson. Mr Khan has been an inadequate substitute for Mr Raja. It is Mr Raja and not Mr Khan who is the moving force on behalf of the Claimant and MFSL. Mr Khan was unable to provide evidence in respect of important matters due to his limited involvement.

VII The general approach to oral testimony

46. This is therefore a case where the Court must rely less on the oral testimony and more on the documents and the inherent probabilities of the situation. The Court has been assisted by well-known dicta of judges in respect of the proper approach to oral evidence in cases with significant documentation. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413, Males LJ stated the following at paras. 48-49 under the heading "The importance of contemporary documents":

> "48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:
>
> > "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."

47. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) said this at [22]:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

48. These passages were considered by the Court of Appeal in *Kogan v Martin* [2020] EMLR 4, confirming the general proposition that especially in commercial cases, the Court must adopt this approach. However, that is not to say that all the evidence including the oral evidence should not be taken into account. The Court of Appeal was there critical of a judge who said that he would take very little account of the oral evidence because of the documents. In the judgment of the court at 88-89 (Floyd, Henderson, Peter Jackson LJJ), it was stated:

> "88. …First, as has very recently been noted by HHJ Gore QC in CBX v North West Anglia NHS Trust [2019] 7 WLUK 57, Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

49. There are aspects of this case where the documents do not always assist, particularly the recollection of Mr Watson of his interaction with Mr Raja. The Court will take into account concerns about the reliability of Mr Watson when his case has been subjected to the scrutiny of contemporaneous documents. However, the Court will also take into account the possibility of adverse inferences due to the fact that Mr Raja was not called to give evidence.

VIII The Consumer Credit Act defence/counterclaim

50. Mr Watson seeks to invoke the provisions of sections 140A and 140B of the Consumer Credit Act 1974 (sometimes hereafter referred to as "the CCA 1974") against both the Claimant and MFSL.

(1) Consumer Credit Act 1974

51. The relevant statutory provisions are as follows:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following–
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate

or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

(5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)

140B Powers of court in relation to unfair relationships

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

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

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

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

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

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

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

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

> (2) An order under this section may be made in connection with a credit agreement only–
>
> (a) on an application made by the debtor or by a surety;
>
> (b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or
>
> (c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.
>
> (3) An order under this section may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person.
>
> (4) An application under subsection (2)(a) may only be made–
>
> (a) in England and Wales, to the county court
>
> (b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or
>
> (c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.
>
> ……..
>
> (8) A party to any proceedings mentioned in subsection (2) shall be entitled, in accordance with rules of court, to have any person who might be the subject of an order under this section made a party to the proceedings.
>
> (9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

52. Mr Watson relies in particular on section 140A of the CCA 1974 to say that the relationship between the Claimant and him arising out of the agreement (or the agreement taken with any related agreement) is unfair to him. He seeks to say this by reference to:

(a) terms of the agreement or of any related agreement (section 140A(1)(a));

(b) the way in which the Claimant has exercised or enforced any of his rights under the agreement or any related agreement (section 140A(1)(b));

(c) other things done (or not done) by, or on behalf of, the Claimant (before or after the making of the agreement or any related agreement) (section 140A(1)(c)).

53. Mr Watson seeks in consequence orders under section 140B of the CCA 1974 to provide for the relief including that the Claimant account for the difference between the money paid by Inter Property Limited and the true value of Heathfield Terrace, Mr Watson will say that this sum is £615,000. Mr Watson says that this will entail an adjustment of the interest account so that interest is applied to the correct debt up until the date of the purchase of Heathfield Terrace and that thereafter Mr Watson says that there is a balance due and owing to Mr Watson by the Claimant. Mr Watson seeks interest on that balance.

(2) The law concerning unfair credit relationships

54. The Court is empowered to make an order under section 140B of the CCA 1974 if it determines the relationship between creditor and debtor is unfair. The unfairness must arise from either the terms of the agreement, the way the creditor enforced its rights or any other thing done by the creditor: see section140A(1) of the CCA 1974. This was expressed more fully by Hamblen J in *Deutsche Bank v Khan* [2013] EWHC 482 (Comm) as follows:

> "342. The core features of the unfair relationships provisions are that section 140A provides that a Court may make an order under section 140B in connection with a Credit Agreement if it determines that the relationship between the creditor and the debtor arising out of the Credit Agreement (or the Credit Agreement taken together with any "related agreement") is "unfair" to the debtor because of one or more of the following:
>
> (1) any of the terms of the agreement or of any related agreement;
>
> (2) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement; or

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

343. The CCA does not prescribe the factors which the Court can or should take into account in making this determination, instead it simply directs the Court to "have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)" (s.140A(2) CCA). Once a debtor alleges that the relationship is unfair, the burden lies on the creditor to prove the contrary: section 140B(9).

344. The consequences of a finding of unfairness are potentially draconian. The orders under section 140B may include discharging the debtor's indebtedness in whole or in part and/or requiring the creditor to repay some or all of the sums paid by the debtor under the Credit Agreement or any related agreement.

345. In considering the test of unfairness guidance is provided by the following authorities in particular: *Maple Leaf Macro Volatility Master Fund & Aor v Rouvroy & Or* [2009] EWHC 257 (Comm) ("*Maple Leaf*"); *Paragon Mortgages Ltd v McEwan-Peters* [2011] EWHC 2491 (Comm) ("*Paragon Mortgages*"); and *Rahman & Ors v HSBC Bank Plc & Ors* [2012] EWHC 11 (Ch) ("*Rahman*").

346. These authorities suggest that the matters likely to be of relevance include the following:

(1) In relation to the fairness of the terms themselves:

a. whether the term is commonplace and/or in the nature of the product in question (*Rahman* [277]);

b. whether there are sound commercial reasons for the term (*Rahman* [278]);

c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position (*Maple Leaf* [288]);

d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face (*Maple Leaf* [289]);

e. the scale of the lending and whether it was commercial or quasi-commercial in nature (*Rahman* [275]) (a court is likely to be slower to find unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers); and

f. the strength (or otherwise) of the debtors bargaining position (*Rahman* [275]);

g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis (*Rahman* [275]);

(2) In relation to the creditor's conduct before and at the time of formation:

a. whether the creditor applied any pressure on the borrowers to execute the agreement (if an agreement has been entered into with a sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor) (*Maple Leaf* [274]);

b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors (*Maple Leaf* [274]);

c. whether the creditor had any reason to think that the debtor had not read or understood the terms (*Maple Leaf* [274]); and

d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair (this point has particular force if he did complain over other terms) (*Maple Leaf* [274]; *Rahman* [276]).

(3) In relation to the creditor's conduct following formation and leading up to enforcement:

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision" (*Paragon Mortgages* [54(b)]);

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation (for example by attending meetings, engaging in correspondence and/or inviting proposals) (*Rahman* [280-281]); and

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor (*Rahman* [280-281]).”

55. As Mr Watson has pleaded reliance upon sections 140A and 140B of the CCA 1974, the Claimant must establish that it has acted fairly in circumstances where the burden of proof is placed upon the creditor by the CCA 1974: see section 140B (9). However, if the debtor’s evidence provides no suggestion that the relationship is

unfair, "the court is likely to regard the creditor as having discharged the burden and to dismiss the debtor's claim": see *Chitty on Contracts* 33rd Ed. at para. 39-224.

56. In considering whether a credit relationship is unfair, the court must have regard to all matters it thinks relevant, whether relating to the creditor as well as the debtor: see section 140A (2) of the CCA 1974. It may be that the features of the credit agreement or relationship operate "harshly" against the debtor. That fact alone does not mean the relationship is unfair – *Plevin v Paragon Finance* [2014] 1 WLR 4222, SC per Lord Sumption at para. 10 who said the following:

> "Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub-paragraphs (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone."

57. The scope of the Court to find a relationship to be unfair and to make orders adjusting the terms of the agreement under section 140B does not depend on an actionable wrong having been committed outside the provisions of sections 140A and 140B of the CCA 1974. Thus, in this context, the case does not depend upon there being a breach of duty of good faith of the mortgagee in connection with the sale of the mortgaged property. The case of *Patel v Patel* [2009] EWHC 3264 (QB) is an example of where the Court made such orders even interfering with compromise agreements which might otherwise have been valid.

58. The Court must consider and take into account not only the points raised by debtor but also any countervailing factors or other matters which put the matters raised by

the debtor into perspective and may affect the assessment. In *Scotland v British Credit Trust Limited* [2014] EWCA Civ 790, Kitchin LJ (as he then was) gave the judgment of the Court of Appeal and said the following at [para. 87]:

> "The court must consider the relationship between the debtor and the creditor arising out of the credit agreement and decide whether that relationship is unfair because of one or more of the matters identified in s.140A(1) having regard to all matters it considers relevant. This necessarily involves a consideration of the position of the debtor and that of the creditor. Further, if there are matters relied upon by the debtor which point to the relationship being unfair the court must clearly take into account any countervailing factors or other matters which put those matters relied upon by the debtor into perspective and so may affect the assessment."

59. Where a creditor enforces a business agreement, the courts have not found such enforcement unfair, unless it has been done in an arbitrary or exploitative manner: see *Chitty on Contracts* 33rd Ed. at para. 39-221.

IX The issues

60. The issues which arise are as follows:

(1) The broker commission

Was the Claimant entitled to pay over a sum of £14,750 to the broker and include that as part of the loan amount, or must it give credit for this sum and all interest charged on the same?

(2) CCA 1974 issue regarding a term of the agreement

In respect of the first 12 months of interest withheld from the loan amount, was the Claimant entitled to calculate that interest by reference to the loan amount and not simply the moneys advanced?

(3) CCA 1974 issues regarding the exercise or enforcement by the creditor of any of its rights under the agreement or any related agreement and/or any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

Did the Claimant behave unfairly to Mr Watson by:

(a) at and prior to the enforcement stage by bullying conduct;

(b) inducing the sale of 16 Heathfield Terrace by concealing Mr Raja's beneficial ownership of the purchaser; and/or

(c) procuring for itself and/or its director Mr Raja the same at an undervalue;

(d) setting out to obtain the valuable portfolio of Mr Watson through the appearance of bona fide loans;

(e) its conduct in respect of 25 St. Mary's Court;

(f) its conduct in respect of 7 Brighton Road?

(1) The commission paid to the broker

61. There is a dispute between the Claimant and Mr Watson whether the Claimant was obliged to pay Mr Watson's broker, MCIFA, a fee of £14,750, that is 1% of the loan. Mr Watson says that this money should not have been paid by the Claimant to the broker and that accordingly this ought to be deducted from the amount of the loan together with all interest charged on the loan referable to the same. In particular, he says:

(a) the broker is a reference to Mr Antoinades personally. He went off for 4-6 weeks at the crucial part of the negotiation.

(b) in early December 2015, MCIFA informed him that his application for a loan from the Claimant was "closed, or dead" and that MCIFA therefore "ceased to act with respect to the proposed financing".

(c) halfway through the application process, prior to or in early December 2015, the broker became unavailable and ceased to act in the proposed financing, following which the process recommenced with Mr Watson directly.

(d) in December 2015, Mr Watson informed the Clamant that he would not agree to the broker's fee being paid and he refused to authorise the payment of the same: see Defence [13].

(e) Accordingly, the broker was not entitled to his fee and so the Claimant should not have paid it.

62. The Claimant points to the documents which are to the following effect. There were various emails from 8 January 2016 to 14 January 2016 between the Claimant and the broker as follows:

(a) By an email of 8 January 2016 from Omkar Hushing on behalf of Paresh Raja for the Claimant to Mr Antoniades for MCIFA, various details were provided to the broker of what had been communicated by telephone to Mr Watson, which the Claimant required the broker to ensure that Mr Watson understood.

(b) By a response of 13 January 2016, Ms Rebecca Glenn of MCIFA responded that Mr Watson was planning completion but asked a specific question about proof of 'residency' and wanted to know if the Claimant was happy for funds to be released.

(c) The immediate response of the Claimant to Ms Glenn was that the Claimant's solicitors were ready to proceed but said that they were awaiting a revised decision in principle and details of the borrower's bank account which would be making payments to the mortgage accounts.

(d) On 14 January 2016, Ms Glenn responded to say that she had advised Mr Watson of this information.

(e) MCIFA (by Rebecca Glenn) sent to the Claimant an invoice for its procuration fee on 14 January 2016 for £34,662.50. (It is not apparent what this fee was about.)

(f) Mr Watson accepted in evidence that Ms Glenn communicated to him the Claimant's request for a signed copy of the Revised Decision in Principle: he sent a fax to the Claimant on 28 January 2016, referring to the "d.i.p," which he accepted meant decision in principle. As noted above, it was a part of the decision in principle that a commission may be paid by the Claimant to the broker.

(g) On 2 February 2016, Mr Watson sent an email to the Claimant stating that he had received the Loan Advance and he was *"going to fax Fahime now"* and would update the Claimant in the next few days. Additionally, the fee paid to the broker was stated on the completion statement sent to Mr Watson's solicitors comprising a sum of £14,750. Mr Watson did not challenge the payment of the broker fee at the time.

63. The Claimant submits that Mr Watson is liable for the Claimant's payment of the broker fee of £14,750 to Mr Watson's broker for the following reasons, namely

(a) By clause 7.1 of the Loan Mr Watson undertook to repay to the Claimant all costs, charges, expenses and liabilities that the Claimant paid and incurred in relation to the Loan, including "all commission." The Claimant communicated the 1% broker fee to Mr Watson in pre-contract negotiations: see Mr Paresh Raja's email to Fahim Antoniades of MCIFA of 7 December 2015.

(b) The Claimant denies that it received an instruction not to pay the broker.

(c) The above documents demonstrate that MCIFA continued to act in January-February 2016.

(d) Mr Watson did not challenge the payment of the broker fee until his defence to this claim.

64. I accept the case of the Claimant. The contemporaneous correspondence of 8 January 2016 – 2 February 2016 shows that MCIFA continued to act, despite the case of Mr Watson that MCIFA ceased to act in December 2015. In my judgment, when these matters were put to Mr Watson in the course of his evidence, he had no answer. If he has a complaint about MCIFA, that is a matter between him and MCIFA. I am not satisfied on the basis of the points made by the Claimant that Mr Watson did tell the Claimant not to pay to MCIFA, nor am I satisfied that MCIFA ceased to act or that the money was not properly paid to MCIFA. On the contrary, I find that as between the Claimant and Mr Watson, the Claimant was entitled to pay the sum of £14,750 to MCIFA and to charge the same to Mr Watson. It was also suggested that the fact that the commission was not spelt out in the loan agreement was significant. It is possible that sufficient notice of a charge could be given to incorporate it into the contract, but that more notice would be required in order for the relationship to be fair. There was nothing unfair about the notice in this case. First, the loan agreement at clause 7 referred to payment of commissions in general terms. Second, so did the decision in principle. Third, the letter of 7 December 2015 referred to the 1% commission. At one point, Mr Watson said that he had not signed the consent form: it is not clear to what he was referring. It may be the decision in principle: the copy in the bundle is not signed, but the Claimant's case is that it was signed. Nothing turns on this since the decision in principle came to his attention: there is no evidence that he rejected it: he relies on the decision in principle in his Defence. He referred to securing a revised decision in principle on 7 December 2015 (para. 7 of the Defence and Counterclaim) and to it being sent by MCIFA to his solicitors on 14 December 2015 (para. 8 of the Defence and Counterclaim).

(2) CCA issue regarding the rolled-up interest in the first year

65. A point which was contended for in the skeleton argument of previous Counsel, Mr Barry Coulter, on behalf of Mr Watson was that terms of the loan agreement evidenced an unfair relationship in both the January 2016 and January 2017 agreements. It was that the Claimant was entitled to withhold 12 months interest payments: at the same time interest was charged on the withheld money. It was submitted that interest is a payment for the benefit of having the lender giving up the use of the money during the period of the loan. In the January 2016 agreement the Claimant withheld £175,000. It was the Claimant who had the use of this money, yet it was Mr Watson who was required to pay interest on this money. The interest on this part of the 'lending' for the first 12 months of the January 2016 agreement was

£20,790. It was then submitted that from the date of the end of the agreement to the date of the commencement of the 3% compound monthly interest the Claimant will have sought a further £5,198 interest on that part of the gross lending, the total interest after the first 15 months was the £25,988. The Claimant will have now added further compound interest at 3% per month thereafter which will be a multiple of the original sum. At the time of the opening skeleton argument for Mr Watson of Mr Coulter in May 2020, this comprised 39 monthly payments comprising, it was said, £58,786 in interest to add to the £25,988 which means that the Claimant seeks £84,774 in interest on money that Mr Watson only ever had a notional use of and that the Claimant always had the actual use of.

66. The Claimant points to the following in response:

(a) This is not a point which appeared in the Defence and Counterclaim. If there could have been any evidence in this regard, it was not led. It was raised in the first skeleton as above. When cross-examined on it, Mr Khan said that the rolled-up provision was common-place in the industry among bridging finance lenders. There was no evidence to contradict this.

(b) This was a bargain which the parties entered. The capitalisation appears in clause 6.1.1, so that the interest was rolled up into the loan amount despite the fact that this part of the loan had never been received by Mr Watson nor was it laid out by the Claimant.

(c) The bargain was entered into in a business context, and it was acknowledged that since he was entering into the agreement in that context, he would not have protections which would otherwise have been available to him.

(d) Mr Watson had lawyers who acknowledged that they had advised about the terms of the loans and the security documentation.

(e) There was an advantage to Mr Watson in receiving this roll up. It meant that he would not have to pay interest or other instalment payments during the intended currency of the loan agreement. The cost to him was this roll up of the interest so that Mr Watson would have 12 months to generate funds to pay anything under the agreement.

67. In my judgment, there was nothing unfair about the clause. It was negotiated in a business context and with the benefit of independent legal advice. In addition to the matters prayed in aid by the Claimant, it is to be noted that if there had not been such a clause, and the interest were to be paid at the end of the 12 months, it would not have been simply 12 equal instalments. Each month, there would have been interest on interest: this would not have been as much as the effect of capitalisation from the start, but it would have been very different from the simple interest calculation on behalf of Mr Watson which is inherent in the calculations of previous counsel. Add to that the greater exposure of the lender, and the lender would have been entitled to reflect that by an additional cost to the borrower for that facility. This point has been

considered despite the absence of pleading. In my judgment, the effect of the capitalisation does not give rise to unfairness let alone the kind of arbitrary or exploitative conduct which may be required in a business context.

(a) CCA issue regarding sweet talking to bullying conduct

68. In a sense, this cannot be divorced from the other headings of unfairness relied upon. However, it can be dealt with at this stage simply by considering this as a possible allegation by itself or in line with other potential points.

69. The evidence of Mr Watson in this regard is as follows. He said that the Claimant was interested in a project which he had to purchase a restaurant in Chiswick. He said that the Claimant was offering enticements and being very responsive because, looking back, its intention was to get Mr Watson into a position where he owed so much money that the Claimant "would get their hands on all of my properties": see Mr Watson's statement [para. 13].

70. In the same statement, it is alleged that MFSL brought in valuers who were there to provide valuations to suit the transaction. He said "the valuation was deliberately at a level they knew was too high in order to allow them to lend to me a sum that would mean there was no equity therefore I could not refinance as I had refinanced with others": see Mr Watson's statement [para. 16].

71. Mr Watson said that as the transaction approached, additional conditions were imposed e.g. holding back payment for the retention of a year of interest instalments: see Mr Watson's statement [para. 17]. He said that he asked about terms of an extension at the end of the loan and that he received comfort as to an extension "it was implied this would be on better terms as to the interest i.e. less than .99% pcm": see Mr Watson's statement [para. 21]. To this end, he says that he had been advised that the Claimant was a flexible company and that it would review matters at the end of a year as regards interest rate and that an option of a 6-month extension would be provided: Mr Watson's statement [para. 37].

72. By contrast, in the course of the year of the bridging loan, he says that the Claimant was constantly pestering for information and updates. Their tone changed from flattering prior to the loan to wanting to have details about the rent being paid on the portfolio from which "it was clear that they wanted to have a charge over them all. Eventually they became not only demanding but very aggressive even bullying. The last quarter was very bad": see Mr Watson's statement [para. 24]. When he asked for an extension towards the end of the year, only a 3-month extension was on offer and with a further charge in respect of 15 Bramley Road being canvassed. Effectively, the Claimant was given a further 3 months to refinance the debt. Mr Watson says he then realised that the Claimant had misled him deliberately about their intentions at the time of the loan: see Mr Watson's statement [para. 27].

73. Mr Watson complains that in the course of the loan, instead of speaking with Mr Watson by phone, Mr Raja kept on summoning him to the office. He was often kept

waiting for up to two hours, which only added to his worry and anxiety: see Mr Watson's statement [para. 46]. By the period of March to August 2017, the meetings became more and more aggressive, threatening and loud: see Mr Watson's statement [para. 50]. He would leave the meeting "literally hearing my blood pulsing in the veins within my head." He described how he was interrogated in a very aggressive manner, there were repeated threats of sending in a LPA receiver, "full and liberal use of the Fu. abuse": see Mr Watson's statement [para. 51].

74. The response to these allegations was only by the oral evidence of Mr Khan. The evidence of Mr Khan was unsatisfactory for the reasons set out above. The person expected to respond was Mr Raja, and he has chosen not to give evidence in circumstances capable of giving rise to adverse inferences.

75. Although the above evidence was not contradicted effectively, that does not mean that it all must be accepted. The third of the propositions in *Wisniewski* was that there must be a case to answer on the particular issue before the court is entitled to draw the desired inference. The suggestion here is that Mr Raja was scheming from the start to acquire the portfolio of Mr Watson's properties. It is said that the Claimant to this end sought charges on both 25 St. Mary's Court and 16 Heathfield Terrace when the latter would have sufficed. To that end, it was suggested that the valuation of the properties was deliberately at an over-valuation in order to cause Mr Watson to borrow as much as possible and then wish him to fail so that Mr Raja could acquire his properties. This is said to explain why the Claimant changed from sweet talk to bullying conduct, from the possibility of extending the loan agreement perhaps by 6 months to confining the extension to 3 months and then requiring further security.

76. In my judgment, Mr Watson's evidence appears to ignore the commercial realities. They may be termed countervailing factors which put his factors into perspective and affect the overall assessment. They include the following:

(1) Mr Watson was taking on short term finance, which was obviously going to be perilous if he did not repay at the end of the primary period. It followed finance from Bank of Scotland plc, and then short-term finance from Commercial Acceptances. Thus, this was not the first instance of short-term finance. Further, there were arrears in respect of the properties in his portfolio comprising about £65,000. This indicates that in late 2015 when he was looking for bridging loan finance that the position was more desperate than he has recognised or admitted in his evidence.

(2) Mr Watson knew this from the outset in particular that after the term of the short-term loan, the interest rate would go up to 3% per month and be compounded. He does not say that those terms are unfair. They provide a context to his complaints about unfairness.

(3) Since his only source of being able to pay was the sale of his properties, it was incumbent on him not to let matters slip outside the primary period. There is in fact very little evidence of his taking steps during the first 12 month period to sell the properties. This may have been that the properties were difficult to sell or that he was unwise. It does not matter what the reason

was. To expect the bridging financier to assist after the primary period is to throw oneself on the mercy of the moneylender. Mr Watson was an experienced person in this field, albeit having far less bargaining power than the Claimant. He can be taken to have known the risks or to have been advised about the risks, and the decision in principle letter warned him about it: "Please note that this is a bridging loan facility, and you must be in a position to repay in full at the end of the Term. You should not assume that the Loan Term will be extended."

(4) Although there was considerable correspondence in 2017 about the possibility of the appointment of an LPA receiver and the like, the allegations about bullying conduct and the like are not referred to in the correspondence. This does not negative the entirety of the evidence in this regard, and the suggestion that Mr Raja behaved in an aggressive or unkind or even coarse manner may be true. However, a degree of pressure was inevitable due to default in respect of a bridging loan. There was nothing wrong with warning him about the possibility of the appointment of an LPA receiver or other enforcement steps.

(5) At each stage, he was advised by solicitors. Hence the various agreements contained acknowledgments by Mr Watson's solicitors, SB Law, that they had advised him about their terms. There was a particularly detailed set of acknowledgments in respect of the January 2016 agreements: there was also acknowledgment about the further agreements in January 2017. The same solicitors acted for Mr Watson in connection with the sale of 16 Heathfield Terrace.

(6) The enforcement was not immediate. First, the second loan agreement was entered into to provide the interest payments for an additional 3 months. Second, there was never enforcement by an LPA receiver in respect of 16 Heathfield Terrace despite the fact that the Claimant was entitled to do so from April 2017. To threaten the appointment of an LPA receiver in mid-August 2017 was almost 7 months after the period of the loan in the first loan agreement and almost 4 months after the expiry of the three months of the second loan agreement. Without condoning coarse language and what may have been perceived as bullying, ultimately the real pressure imposed on Mr Watson was the threat of the appointment of a receiver in circumstances against interest accruing at 3% per month on a compound basis and a sale price which did not even pay off the loan. Third, it is not consistent with Mr Raja wanting the property from the start that he did not become involved in a possible purchase until late June 2017, and that he was bearing with attempts of Mr Watson to sell the property to others. Mr Watson was no doubt under great pressure by a situation not of the Claimant's making.

77. It follows that I reject most of the allegations about the way in which the Claimant conducted itself in the course of the relationship. It was legitimate for the Claimant to threaten the appointment of an LPA receiver and to express displeasure about the situation. If and to the extent Mr Raja expressed himself using aggressive and coarse

language, without condoning that behaviour, that did not by itself give rise to the relationship being an unfair one in all the circumstances of the case. It is to be borne in mind that Mr Watson was in a commercial context and that he had the services of his solicitors throughout, and the communications were not regarded as serious enough at the time for this to be taken up in correspondence in the correspondence of SB Law on his behalf.

(b) CCA issue: inducing sale of Heathfield Terrace by false representation about identity of buyer

(1) The evidence

78. The facts have been set out above about the Mr Watson's case that he was misled into selling 16 Heathfield Terrace to a company controlled by Mr Raja. Mr Watson in his witness statement stated that the Claimant claimed to have found a buyer who were "prominent business-people in the Jewish community" who had "real money". Mr Raja advised that a property agent for them would be in contact. Mr Watson had dealings with Mr Qureshi who referred to himself as Asif. He would not identify the buyers by name.

79. At the next meeting with Mr Raja, Mr Watson was informed that his buyer would offer £1,000,000. Mr Raja said that "maybe we can get him to £1.1 million". Mr Watson refused and said that he needed to get £1.5/£1.6 million. He related a conversation at para. 64 of his statement at which Mr Raja was cutting across Mr Watson aggressively with a view to getting Mr Watson to accept the offer. At a further meeting, Mr Raja said that the offer had increased to £1.2 million. When Mr Watson said that he would not accept this, saying that he was not going to give away his property, the reaction was that they had found a very good buyer and it would remove some of his pressure: see Mr Watson statement [para. 66]. Mr Watson says that a sale at £1.63 million was progressing, and he asked why the buyer would not match the sum of £1,402,500 which had been notified by his solicitors. Mr Watson referred to how he was not permitted to speak to the buyer, but that Mr Raja conducted conversations with the buyer in his presence.

80. Mr Watson expressed concern about the balance, and Mr Raja said that they could work out the balance and it would not happen that they would come back in 3 or 4 months or so demanding the balance. He also says that at these meetings, Mr Raja made out that he and Mr Khan were arguing the position of Mr Watson, but they were being out voted by other people at the meetings. At no stage did Mr Raja identify that he was in fact the buyer through Inter Property Limited. There was no other buyer.

81. In his witness statement at para. 81, Mr Watson says that right until the day of completion, Mr Raja was pretending that the other buyer existed. Mr Watson says that the lies were told in order to get the property at a knock down price for himself. At para. 85, Mr Watson said as follows:

> "If not being bullied from pillar to post I could have taken the time to sell the property as a willing seller on the open market

> and obtained a much better price. If I had known the truth about the buyer, I would have known I was being bullied into selling at an undervalue I would not have sold to Mr Raja or his company unless I knew I was getting the proper price. He used his deception to finally cheat me of my property."

82. In the course of his evidence, Mr Watson accepted that he knew that Mr Raja was involved in the purchase of the property. He was referred to an email sent by the Claimant's solicitors to his on 27 July 2017 at 15:38, which said: "My client is in the process of confirming which of their companies the property will be bought by – as soon as this is finalised, I will revert". His evidence was that he understood the reference to "their companies" was to a company belonging to Mr Raja and associated with the Claimant. He also confirmed that in any event his solicitors had discovered Mr Raja's involvement with Inter Property Limited by 2 August 2017, from searches they had done. It was on that date that Inter Property Limited was incorporated and the solicitors for the Claimant, also solicitors for Inter Property Limited, informed his solicitors of the buyer's name. That was more than a week prior to exchange of contracts (11 August) and more than two weeks prior to completion (18 August).

83. This showed that para. 85 of Mr Watson's witness statement was untrue. When asked why he did not reject the possible purchase when he discovered the fact that Mr Raja was behind the buyer, Mr Watson said that it was then too late. He was facing the prospect of the property being repossessed, and the interest was mounting on the moneys borrowed. Mr Watson said that by late July 2017, he was committed to the sale and that but for the false information, he might have been able to sell it to an arm's length purchaser. He had lost a critical month of looking for a bona fide purchaser.

84. The written evidence of Mr Khan referred to the earlier offer of Prime Haven and how that offer was made, and then it did not lead to a purchase. At para. 31 of his witness statement, Mr Khan said in respect of a meeting of 2 August 2017:

> "Mr Raja told the Defendant that as the other potential buyer had pulled out and he had not managed to find another buyer despite extensive efforts one of his companies would be prepared to offer the same price as the other potential purchaser, namely £1,285,000. It was made clear that this was a company of which Mr Raja had control. It was also made clear that if Inter Property brought the property the Defendant would not have to pay selling agents fees. At that point the Defendant stood up shook Mr Raja's hand and thanked him for helping him out since the original term had expired and for purchasing the property from him. The Defendant was fully aware at that time of Mr Raja's senior role in the Claimant and MFS."

85. I have commented above that the evidence of Mr Khan was unsatisfactory. His evidence as noted above was very hesitant when it was first put to him that Mr Watson did not know about the involvement of Mr Raja. I do not accept his evidence that Mr Raja had come forward identifying himself as the purchaser. Mr Raja has not given any evidence on this subject when it would have been within his knowledge. I prefer the evidence of Mr Watson that the true position was unravelled between him and his solicitors and not because the matter was expressed.

(2) Discussion

86. The evidence is unsatisfactory. Mr Watson has provided a case to answer that a false representation was made repeatedly that there was a purchaser for 16 Heathfield Terrace and that the case that this was a person from the Jewish community was in order to mislead Mr Watson into believing that this would be an arm's length purchaser. In my judgment, unsatisfactory though aspects of Mr Watson's evidence were, I consider it unlikely that he invented the story of Mr Raja referring to the Jewish buyer.

87. The evidence of the Claimant is deficient because Mr Raja was not called to give evidence. There is no good reason provided why he did not give evidence. The evidence of Mr Khan to the extent that he denied the above was unsatisfactory and largely secondary. Mr Raja was the obvious person to rebut the evidence of Mr Watson that there was a pretence about the identity of the buyer to conceal the fact that the company was a front for Mr Raja.

88. It is said on behalf of the Claimant that the evidence of Mr Watson was unsatisfactory because it was shown that by late July or early August 2017, Mr Watson knew that Mr Raja was behind the purchaser. It was also pointed out that in other respects Mr Watson was an unsatisfactory witness. I take that into account, but, in my judgment, it is unlikely that Mr Watson simply made up the case about the representation about the buyer from the Jewish community. Mr Raja had the opportunity to deny this, and to be tested on such denial.

89. The Claimant and MFSL say that Mr Watson's case is incredible comprising multiple acts of fraud. Despite reason for scepticism and caution about parts of the evidence of Mr Watson, and the fact that in this judgment, the Court rejects various aspects of his evidence, in my judgment, it is unlikely that he made up the account about Mr Raja's reference to finding a purchaser from the prominent Jewish community. The representation that the purchaser was from the Jewish community was asserted at para. 29 of the Defence and Counterclaim, and it was refuted at para. 32 of the Reply, but it was not backed up by evidence from Mr Raja. It is in my judgment more likely than not that the representation was made and that it was untrue without an adverse inference being drawn from the failure to call Mr Raja. I reach that conclusion taking into account the need for the evidence of fraud or reprehensible conduct to require more cogent evidence in order to raise a case to answer. I do not accept the suggestion that the Claimant could rely or believed that it could rely on Mr Khan to refute the case of Mr Watson. It must have been obvious to the Claimant that Mr

Khan's ability to answer the allegations in particular about the "fake buyer" was going to be limited and inadequate.

90. When Mr Khan was cross-examined about his inadequate knowledge and the reasons why Mr Raja was not called, he was unable to give any credible explanation as to why Mr Raja had not been called. In my judgment, this left unexplained the decision not to call Mr Raja. It leaves an adverse inference that he was unable to give a satisfactory response to the obvious questions about his wishing to hide the identity of the buyer. Taking into account the totality of the evidence, and even bearing in mind aspects of the evidence of Mr Watson which were unsatisfactory, I find on the balance of probabilities that (a) even without any adverse inference Mr Raja did make the false representation regarding the identity of the buyer so as to conceal his own involvement, and (b) I prefer the evidence of Mr Watson to the denial of Mr Khan about the reference to the buyer being from the Jewish community. Although it is unnecessary in order to reach the conclusion that the representation was made, this case is reinforced by the existence of an adverse inference from the fact that Mr Raja was not called.

91. In the course of the case, and in further submissions before the handing down of the final judgment, the position of Prime Haven was considered. The Court heard the following arguments and come to the following conclusion, namely

> (1) the submission on behalf of Mr Watson is that Prime Haven was used by Mr Raja in order to acquire 16 Heathfield Terrace: it was not a genuine purchaser or it was in some way in league with Mr Raja. It was also submitted that it had a link with Mr Raja in that it was incorporated on the same day as Inter Property Limited, Mr Raja's vehicle for the purchase.
>
> (2) the Claimant says that what was put by Counsel is not evidence and that there is no evidence to the effect that Mr Raja had control of Prime Haven. If the Court were to admit the evidence of a Prime Haven company formed on 2 August 2017, it would open up the fact that there was another Prime Haven company formed in 2014 and the fact that Mr Raja was not shown as a director of either company.
>
> (3) Ms Bailey on behalf of Mr Watson submits that the Court should admit company searches for such Prime Haven companies as there are, and should require the Claimant to provide information relating to Prime Haven.
>
> (4) In my judgment, it is too late at this stage to admit further evidence about Prime Haven, what was its true name, who owned it and its relationship or interaction with the Claimant.

92. On the other hand, the failure of the Claimant to adduce evidence as to who Prime Haven is and why it became interested and then ceased to be interested in the purchase may give rise to suspicion. Even if there is suspicion, the question is whether there is sufficient to prove that Prime Haven was not a bona fide prospective purchaser. I am satisfied that there is insufficient evidence to infer or establish this on the balance of probabilities. This does not affect the finding about the false

representation relating to the Jewish buyer, which is established irrespective of the position as regards Prime Haven. In the face of an intentional misrepresentation, there is a rebuttable presumption of an intention to induce the representee to rely upon the fraud and of reliance. If there is scope for such a presumption in this case, it is rebutted on the evidence. Mr Watson's case that he was ultimately misled was demonstrated to be false by the contemporaneous documents and by his oral evidence. That showed that he knew about Mr Raja's involvement before exchange of contracts and completion. Further, during the period following what he called the 'fake buyer' meeting in late June 2017, instead of relying on the Jewish purchaser representation, he was seeking to negotiate a sale to others who would offer more, but he failed to secure such a purchaser.

93. Various matters advanced in Mr Watson's witness statement have been shown to be false, namely:

(1) he believed until the time of the sale that he was selling to an arm's length buyer: the contemporaneous documents and oral evidence of Mr Watson show that he knew the true position from 27 July 2017 onwards;

(2) he acted to his detriment relying on the sale to an arm's length buyer: he was trying actively to sell to different buyers from whom he hoped to receive a higher price in June and July 2017, and throughout this period he thought that the sum offered by the buyer 'introduced' by the Claimant was not sufficient;

(3) he would have been able to have obtained a purchaser who would buy at the market value which was as valued in December 2015 of a sum of over £1,800,000: in fact, the marketing of the property by Mr Watson independently of the Claimant showed that he himself was unable to find a purchaser at such a price, and further that he was prepared to proceed with a sale at £1,365,000 (where there might have been an estate agency commission) after other sales at higher sums had failed to materialise;

(4) the belated case that by the time that it was known who the purchaser was, it was too late to find another purchaser implies that Mr Watson relied on this purchase taking place. That is not so: as stated above, the evidence is that Mr Watson was looking to find another purchaser, believing that the sums offered were too low. Hence, he negotiated upwards and so obtained a larger price than the early offers communicated by Mr Raja.

94. A further matter put in cross-examination to Mr Khan was that if Mr Watson had known that Mr Raja was in effect the buyer, he would not have consented without agreeing that the sale should be in full and final settlement of the indebtedness of Mr Watson to the Claimant. This was not in the pleadings. Further, it is at odds with the fact that when Mr Watson did know of the involvement of Mr Raja, but the witness statement does not say that there was an attempt to have the balance waived. On the contrary, the concern was how long it would be until the Claimant sought the balance and not whether the Claimant would seek the balance.

95. The representation might make the Court particularly suspicious about the motives of Mr Raja. The most likely motive would be to obtain the property at less than the market value. However, the fact is that the transaction proceeded in circumstances where (a) none of the other prospective buyers materialised into a contract of sale, (b) Mr Watson proceeded to sell to Mr Raja's company knowing about his involvement, and (c) Mr Watson was at the material time represented by solicitors.

(c) CCA issue: whether the sale of 16 Heathfield Terrace was at an undervalue

96. As regards whether the sale was at an under-value, the evidence to support this case is limited. First, there is the fact that a valuation was made in December 2015 of a sum of £1,850,000, and there was also estate agency evidence of marketing information relating to the property in the middle of 2015. Second, Mr Watson also relies upon his pleaded case that after acquiring 16 Heathfield Terrace in August 2017 for £1,280,000, the buyer raised lending on it in the sum of £1,500,000 in January 2018. It is submitted in the Defence that there can then be extrapolated from this that Heathfield Terrace must have been worth more than £1,500,000 (if a ratio of lending to value of 100/75 is taken), then it would have been worth £2,000,000. Mr Watson says also that no documents were provided by the Claimant in connection with this lending, and further that inferences can be drawn from the failure of Mr Raja to give evidence. It should be added that in the course of the trial, there was a belated attempt to introduce a sale of a property further up the road for over £2 million, which the Court ruled as too late. Even if it had admitted such evidence, it would not have altered the result because the value of a nearby property without detailed consideration of the condition of the property, the nature of the sale and all factors for and against the property being a comparable would have been insignificant and non-probative.

97. These matters do not weigh heavily the other way. They have to be put into the balance against what people were prepared to offer in the market. The history of what happened at the relevant time indicates that it was not possible to receive a significantly higher sum for the sale of the property. The circumstances were akin to a forced sale. None of these other factors prove a case to the contrary, bearing in mind especially the following:

> (1) the case about the valuation is confused. In one breath, Mr Watson was saying that the valuation was inflated by a friendly surveyor who would act to the Claimant's order so as to get more business: the higher the valuation, the greater the loan could be and the greater the prospect of default to the advantage of the lender. This is a speculative case: it was not borne out by other case histories, and as a business model, it sounds like one which would destroy a lender rather than offer rich pickings. It does not deal with any consideration as to whether there were any changes in the local or regional market in the 20 months from December 2015 to August 2017.
>
> (2) There is no evidence of what triggered the loan in January 2018, or as to the terms of the loan and the security available to the lender. It does not sound as telling as the prices which prospective purchasers were prepared to

pay in 2017 for the property, and the history of intended purchases which did not proceed.

(3) As regards the charge on the property in favour of a company which lent Inter Property Limited a sum of £1,500,000, this tells nothing. The legal charge was in the same terms as the legal charges entered into by Mr Watson and the solicitors of the Claimant have their name on the document. The inference is that the lender to Inter Property Limited was a company connected with Mr Raja and the Claimant. The consequence is that there is little scope for an inference that the loan amount proved that the property was thought to be worth more than £1,500,000 or even that sum.

(4) The most significant point is the history of those offers which were made at far less than the valuation sum and with which Mr Watson was prepared to engage. If the sale had gone through at the sum of £1,365,000 and Mr Watson had been liable to pay estate agency fees, then he would have received possibly less than £50,000 more than he did receive on the sale to Inter Property Limited. In any event, the sale did not proceed. If a property is ultimately worth what somebody will pay for it, the history of transactions which did not proceed is more telling than a valuation.

98. There has been no expert evidence to show that the property sold at an undervalue. Of crucial importance, this was akin to a forced sale in that Mr Watson wished to avoid a sale by a Law of Property Act receiver, and he was acutely aware about the interest accruing on the outstanding loan. The evidence of attempts to sell the property before Mr Raja's company emerged showed an inability to attract sums anywhere near the valuation of the property from December 2015. Further, those offers which were not radically higher than the amount of the sale which did go through (most were not more than 10% over the actual sale price) did not proceed. The Court is therefore left without any reliable evidence to show that there was a sale at an under-value.

99. What actually occurred was that Mr Watson entered a short-term bridging loan. Either improvidently or due to force of circumstances, he did not sell or refinance within the year of the loan or the additional 3 months, and when he came to attempt to sell the property, he was unable to find a purchaser. Mr Raja may have started to attempt to mislead Mr Watson about the identity of the purchaser, but this deceptive behaviour did not continue because Mr Watson, with his solicitors, found out the true position. Mr Watson proceeded because Mr Raja's company was the only available purchaser. This was a sale entered into by Mr Watson through a solicitor, and not a sale by a receiver or a mortgagee. He proceeded as seller, and so the case is not analogous to a sale made by a receiver or a mortgagee in possession.

100. The case in the end does not turn on the burden of proof. It is often said that a property is worth only what someone will pay for it. This was akin to a forced sale by the time of the sale. Based on the evidence of other offers and the failure to be able to secure the same, the sale was for whatever someone would pay at the time of a speedy sale. The sale took place after some amount of marketing which had preceded it, and offers which had come and gone without materialising into a sale. Some of the offers,

which Mr Watson had been prepared to accept, were for prices which were not radically greater than the price which he accepted from Inter Property Limited.

101. In all the above circumstances, this is not a case where the Court can infer that Mr Raja acquired 16 Heathfield Terrace through a trick or that Mr Watson sold the property to Inter Property Limited in reliance on a fraudulent misrepresentation (since he knew the true position about a fortnight before exchange of contracts) or that he sold the same at an undervalue. There was an attempt to show that the buyer was at arm's length, but it was short lived, and the ultimate sale was not the result of any attempted fraud.

(d) CCA issue: setting out to obtain the valuable portfolio of Mr Watson through the appearance of bona fide loans

102. The case here is from the start, the Claimant set in train a method whereby Mr Raja would acquire some or all of the portfolio of Mr Watson. It is said that Mr Raja set up Mr Watson to fail. To this end, it is alleged that there was manipulation of the surveyors in order to get them to provide excessive valuations so that Mr Watson would borrow so much that he would fall into default. It is, in my judgment, far-fetched. It is at odds with the case of Mr Raja procuring a purchase at an undervalue. It is a very unsound model for a lender. There was no hard evidence of other cases where this had occurred, or of purchases by Mr Raja or his companies in similar circumstances. It does not follow from the fact that a lender has an ongoing commercial relationship with surveyors that they would provide a fraudulent valuation. Each surveyor may have provided 10-15 valuations per annum for a fee of £475 each, but it would be highly improbable that this would give rise to a reason to give a valuation for a fraudulent purpose. It also does not follow from the fact that latterly Mr Raja may have been seeking to mislead Mr Watson through the use of a 'fake buyer' that he would therefore have been trying to set up Mr Watson to fail all along. This part of the case is based on speculation, and it does not raise a case to answer such as to give rise to the possibility of an adverse inference by the fact that Mr Raja did not give evidence.

(e) CCA issue: conduct in respect of 25 St. Mary's Court

103. The evidence regarding 25 St. Mary's Court has been discussed above in that it shows how unsatisfactory was the evidence of Mr Khan. The evidence is that LPA receivers were appointed on 29 January 2018 by the Claimant as second mortgagee. There was then difficulty in getting the tenants out of the property. The witness statement of Mr Khan reveals that this property was tenanted, and that possession was obtained by an order of 21 March 2019 and enforced on 4 June 2019. As noted above, Mr Khan assumed that it had been sold two years ago which was demonstrably untrue. The source of his information was unclear. When it was put to him that 25 St. Mary's Court had not been sold according to the records being held by the Land Registry, Mr. Khan did not modify his answer. The explanation as to why no credit had been given

for the so-called sale of 25 St. Mary's Court was that the first mortgagee had been paid and that no real surplus had accrued.

104. This is untrue. It is incomprehensible how this information has not been forthcoming despite the Claimant's close relationship with the LPA receivers. Further, after the unsatisfactory nature of Mr Khan's evidence, there was no attempt to volunteer an updated position to the Court. Here too, the person who was likely to know most, namely Mr Raja, was not called.

105. The Claimant's response is one of law. The relevant law can be summarised as follows:

(1) "A mortgagee's decision to exercise or to refrain from exercising such powers is not constrained by reason of the fact that the exercise or non-exercise of the powers will occasion damage or loss to the mortgagor." see *Lightman & Moss* 6th Edition at para. 13-007;

(2) The same applies to receivers even though they have been appointed as such. They must exercise their powers in good faith. If there was evidence that they were not selling for some collateral reason such as to expose the mortgagor to the largest possible debt, there may be a breach of the duty of good faith;

(3) "The receiver, although appointed by the mortgagee, is deemed to be the agent of the mortgagor, who is solely responsible for the receiver's acts and defaults unless the mortgage deed provides otherwise [see Law of Property Act 1925 s,109(2) and clause 7.4.6 of the legal charges] or unless the mortgagee gives directions to the receiver or interferes with his conduct": see *Standard Chartered Bank v Walker* [1982] 1 WLR 1410 at 1416 and *Snell on Equity* 34th Ed. para. 39-057. It therefore follows that without more his default or breach of duty is as agent for the mortgagor and not the mortgagee.

106. Applying the above to the instant case, there is no evidence here of an absence of good faith on the part of the receiver in connection with the fact that no sale has not taken place. It would be unusual for there to be a liability for the fact that the property has not been sold. In any event, the Claimant is not liable for the acts and defaults of the receivers due to the deemed agency for the borrower, unless directions are given by the mortgagee to the receivers or the mortgagee is interfering with the conduct of the receivers. There is a case here put on behalf of Mr Watson to Mr Khan, namely that since there was a close relationship between the Claimant and the receivers, it must follow that the Claimant was giving instructions and directions and/or was interfering with the conduct of the receivers. In my judgment, this is surmise and supposition. This is not a basis for a case. It might have been different if on disclosure there had been found some document about such interference or directions. There is no such evidence. In these circumstances, there is no case to answer in this regard. It therefore follows that the absence of evidence from Mr Raja does not give rise to an adverse inference in this respect.

107. Although there is scope for an unfair relationship even in circumstances where there is no other underlying legal or equitable right, the requirement of a second charge in respect of St. Mary's Court was a matter for the lender. There is nothing which appears arbitrary or exploitative about having a charge over St. Mary's Court. Further, the fact that it was not sold does not affect the requirement of Mr Watson to honour his covenant to pay without reference to any underlying security whether or not possession was taken of it and whether or not it was sold. The only pleaded aspect is that the charge should be discharged. It is not apparent from section 140B that the Court has power to make such an order. If it does, it is an order which should not be made in the circumstances of this case.

(f) CCA issue: sale of 7 Brighton Road

108. This property was charged in respect of the additional loan of January 2017. It does not form a part of the allegations in this case. The allegations in the Part 20 claim against MFSL do not include allegations relating to the sale of 7 Brighton Road. This was a second charge against that property. There was a sale by receivers over 7 Brighton Road. It was a second charge, and the sale realised only a net sum of £2,211. The pleading does not contain any separate allegation relating to the conduct as regards this property. There is no allegation of a sale at an undervalue, still less anything tangible against the Claimant or MFSL.

109. Even if it could be pursued without being pleaded, an allegation in respect of 7 Brighton Road cannot succeed on the evidence. It was suggested that it was wrong to take additional security at the time of the second loan in circumstances where the first loan was not being enforced. There was no reason why this could not be required by a prudent lender. Mr Watson agreed to it and his solicitors acted in advising him in respect of the second loan and the charge. There is also nothing to indicate that the sale is to be impeached. This was a receiver sale, and therefore prima facie undertaken by the receiver as agent for Mr Watson. There was no evidence of interference. Mr Khan at one point referred to the receiver acting on the matter being "our receiver": in context, this was a reference to the fact that the receiver was the appointee of the Claimant.

110. The sale was for a sum of just in excess of £200,000, whereas Mr Watson obtained a valuation for a sum of £300,000. This by itself and without more does not necessarily indicate a sale at an undervalue. More would have to be known about the marketing of the property and the time allowed for its sale. In any event, the only pleaded case is that the charge should be discharged. That is not possible because the sale has taken place. It follows for all these reasons that any allegation in respect of 7 Brighton Road is not sustainable.

(g) CCA issue: other unfairness

111. In her concluding written submissions, Ms Bailey summarised the areas of unfairness at para. 62 in nine sub-paragraphs i-ix. In fairness to her carefully prepared

submissions, the Court will consider the same insofar as they add to the matters set out above.

112. They are as follows using the numbering therein:

> i-iii. There was a mistake in respect of the Bramley Road moneys. They did increase the amount of the indebtedness, but not to an extent that had an impact on the overall lending and risk. There was no money to be released to Mr Watson in circumstances where the security did not equal the sums of money advanced even after allowing for the mistake in respect of the Bramley Road moneys. Further, this is not a case where additional moneys were raised. Nothing has been raised by Mr Watson.
>
> iv-v. There was no promise about a three-month extension, and there were written warnings to contrary effect. In fact, Mr Watson was given the benefit of the second loan agreement and the quid pro quo was the charge on 7 Brighton Road. Mr Watson's solicitors advised him in respect of this transaction and the first transaction. There was no question of depriving Mr Watson of independent advice as is evidenced by the transaction documents showing a desire that they be involved and advise Mr Watson fully.
>
> vi-vii. The detailed findings in respect of 'fake buyer' appear above. In the end, the true position was revealed prior to exchange of contracts, and the attempts to say that they had a continuing causative effect fail.
>
> viii-ix. The matters relating to 7 Brighton Road and 25 St Mary's Court appear above.

X Conclusions

113. The Court has considered each of the matters raised by Mr Watson. The sole matter which has been established on the balance of probabilities is that there was a representation that the purchaser was going to be from the Jewish community, when this was not true: this was over a limited period of time. However, Mr Watson's case that this led him into selling to Inter Property Limited has failed because, contrary to his written evidence, it has been demonstrated that about 2 weeks prior to exchange of contracts and 3 weeks prior to completion, he and his solicitors found out that Mr Raja was behind the buying company.

114. The fact that there was an intent to mislead on the part of Mr Raja in this regard has made the Court consider with particular caution other aspects of the case about an unfair relationship. Having given careful consideration, the Court has found that there was nothing about the terms of the contract, as alleged by Mr Watson which could amount to an unfair relationship. It has also found that although there was a representation about a Jewish purchaser, it was not relied upon because during the period when the representation was made, Mr Watson was seeking to find a purchaser elsewhere who would purchase at a higher price. Prior to exchange of contracts with

Inter Property Limited, Mr Watson and his solicitors uncovered the fact that the intended purchaser was a company to be owned by Mr Raja. Acting with and through his solicitors SB Law, Mr Watson decided to sell the property to Inter Property Limited for the sum of £1,285,000.

115. The harsh reality of this case is that Mr Watson had a property business which experienced significant difficulties triggering the borrowing from the Claimant. The borrowing was with the assistance and advice of his solicitors. He has not explained how and why he did not procure an earlier disposal of 16 Heathfield Terrace or the other properties. The allegations of an intent from the start to cause Mr Watson to fail and undue pressure have not been established. In the end, Mr Watson was allowed a further 3-month agreement and a further period of 4 months before an LPA receiver would have been appointed. He was unable to secure a higher price than the price at which he sold the property to Inter Property Limited. Mr Watson sought other opportunities for someone other than Mr Raja through a company to acquire the property. In the end, Mr Watson ran out of options, but that did not make the transaction unfair or the relationship an unfair one.

116. When the position between the parties is seen in the round, there was no unfair relationship in that the Jewish purchaser representation had no consequence. If, contrary to the foregoing, there was an unfair relationship, it had no causative effect and there is no reason to order any remedy other than that it will be considered as being potentially relevant to costs, consideration of which is to follow.

117. The Court has also considered whether there was an entitlement on the part of the Claimant to recover the sum of £14,750 paid to the broker. It was entitled to this, and further, there was nothing unfair about requiring the same to be repaid. The Bramley retention moneys were credited, and there ought to be checked that the requisite interest was also credited. The Court was provided with the answer that the Bramley retention moneys were indeed credited on 13 April 2017. It was suggested that this sufficed because the interest was aggregated for the purpose of the first 12 months and thereafter for the subsequent 3 months, and the Bramley retention money was credited in advance of the monthly interest of 3% per month being charged. This did not not suffice because on the basis that the Bramley retention moneys were never paid, they never formed a part of the moneys lent. It therefore followed that it was necessary to give the credit not as at 13 April 2017, but as at 13 January 2016. In short, it needed to be deducted from the loan, because it was never advanced.

118. The capitalisation of interest under the first and the second agreements between 13 January 2016 and 13 April 2017 needed to be deducted to be reduced to take into account that the sum of £26,460 comprising the Bramley retention moneys was not a part of the loan, and therefore interest should not have been capitalised on this. This has been done on 22 February 2021 so that there has been credited interest of £3,930, and the base sum from which default interest from 13 April 2017 was calculated has been correspondingly reduced. This has been the subject of comment by the Defendant on 23 February 2021. Those comments include the following:

    (1) The arrangement fee of 2% must be reduced to reflect the lower loan of £1,448,540 as a result of which the arrangement fee should be £28,970.80 and not £29,500. The effect is a further reduction of the capitalised interest until

13 April 2017 and thereafter of the amounts due and the interest thereon from then. This seems to be correct.

(2) It follows from the way in which costs are to be the subject of an assessment that they are to come out of the calculations, whereas at the moment, they are included in the calculations with interest. The way in which this will operate in practice can be agreed or adjudicated upon. At this stage, the order should include a sum net of the costs and the interest thereon.

(3) Insofar as other sums are included other than the loan sums (e.g. valuations and security fees), they too should be excluded at this stage. A method for dealing with these costs should be agreed, or there can be an adjudication as to how that will work.

119. Subject to the foregoing, the claim of the Claimant succeeds, and the Counterclaim is dismissed. A judgment about costs is being handed down at the same time as this judgment. The Court orders that this hearing is adjourned as regards any other consequential matters. The parties must seek to provide a draft order along the lines indicated in this judgment and in the judgment as to costs for the Court to consider and approve.