Neutral Citation Number: [2016] EWCA Civ 491

Case No: B5/2015/2604 CCRTF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT LEEDS
MR RECORDER CADWALLADER
A80LS245

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2016

Before :

LORD JUSTICE ELIAS
LORD JUSTICE CHRISTOPHER CLARKE
and
LORD JUSTICE KITCHIN

- -

Between :

THOMAS NELMES	**Appellant**
- and -	
NRAM PLC	**Respondent**

- -
- -

John Pugh (instructed by **Trinity Law**) for the **Appellant**
Elizabeth Ovey (instructed by **DWF LLP**) for the **Respondent**

Hearing date : 21 April 2016
- -

Approved Judgment

Lord Justice Christopher Clarke :

1. Thomas Nelmes ("Mr Nelmes"), the appellant, was born in 1955. Between 1974 and 1980 he was a professional rugby league player. Unfortunately he suffered an elbow injury which eventually brought his career to an end. He received some financial compensation which he used to start a business buying properties to renovate and let. By 2007 he had acquired a portfolio of 25 buy-to-let residential properties in Huddersfield which were charged to a number of different lenders and he had a good idea of property values in Huddersfield. He was also occupying a property ("the Property") – 25 Broadgate, Almondbury, Huddersfield - as his home.

2. Mr Nelmes wanted to have all his borrowing from one lender and to obtain some more funds without having to charge any more properties. To that end he entered into loan and security arrangements with Northern Rock PLC, now named NRAM plc ("NR"), the respondent. These arrangements were the product of negotiations over most of 2007 during the course of which the Property came to be included within the security.

3. In July 2013 NR sought to enforce its security over the portfolio and the Property. Mr Nelmes brought proceedings in the Leeds County Court in which he claimed that the relationship between NR and him arising out of the relevant agreements was unfair because of one or more of the matters specified in section 140 A of the *Consumer Credit Act 1974* and asked the court to grant him a range of relief.

4. The claim was heard for five days in April 2015 before Mr Recorder Cadwallader in the Leeds County Court. On 18 July 2015 he declined to find any aspect of the relationship unfair save one; declined to grant any relief; and ordered Mr Nelmes to give up possession of the Property. From that decision Mr Nelmes appeals, permission having been granted by Vos LJ.

5. The judgment of the learned recorder ("the judge") is thorough, careful and clear. Save in one respect Mr Nelmes does not seek to challenge his findings of fact. In those circumstances I propose to refer to such of the history, as found by the judge, as is necessary to identify the matters on which Mr Nelmes unsuccessfully relied (and now seeks to appeal) and to state my conclusions on them as they arise.

The broker

6. Mr Nelmes was introduced by a friend to Mr Ian Blair of ASC West Yorkshire ("ASC"), a broking firm. Mr Blair became his broker. On 23 February 2007 Mr Blair wrote to Mr Nelmes at the Property to say that he was completing ASC's Preliminary Financial Assessment and had already communicated with "*our lending institutions"* which had confirmed that in principle they were very interested in his proposition and subject to various matters were prepared to proceed with his application for finance.

The properties

7. By this stage or shortly thereafter Mr Nelmes had provided Mr Blair with a list ("the portfolio list") that had been compiled for him of 26 properties including the Property itself. All but two were mortgaged. The approximate value of those properties was said to be £ 2,656,000; and the mortgage balance was said to be £ 1,228,004, leaving

an equity of £ 1,417,996. In fact the £ 2.656,000 was only correct if the Property was excluded. The monthly payment for the properties was said to be £ 7,574.87 and the monthly rent received £ 15,510. The information in the portfolio list came either from Mr Nelmes or from someone acting on his behalf.

The applications

Mr Nelmes at ASC

8. On 2 March 2007 Mr Nelmes signed an application form to ASC. It revealed that he had been at the Property for 3 years. It described his business as "*Thomas Nelmes Developments*" whose business address was that of the Property and whose yearly income was said to be £ 60,000. The business was said to have been established for 25 years. The gross rent was said to be £ 186,120 (i.e. £ 15,510 x 12). The portfolio list was one of the papers attached to the application form. Under the heading "*Loan details*" was written "*Refinance & Capital raise on property portfolio*". The form revealed that Mr Nelmes had had County Court judgments against him and they may have been set out in an attachment.

Mr Nelmes to Northern Rock

9. On 8 March 2007 Mr Blair wrote to Mr Brian Walters, the Regional Manager of NR in Leeds. The letter was headed "*Refinance & Capital raise on Huddersfield Investment Properties*" and attached a written Application. This referred to Mr Nelmes' ownership of 26 residential investment properties as well as the Property[1] with buy to let mortgages from different lenders. The loan required was £ 2,400,000 of which £ 1,240,000 was to refinance existing mortgages and £ 1,160,000 was to be for capital raising. The security was to be a first charge over residential investment properties in Huddersfield with an estimated market value in excess of £ 3,000,000. This was said to be an increase over the £ 2,486,000[2] valuation at the time of the original mortgages because the reports were between one and six years old and values had increased.

NR's indication

10. On 9 March 2007 Mr Mick Graham, NR's Commercial Finance Manager, wrote to Mr Blair "*to confirm the indicative structure of the proposal that we would look to recommend to our Lending Team*". The letter included the following:

> "You will appreciate these terms are only an indication of the basis upon which we would look to progress the application and do not represent a formal offer of finance, either express or implied.
>
> BORROWER
>
> Mr Thomas Nelmes

[1] This may have been a mistake since the portfolio list contained 26 including the Property.
[2] This figure appears to have been reached by taking the £ 2,656,000 figure on the portfolio list, deducting £ 245,000 for the Property which was wrongly assumed to contribute to the £ 2,656,000 figure, and adding £ 75.000. £ 2,656,000 + £ 75,000 - £ 245,000 = £ 2,486,000.

LOAN AMOUNT AND PURPOSE

A loan of up to £ 2,400,000 towards:

£ 1,240,000 to refinance existing mortgages

£ 1,160,000 equity release /forward buying facility."

11. The letter also indicated, inter alia, that NR would look to charge interest at 1% above Commercial Tracker or a Fixed Rate, subject to availability; that there would be an Arrangement Fee of 1% of the Loan Amount i.e. £ 24,000; the security would be a first legal charge; and the loan to value ratio ("LTV") was not to exceed 80% of the purchase price, open market investment value or the vacant valuation as advised by panel valuers.

Equity Release/Conditional Credit Facility

12. Borrowing takes many forms. In one form a person with property worth (say) £ 1,000,000 which is charged with a debt of £ 500,000 may be able to obtain more funds from his lender up to the proportion of the value of the property which the lender is prepared to lend. Thus if the lender's LTV for this borrower is 80% the borrower of £ 500,000 may obtain a further £ 300,000 on the strength of the existing charge. This form of borrowing is sometimes called equity release. The borrower of the additional £ 300,000 does not have to charge any further property in order to obtain it.

13. Another form of borrowing is one whereby the lender is prepared to lend money but only against the security of property which is not, but will later be, subject to a charge in his favour. Thus a lender may provide a conditional credit facility ("CCF") under which he is prepared to loan £ 1,000,000 but only against property which has not yet been acquired but which, once acquired and found to be suitable, is to be security for the loan. The lender may stipulate that any such loan must have a specified LTV.

14. The lender can, of course, offer a facility which is in part an equity release and in part a CCF and the borrower will need such a combination if the advance that he seeks exceeds the specified LTV.

15. The facts of this case illustrate that the two concepts – equity release and CCF – and the distinction between them may not be clearly understood. The judge regarded the expression *"forward buying facility"* in the letter of 9 March 2007 as a reference to the possibility of a CCF but said (a) that he did not know whether Mr Blair (who did not give evidence) understood it that way; and (b) that there was no indication at that stage that anyone was positively proposing a CCF arrangement.

Communications between NR and Mr Nelmes

16. On 16 March 2007 Mr Blair wrote to Mr Nelmes to tell him that he had heard favourably "*from our lending sources*". He said that in principle they were interested in Mr Nelmes' proposal for finance and confirmed that Mr Graham of NR would meet Mr Nelmes at his home on 21st March. The letter did not say anything about a CCF nor did it set out all the detail of NR's letter of 9 March.

17. On 21 March 2007 a meeting took place at Mr Nelmes' house between him and Mr Walters (not Mr Graham) and Mr Blair. Mr Blair and Mr Walters were good friends and very familiar with each other. Mr Walters filled in an application form for Mr Nelmes to sign (which he did). This reduced the amount for which a loan was sought from £ 2,400,000 to £ 2,320,000, Mr Walters did this because the portfolio list given to him by Mr Blair included the Property which was not intended to be part of the Charge. The form revealed the existence of two County Court judgments (CCJ) in the sum of £ 498 and £ 902 which were said to relate to previous tenants at Mr Nelmes' properties and which he agreed to clear if successful in his application.

18. Mr Nelmes described this meeting as having given rise to an agreement in principle. The judge did not accept this. Nor do I. NR had written a letter which was expressed to be only an indication of the basis upon which NR would look to progress the applications, and was expressly not a formal offer, and Mr Nelmes had completed an application form. There was a way to go before any agreement was reached in principle or otherwise. The judge accepted that NR had "*nearly bitten his hand off*" (Mr Nelmes' phrase) in what was a highly competitive market for finance providers. But enthusiasm for a deal and agreement, even in principle, are not the same thing.

19. Nor do I accept that there was some element of unfairness on the ground that Mr Nelmes had been misled by the letter of 9 March. The letter was no more than an indication; it preceded the completion of any application form and it was plainly open to change.

20. In the afternoon of 21 March 2007 NR learned from an Experian credit report that, in addition to the two CCJs (one of which was £ 468 and not £ 498) there was an undisclosed default on 16 March 2005 on some bank finance the balance of which was described as £ 1,206.

Commercial Finance Decision Document

21. On 23 March Mr Graham of NR and his assistant prepared a Commercial Finance Decision Document ("CFDD"). This is a document prepared at the regional office for submission to head office together with an Underwriter Summary Policy & Grid document ("USPG"). The CFDD referred to Mr Blair as the introducer. It stated that there was to be a fee payable to NR ("our fee") of £11,160 and a "proc.fee" in the same amount payable to Mr Blair or his company. The form recorded that the properties were let predominantly to private tenants. This information, derived from Mr Nelmes, was false. Mr Nelmes confirmed in cross examination that he dealt mainly with housing benefit recipients who represented about 90% of his tenants. Its falsity was significant since under NR's policy DSS tenants were not acceptable.

22. The loan sought was £ 2,232,000 with £ 1,240,000 being refinance and £ 992,000 for equity release. Of that £ 992,000 £ 60,000 was to be used to satisfy redemption penalties. The form recorded that Mr Nelmes had made offers (subject to funds) on 4 properties totalling £ 400,000 and that he planned to use part of the equity raised to purchase these properties with the remainder being put in a deposit account which would enable him to purchase 6/7 properties at auction over the next 12 months. The value of the 25 properties was now put at £ 2,790,000 (to take account of the fact that the Property was not to come within the charge) and the LTV ratio was to be 80%. In the box for Regional Office comments it was recorded that the majority of the 25

properties had been let to private tenants on assured shorthold tenancies, Mr Nelmes only having two DSS tenants. The form referred to the existence of 3 CCJs. totalling £ 1,900.

23. On 27 March 2007 NR obtained a further credit report which showed the third CCJ and described it as having been settled. The sum involved was £ 530. There was also a reference to a mortgage payment default of £ 67,132 to the Kensington mortgage company apparently arising from a direct debit error, necessitating the provision of a cheque.

NF's change of view

24. On 27 March Mr Graham emailed Elliot Newey, one of the NR underwriters, to confirm what was known about the "*defaults registered*" which included the 3 CCJs and the problem with the £ 67,132. He confirmed his agreement with what must have been Mr Newey's idea that an 80% LTV would not be realistic to offer at this stage. He suggested a compromise of 70-75% and "*a consolidation period for further gearing up for 6/12 months*". He also proposed that the margin would be increased to 1.2% over base. His email ended "*The aim will be for Mr Nelmes to introduce more properties to the portfolio after the refurbishment which will then reduce the exposure further."* Mr Newey replied "I agree". The judge accepted that there was no reason why a change of mind of this kind should have been documented any further at this stage. He did not accept that there was some deliberate concealment from Mr Nelmes of the change of mind; and found that there was good reason for it in the light of the Experian report which caused a re-evaluation of the risk. I agree.

The amended CFDD

25. As a result of this email and the discussion around it the original CFDD was amended but not re-dated. Under this version the equity release figure was reduced to £ 560,000 and a CCF element of £ 432,000 was introduced described as "*to provide 100% funding for future acquisitions yet to be identified*". The margin was now to be 1.2% and the LTV to come down to 69.3%.

The Sub Committee meets

26. On 28 March there was a meeting of the relevant NR subcommittee which required further information (probably certificates of satisfaction of the outstanding judgments) before granting approval. The meeting was considering the original CFDD. At a further meeting on the same day the subcommittee decided to accept the proposal (including the CCF) on the footing of a 70% LTV for up to 6 months. This was on the basis of the amended CFDD and a USPG document prepared at regional office which included a reference to a CCF being required for acquisitions yet to be identified. The loan was sanctioned subject to a number of conditions including a valuation report, satisfaction of the CCJs, and a 70% LTV for six months. The report specified that the Valuer was to be Steele Ross.

The Formal Loan Offers ("FLO") of 2 April 2007

27. By a letter of 2 April 2007 addressed to Mr Nelmes, NR made an offer of finance. The letter, which has 5 pages plus a one page schedule, included the following terms:

"*Lender:*	*Northern Rock plc*
Borrower:	*Mr Thomas Nelmes*
Security Property:	*The property offered up and acceptable to the Lender in accordance with the attached schedule*
Purpose:	• *£1,240,000.00 to refinance 25 residential Security Properties* • *£560,000.00 equity release to satisfy redemption penalties and fund/refurbish future acquisitions* • *£432,000.00 to provide 100% funding for future acquisitions*
Term:	*25 year(s) from the Drawdown Date*
Final Repayment Date:	*25th anniversary of the Drawdown Date*
Interest Rate:	*Commercial Tracker plus the Margin*
Margin:	*1.20 per cent*
….	
Release of Loan:	*The Loan will be made in one advance or otherwise in agreed instalments*
Drawdown Date:	*The Loan is to be drawn down no later than 18th May 2007 or as otherwise agreed with the Lender*
Fees:	*The fees payable in respect of this Loan are:* *Arrangement Fee £22,320.00*

…..

Ongoing Conditions and Ratios

2 The Loan, excluding the Arrangement Fee should the Borrower elect for it to be added to the principal balance, shall not exceed 70% of the vacant possession / investment value (whichever is the lower) of the Security Property throughout the term.

…

4 The Conditional Facility is available only for residential property acquisitions. Subsequent Drawdowns under the Conditional Credit Facility will be subject to the following:-

- *Satisfactory valuation and Title*
- *Ongoing satisfactory account conduct*
- *Observance with specified Loan covenants*
- *Solicitors confirmation of purchase price*

5 This Loan is offered on the basis that the Loan is fully drawn down within 180 days from the date of this Formal Loan Offer."

28. The Schedule of Security Property contained the 25 properties in the property portfolio not including the Property and as item 26:

> *"Suitable residential properties to be acquired utilising the Conditional Credit Facility."*

29. As is apparent from the amended CFDD the offer was designed to distinguish between the £ 560,000 equity release and the £ 432,000 CCF. The latter would not be available without security being provided in the form of properties other than the 25 listed in the Schedule. An USPG of 29 March 2007 recorded that an equity release was required to satisfy redemption penalties and fund future acquisitions/works and a conditional credit facility for acquisitions yet to be identified. It also stated that a valuation was required and referred to Steele Ross as being on NR's panel and satisfactory.

The relationship between the broker and NR

30. Mr Blair had chased up the offer from NR. On 2 April 2007 Mr Newey, the NR underwriter, had sent Mr Graham a draft copy of the 2 April FLO. Mr Graham asked Mr Christopher Hoy of Commercial Finance, Leeds to check and ensure that all copies of it went to the broker. By an email of the same date Mr Hoy told Mr Newey that:

> "The offer needs to be sent to the broker ONLY – Please can you ensure that a copy doesn't get sent to the borrower. – This is because the broker is concerned that Mr Nelmes may use the offer to obtain a deal elsewhere".

31. All 3 copies of the 2 April FLO were issued to the broker on 3 April 2007. Mr Nelmes' case was that NR and the broker were working together to ensure that NR got the deal and that he did not see or have an opportunity to consider the details of the FLO and to appreciate how it differed from what he wanted. The judge found that the emails were to be taken at face value. Mr Blair was concerned that Mr Nelmes might use the offer to obtain a deal elsewhere, jeopardising his fee. He declined to find that NR and Mr Blair were working together to mislead Mr Nelmes, or allow him to mislead himself, about the terms of the offer.

32. Mr Nelmes sought to support his contention by reference to the large undisclosed procuration fee which he was indirectly paying the broker. The arrangements between him and AWC were that Mr Nelmes would pay AWC an arrangement fee of 0.75% which was, in the event at least £17,839. In addition Mr Nelmes was at this stage to pay NR an arrangement fee of £ 22,320 and NR was to pay AWC/Mr Blair a procuration fee of £ 11,160. The judge held that Mr Nelmes was making too much of this. The payment of procuration fees was not uncommon as was the non-disclosure thereof but that did not mean that the broker and NR were co-operating to mislead Mr Nelmes.

33. In my view the judge was entitled to find that NR and the broker were not co-operating to mislead Mr Nelmes about the FLO and that the relationship was not unfair on that account. NRC was, as the judge held, entitled to assume that Mr Blair, who was acting for Mr Nelmes, would pass the information contained in the offer to him. As will become apparent the time for which Mr Blair had a copy of the FLO when Mr Nelmes did not was very limited. The judge was also entitled to find that the

arrangement whereby the FLO went to Mr Blair first did not give rise to any unfairness.

The procuration fee

34. In respect of the procuration fee, however, the position is different. Mr Blair/AWC was acting as agent for Mr Nelmes in his dealings with NR and. Mr Nelmes was entitled to his undivided loyalty. The payment of the procuration fee by NR to Mr Blair/AWC of 0.5% of the sum advanced, being half the arrangement fee payable by Mr Nelmes, was kept secret from him. Its acceptance by the broker, who was charging 0.75% of the amount of the advance was a breach of the duty owed by him to Mr Nelmes, and was brought about by NR by the payment of it. On classic principles Mr Nelmes would be entitled to recover the amount of the commission paid by NR to the broker from either of them: *Wilson v Hurstanger* [2007] EWCA Civ 299.

35. The claim against NR in the present action is not a claim that it should account for the commission or for rescission of the credit agreement, but that relief should be given because of the unfair nature of the relationship. That claim raises different, and broader, considerations. I am, however, quite satisfied that in this respect the relationship between NR, the creditor, and Mr Nelmes, the debtor, arising out of the loan agreements was unfair on account of the combination of the following: (i) the term of the credit agreement that Mr Nelmes should pay NR an arrangement fee; (ii) the related agreement that NR should pay commission of half that amount to Mr Nelmes' broker; (iii) the payment of that commission; and (iv) the failure of NR to tell Nelmes about the payment. A relationship between lender and borrower which involves such a payment deprives the borrower of the disinterested advice of his broker and is, for that reason, unfair.

36. I would accordingly require NR to account to Mr Nelmes for all the commission it has paid the broker (which I understand to be half the eventual Arrangement Fees of £ 21,483 and £ 8,500) together with interest from the date of payment. The fact, if it be such, that such undisclosed commissions were not at the time uncommon (about which we were told there was no actual evidence before the judge) does not alter the position.

37. I do not, however, regard it as appropriate to grant any further relief. The effect of the non-disclosure of the procuration fee did not mean that Mr Nelmes was not in a position to assess the value for money offered by the proposed deal (as was the case in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61). Nor, on the judge's finding was there any plan to conceal anything about its terms from him, nor were the terms concealed.

After the first FLO

38. The 2 April FLO was signed on behalf of NR. It was not signed by Mr Nelmes, who may never have seen it. This is because on 4 April 2007 NR produced a revised FLO. NR faxed this to Mr Blair on that date and also sent originals by first class post. The only difference between the 2 April and 4 April FLOs was the reduction of the margin from 1.2% to 1%. This may well have been the result of efforts made by Mr Blair on Mr Nelmes' behalf. Mr Nelmes saw and signed the faxed copy of the 4 April FLO

which Mr Blair faxed to Mr Graham on Thursday 5 April. Mr Blair, who was about to go on holiday the following week, sent Mr Nelmes the originals in the post for signature and return to Mr Graham. A copy of one of them, signed on 6 April 2007 was before the judge. The terms of the FLO called for the signature and return of one copy within 10 days of receipt. This gave Mr Nelmes adequate time to consider it.

39. Mr Nelmes' contention was that the offer was misleading in that it did not specifically refer to a CCF on its first page where the purpose of the loan is set out, but only 3 pages later in the ongoing conditions and in the Schedule. He was, he suggests, under pressure to sign a document (since he needed a loan quickly) which was not explained to him by those who were not disposed to point out to him to what exactly he was signing up.

40. The judge did not accept that the offer was misleading and neither do I. The drafting could have been clearer. But it is apparent that the amount to be loaned for future acquisitions was divided into £ 560,000 (also to be used to satisfy redemption penalties) and £ 432,000. The distinction is otiose if there is no CCF. It is apparent that part of the Loan was to be a CCF for which property *to be acquired* is to be the security: see the Schedule, which states in terms that the security is to include "*suitable properties to be acquired utilising the CCF"*. In addition the Loan was not to exceed 70% of the value of the security throughout the term.

41. Mr Nelmes draws attention to the fact that the offer contained the Release of Loan and Drawdown Date provisions cited above and that these were, or appeared to be, inconsistent with a CCF. I do not agree. The former provides for a release of the loan in agreed instalments and the latter for a drawdown by 18 May 2007 or as otherwise agreed with the Lender. Any advance under the CCF would require the agreement of the Lender under ongoing condition 4. If the new property and the account conduct of the borrower was regarded by the Lender as satisfactory agreement to the drawdown would be expected to follow.

42. As I have said, the judge rejected the suggestion that there was any form of intentional concealment or misleading of Mr Nelmes or that NR worked with Mr Blair to keep him in the dark. He found that NR was entitled to assume that the broker would pass the information contained in the offer to him. The undisclosed procuration fee did not change that. He was entitled to reach these findings for the reasons which he gave. It was apparent from reading the FLO that there was a material change from what Mr Nelmes had been asking for because there was a reduced LTV ratio and part of the loan was to be a CCF. It was, as the judge found, Mr Nelmes' responsibility to read what was not a very long document. He had the advice of a broker for anything he did not follow or had doubts about. It was up to him whether or not he accepted the offer and he had 10 days in which to do so. The pressure to proceed quickly came from his side rather than NR. When it received his signed offer NR was entitled to assume that he accepted it according to its terms. This was a commercial transaction between a lender and a borrower of 25 years' experience in the property business. It was not in that context necessary to draw attention to, and fully to explain, each particular respect in which the offer departed from the application. It was for Mr Nelmes to satisfy himself as to the acceptability of the offer and take whatever time and advice he needed to do so.

43. The judge found it most likely that Mr Nelmes did in fact read parts of the offer; but not all of it, and that he did not read what he did read of it with consistent care. He did not understand the implication of the CCF which was that monies in excess of the £ 560,000 would only be released on the acquisition of property which would constitute satisfactory further security; but he did understand that the LTV had been capped at 70%. If he had understood what was on offer properly he would have explored the possibility of going elsewhere but whether, had he done so, he would have obtained better terms was unknown.

The Property is added to the security

44. On 11 April 2007 Rachel Churnside of NR sent an email to Commercial Finance New Lending asking them to consider a revised decision document for Mr Nelmes "*who would like to add an additional property to his recently sanctioned facility*". The new proposed loan was £ 2,378, 495 (close to the £ 2,400,000 originally sought) and the revised CFDD said that the request was to bring in an additional property which was to be let to private tenants for £ 10,200 per annum. The property in question was the Property although the decision document did not refer to it as Mr Nelmes' home. It was currently financed with Preferred Mortgage Payments with an outstanding balance of £ 146,495 and a market value of £ 245,000. On completion the LTV would reduce to 68%.

45. The judge was entitled to reject, as he did, Mr Nelmes' claim that he had no idea that the Property was to be brought into the charge, never asked for it, and never agreed to it and that the idea came from Mr Walters who invented a rent of £ 10,200. He did so for the reasons set out at paragraph 57 of his judgment. These included the likelihood that the proposal came from Mr Nelmes and the improbability of Mr Walters inserting both the Property and the rental figure into the BTL property to be charged without Mr Nelmes' knowldge or consent. The figures, apart from the £ 10,200 rent for the Property came from the property portfolio and the £ 10,200, the judge found, came from Mr Nelmes. It was, as he found, Mr Nelmes who proposed bringing the Property into the security in order to bring the amount of the loan close to the figure which he had originally wanted. In addition Mr Nelmes and his solicitor received copies of the valuation and his solicitor gave a certificate of title to it. It was much more likely that he knew perfectly well that this was Mr Nelmes' home than that he had accidentally failed to pick that up.

46. This led to a new CFDD of 11 April 2007 which proposed the new loan amount of £ 2,378,495 which, with the Property included in the security, would lead to a LTV ratio of 69%. Mr Newey's comments on the proposal expressed a wish to use an alternative valuer on the Property because it was said to have a higher value that the other 25 properties. The subcommittee minute of the same date accepted the proposal.

47. On 12 April 2007 NR instructed Mr David Amies of Ramsdens, to act as their solicitors (also acted for Mr Nelmes) in relation to the loan. A separate letter of the same date invited him to note that the Property had been added to the schedule to the FLO and enclosed a revised schedule which included the Property as item 26 and as item 27 "*Suitable residential properties to be acquired utilising the Conditional Credit Facility*". The judge was entitled to hold, as he did, (a) that it was likely that Mr Amies confirmed the inclusion of the Property with Mr Nelmes; (b) that from this point on Mr Amies was or ought to have been aware that an element of the finance

offered included a CCF; and (c) that NR was entitled to assume that from this point on, if not before, that Mr Nelmes knew of the CCF element.

48. On 15 May 2007 Mr Amies confirmed to NR that he had explained in plain intelligible language all the terms and conditions of the Loan Offer, the security documents and their effect. As the judge rightly held, NR was entitled to rely on that confirmation, having given Mr Amies the information which put him in a position to give it.

The valuers are instructed

49. On 12 April 2007 NR instructed Mr Ian Wild of Steele Ross to value the portfolio of properties. There was also a conversation and a discussion by email between Elliot Newey and Rachel Churnside in which she questioned why an alternative valuer was necessary for the Property and asked whether it would be possible to use Steele Ross, provided that they explained to Mr Nelmes that future properties brought to them would require an alternative valuer. In response Mr Newey explained that the Property which was said to be worth £ 245,000 seemed to have a high value compared with the other properties, which had a value in the region of £ 110,000 each, and that use of an alternative valuer would add some "*diversity*" and should not really impact on costs on the borrower's behalf. He observed :

> "Its down to the lender to dictate the valuer and not the borrower as the valuation is carried out for the benefit of the lender. I appreciate this is not the response you were after however I'm willing to speak to the sub-committee again to discuss the valuation if need be".

The choice of Steele Ross

50. It was NR who instructed Steele Ross in relation to the first 25 properties and in that sense selected Mr Wilde as a valuer (the phraseology used in paragraph 27 (1) of the Reply to the Amended Defence and Defence to Counterclaim) from their panel of valuers. But the judge held that the likelihood was that Steele Ross was Mr Nelmes' choice [59] and the valuer he wanted [96]. Mr Nelmes contends that this was not a conclusion that was open to him both on the pleadings and on the evidence. As to the latter, Steele Ross had been specified at an early stage (see [29] above) and there was no proper basis on which the judge could conclude that they were Mr Nelmes' choice.

51. I disagree. I do not regard the form of the pleading as precluding the judge from reaching the findings that he did; nor do I regard it as open to the appellant to take this pleading point now. At trial it was NR's case that it was Mr Nelmes who chose Mr Wild although it was NR which proceeded formally to select him. It was not suggested that this case was not open to NR on the pleadings or that any amendment was required.

52. As to the facts, it was open to the judge to conclude that Mr Nelmes, who instructed Steele Ross himself in relation to certain additional properties (see [68] below), wanted Mr Wild. The email correspondence which I have summarised prompts the inference, which the judge drew, that Mr Nelmes wished to ensure that Steele Ross

were used and did not want a change in the case of the Property. Importantly, in an email of 22 August 2007 sent at 1028 Mr Walters said to Mr Nelmes' solicitor:

> "A few months ago we remortgaged some 27 properties for your client all of which were valued by Steele Ross, which was the valuer put forward by your client".

The natural reading of that passage, which was not contradicted, is that Steele Ross had been put forward by Mr Nelmes to value some 27 properties from the beginning and not just the 5 new properties referred to in the email of 0930 of 22 August 2007 to which the 1028 email was a reply. If that is what had been intended the sentence would read something like "all of which were valued by Steele Ross, which is also the valuer now put forward by your client". The conclusion that Steele Ross was selected by Mr Nelmes from the start is also consistent with Mr Newey's statement that "It's down to the lender to dictate the valuer and not the borrower" referred to in [49] above and the fact that NR would have no obvious incentive to select a valuer based in Sheffield, as Steele Ross was, to value property in Huddersfield.

53. On 20 April 2007 Mr Walters met Mr Nelmes and Mr Nelmes indicated that he would have an issue with the use of a valuer other than Steele Ross. The valuer, he said, had already been out that day and it was fairly easy for him to value the Property whilst valuing the others which were close by. An additional valuer would add to the cost. In an email of that date Mr Walters invited the sub-committee to look at the question again. A reply from Andy McColl, another NR underwriter, indicated that he had had done a little digging and found that the value of the Property was broadly in line with other assets in the locality and agreed that on this occasion they would use Steele Ross. It was suggested that Mr Walters had fought valiantly to keep Steele Ross. The judge found that he did so in order to keep Mr Nelmes happy. In effect Mr Nelmes got his way.

54. Between 20 and 24 April 2007 Mr Wild of Steele Ross produced a series of reports on the value of the properties which were to form the security. The valuations totalled £ 3,194,000, which included £ 125,000 for 3 Knowl Road. The evidence at the trial established that this was a gross over valuation of the order of £ 1,113,000. Mr Nelmes received copies of these valuations. He had accompanied Mr Wild on some of them. The judge found his denial that he had discussed potential values at all when walking round to look at the properties with Mr Wild to be "*deeply unconvincing*" [96]. He also found that Mr Nelmes knew that the first set of valuations Steele Ross had carried out were unsupported by inspections of internal conditions and that he was not naïve enough to think that that was a proper way to carry out a valuation. The judge found his denial that he only wanted the correct value to be "*very hollow*". In essence, the judge has found, he knew that the Steele Ross valuation was likely to be an overvaluation.

The 23 April 2007 FLO

55. On 23 April 2007 NR produced a revised FLO for a loan of £ 2,378, 495 which was to be used as follows:

- £ 1,386,495 to refinance 26 residential security properties

- £ 560,000 by way of equity release to satisfy redemption penalties and fund/refurbish future acquisitions

- £ 432,000 to provide 100% funding for future acquisitions

The terms were otherwise as before save that the Arrangement Fee was now £ 23,785 and the Schedule now contained the Property.

56. The judge accepted that Mr Nelmes did not see this FLO.

The Charges

57. On Friday 18 May 2007 Mr Nelmes executed a number of Legal Charges in respect of the properties on the portfolio list excluding 3 Knowl Road. The summary of security at completion recorded a total facility of £ 2,378, 495 (as above) but with a drawdown amount of only £ 1,858, 595. The security was described as including the Property but not 3 Knowl Road (in relation to which it had been discovered that the Council had served an improvement notice) with a total portfolio valuation of £ 3,069,000 and an LTV of 60.57%.There was to be a retention of £ 87,500 for 3 Knowl Road which was to be released when the improvement notice had been cleared. After some correspondence with the solicitors about whether funds could be released on the basis of a solicitor's undertaking to clear the CCJs NR decided to authorise the release of, and did release, the £ 1,858,595.

Mr Nelmes' position in April/May 2007

58. The judge accepted that the first time that Mr Nelmes knew that he would not be able to draw down the full amount of the loans was when he saw an email of 18 May 2007 from Mr Atkin of NR to Mr Amies of Ramsdens in which Mr Atkin referred to the release of £ 1,858,595 and the £ 87,500 retention and said that no further releases would be made until the CCJs had been cleared and a full tenancy schedule produced. Mr Nelmes claimed that since this email did not refer to the CCF as a reason for no further advances the reasons given in the email were false and designed to conceal the existence of the CCF.

59. The judge rightly rejected this. It was plain from the NR correspondence that the release of the CCJs was of importance to NR; and the email did not refer to the CCF as a reason for not releasing more because it was giving reasons for no further releases under the CCF until the CCJs were resolved.

60. At this stage Mr Nelmes was in difficulty. He had agreed to buy four additional properties and needed more funds than had by then been released to pay for them. On Monday 21 May Mr Walters came to the rescue by emailing Mr Atkin to explain that the facility sanctioned did not give Mr Nelmes sufficient monies to complete on all four properties and that it was not practical to await the certificates of satisfaction of the CCJs and the documentation on 3 Knowl Road. In addition Mr Nelmes was keen to acquire similar properties via the CCF facility and the present stance meant that it would be several weeks before he could do so. He suggested replacing Knowl Road with one of the newly purchased properties in order to release at least the £ 87,500. He asked for the matter to be discussed with the underwriting team. On the same day Mr Amies emailed Mr Walters and Mr Atkin to say that Mr Nelmes had told him that

he needed another £ 100,000 approx to complete the purchase of the four auction properties, which he had agreed to buy, on Thursday of that week.

Problems solved

61. In the event NR solved the problem. On 24 May 2007 NR authorised the release of and released a further £ 130,000 (Mr Nelmes had by now said that he needed that sum in order to complete). A revised CFDD was executed and a revised final loan offer issued. The Loan Amount was to be £ 2,390,995 and its purpose was expressed as follows:

- £ 1,386.495 to refinance 25 residential Security Properties
- £ 602,500 equity release to satisfy redemption penalties ad fund/refurbish future acquisitions
- £ 402,000 to provide 100% funding for future acquisitions

The Arrangement Fee was now £ 23,909. In respect of the funds released the LTV ratio was now 64.81%. The amount of the £ 2,390,995 which remained unadvanced was £ 402,000. Mr Blair sent Mr Nelmes two copies of the latest version of the FLO. He did not, however, sign it.

62. As the judge recorded, it was not until 1 June 2007 that the parties began to appreciate the others' respective views of what should have happened in relation to the CCF. Mr Walters spoke with Mr Nelmes and, as he recorded in an email to Mr Amies, learnt that he thought he was getting an equity release of 70% of LTV but that was not what he had been offered. He understood that Mr Nelmes now agreed that NR could take the 4 recent purchases into charge together with 3 Knowl Road and NR would then release the £ 402,000. Valuers would have to be instructed. What Mr Nelmes would then do would be to apply for further equity release so that when fully drawn down the loan would take the exposure to 70% of the property charged. Mr Amies responded to say that his understanding of what Mr Nelmes had agreed was that he would receive the £ 402,000 now and would then charge the 4 new properties for a further 70% advance against their value. The £ 402,000 was to be used for further acquisitions but he would not have to charge the new properties to NR.

63. There had been, the judge found, a genuine misunderstanding, which Mr Walters had tried to resolve in discussions with Mr Nelmes and Mr Amies. In the event it was resolved in the following way. On 5 June 2007 a revised CFDD was issued seeking to increase the equity release rather than using the CCF. The Loan Amount was to be £ 2,148,300 consisting of refinancing and equity release i.e. there was to be no CCF element. The underwriter made no objection saying that the LTV remained in line.

The 6 June 2007 FLO

64. On 6 June 2007 NR issued a further revised FLO in the sum of £ 2,148, 300 to be used for refinance and equity release. There was no CCF element. The FLO provided for an Arrangement Fee of £ 21,483. Mr Nelmes did not sign it. On the same day a further £ 159,305 was released, bringing the total amount loaned to £ 2,148,300 (£ 1,858,995 + £ 130,000 + £ 159,305). The effect of this was that by this date Mr

Nelmes had acquired a loan of 70% of the value of the security[3] without having to acquire any new properties to offer as security. He was always aware that the lending was to be subject to a 70% LTV.

Events after 6 June 2007

65. On 8 June 2007 Mr Walters reported to Mr Amies a change of mind on the part of Mr Nelmes. He now wanted to bring the 4 recent purchases and 3 Knowl Road in as security on the basis that NR would lend 70% LTV against them. On 12 June 2007 a new CFDD was prepared which recorded that Mr Nelmes had asked for £ 850,000 by way of a CCF in order to purchase further residential properties. It provided for a fee to NR of £ 4,250 and a procuration fee to the broker of the same amount.

66. On 13 June 2007 Mr Nelmes signed a commercial loan application form for the £850,000 on the basis of a CCF with a 70% LTV. On 18 June 2007 a USPG was prepared for the proposal.

67. On 22 June 2007 a formal loan offer for £ 850,000 by way of CCF was issued and on 4 July 2007 Mr Nelmes signed it. It provided for an Arrangement Fee of £8,500. The security was to be suitable residential properties to be acquired utilising the CCF. Attached to the offer was an Existing Security Schedule which included the whole of the portfolio, not including 3 Knowl Road but including the Property. On 4 July 2007 Mr Nelmes signed this letter. Ramsdens sent it to NR on 9 July 2007 and stated that their understanding was that Mr Nelmes was looking to charge five properties including 3 Knowl Road.

68. There then followed a sequence of events set out in paras [93] ff of the judgement. In short NR instructed E-Surv to value the additional properties which Mr Nelmes intended as security. The values produced by them were disappointing to Mr Nelmes. He himself had already instructed Steele Ross who had valued them at a much higher figure. Mr Amies asked whether Mr Walters might be able to rely on the higher valuation figures. Mr Walters replied that it had been made clear last time that NR would want a different firm to conduct future valuations. At Mr Walters' suggestion Mr Amies sent him the Steele Ross valuations. Then, at Mr Walters' request, the comparables relied on by Steele Ross were supplied and passed on to E-Surv.

69. E-Surv wrote a detailed and, as the judge put it, "*stinging*" fax on 24 September 2007 to the effect that they had been unable to obtain any information on one of Steele Ross' comparables from the agents, who advised that they had not sold a property at that location; that their own figures were achievable and supportable based on evidence; that Steele Ross appeared not to have taken into account the sales prices achieved by the properties at a recent auction; and that the figures put forward appeared to be in line with Mr Nelmes' requirements (he himself having put forward figures of £ 3,000,000 and £ 2,790,000 in March 2007) i.e.. as the judge interpreted it [96], that they were providing "*helpful*" valuations as specified or required by Mr Nelmes, a finding which appears to apply to both sets of valuations. The judge held that Mr Nelmes was aware of this. He was entitled to do so for the reasons set out in [96] of his judgment.

[3] 70% of (£ 3,194,000- £ 125,000) = £ 2,148,300.

70. On 15 October 2007 NR released £ 353, 342.88 on the security of the five new properties. The effect of this payment was that the new balance on the loan was £ 2,527,699 with an LTV ratio of 70%.

71. On 27 November 2007 Mr Blair emailed Mr Walters to say that Mr Nelmes sought an equity release of around £ 375,000 on his existing portfolio by bringing his LTV up to 80%. That request was declined on the basis that it had taken too long to deal with the CCJs and only one equity release was allowed in any given 12 months.

72. However, on 13 December 2007 NR instructed Steele Ross to report on the value of 3 Knowl Road so that Mr Nelmes could withdraw 70% against it under the CCF. Steele Ross did a desktop valuation, as requested by Mr Walters, which produced the same figure as before (£ 125,000) and £ 87,500 (70%) was drawn down on Mr Nelmes bringing 3 Knowl Road into the security.

The end result

73. Thus the upshot of this lengthy saga was that Mr Nelmes secured finance at an LTV ratio of 70% of the properties charged. Although the proposed ratio had originally been 80% NR was fully entitled to decline to lend at that ratio, particularly in the light of the CCJs. Every FLO had stipulated 70% LTV and Mr Nelmes had no entitlement or legitimate expectation that he would get a more favourable deal. By 6 June 2007 he had got an equity release taking his loan up to 70% of the value of a portfolio of property. Thereafter he secured further finance with the introduction of new properties, also on 70% LTV terms. He also had the benefit of borrowing during a period of unprecedentedly low interest rates. For example the monthly payment of £ 12,445.27 applicable in respect of the first tranche of borrowing in August 2007 had fallen to £ 2,773.69 by April 2009 and remained below £ 3,000 at all times thereafter until formal demand was made. No attempt was made by him to reduce the capital outstanding.

Later events

74. The sequence of events thereafter is set out in [103] ff of the judgment. In June 2008 Mr Nelmes sought to reduce his monthly payments to about £ 8,000 for the next 12 months and NR declined to allow him to do so. On 17 September 2008 his direct debit for the mortgage instalment of £ 10,705.15 was returned unpaid. The request was repeated again in a letter from Mr Amies of 8 October 2008 in which he said that Mr Nelmes wanted substantially to reduce his borrowing by selling 12 properties which he had been advised would be easier to do with vacant possession. He wished to reduce his payments so as to be able to vacate some of the properties and sell them to reduce the debt. The letter was sent to the wrong address, namely Gosforth and not Sunderland.

75. On 21 October 2008 NR wrote to Mr Nelmes from its Sunderland offices to ask for various items of information. Mr Amies sent two letters chasing a response, also to the Gosforth address. He also wrote a letter asking whether it would be possible for Mr Nelmes' son to join in the mortgage with a view to extending the repayment term. NR responded to this letter saying that they would not extend but would consider adding him to the mortgage. On 6 November 2008 NR wrote to Mr Nelmes saying that the other correspondence from Mr Amies had not been received because it was

sent to the wrong address. On 10 July 2008 NR had written to Mr Nelmes to say that all correspondence should now be addressed to its offices in Sunderland.

76. On 11 November 2008 Mr Amies wrote back saying that Mr Nelmes had decided that there was no benefit in transferring the loan into joint names but that he was still looking to have the monthly repayments reduced, which he hoped was more readily achievable in the light of the recent interest rate cuts. In the meantime Mr Amies said that Mr Nelmes had cancelled his direct debit mandate and instructed Mr Amies to forward his enclosed cheque of £ 8,000 for the next monthly payment.

77. NR wrote back on 13 November 2008 to point out that the £ 8,000 left a shortfall of £ 4,218.67. After that Mr Amies had a conversation with Mark Samuels, the NR loan review manager. He pointed out that the option to move to a lower rate of interest had not been accepted and that NR would have to treat the account as being in arrears. The next repayment would however be only £ 8,621.88. He required the account to be brought up to date as a matter of urgency.

78. In January 2009 Mr Nelmes sent NR a cheque but it was dated December 2009 and not therefore presentable. The November 2008 balance remained outstanding. Mr Nelmes sent a cheque for the February payments but there were still arrears of £ 4,218 for November. He also sent a sick note referring to stress related problems.

79. On 11 February 2009 NR wrote to say that if he could maintain all future payments it would consider any acceptable proposal he might make to clear the arrears. They wrote again on 15 April 2009 chasing the arrears and seeking proposals. On 19 May there was an internal NR review of the account at which it was recommended that the matter be diarised ahead for the next annual review.

80. On 6 August 2009 NR wrote again to chase the arrears, then amounting to £ 3,857.23. After two further chasing letters NR agreed in November to Mr Nelmes' proposal to add £ 100 onto his normal repayment to reduce the arears over a period and to freeze the weekly arrears charges until he missed a further payment.

81. On 16 February 2010 Mr Nelmes sought a list of the properties mortgaged and the amounts outstanding. NR provided a list which included the Property. Mr Nelmes did not complain that the Property ought not to have been on the list.

NR wants a revaluation

82. In June 2011 and thereafter NR indicated that they wanted a revaluation of Mr Nelmes' portfolio. Mr Nelmes was resistant to the idea and in April 2012 cancelled appointments fixed with a valuer due to serious gout. In June 2012 Mr Nelmes went into hospital for heart surgery and between then and October he had significant health problems. On 7 December 2012 NR wrote to Mr Nelmes to tell him that it was now essential to complete the valuation process and a drive by valuation would be instructed unless satisfactory alternative arrangements could be made. As the judge found NR would have preferred valuations on inspection and Mr Nelmes did not want there to be any because he was concerned that they would be low.

83. On 18 April 2013 Ms Nikki Murphy wrote to Mr Nelmes to introduce herself as a Relationship Manager. By another letter of the same date she wrote to say that his

mortgage account was in arrears and that an immediate payment of £ 5,149.36 was required. By another letter of the same date she warned that NR intended to carry out a revaluation. On 22 April 2013 she sent a letter seeking various items of information and enclosing a copy of an agenda for a meeting that had been agreed.

84. The meeting took place on 30 April 2013 and the judge accepted the accuracy of Ms Murphy's notes. What Mr Nelmes said is recorded in paragraph114 of the judgment. It included the statement that he tended to take tenants which nobody else wanted, and had lots of housing benefits tenants and issues with housing benefits being paid. One third of the portfolio was vacant. Most properties needed work doing to them and he was in the process of doing that. One needed a new roof. She told him that a revaluation would have to take place. He was against it and refused to pay £ 4,500 to a valuer when he knew that prices were down.

Mr Sharman's intervention

85. On 28 May 2013 a Mr Sharman of a business called Paralegal Services wrote to NR. He asked for a copy of the "Original Loan Contract" and the FLOs of 6 and 22 June 2007. On 31 May 2013 Ms Murphy sent copies of the formal loan agreement. On 3 June Mr Sharman asked for a copy of the Terms and Conditions attached to the Offer Letter and subsequent loan and Ms Murphy wrote to Mr Nelmes to say that NR would be carrying out a revaluation at his expense.

86. On 4 June 2013 Cath Roffey of the survey distribution team of Legal and General called Mr Nelmes' phone. The man who answered (whom she was sure was Mr Nelmes) would not say who he was and said that it was nothing to do with him. Mr Nelmes was said to be on holiday until Saturday and his solicitor to have said that he did not need these valuations. She said that Legal and General had been instructed again and so needed to go ahead and asked Mr Nelmes whether he would prefer drive by valuations so that they did not have to have access. He said that he was not having anything.

The 2013 valuations

87. On 14 June 2013 drive-by valuations were undertaken of the entire portfolio. These raised concerns over the state of repair of some of the properties. One had been demolished following a gas explosion. Mr Nelmes had received an insurance payment of about £ 88,000 which he paid into his own account rather than applying it in restoration of the secured property. The total value amounted to £ 1,763,500 with vacant possession and £ 1,682,000 without. As a result the LTV was 148% or 155% rather than 70%. It was inevitable, as the judge found, that a formal demand would follow.

The demamds

88. On 15 July 2013 NR sent a formal demand for repayment of the whole debt namely £ 2,618,999.41 by 22 July 2013. The letter went on to say that if the sum was not paid by 4pm on 6 August 2013 NR might without further warning enforce the security and take legal proceedings for recovery. The breach of the mortgage conditions relied on was the fact that the LTV ratio was 148%. A covering letter indicated that NR might be able to waive the breach if a mutual plan to rectify the breach could be agreed. Mr

Nelmes was told that he must respond with a proposal by 30 July. He received the demand on 18 July 2013, the letter being posted on 17 July 2013.

89. Mr Nelmes claimed that the demand and covering letter were unfair because of all the different dates and because the letter only gave him one working day to come up with the money. The judge did not accept that there was unfairness and was entitled not to do so or, at the very least, entitled not to think that these circumstances merited any relief. The letter made it clear that proposals might be submitted by 30 July and if they had been there would no doubt have been further dialogue. If the proposals were acceptable or if a dialogue continued Mr Nelmes could expect that legal proceedings would not ensue or would not ensue at that point. Moreover he had access to solicitors, an accountant and Mr Sharman. The time for proposals was very short but an indication that a proposal was to be formulated might have been expected to take some of the heat off.

90. Ms Murphy did not expect Mr Nelmes to come forward with a repayment proposal for the LTV breach. On 16 July 2013 she prepared a customer portfolio review document for the credit risk committee meeting the following week recommending the appointment of receivers. The document recorded, inter alia, that there was a small arrears balance of £ 653.35 and, on the basis that no proposal had been forthcoming, recommended that receivers be appointed. Consideration was given to working with Mr Nelmes to reduce the LTV and the other breaches (failure to allow access, failure to maintain the properties, and allowing a property to be demolished without consent) through capital payments but it was felt that with no other source of income or assets it was extremely unlikely that Mr Nelmes would be able to offer a suitable repayment plan. The review also recorded that Mr Nelmes was unable to provide rental information, claimed that about a third of the properties were vacant and required work and that his tenants were "*all of the ones no other landlord wants*". Most were on Housing Benefit and appeared to be in and out of prison on a regular basis.

91. On 17 July 2013 Ms Murphy sent out a further formal demand (wrongly dated 15 July 2013) relying on the LTV and the additional breaches and requiring repayment by 4 p.m. on 22 July 2013 and threatening enforcement of the security if payment was not made. Mr Nelmes signed for this on 18 July 2013 (as the judge accepted).

92. On 18 July 2013 Mr Sharman wrote to Mr Murphy referring to her formal demand and covering letter dated 15 July 2013. He expressed his disappointment that the correspondence had not been sent to him – a disappointment which the judge found to be misplaced because the first formal demand was correctly sent to Mr Nelmes directly. Mr Sharman asked for a detailed breakdown of the individual valuations of each property. He also asked for a copy of the valuations that were provided before the original loan facility had been offered to Mr Nelmes. This letter was sent to North of England House in Sunderland, being the address given for previous communications by letter. For some reason NR's response to this was a standard form letter from Durham dated 26 July 2013 treating the 18 July letter as a complaint. No information was supplied. This was not Mr Nelmes' fault nor that of Mr Sharman. As the judge recorded, perhaps oddly Mr Sharman appeared not to appreciate that something had gone wrong and simply reiterated his request for information in a letter dated 30 July 2013 which he copied to Mr Nelmes.

Appointment of Receivers

93. On 31 July 2013 NR appointed Receivers. This was premature being the day after the deadline it had set for proposals and 6 days before the date it had set for enforcement. As the judge found, those responsible acted on the basis that the preconception that Mr Nelmes would have no proposal to make was correct. The decision was made in ignorance of Mr Sharman's letter of 30 July 2013.

94. Mr Nelmes never did make any proposals. By a letter of 9 August 2013 solicitors instructed by NR apologised for the mistake over the correspondence which involved treating Mr Sharman's letter to Ms Murphy of 18 July 2013 (and a follow up letter of 1 August 2013) as a complaint and enclosed each of the current valuations together with a summary sheet. NR did not provide copies of the original valuations.

95. The judge rejected the suggestion that Ms Murphy had palmed off Mr Sherman's letter to a complaints department and found it inherently more plausible that it was an unhappy accident of internal administration.

Valuation reports

96. On 4 September 2013 Landwood Group produced valuation reports for the receivers from which it appeared that the property portfolio had not been maintained for a long time and was in poor condition, and the tenants had resorted to improving the properties themselves. On 9 October 2013 the Receivers withdrew in relation to the Property which was unlet and was Mr Nelmes' home.

97. Possession proceeding were issued on 20 November 2013. On 7 May 2014 an open settlement proposal was put forward the details of which are at [129] of the judgment. The offer was rejected on 19 June 2014.

Breaches and NR's entitlement

98. As the judge recorded, the loan offers required Mr Nelmes to make his regular payments by direct debit and that the LTV should not exceed 70% at any one time. The Legal Charge required him to make his payments punctually, to put and keep the properties in good and substantial repair, to ensure that no one demolished them, and to give all reasonable assistance and access to them as reasonably required to obtain a revaluation. NR would be entitled to demand immediate payment of the full balance if payments were not made when due or in the event of other breaches of the loan offer or any other document or of a breach of the LTV ratio. In the event of such a default it would be entitled to appoint receivers.

99. Mr Nelmes did not make his regular payments by direct debit for a period from September 2008 and some small arrears arose and were outstanding. It was plain, the judge found, from the later valuation reports, in particular one from the single joint expert in the proceedings, that he had substantially and seriously broken his repairing obligations. One of the premises had been demolished following a gas explosion and the insurance payment had gone into Mr Nelmes' bank account. From 10 June 2013, as the judge found, Mr Nelmes had refused to afford the access which was requested. That was a serious breach because it meant that NR's revaluation had to be carried out without full information on the condition of the properties. By the date of the demands the LTV ratio substantially exceeded 70%. Accordingly subject to the effect of the Act and Regulations NR was, he held, entitled to demand immediate payment

of the whole debt when it did. Each of the two demands it made was valid and effective. Accordingly NR was entitled to appoint receivers. It was not suggested that the appointment was invalid on the ground that it took place before the expiry of the time when one demand although not the other stated that the legal charges might be enforced. Subject to the Act and the Regulations NR was entitled to possession of the Property.

The Law and its application

100. Section 140A of the 1974 Act provides:

> "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.
>
> …… "

Section 140 B gives the Court a wide range of powers. 140 B (9) provides that if the debtor alleges that the relationship between him and the creditor is unfair to him it is for the creditor to prove to the contrary.

101. The judge referred to the decision of Hamblen J, as he then was, in *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 and in particular paragraph 346 where he identified, by reference to the authorities cited in para 345, the matters likely to be of relevance as including

> "(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]).”

102. The judge also referred to the observations of Lord Sumption in *Plevin v Paragon Personal Finance Ltd* at [10] including his observation in relation to section 140A that 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.*”

The judge's findings on the fairness of the relationship

103. The judge then considered the question of fairness in the round and by reference to the factors identified in *Deutsche Bank*. In relation to the terms he found that *the terms in the loan offer* and Legal Charge were commonplace for products of that kind, that there were sound commercial reasons for them, namely to limit the risk to the lender, and that they represented a legitimate and proportionate attempt by the creditor to protect his positions. The 70% LTV ratio was to protect the lender from the risk in the diminution in value of his security for which he was not responsible and over which he had no control and the right to possession was to protect him from the default of the debtors. The right to appoint receivers gave the right to control the properties without going into possession. The CCF position was not solely for the benefit of the lender and was there to provide security for further borrowing. The lending was substantial and of a commercial nature between commercial parties. As to Mr Nelmes’ bargaining position he was not obliged to refinance or borrow at all and could have gone elsewhere. The terms were not individually negotiated, save as regards margin, and were presented on a take it or leave it basis but Mr Nelmes was experienced and had advice and could have gone elsewhere.

104. In relation to *the creditor’s conduct before and at the time of the formation of the agreement* NR had applied no pressure on Mr Nelmes to execute the agreement; it understood and had reasonable grounds to understand that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors; and had no reason to think that he had not read and understood the terms at the time when he got them. The debtor did not at the time of formation demur over the terms.

105. In relation to NR's *conduct after formation and leading up to enforcement* no demand was prompted by any improper motive or was the consequence of any arbitrary decision. As to attempts at accommodation the judge found that Mr Nelmes had failed to co-operate with the revaluations sought and that an open offer from NR of 7 May 2014 was met with intransigence on the part of Mr Nelmes, who had insisted that the process of compromise could not start until NR recognised that he had a case of substance on unfairness, He claimed that NR had sabotaged his business and would have to start by assessing his loss.

106. The judge rejected the suggestion that NR had misled Mr Nelmes by not drawing to his attention that it was withdrawing its in principle offer of equity release and substituting a CCF subject to a 70% LTV and by burying the difference in a formal loan offer which was not clearly expressed and misleading. There was no offer or agreement in principle. It was not unfair in the circumstances of this case for NR to have left it to Mr Nelmes and his advisers to consider the terms of the offer when it came and to rely on Mr Amies' certificate that he had explained it. The formal loan offers were clear enough in a business context. If there was a rush which limited time for consideration that was not the responsibility of NR and there was no subsequent concealment or misleading of the CCF.

107. There was, the judge found, no basis for supposing that, as Mr Nelmes alleged, NR worked with Mr Blair to keep him in the dark. His home was not brought into the Charge without his knowledge. Steele Ross was Mr Nelmes' choice as valuer and they were providing valuations at figures specified or required by him as he was well aware. He was aware of the large disparity between the second set of valuations carried out by Steele Ross and E-Surv although not the full terms of the criticisms by the latter. It was not unfair not to pass on the full criticisms.

108. Nor was it unfair of NR to reject Mr Nelmes' proposal to reduce his monthly payment to £ 8,000 for a year when he provided no information as to the supposed causes of the problem or his plan, if there was one; what properties were to be sold at what estimated prices; what the effect would be on his mortgage payments and rent roll; what he was doing to maximise his rent roll; how the figure of £ 8,000 was arrived at and what he was doing to catch up. It was fair not to regard his proposal, as put, as a serious commercial proposal. Mr Nelmes took unilateral action to put the proposal into effect so putting his account into arrears and failed to respond to requests for proposals for nearly a year until he proposed adding £ 100 to his mortgage repayments, sought redemption figures for the first time, and failed to supply an up to date tenancy schedule in the run up to the review of his account. NR did not act unfairly during this period.

109. NR was restrained in pursuing the review exercise in the light of Mr Nelmes' illness until eventually revaluations were obtained despite his non co-operation. From that point on a demand was inevitable and not unfair. The sums demanded were contractually payable There was still time to make proposals if any could be made or to challenge the valuation .If he had made a proposal it would have been considered on its merits. Instead of indicating a wish to do either and seeking more time to do so his adviser Mr Sharman wrote seeking both current and historical valuations. The fact that his letter went astray was not the result or cause of any unfairness in the relationship.

110. There was nothing unfair about NR's decision to appoint Receivers. It was however unfair to move to the appointment of Receivers, thus terminating his income stream from those properties[4], without further notice immediately after the deadline for proposal and 6 days before the date NR had itself set for enforcement; and to have done so while information on the basis of which a proposal might have been formulated was being sought in correspondence albeit with the complaints department. There was no need to act with such precipitate haste. However notwithstanding the appointment of receivers and its effect on his income stream it was still not impossible for Mr Nelmes to make any proposals but he never did so. Even if receivers had not been appointed until a reasonable time later, say a month, it would have made no substantial difference. The unfairness in question did not call for any order under section 140B.

Conclusion

111. With the exception of his treatment of the procuration fee, the judge was, in my view, entitled to conclude that there was no unfairness in the relationship between NR and Mr Nelmes which required the court to use its powers under section 140B. After a 5 day hearing he made detailed findings of fact, based, inter alia, on an assessment of Mr Nelmes' written and oral evidence. He made a careful and through evaluation of the question of fairness. In those circumstances this court should, in my view, be reluctant to interfere with the judge's findings of fact unless they were not open to him; and should not overturn his evaluation of the fairness of the relationship unless in some respect his conclusion is not one to which he could properly come. I am not persuaded that there are, save in the respect which I have mentioned, any good grounds for interfering with the conclusion of the judge.

112. The Property was, on the judge's findings, included in the security with Mr Nelmes' full knowldge and that of the solicitor advising him. Reliance is placed by Mr Nelmes on the fact that under clause 18 of the FLO he undertook that the residential security property was or would be let by way of validly created assured shorthold tenancy agreement and that clause 7.2. of the Charge made, inter alia, breach of clause 18 an event of default, which would entitle NR to appoint a receiver. Accordingly the FLO invited Mr Nelmes into an agreement in which he was in breach from day 1. However, that was never a breach relied upon by NR and there were several other breaches which were. Further it was Mr Nelmes who had indicated that the Property would be let by putting forward the £ 10,200 rental figure. In those circumstances there was no unfairness in the relationship and certainly none affording sufficient reason to grant any relief.

113. Mr Nelmes contends that the relationship between him and NR was unfair because he was entering into a transaction which was doomed economically from the start on account of the overvaluation by £ 1,130,000 by Steele Ross, NR's panel valuer, as a result of which he was paying interest on a loan which was £ 1 million greater that the rental yield of the properties on which it was secured would justify. NR, he submits, ought to have realised that Mr Wild of Steele Ross was incompetent. Instead it withheld information about what it knew of his incompetence. In April 2007, as NR became aware, Mr Wild had valued 3 Knowl Road at £ 125,000 even though it was

[4] There was, we were told, no evidence either way as to whether Mr Nelmes had any other and, if so, what income.

the subject of an improvement notice from the Kirklees Council and no works had been carried out. He verified that no works were required to the property as a condition of the mortgage. In its letter of 11 May 2007 NR had to tell Mr Wild that his valuations ought to be supported by comparables but it did not tell Mr Nelmes that Mr Wild did not know his business at this early stage. On 28 August 2007 NR received Mr Wild's valuations for the second set of 5 properties, again without adequate comparables, which NR did not receive until 6 September 2007. NR did not inform Mr Nelmes of this or consider whether the original valuations ought to be checked. NR did not show Mr Nelmes' E-Surv's stinging response to these new valuations.

114. I do not accept that these submissions are well founded. On the judge's findings Steele Ross was Mr Nelmes' choice; and they were chosen because they would provide "*helpful*" valuations as specified or required by Mr Nelmes. He was aware of the inadequacies of the first set of valuations. He then used Steele Ross again for the second set of valuations to support him against the lower valuation by E-Surv. The judge did not find that NR knew or ought to have known of Steel Ross' incompetence and he found it impossible to resist the inference that Mr Nelmes instructed Steel Ross in the hope of getting valuations which were substantially higher than those available from another valuer. Further, on the judge's findings Mr Nelmes had an awareness of property prices in Huddersfield and had discussed the valuations with Mr Wild. On the judge's findings Mr Nelmes had every reason to believe that Mr Wild was not independent and had not carried out the evaluations in a competent manner.

115. Mr Nelmes also relies on the fact that NR refused to consider taking action against Steele Ross to restore the LTV ratio when their 2013 re-valuations made plain that the original valuations (both sets of properties) had reduced from £ 3,611,000 to £ 1,763,500. This submission is not well founded. Any claim by NR against the valuer would have to give credit for the true value of (i) NR's security and (ii) Mr Nelmes' covenants: see *Canada Square Operations Ltd v Kinleigh, Folkard & Haywards Ltd* [2016] PNLR 3. In view of the shortfall between the loan and the security a claim on Mr Nelmes would be inevitable and any claim against the valuers for negligent overvaluation would be to make up for the shortfall after taking account of the claim against Mr Nelmes.

116. As to Mr Nelmes' case that he was only given 1 working day to come up with £ 2.6 million and that the appointment of receivers was made 6 days before the date specified for enforcement, neither of these in practice prevented Mr Nelmes from making a proposal to NR if there was one to be made. He never did so and the judge was entitled to find that the unfairness in appointing receivers too soon was not one which called for a remedy under section 140 B because an appointment only after the expiry of a reasonable time would have made no substantial difference.

117. I would, therefore. If my brethren agree, allow the appeal but only to the extent of giving judgment for the amount of the procuration fee plus interest. I would invite Counsel to agree the principal amount and on the rate of interest and to draw up an order to reflect my conclusion.

Lord Justice Kitchin:

118. I agree.

Lord Justice Elias:

119. I agree.