Claim No: HQ15X00172

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Neutral Citation Number: [2018] EWHC 1009 (QB)

Royal Courts of Justice
The Strand
London WC2A 2LL

Friday, 20 April 2018

BEFORE:

HIS HONOUR JUDGE RAWLINGS
(Sitting as a Judge of the High Court)

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BETWEEN:

(1) MR COPE HODELL
(2) MRS GALYNA HODELL
(3) BREWSTER SCOTT LIMITED
(4) TOWER ASSETS LIMITED

Claimants

-and-

CLYDESDALE BANK PLC

Defendant

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DAVID McILROY (Instructed by Ellis Jones Solicitors LLP, 302 Charminster Road, Bournemouth BH8 9RU) appeared on behalf of the Claimants

SCOTT RALSTON (Instructed by Gateley Plc, One Eleven Edmund Street, Birmingham B3 2HJ) appeared on behalf of the Defendant

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JUDGMENT
(As Approved)

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Background

1. Mr Hodell, the first Claimant, is a property developer, operating principally, in the Portsmouth area. At all relevant times he carried on business as a property developer in his own name, in partnership with his wife, the 2nd Claimant ("Mrs Hodell" and "the Hodell partnership") and through limited companies, including the 3rd Claimant, Brewster Scott limited ("Brewster") and the 4th Claimant, Tower Assets limited ("Tower") Mr Hodell is a director and shareholder of Brewster and Tower.

2. The Defendant is a company registered in Scotland which, at all material times, carried on business providing banking and financial services.

3. On 14 September 2005 the Defendant offered a loan to Brewster of £380,000 to assist with the purchase of Sites at London Road and Munster Road in Portsmouth ("the Sites") which were acquired for £425,000 ("the Purchase Facility"). The Purchase Facility was drawn down on 21 October 2005. By letter dated 6 July 2006 the Purchase Facility was extended to 5 July 2007. By a facility letter dated 23 July 2007 the Purchase Facility was refinanced.

4. On 5 July 2006 the Defendant offered a Development Facility of £970,000 to Brewster to be used by Brewster to develop the Sites ("the Development Facility"). The Development Facility lasted for the period of 12 months until 31 July 2009. The Development fFacility was renewed on 5 July 2007 and increased to £1,070,000 by a new facility letter dated 31 July 2008 ("the 2008 Facility Agreement").

5. Richard Moakes ("Mr Moakes"), an employee of the Defendant, became the new relationship manager for all of the Claimants in January 2009, by virtue of which he became responsible for the day-to-day management of the relationship between the Defendant and the Claimants and, in particular the Purchase Facility and the Development Facility.

The reduction in the Development Facility in early 2009

6. The Claimants say that, at the first meeting which took place between Mr Hodell and Mr Moakes, in early 2009, Mr Moakes told Mr Hodell that he would reduce the Development Facility which was then governed by the terms the 2008 Facility Agreement, by £300,000. Mr Hodell says that Mr Moakes explained that the reason why he had to reduce the Development Facility was because the Bank of England had inspected the Defendants loan agreements and considered that the Purchase Facility with Brewster was "incorrect", but because that loan had already been advanced, the Defendant would have to reduce the level of borrowing available to draw down under the Development Facility, in order to recoup the value of the Purchase Facility (or part of it) ("the Bank of England justification").

7. The Defendant accepts that the Development Facility was reduced from £1,070,000 to £765,000, in January 2009 but it says that it was increased again in February 2009 to £830,000, in March 2009 to £895,000, in May 2009 to £958,000, and in June 2009 back to its original level of £1,070,000. The Defendant says that the reason why the Development Facility was reduced is that Mr Moakes, on reviewing the 2008 Facility Agreement noted that there was a funding shortfall in relation to the Sites, because the estimated cost to complete the development of the Sites exceeded the amount remaining available to draw, under the 2008 Facility Agreement. Mr Moakes also says that Mr Hodell had failed to inject his own funds of some £95,000 into the funding of the development of the Sites. This, says Mr Moakes, placed the bank's security in jeopardy (because it appeared that there were insufficient funds available to enable the development of the Sites to be completed and therefore the partly completed developments would not be good security for the Defendants lending).

8. The Claimants say that a term should be implied into the 2008 Facility Agreement that the Defendant would not exercise the right that it had, under the 2008 Facility Agreement to cancel all or part of its lending dishonestly, for an improper purpose, capriciously, arbitrarily or irrationally ("the Implied Term"). The Claimants say that the Bank of England Justification was not true and as such, the reduction of 2008 facility by £300,000 was irrational, arbitrary and/or capricious and therefore a breach of the Implied Term.

9. The Defendant says that the Implied Term should not be inserted into the 2008 Facility Agreement, and, in any event, the Defendant did not act in a way that was irrational, arbitrary and/or capricious.

An alleged Agreement to Provide Long Term lending at Discounted Rates

10. Mr Hodell says that, in September 2009, he sought funding for the Claimants from other lenders and received an offer from National Westminster Bank Plc ("Nat West") and that he told Mr Moakes that he intended to move the Claimants banking facilities with the Defendant, to NatWest.

11. On 22 September 2009 the Defendant wrote to Mr Hodell offering him personally, a loan of £900,194 which was available for acceptance, until 31 October 2009 to restructure his existing lending with the Defendant, but that offer was not accepted

12. In the Amended Particulars of Claim, the Claimants say that, at a subsequent meeting, in October 2009, between Mr Hodell and John Anderson, managing partner of the Defendants Portsmouth and Southampton Financial Solution Centre ("Mr Anderson"), Mr Anderson made the following promises, with a

view to retaining the Claimants' business which amounted to a contractual offer and/or representations:

(a) the Defendant would provide long term finance to enable Brewster and Tower, to fund the letting out of the Sites;

(b) the finance would be for a similar period to that of a new life insurance and critical illness policy to be entered into by Mr Hodell; and

(c) the lending would be at a discounted rate compared to what would otherwise have been available.

13. The Claimant's amended reply at paragraph 14 says that all 4 Claimants and GI were parties to the agreement and at paragraph 21 of the amended Reply, that the agreement applied to all present loans and to future loans on existing development sites including loans made to Tower.

14. the Claimants say that, in return for these promises, Mr Hodell was required to take out life and critical illness insurance for a period of 22 years and that Mr Hodell met with Sarah's Swinford (now Sarah Peacock) an independent financial adviser employed by the Defendant, in order to arrange a life and critical injury policy, for himself for that period.

15. The Claimants say that, on 13 November 2009, Mr Moakes sent an email to Mr Hodell setting out various options for the provision of facilities by the Defendant to the Claimants, which set out the reductions in interest rates available to the Claimants, in accordance with the promise made by Mr Anderson at the meeting in October. Those options included the provision of facilities by the Defendant to GI asset Management Ltd ("GI"), another development company controlled by Mr Hodell.

16. On 22 December 2009 a letter was sent to Brewster offering it a facility of £1,450,000 ("the Second Development Facility") and 2 letters to GI offering it facilities of £114,000 and £660,000, in each case with an interest rate of 3.35% above LIBOR. Those facilities were offered for terms of 3 – 4 years. It is a Claimant's case that, in accordance with what was promised by Mr Anderson in October 2009 the facilities ought to have been for the period of 22 years to match the period of the life and critical injury policy.

17. Mr Hodell says that he queried with Mr Moakes, in March 2010, why the facilities were only for terms of up to 4 years rather than 22 years. Mr Hodell says that Mr Moakes told him that, instead of giving the Claimants one set of loans for 22 years, the Defendant would grant a series of back – to – back loans with terms of up to 4 years each, which would provide 22 years of finance, in total.

18. Mr Hodell says that he accepted the offer constituted by: (a) Mr Anderson's promises in October 2009; (b) Mr Moakes's email of 13 November 2009; and (c) Mr Moakes' clarification that the 22 years of finance would be provided by

rolling over loans of 4 years, on a back-to-back basis, by entering into, what turned out to be, by that time, a 21 year life and critical injury policy on 1 April 2010 **("the First Policy")**. Mr Hodell says that, Mr Moakes confirmed, by email to Mr Hodell , on 6 May 2010 that the rate of interest chargeable on the facilities offered to: (a) Mr Hodell on 22 September 2009 and accepted by him on 30 October 2009; (b) to Brewster, on 22 December 2009 and accepted by it, on 5 January 2010; and (c) to GI, on 26 April 2010 , would be 2.56% above LIBOR.

19. The Defendant says that:

    (a) the alleged promises of long-term lending were not made. The true position is that the Defendant was prepared to reduce the interest margin on certain loans advanced by the Defendant to Brewster, Mr Hodell **and GI,** if Mr Hodell entered into the First Policy, (upon which the Defendant would earn commission) for so long as he maintained that policy;

    (b) Mr Hodell decided to take out the First Policy for his own reasons and not because he thought he was fulfilling a pre-requisite of long – term finance at reduced interest rates;

    (c) Even if the alleged promises were made, they cannot be contractual, because they did not have the necessary element of an expression of willingness by the Defendant to be bound;

20. The Clamants' case is that Defendant breached the contract made by:

    (a) offering Brewster loans on 18 August 2010, 15 December 2010 and 10 May 2011 at 3% above LIBOR;

    (b) offering Tower a loan on 18 May 2011 at 3% above LIBOR; and

    (c) failing to provide the Claimants with funding for 22 years in that the Defendant subsequently refused to renew or extend the facilities, when they expired.

21. The Claimants say that, if the promises of long term finance at discounted rates, accepted by Mr Hodell, were not legally binding agreements, then they were representations of the Defendant's intentions at the time and were false and made negligently in that the Defendant did not intend to offer the Claimants loans of 22 years and did not intend to offer further loans on expiry of the existing facilities or did not intend to offer them at the reduced margin of 2.56% above LIBOR.

22. The Defendant says that the alleged representations were not made, if they were made, they were not the cause of entry by Mr Hodell into the First Policy, and in any event, that they are not actionable representations.

Variation of the Offer of Long Term Finance to interest only finance

23. On 18 August 2010 the Second Development Facility was refinanced as separate facilities of £870,000 offered to Brewster and £580,000 offered to Tower.

24. On 27 August 2010, the Hodell Partnership entered into an £800,000 loan with the Defendant.

25. Loans of £917,000 were offered by the Defendant to Brewster to refinance existing borrowings on 15 December 2010 and 10 May 2011.

26. On 18 May 2011 the Hodell partnership entered into an £850,000 loan with the Defendant and a loan of £580,000 was offered to Tower to refinance is existing borrowings.

27. Mr Hodell says that, at a meeting with Mr Moakes, in December 2011, in return for Mr Hodell entering into a second life and critical illness insurance policy with Zürich, for the term of 15 years, Mr Moakes promised that the Defendant would convert all of the long-term loans that had been promised to the Claimants to interest only loans and Mr Hodell accepted that promise, by entering into a second life and critical illness policy with Zürich, on 1 January 2012 ("the Second Policy").

28. The Defendant says that it agreed to convert the loan of £909,000 which had been advanced to Mr Hodell, on 26 October 2009 and was due to expire on 31 October 2012, to an interest only loan in return for him entering into the Second Policy, but not to convert any other loan to interest only.

29. The Claimants say the Defendant breached the agreement by not converting all the Claimants' existing facilities (which it had promised would last 22 years) to interest only loans.

30. On 25 July 2012, the Defendant sent a letter to Mr Hodell referring to a review carried on earlier in the year which had resulted in a decision that the Defendant would withdraw from the commercial real estate ("CRE") market and transfer its outstanding CRE loans to its parent company, National Australia bank ("NAB") by 31 March 2013. The letter explained that the management of CRE loans currently carried on by the Defendant would be transferred to a new relationship manager employed by NAB. On 5 October 2012, Christopher Harrington, senior manager in commercial real estate, employed by NAB ("Mr Harrington") took over responsibility for managing the relationship between the Defendant/NAB and the Claimants.

Unfair credit relationship

31. the Claimants say that, as a result of the promises which were made, on behalf of the Defendant, but which have not been kept, their relationship with Defendant was unfair within the meaning of s.140A of the Consumer Credit Act 1974 ("1974 Act") and further that the First Policy and the Second Policy

are linked transactions for the purposes of Section 19 (1) (c) the 1974 Act , and as a result are subject to the provisions of the 1974 Act. The Claimants seek orders under Section 140 of the 1974 Act requiring the Defendant to repay to the Claimants the difference between the sums that the Claimants have paid to the Defendant and the sums that they would have paid, if the Defendants had granted the Claimants loans for 22 years at the rate of 2.56% above LIBOR. In the alternative, Mr Hodell says that he should be compensated for the monies that he has paid by way of premium for the First Policy and the Second Policy which he took out, in return to the promises made and such further or other relief as the court thinks just.

32. the Defendant D denies the allegations of unfairness and contends that the relevant credit relationships were fair. The Defendant also says that the First Policy and the Second Policy were not linked transactions for the purposes of the 1974 Act and, that Brewster and Tower, as corporate entities, can have no claim under the 1974 Act.

Quantum

33. The Claimant's say that, as a result of their loans not being renewed and being classed as unauthorised overdrafts, the Claimants were unable to re-finance, and had to take out bridging finance in March 2016, from MSP Capital before they could obtain finance from another mainstream lender (Santander) in July 2016.

34. The Claimants' claim the difference between the rate of interest of 2.56% above LIBOR that they say was promised to them by the Defendant, for 22 years and the rate of interest they have had to pay and will pay and bank charges that they say they would not otherwise have incurred. In the alternative, Mr Hodell claims reimbursement of the monthly premiums that he has paid to Zürich under the First Policy and the Second Policy.

35. On the morning of the first day of trial, I was informed by the Defendant's counsel, Mr Ralston, that the Defendants had been unable to comply with an order made by Mr Justice Kerr, on 6 April 2018, which required the Defendant, by 10:30 AM, that morning, to produce, in readable form, emails and attachments which had been produced on disclosure in an unreadable form, or to produce a statement setting out the steps that had been taken by them to render the documents readable and confirmation that they remained unreadable despite those steps having been taken. Mr Ralston explained that the reason for this was that the unreadable documents were password protected and the person who had been allocated the task of opening them had suffered a bereavement, had left work on Friday and had not returned.

36. Subsequently, after lunch on the first day, I was informed, by Mr Ralston, that his instructions were that it would take a further week to obtain the unreadable documents in a readable form. I was informed that the unreadable documents were in the email box of the secretary to Mr Harrington and that those

documents may include emails and attachments relating to Mr Harrington's dealings with the Claimants' facilities, after he became their relationship manager, on 5 October 2012. Having considered submissions from both counsel, I decided to continue with the trial in relation to the issue of liability only, as it is not asserted by the Claimants that Mr Harrington had any involvement in the various promises which the Claimants relied upon in support of their claims. Finally, this morning on the final day of trial, the missing emails were produced and Mr McIlroy, on behalf of the Claimants, confirmed that he had no points to make in relation to those emails so far as the issue of liability is concerned.

REPRESENTATION

37. The Claimants were represented by Mr Mcilroy

38. The Defendant was represented by Mr Ralston

WITNESSES

39. The Claimants relied on witness statements from the following witnesses:

    (a) Mr Hodell who provided two witness statements dated 25 January 2018 and 5 April 2018. Mr Hodell provides evidence on all issues;

    (b) Sarah Peacock ("Mrs Peacock") provide a witness statement dated 25 January 2018, to which she exhibits a letter written by her on 19 November 2013 "to whom it may concern". Mrs Peacock refers to her understanding that the Defendant would provide long-term lending to the Claimants to match the period of the First Policy which was to be entered into by Mr Hodell; and

    (c) Karen De Klerk who provided a witness statement dated 19 January 2018. Ms De Klerk provided evidence as to the calculation of the losses that the Claimants say they have suffered as a result of the breaches of contract/misrepresentations on which they base their claims. Pursuant to my decision on the first day of the trial, only to deal with the issue of liability and not quantum, Ms De Klerk was not called as a witness.

40. The Defendant relied on witness statements from the following witnesses:

    (a) Mr Moakes who provided witness statement dated 12 November 2017 and 18 January 2018. Mr Moakes dealt with: (i) the reduction in the limit under the 2008 Facility Agreement of £300,000 in early 2009; (ii) the allegation that Mr Anderson agreed in late 2009 to provide long-term finance for all of the Claimants at a discounted rate in return for Mr Hodell entering into the First Policy; (iii) the allegation that Mr Moakes email of 13 November 2009 provides confirmation of Mr Anderson's agreement , in late 2009 to provide long-term finance and that Mr Moakes confirmed, at a meeting in March 2010, that the bank would rollover loans

to the Claimants on a back to back bases to provide 22 years of finance in total; (iv) the setting up of the First Policy; and (v) the setting up of the Second Policy and allegation that Mr Moakes agreed that, in consideration of the Second Policy being set up, that all of the Claimants outstanding loans would be converted to interest only and this would apply for the 22 year period of those loans.

(b) Mr Harrington who provided a witness statement dated 11 November 2017. Mr Harrington provides evidence of his dealings with Mr Hodell after he took over the responsibilities of relationship manager for the Claimants on 5 October 2012. He also produces from the Defendant's files, documents which he asserts contradict the Claimant's case.

CREDIBILITY OF WITNESSES

41. A considerable amount of documentation has been produced by the Defendant, however the Claimants case is based principally upon Mr Hodell's recollection of events, some of which recollection, he says is supported by the content of certain documents that the Defendant has produced.

42. Mr Anderson who Mr Hodell says made a promise, at a meeting with him, at the end of 2009, that the Defendant would provide long-term finance to all of the Claimants at discounted rates if Mr Hodell entered into the first policy, has not been called as a witness.

43. There is a dispute between Mr Hodell and Mr Moakes, as to why the Development Facility was reduced by £300,000 and whether Mr Moakes made certain promises and statements about the provision of long-term finance at discounted rates to the Claimants, on an interest only basis.

44. Mr McIlroy on behalf of the Claimant invites me to make adverse inferences from the fact that the Defendants have not called Mr Anderson or Mr Bloomfield. Mr Anderson, I have already referred to. Mr Bloomfield is the independent financial adviser who provided advice to Mr Hodell in relation to the second insurance policy which was entered into. It is said that no excuse has been given by the Defendants for not calling these witnesses and there is no excuse in the evidence before me save that they are no longer employed by the Defendant. As to that submission, I accept the failure to produce Mr Anderson and Mr Bloomfield may count against the Defendants in those cases where the Claimant makes assertions as to what they may or may not have done or said or agreed, but I will consider the extent to which their absence leads to me making such adverse inferences as part of the evidence generally in relation to those issues. I comment that it was also open to the Claimants to produce witness statements from the second Claimant, Mrs Hodell, and from the other director of Brewster and Tower, corroborating evidence which was given by Mr Hodell that reassurances were made in their presence to Mr Hodell about the provision of long-term finance to the Claimants, but they have not appeared as witnesses either.

45. A significant amount of documentation has been produced by the Defendant. However, the Claimants' case is based principally upon Mr Hodell's recollection of events. Some of that recollection, he says, is supported by the content of documents that have been produced by the Defendant, and I will come to that in due course.

46. In those circumstances the credibility of the witness is and in particular the credibility of Mr Hodell and Mr Moakes (and to a lesser extent Mrs Peacock) is of key importance to determining the claims.

47. Mr Ralston reminds me of the approach recommended by Leggatt J in **Blue v Ashley [2017] EWHC 1928 (Comm)** to testing the memory of witnesses, alongside contemporaneous documents, at paragraph 16 of his judgment. Leggatt J says "I expressed the opinion in the Gestmin case (paragraph 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance 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." I take that guidance into account in gauging the reliability of the evidence of the witnesses in this case.

48. I will take that guidance into account but I also accept Mr McIlroy's point that Mr Hodell came across as a witness who does not appear to me to be a man for whom documents play a central role in his modus operandi. It is perhaps less surprising than it might be in other circumstances, therefore, that so far as he is concerned, he does not produce many documents which evidence the agreements and promises that he alleges were made.

Credibility of Mr Hodell

49. Mr Hodell clearly feels strongly that the Defendant has treated him badly and acted unreasonably. He says that the Defendant did this, by reducing the 2008 Facility Agreement by £300,000 without proper justification and by (on his case) promising long term facilities in October 2009 (not only to the Claimants, in respect of the Sites that they were developing but also for the developments which were, at point being funded by other banks and all future developments that Mr Hodell may undertake either personally, through the Hodell partnership or through any other entity that he chose to use for development and property investment) and then reneging on that promise. Mr Hodell described himself as a man of his word, doing deals on a handshake, which was his explanation for not documenting, by e mail or otherwise the various offers/promises that he says were made to him by Mr Anderson and Mr Moakes. He also clearly attached great importance to acting reasonably and feels the Defendant is acted unreasonably.

50. Mr Hodell's credibility as an accurate witness of fact and as to what was agreed, and as to what was a binding agreement or a representation, as opposed to an expression of confidence that the Defendant would be able agree to something, was, undermined by the following:

(a) Mr Hodell says that he did not realise, until a point in 2009, when he was informed of this, that the 2008 Facility Agreement was repayable on demand by Brewster. He accepted that he had probably not read all of the 2008 Facility Agreement. It is clear from clause 3.1 of the 2008 Facility Agreement that the facility is repayable on demand, and I would expect Mr Hodell, who was, by July 2008, very experienced in obtaining facilities from banks to purchase and develop property and invest in property, to understand that certain facilities were repayable on demand and to read the 2008 Facility Agreement to understand that that term applied to that facility. This suggests at the very least, a lack of care and attention to detail, on Mr Hodell's part in his dealings with the Defendant and a failure to ensure that he understood the nature of the agreements that he was entering into;

(b) it is Mr Hodell's case that, as a result of the 2008 facility being reduced by £300,000, in January 2009, he was unable to fund the completion of development of the Sites and that this caused completion to be delayed by some 3 months. Mr Hodell was taken to documents that show that the Defendant continued to permit Brewster to draw funds to progress the development of the Sites between January and April 2009 against architects' certificates which confirmed the amount of work carried out on the Sites. When taken to these documents Mr Hodell had to accept that the Defendant had continued to provide funding of the development of the Sites, in the period January – April 2009, to the extent that the architect certified that works been carried out, and that the 2008 Facility Agreement requires drawings to be made against architects certificates;

(c) as an explanation of where Mr Hodell obtain the funds from, in order to complete the development of the Sites when the Defendant reduced the 2008 facility, at paragraph 53 of his statement, Mr Hodell says that he advanced £400,000 to Brewster from the proceeds of flats sold by GI at the Art Centre. When I asked Mr Hodell how money had been made available from the Art Centre, given that it was charged by GI to the Defendant, Mr Hodell said that he was pulling money from everywhere to complete the development of the Sites and that money was taken from the sale of property at the Art Centre to help achieve completion of the development in October/November 2009. Mr Hodell was then taken, by Mr Ralston to a credit memo issued in respect of GI on 27 October 2009 which showed that, at that stage 7 flats had been sold and all of the proceeds of those flats (except £100,000) had been paid to the Defendant (the £100,000 being released to GI). It appears therefore that, at most £100,000 could have been released from the sale flats at the Art Centre to assist in completion of the development at the Sites, which is inconsistent with content of paragraph 53 Mr Hodell's witness statement;

(d) in his witness statement, Mr Hodell refers to an offer of finance made by NatWest, prior to October 2009. Mr Hodell said that he has been unable to find a copy of the email that he says was sent to him making that offer. When Mr Hodell was asked about the email and any attachments to it, Mr Hodell said that it was an email, with no attachment "sketching out" what

NatWest could do and asking Mr Hodell whether he would be prepared to take out life assurance. From the description that Mr Hodell gave of the email, it is unlikely that it was an offer of finance, capable of acceptance but rather an indication of what NatWest might be able to do, subject to obtaining credit approval, by way of refinancing the loans that had been advanced to the Claimants by the Defendant;

(e) Mr Hodell said, at trial, that, what Mr Anderson agreed to do at the meeting in October 2009 was to provide long-term finance, not only for the Claimants in relation to Sites then being developed by them but also in relation to any future sites that Mr Hodell chose to develop either by himself, through any of the Claimants, or through any legal entity that he set up. I will consider this suggestion in more detail below, but note at this point, that it appears highly unlikely that Mr Anderson would have been in a position to make a firm offer of long-term finance in relation to legal entities and sites that he knew nothing about, including sites which were not even in existence at the time he spoke to Mr Hodell, in October 2009;

(f) in paragraph 132 of Mr Hodell's first witness statement, he says that, at a meeting with Mr Moakes, in December 2011, Mr Moakes told him that, if he entered into a second life and critical illness policy the Defendant would convert his October 2009 loan into an interest only loan for the remainder of its term and would provide him with the long-term loans that the bank had promised on an interest only basis as well. However, Mr Hodell then says, in paragraph 132, that the promise of long-term loans was not specifically discussed in the meeting as they had been discussed on numerous occasions beforehand and he felt it was now an implied condition that they would be provided. The two statements made in paragraph 132 of Mr Hodell's statement are inconsistent with each other, Mr Moakes could not have told Mr Hodell that, if he entered into the Second policy, the Defendant would convert all of the long-term loans to interest only, if long-term loans were not discussed at the meeting. This tends to suggest that Mr Hodell discerns that promises have been made where it is clear, even on his own version of events, that they have not been made;

(g) towards the end of his cross-examination, Mr Ralston asked Mr Hodell whether he accepted that although, on his case Mr Anderson/Mr Moakes had told him that the Defendant would roll over facilities on a back to back basis giving the Claimant's (and others) 22 (or 21) years of finance that, nonetheless the extensions of the facilities had to be approved by the Defendant's credit process. Mr Hodell confirmed that he did accept this and that he accepted that a facility fee and possibly a valuation fee would be required each time that the facilities were extended. It was put to Mr Hodell that this must necessarily mean that, if the credit criteria for extension of the facility was not met, the facility would not be extended. Mr Hodell's response to this was to say that his developments always met the Defendants loan to value criteria , but it seems to me that these concessions by Mr Hodell undermine his case that a binding offer or representation that long-term finance would be made available to the

Claimants and others, was made by Mr Anderson/Mr Moakes because, if the Defendant's credit process had to be satisfied, in order for the facilities to be extended, then there could have been no binding offer or representation that long-term finance would be available; and

(h) finally, Mr Hodell was unable to produce any witness other than himself and, in my judgement no document which supports his case that he was promised long-term finance by Mr Anderson/Mr Moakes for the Claimants and/or for all his future projects. Mr Hodell suggested that Mrs Peacock would be able to confirm that a promise was made in her presence to Mr Hodell, by Mr Moakes, in March 2011, but in the event, at trial Mrs Peacock did not confirm this. Mr Hodell says that his wife and fellow director of Brewster and Tower, were witnesses to Mr Anderson confirming his offers or promises of long term finance, but they did not appear as witnesses. There is a considerable amount of contemporaneous documentation which is inconsistent with Mr Hodell's case, to which I will turn shortly.

Credibility Mrs Peacock

51. I found Mrs Peacock to be both an honest and reliable witness as to those matters that she was able to give evidence about. Mrs Peacock accepted however that she was not able to give any evidence regarding the loans made or to be made by the Defendant to the Claimants, or to any entity associated with Mr Hodell. She suggested that some reassurance had to be given to Zürich about the longevity of the loans provided by the Defendant to the Claimants, but in the event, the emails, that I have seen passing between Joe Davison, Mrs Peacock's assistant and Zurich suggest that the only assurance given to Zürich was that facilities were "generally" rolled over. Mrs Peacock accepted that she could not recall ever having been present, at a time when Mr Anderson or Mr Moakes had confirmed that long-term finance would be provided by the Defendant, the most that she could say was that she had heard Mr Hodell and Mr Anderson talking about Mr Hodell's long-term plans but her evidence did not go beyond that.

Mr Moakes

52. I found Mr Moakes to be an impressive witness. He was willing to make concessions when appropriate, for example that a business partner, such as himself was likely to know whether credit would or would not approve a proposal for the Defendant to provide finance to a customer and that, funding the Claimants to hold properties in the longer term would have been a good outcome for the Defendant, given Mr Hodell's track record, however he qualified that point by noting that the Defendant did not have the appetite for such long-term property -related lending, from late 2008/early 2009 onwards. When Mr Moakes was asked whether he recalled meetings taking place, he often said that he could not recall whether a particular meeting had taken place or not and, when he was asked whether it was possible that there had been discussions at meetings about for example the duration of loans he conceded that it was possible that there had been discussions about this. What Mr Moakes

was adamant about however was that he would not have lied about the reasons why the 2008 facility was reduced by £305,000 in January 2009 or offered or promised finance to Mr Hodell until he first obtained credit approval for such an offer and that he knew from late 2008/early 2009 onwards that the Defendant was extremely unlikely to support long-term lending to the commercial real estate sector.

53. Mr Hodell said that he was not attacking the integrity of Mr Anderson or Mr Moakes and that Mr Moakes was more of an "old-fashioned banker "" or "stickler for the rules" when compared to others at the Defendant bank at the time. Having heard from Mr Moakes, I accept that he would not have deliberately lied to Mr Hodell about the reasons for the 2008 facility being reduced in January 2009 and that he would not have offered or promised that the Defendant would provide lending for the Claimant's until such lending was approved by credit.

Mr Harrington

54. The Claimants does not say that Mr Harrington made any promises, which form the subject matter of the claim in these proceedings. Mr Harrington only became relationship manager to the Claimant's, when he took over from Mr Moakes October 2012. His evidence related to the contents of the Defendant's files and to his dealings with Mr Hodell leading to the repayment, by the Claimants of the loans owing to the Defendant. I found no reason to doubt that Mr Harrington gave anything other than honest and reliable evidence but his evidence is of little direct relevance to the points in dispute.

ISSUES

55. The parties agreed what issues I should determine. I adopt the list of issues suggested by the parties, subject to removing those issues that relate to quantum. I will deal with the issues by reference to the headings set out in the list of agreed issues.

The 2008 Facility Agreement-(reduction of facility by £305,000)

Does the Implied Term asserted by the Claimants exist

56. the 2008 Facility Agreement increased the facility available to Brewster to develop the Sites from £970,000 to £1,070,000. Clause 3.1 of the 2008 Facility Agreement provided "all amounts outstanding under or in respect of the facilities are repayable on demand. If the bank makes a demand on any facility, all facilities will be immediately cancelled. The bank may also, at any time, cancel all or any part of any facility by notice to the borrower…"

57. The Claimants contend that the court should imply a term into the 2008 Facility Agreement, that the Defendant will not operate clause 3.1, so as to cancel all or any part of the facility "dishonestly, for an improper purpose, capriciously, arbitrarily or irrationally" ("the Implied Term").

58. Mr McIlroy, on behalf of the Claimants says that the courts will insert the Implied Term where a party is exercising a discretion given to them by the contract and is not simply exercising a binary choice, such as whether to terminate a contract for breach, but is choosing from a range of options (in this case whether to reduce the facility and if so by how much). Mr MciIroy refers to the decision of the Supreme Court in **Braganza v BP shipping Ltd [2015] UKSC at page 17.**

59. In Braganza, the Supreme Court was concerned with an enquiry which was carried out by BP shipping, into the circumstances in which Mr Braganza vanished from one of its ships, whilst at sea. An internal enquiry held by BP shipping concluded that Mr Braganza had committed suicide and as a result denied his widow the death in service benefit to which she would otherwise have been entitled. By a majority the Supreme Court inserted an implied term into the contract of employment between the shipping company and Mr Braganza, that the shipping company would exercise its power to hold an internal enquiry and the enquiry would form an opinion as to relevant facts, not only acting in good faith but also without being arbitrary, capricious or irrational. Lady Hale, in her speech, with which the majority of the Supreme Court agreed said, at paragraph 18, "Contractual terms in which one party to the contract is given the power to exercise discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions, which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as their often will be, in an employment contract. Courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."

60. Mr Ralston says that if a party is exercising a contractual right as opposed to a discretion the court will not impose the Implied Term. Mr Ralston refers to the decision of the Court of Appeal in **Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust [2013] BLR 265**. In that case the trust was given the right to calculate service failure points incurred by Medirest and to deduct from monies otherwise payable to Medirest, a sum of money based upon those service failure points. The trust assessed that it was entitled to deduct over £700,000 in relation to the service failure points that it calculated Medirest had incurred. Medirest contended that an implied term should be inserted into the contract that the trust would not exercise the discretion given it under the contract in an arbitrary, irrational or capricious manner.

61. Jackson LJ, after referring to a number of cases in which the courts had implied a term into contracts similar to that for which Medirest contended stated, at paragraph 82 "In each of the above cases the implied term was intrinsic. The contract would not make sense without it. It would have been absurd in any of those cases to read the contract as permitting the party in question to exercise its discretion in an arbitrary irrational or capricious manner. …". He went on at paragraph 83 to say "an important feature of the above line of authorities is that, in each case, the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. …"

62. Lord Justice Jackson then went on to note that, in accordance with his interpretation of the contract, it set out a precise mechanism for calculating the number of service failure points and what deductions the trust could make from the sum otherwise due to Medirest, based upon those service failure points. Their calculation was not therefore a matter over which the trust could exercise a discretion. The discretion which the trust had, was whether to award less than the full amount of the service failure points or to deduct less than the full amount that it would be entitled to deduct from the sum otherwise payable to Medirest, based upon the service failure points that it awarded. Jackson LJ noted at paragraph 91 that "the discretion conferred by clause 5.8 simply permits the trust to decide whether or not to exercise an absolute contractual right.". At paragraph 92 he said "There is no justification for implying, into clause 5.8 a term that the trust will not act in an arbitrary, irrational or capricious manner."

63. Mr Ralston says that the Defendant is entitled, in accordance with clause 3.1 of the 2008 Facility Agreement , to decide whether to cancel all or any part of the facility. That is a contractual right which it has, similar to the right given to the trust in **Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex hospital Services NHS Trust** and there is similarly, no justification for imposing the Implied Term in connection with the exercise of that contractual right. Mr Ralston also points to a number of cases in which the courts have refused to imply a term restricting the use, by a lender of their rights under facility documentation: (a) to decide whether to withdraw a facility (**Chapman v Barclays bank [1998] PNLR 14); and** (b) in demanding repayment of a facility that is repayable on demand (**Lloyds Bank plc v Lampert [1999] BCC page 507; Bank of Ireland v AMCD (Property Holdings) Ltd 19 March 2001. Lawrence Collins J (unreported); and Hall v RBS plc [2009] EWHC 3163 (QB)**.

64. I agree with Mr Ralston that clause 3.1 of the 2008 Facility Agreement provides a contractual right to the Defendant enabling it to cancel all or any part of the facility (and to demand repayment of the facility). As in **Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust,** the Defendant here is entitled, in accordance with its contractual right under clause 3.1 of the 2008 Facility Agreement, to demand repayment of the facility and/or to withdraw all or part of the facility, those are, in my judgement, contractual rights, the fact that the clause gives the Defendant a discretion as to how it chooses to exercise its contractual rights (in whole or in part) in my judgement does not detract from them being contractual rights. I do not see the Supreme Court case of Braganza (and Mr McIlroy cited no other authority for his proposition that, where the choice is other than binary the Implied Term will be imposed by the court) as saying that merely because a party has a choice as to how they exercise their contractual rights, that choice should be made subject to the Implied Term.

If there was an Implied Term, did the Defendant breach it?

65. As I have found that the Implied Term for which the Claimants contend should not be read into the 2008 Facility Agreement, it is strictly speaking unnecessary for me to consider whether or not the Defendant would have breached the Implied Term for which the Claimants contend, if I had accepted that it should be implied into the 2008 Facility Agreement. For completeness however, if I had inserted into the 2008 Facility Agreement, the Implied Term, for which the Claimants content I would not have found the Defendant to be in breach of it. I come to this conclusion for the following reasons:

    (a) Mr Hodell says that Mr Moakes told him that a Bank of England inspection had revealed that the Purchase Facility advanced to Brewster, to enable the Sites to be purchased, was incorrect but, as those monies had already been advanced, nothing could be done about the Purchase Facility, instead the Development Facility would need to be reduced by some £300,000;

    (b) It is Mr Hodell's case that, what Mr Moakes told him about the Bank of England inspection was untrue and was invented by Mr Moakes as an excuse for reducing the Development Facility. It would follow from that, that there would be no reference in the Defendants' records to a Bank of England inspection or there being something wrong with the Purchase Facility advanced to Brewster. However, even if the Bank of England inspection excuse was spurious, it would still need to make some sense in terms of what happened to the Development Facility thereafter, in order for that excuse to have had some credibility at the time. What happened to the Development Facility however is that it was reduced to £765,000 in January 2009 (a reduction of £305,000), then increased to £895,000 in March 2009, to £958,000 in May 2009 and then back to £1,070,000 in June 2009. These movements in the 2008 facility, make no sense in respect of an excuse that the Bank of England had found some problem with the Purchase Facility (which was for a sum of £380,000) which had to be corrected by reducing the Development Facility, because if, by some

means the Purchase Facility had to be cancelled out, this would not be achieved by a temporary reduction in the Development Facility;

(c) at trial, Mr Moakes was taken to file notes, one dated 24 November 2008 relating to GI and the second note dated 23 February 2009 relating to Brewster. Initially Mr Moakes conceded, when he was taken to the Brewster note, that he could not recall reducing the facility for Brewster or that there were problems associated with the lending to Brewster. He did recall a problem with the lending to GI, to develop the Art Centre, whereby the funds required to complete the Art Centre exceeded the amount remaining available under the development facility provided to GI. Mr Moakes then read the note, apparently made by him on 23 February 2009, referring to an investigation carried out by him, in relation to the 2008 facility advanced to Brewster to develop the Sites, which identified a similar position of a shortfall between the amount required to complete the development of the Sites and the balance of monies available under the 2008 facility. Mr Moakes confirmed that, because of the style of the note of 23 February 2009, he accepted that it was a note made by him. He was unable to explain why the note was only written on 23 February 2009, when the Brewster facility was reduced by some £305,000, in January 2009;

(d) The first file note, dated 24 November 2008, relating to GI says that, in simple terms, it was intended that Mr Hodell would cover interest but it had instead been rolled up by increases in the facility. This had come to light when a valuer's report from Vail Williams advised that the cost to complete the works was £230,000 but the available loan balance was £151,000, £92,000 of which was earmarked to rolled up interest, meaning that only £59,000 was available for the outstanding development costs, giving the shortfall of £171,000. The second file note relating to Brewster, dated 23 February 2009 refers to the problem previously noted with GI and the Art Centre and that that problem had caused an investigation to be carried out by Mr Moakes, in relation to the 2008 facility for Brewster for the development of the Sites. The note says that an issue, very similar to that for GI and the Art Centre scheme had arisen in relation to the 2008 facility and the Sites, with the 2008 facility having been increased to cover interest leaving a shortfall between funds available under the 2008 facility and the costs to complete the development of the Sites. The note says that, according to the Mr Moakes calculations, there was a £148,000 shortfall between the amount available under the 2008 facility and the amount required to complete the development of the Sites, (£248,000 was available under 2008 facility, of which £79,000 had been earmarked to pay interest, leaving a net sum available of £169,000, whereas the cost to complete were £317,000, leaving a shortfall £148,000). Reference is made to Mr Hodell not putting the £95,000 into the scheme that it was envisaged he would put into the scheme.

(e) Mr Hodell disputes what is said by Mr Moakes note of 23 February 2009, he says that he had put in excess of £95,000 into the scheme to develop the Sites and he produces a schedule of what he spent and when. He says, in any event, that the issues identified by Mr Moakes were easily solvable and that it was not sensible to reduce the 2008 facility as this would put

completion of the development at risk, which would have a significantly adverse effect on the Defendant's security.

(f) Mr Hodell was taken to a number of architects certificates issued between January and April 2009 and to account statements of Brewster showing that the value of those architects certificates was being paid out of Brewster's account with the Defendant, during the period January – April 2009, Mr Hodell was forced to accept therefore, in cross-examination, that the Defendant did continue to release funds , for the development of the Sites, subject to the Defendant being presented with architects certificates for work carried out, contrary to his suggestion that funding ceased altogether.

(g) The 2008 Facility Agreement provides, at clause 4.5 that the current cost to complete the development of the Sites (including anticipated finance costs), as determined by the Defendant were not to exceed available funding within the Defendants agreed facilities and that drawdown would be made against architect certification.

(h) Mr Moakes's explanation of the reason for reducing the 2008 facility appears therefore to be consistent with the documents, by which I mean that: (a) a file note has been produced, apparently written by Mr Moakes, which says that the development being carried out at the Art Centre by GI had got into a position where the cost to complete exceeded the finance available from the Defendant; (b) a file note, completed by Mr Moakes in respect of Brewster confirms that he identified a similar problem for the Sites, in that the cost to complete the development of the Sites exceeding funds available under the 2008 facility to Brewster; (c) the Defendant nonetheless continued throughout the period January – April 2009 to advance funds against architects certificates to fund the continuation of the development of the Sites; and (d) the 2008 Facility Agreement provides that, it was a condition that the cost to complete the development of the Sites would not exceed the undrawn funds available under the 2008 facility.

(i) Notwithstanding that the 2008 facility appears to have been reduced by £305,000, in January 2009, and Mr Moakes file note is dated 23 February 2009, I have no hesitation in preferring Mr Moakes's explanation of the reason why the 2008 facility was reduced by £305,000 (temporarily). I prefer Mr Moakes evidence on this point because, as I have already said, I accept that he would not have deliberately lied to Mr Hodell about the reasons why the 2008 facility was reduced. Mr Moakes evidence supported by the documents to which I have already referred and by the evidence of the Defendant continuing to advance funds to Brewster against architect's certificates (in accordance with the terms of the 2008 Facility Agreement). I also note that, the evidence given by Mr Hodell, in his witness statement, that he used £400,000, from the sale of units by GI, at the Art Centre, to complete the development of the Sites turns out to be wrong in that all of the funds from the sale of flats in the Art Centre were paid to the Defendant except for £100,000 and therefore the maximum that could have been contributed to the development of the Sites, from the sale of flats at the Art Centre was £100,000;

(j) Given that I have accepted Mr Moakes's explanation of the reason why the 2008 facility was temporarily reduced by £305,000, I also accept that the reduction in the 2008 facility cannot be said to have occurred for a dishonest, improper, capricious, arbitrary or irrational reason. Rather the reduction was to ensure compliance with a condition of the 2008 facility agreement that the cost to complete the Sites should not exceed the balance of the funds available under the 2008 facility. Further, given that, as Mr Hodell was forced to accept, the Defendant continued to pay against architect's certificates (which is what the 2008 facility letter provided it should pay against) I am not satisfied that the reduction in the 2008 facility resulted in the Defendant advancing less funds to Brewster, to enable it to complete the development on the Sites, than it was obliged to, in accordance with the requirement in the 2008 facility letter for architects certificates to be produced to support drawings against the 2008 facility.

Breach of the First Alleged Contract

The alleged meeting with Mr Anderson in October 2009

66. The Re-Amended Particulars of Claim, at Paragraph 17 plead that, at a meeting, over dinner, which took place between Mr Hodell and Mr Anderson, in October 2009, Mr Anderson said that: (a) the Defendant would do its utmost to retain the Claimants as clients; (b) the Defendant would provide long-term finance, sufficient to allow Brewster and Tower to fund the letting out of the developments at the Sites; (c) that the long-term finance would be for a period commensurate with Mr Hodell's new life insurance policy; (d) the lending would be at a discounted rate compared to what would otherwise have been available; and (e) in return for the commitment to long-term funding and discounted interest rates, Mr Hodell was required to take out life and critical illness insurance for a period of 22 years.

67. In the amended reply, at paragraph 14 (b) the parties to whom, the Claimants allege that Mr Anderson agreed to provide long-term finance increased to all 4 Claimants and GRI and at paragraph 21 of the Reply that the agreement applied to all present loans and future loans on existing development Sites, including loans made to Tower.

68. I am prepared to accept that a meeting did take place between Mr Anderson and Mr Hodell, in or around October 2009. I am also prepared to accept that Mr Anderson indicated, during the course of that meeting, that he was optimistic, that the Defendant would be able to provide long-term facilities to the Claimants at discounted rates, and that if Mr Hodell was prepared to enter into a life and sickness policy it would or may increase the prospects of this being achieved. Mr Anderson may well have done this because Mr Hodell had indicated that he had an offer of finance from NatWest to repay the Defendant. All of that makes sense and may well be the sort of thing that Mr Anderson would want to do, in order to try to retain the Defendant's banking relationship with the Claimants. Mr Hodell has not, however persuaded me that Mr Anderson made a promise or a representation to Mr Hodell, that the Defendant would provide long term facilities to the Claimants and/or to any other party

associated with Mr Hodell, as Mr Hodell asserts, in return for Mr Hodell entering into a life and critical illness policy. I come to this conclusion for the following reasons:

(a) Mr Anderson knew, because he was an employee of the Defendant, that credit approval would be required before any offer or promise of finance could be made to a customer, in particular Mr Anderson would know that credit approval was necessary before an offer or promise of finance for over 20 years to multiple customers could be made;

(b) Mr Hodell accepted, during his cross-examination, that he knew that Mr Anderson would not have obtained credit approval for the proposal that he made to Mr Hodell, in October 2009 and that he knew that such approval was necessary before lending could take place. Mr Hodell said that Mr Anderson had told him that he knew how he was going to do it, which can only mean, even Mr Hodell's evidence, that Mr Anderson was telling Mr Hodell, that he knew how he could put forward a proposal that he believed would obtain credit approval.

(c) in his witness statement, at paragraph 66 Mr Hodell says "Through my previous dealings with Clydesdale and other banks, I have found that the bank managers are aware of what they can and cannot offer. I had no reason to doubt the promises made by John Anderson, particularly due to his level of seniority. His question about whether I would be prepared to take out life insurance with Clydesdale, in order to obtain interest only facilities, showed that he knew what the banks credit criteria were. Both John Anderson and Richard Moakes would have known exactly what criteria were required to pass the facilities through credit and I trusted that they could fulfil any promises made to me". Whilst in this paragraph Mr Hodell talks about promises being made, he does so, in the context of asserting that bank managers generally and Mr Anderson and Mr Moakes, in particular would have known what criteria was required to pass the facilities through credit. In my judgement this paragraph in Mr Hodell's statement is a contradiction, Mr Hodell is accepting that facilities needed to be authorised by credit, and he says that bank managers generally and John Anderson and Richard Moakes in particular would know what was likely to be approved by credit and yet he talks about promises being made by them. In my judgement what Mr Hodell refers to as "promises" are really no more, even on his own evidence, than assurances given by Mr Anderson and Mr Moakes, that they were optimistic, that the Defendant's credit department would approve facilities, but of course they might not, in which case the facilities could not be offered;

(d) it is accepted by both parties that, by October 2009 the "credit crunch" was in full swing. Mr Anderson could therefore perhaps be optimistic that credit would approve long-term finance for the Claimants, (although even that seems unlikely on the evidence of Mr Moakes, which I accept and which I will refer to shortly and the documents I have seen) because of the high regard in which he and the Defendant more generally held Mr Hodell,

however he could hardly, in my judgement, have thought that this was a foregone conclusion;

(e) there is, amongst the documents produced by the Defendant, a headline deal sheet dated 25 August 2009, which sought approval from the Defendant's credit function, for a strategy going forward for the Defendants loans to Mr Hodell, Panther Homes Ltd (another company associated with Mr Hodell), GI and Brewster. The headline deal sheet says that the GI loan and assets may be transferred to Mr Hodell, but in any event that the lending to Mr Hodell/GI should be for a three-year term. In respect of Brewster it is noted that Brewster's preference was to retain the units which were nearing completion and that NatWest and Lloyds had indicated their possible agreement to support this,, subject to lets being in place. It was proposed that the lending to Brewster should be retained on a six-month interest only basis allowing Brewster time to refinance. The Key reasons given for the proposals included, that it would significantly reduce the Defendant's property exposure in line with its current strategy while retaining sufficient loans with the member to continue a meaningful relationship with him. This was said to have been supported by credit, on the basis of the overall relationship and reducing structure. It appears to me very unlikely that Mr Anderson, at a meeting taking place 2 months after this deal sheet was completed would feel so confident that credit would approve long-term funding of 20+ years for the Claimants that he could promise this to Mr Hodell, without getting credit to approve it first.

(h) the position is further complicated, by Mr Hodell's changing his position as to who Mr Anderson said the Defendant would advance long-term finance to and for what. In the amended particulars of claim the promise was said to be of sufficient finance to enable Brewster and Tower to fund the letting out of the Sites (paragraph 17 (b) of the amended particulars of claim). In the reply the promise of long-term finance was said to apply to all present loans and future loans on existing development sites, including loans made to Tower. Mr Hodell's evidence at trial took the matter one step further, when he said that the offer of long-term finance made by Mr Anderson at the meeting in October 2009 was not only for present and future loans on existing development sites but also to refinance his borrowing and that of entities connected with him, from NatWest and to provide long-term finance for any sites that he chose to develop in the future, through any legal entity that he set up. The changes in Mr Hodell's position as to what it was that Mr Anderson promised in relation to long-term finance, undermines the credibility of his case that Mr Anderson made a legally binding offer/promise at all. It is very unlikely that Mr Anderson could really have intended, or that Mr Hodell could really have understood him to intend, to make a legally binding offer or representation that the Defendant would provide long-term finance to any legal entity in which Mr Hodell had an interest and in relation to any site that he wanted to develop at any point in the future;

(i) Mr Moakes was clear in his evidence that any application to credit to approve long-term lending for the Claimants would have to be originated by

him and not by Mr Anderson (although Mr Anderson could have supported it). He was also quite clear in his evidence that, if Mr Anderson had come to him and told him that he had agreed to provide the Claimants with 22 year facilities this would have made him extremely concerned, as Mr Anderson had no authority to agree such a facility and he was sure that, at that point, there was no prospect of credit approving such facilities. He made the point that the Defendant did not provide long-term loans in excess of 15 years, even in the good times, and that, in the circumstances of 2009, credit would not have approved longer term lending for commercial real estate at all. I accept Mr Moakes evidence, it makes sense and is consistent with the documents that I have seen from the Defendant's files which strongly suggest that by October 2009 the Defendant's credit function would not have been receptive to a credit application for long-term facilities in the commercial real estate sector;

(j) after Mr Hodell entered into the First Policy, on 1 April 2010, facility letters were issued to GRI, on 26 April 2010, to Brewster, on 18 August 2010, 15 December 2010 and 10 May 2011, to Tower on 18 August 2010 and to Mr Mrs Hodell on 18 May 2011 ("the post April 2010 Facility Letters"). Each of the Post April 2010 Facility Letters were for short periods of time, Mr Hodell signed those facility letters and no complaint was made by Mr Hodell contemporaneously with his signing these facility letters that GRI, Brewster, Tower or Mr Mrs Hodell were not being offered what had been promised by Mr Anderson. Mr Hodell's has an explanation for this, which I will turn to in due course but I do not accept that explanation (for reasons I will explain). All of the loan agreements entered into after Mr Hodell entered into the first policy are therefore inconsistent with a binding offer or promise having been made to Mr Hodell, in October 2009, by Mr Anderson that the Defendant would provide long-term loan facilities to the Claimants and GRI.

69. I come very firmly to my conclusion as to the limits on what Mr Anderson said in October 2009, notwithstanding that Mr Anderson did not appear as a witness. Any adverse inference to be drawn from that does not deflect me from the conclusions that I have come to.

70. In his closing arguments, Mr McIlroy accepted that the promise that Mr Hodell asserted that Mr Anderson made in October 2009 was too uncertain to amount to a legally binding offer or promise of finance to the Claimants and others for the future. He said, however, that the meeting, with Mr Anderson, should be seen as the start of a process which ended in a legally binding offer or promise of finance which was made sufficiently certain to be legally binding by, firstly, Mr Moakes' email of 13 November 2009 when the term of long-term finance was agreed at 22 years to match the life policy Mr Hodell would enter into, the entities to whom the loans would be advanced on a long-term basis were identified and the terms of the life policy which Mr Hodell had to enter into were agreed; and secondly, a meeting in March 2010 when Mr Moakes agreed that the funding would match the policy for 21 years, and that this would be achieved by rolling over three to four year facilities on a back-to-back basis.

Was Mr Hodell required to take out life and critical illness insurance in return for the long term lending at a discounted rate, which it is alleged Mr Anderson promised?

71. On the basis that I have found that no offer or promise of long-term lending was made by Mr Anderson, it follows that Mr Hodell could not have been required to take out life and critical illness insurance in return for such long term lending at a discounted rate. There are however the following additional reasons for concluding that there were reasons for Mr Hodell to take out the First Policy, other than his entry into the policy being consideration for an offer or promise of long-term lending:

    (a) Mrs Peacock (or Sarah Swinford as she then was) completed an advice for Mr Hodell upon the proposal to enter into the First Policy. The document is dated 15 September 2009 but it appears to be accepted that this is an error and the correct date is 15 October 2009. On the 5th page of the document, there is set out the reasons given by Mr Hodell for wanting the policy to be put in place and the terms of the cover he wanted. Mrs Peacock recommended critical illness cover of £3 million, but Mr Hodell wanted critical illness cover of £2 million. The document records that Mr Hodell wanted the policy in place for 22 years because, by then, his youngest child would be financially secure and his wife and 2 ex-wives (I understand 2 ex-partners) would no longer be financially dependent upon him. As for life assurance he wanted a lump sum which could be used to support the current standard of living of his 9 children, one wife and 2 ex-wives. Mrs Peacock recommended cover of £3,960,000 for Mr Hodell's personal protection but he insisted on £8 million to include outstanding loans (said wrongly to be £8 million of loans with the Defendant). The Document says that, ideally debt should be covered for a specific term and at the exact amount of the debt however, as Mr Hodell had so many loans in place and many of them were renewed on a rolling basis, over a different number of years it would not be practical to have individual policies in place of each for them. In my judgement therefore, whilst covering the amount of debts (only some of which were owed to the Defendant bank) was part of the reason for Mr Hodell seeking to put in place life and critical illness cover, he also had his own personal reasons for this, in terms of ensuring the financial future of his family in the event of his death or serious illness; and

    (b) it was not a term of any facility letter entered into by the Defendant with any of the Claimants, that Mr Hodell enter into the First Policy, nor that the First Policy should be assigned to the Defendant. The facility letters for Brewster and Tower of 18 August 2010 said that the reduction in interest rates, for which they provided was linked to the continuation of the life policy (entered into on 1 April 2010). These facility letters were renewed on 10 May 2011 and 8 May 2011 respectively on the same terms. The facility letter for the loan to Mr and Mrs Hodell does not have such a term in it but the "deal header" of 13 May 2011 which sought credit approval for their loan does say that the reduction in interest rates to LIBOR +2.56% is because of the entry of Mr Hodell into the First Policy.

In return for entry into the First Policy therefore Brewster, Tower and Mr Mrs Hodell received a discount to the rate of interest that they would otherwise have had to pay to the Defendant in relation to the facilities that they then enjoyed from the Defendant.

Did Mr Anderson's statements amount to a contractual offer of long-term finance as alleged?

72. The answer to this question, consistent with the findings that I have already made, is that, if Mr Anderson did discuss with Mr Hodell providing long-term finance, Mr Anderson would have done no more than express optimism that the Defendant's internal credit process would approve long-term financial arrangements for the projects then being undertaken by the Claimants.

Did the email of 13 November 2009 sent by Mr Moakes to Mr Hodell constitute an offer of long-term finance?

73. The email that Mr Moakes sent to Mr Hodell on 13 November 2009 sets out 4 different ways in which facilities could be offered to the Claimants with interest reductions applying, if Mr Hodell entered into the First Policy. The email says "I have also now had a chance to look at the margins etc following our meeting with Sarah last Friday and can now give you a good indication of margins depending on the various circumstances we spoke about. All these margins have been assessed on the basis that life cover at £8 million and CI cover at £2 million are accepted on normal terms i.e. monthly premium of £3,739 – I can of course amend things accordingly depending on actual outcome." The email then goes on to describe 4 scenarios, depending on when loans were repaid with better interest rates being offered if loans were repaid earlier.

74. Mr Hodell presents the email of 13 November 2009 as an offer of long – term finance. Not only does the email of 13 November 2009 not mention the alleged agreement by Mr Anderson, in October 2009 to provide long-term finance and not mention any loans, other than the existing loans (all of which were short-term) but it does refers to giving a "good indication of margins depending on various circumstances". That is not the language of an offer and it appears clear to me that the email was meant only to give an illustration of the sort of interest margin reductions that might be offered by the Defendant, on existing loans only, in the event that the First Policy was entered into. My answer to the question posed therefore is that the email of 13 November 2009 did not constitute an offer of long term finance to Mr Hodell, nor did it part of an offer of long-term finance.

75. I note also that the post April 2010 facility letters are inconsistent with Mr Moakes having offered/promised/confirmed that the Defendant would provide long-term finance to the Claimants. It seems to me that what Mr Hodell has done is to look for documents produced by the Defendant which appear to support some or all of his case and he has seized upon the email of 13 November 2009 which refers to a reduction in interest rates, in return for Mr Hodell entering into an insurance policy, as providing support for his case that Mr Anderson made a promise, before the email was sent, of long-term facilities for the Claimants and to suggest that, because the email of 13

November 2009 shows that the Defendant was willing to provide something in return for Mr Hodell entry into the first policy, this can somehow be used to support his case that the "something" that the Defendant was offering was a reduction in interest rates on long-term loans that had previously been promised by Mr Anderson. The email does link the reductions in interest rates, referred to in the email, to Mr Hodell's entry into a life insurance policy but it is consistent with the Defendant's case that it agreed to reduce interest rates on existing facilities only, if Mr Hodell entered into the First Policy, but only for the remaining period of those facilities and the Defendant did reduce rates after Mr Hodell entered into the First Policy.

Did a meeting take place between Mr Moakes, Mr Hodell, Mrs Peacock and Mrs Barfoot in March 2010 and did Mr Moakes say that the Defendant would offer the Claimants loans of up to 4 years at agreed reduced rates of interest and when Mr Hodell raised a query as to why the terms of the loans were not 22 years, as he asserts had been agreed, did Mr Moakes state that the Defendant would grant a series of back to back loans with terms of up to 4 years in order to provide 22 years of financing total?

76. Mr Ralston pointed to inconsistencies in Mr Hodell's case, so far as it relates to reassurances or representations that he says he received from Mr Anderson and Mr Moakes, concerning the Defendant making available long-term finance. In the Claimant's original particulars of claim, dated 14 May 2015, at paragraph 23 it is asserted that, at a meeting taking place between Mr Anderson, Mr and Mrs Hodell and the other director of Brewster and Tower, Mr Hodell queried with Mr Anderson, why the Defendant was offering 3 – 4 year loans rather than the 22 year loans that Mr Anderson promised. It is asserted that Mr Anderson promised that the 22 year long-term loans would be achieved by a series of back to back 3 – 4 year loans. In the amended particulars of claim, the allegation appearing at paragraph 23 of the original particulars of claim is deleted and, at paragraph 19 A, a new allegation appears that, at a meeting in March 2010 between Mr Hodell, Mr Moakes, Mrs Peacock and Joe Davison, Mr Hodell queried with Mr Moakes why the loans were only 3 – 4 years and Mr Moakes promised that 22 year long-term loans would be achieved by a series of back to back 3 – 4 year loans.

77. Mr Hodell said during his cross-examination, that there were a large number of meetings during the course of which he was provided with reassurance by Mr Anderson and Mr Moakes that the long-term loans would be provided, by the Defendant. When I asked Mr Hodell whether, what was contained in paragraph 23 of the original particulars of claim and in paragraph 19A of the amended particulars of claim were both true, in terms of assurances he was given, first by Mr Anderson and then by Mr Moakes, Mr Hodell said that he believed they were both true. He had no explanation however as to why reference to both meetings was not contained in the amended particulars of claim other than that that was what his solicitors decided.

78. Mr Hodell does make reference, in paragraphs 83, 84, 85 and 117 of his witness statement to various meetings when he says reassurances were given to him,

that the Defendant would provide the promised long-term finance. There is no written record of any of those meetings produced by either party. Mr Hodell has not supplied a date or approximation of the date of those meetings and Mr Hodell accepts that at no point did he ever write to Mr Anderson, Mr Moakes or anyone else at the Defendant (prior to November 2012, when he wrote to Mr Hargreaves to assert that he believed he had had a promise of long-term finance) to confirm that a promise of long-term finance had been made to him, in return for his entry into the First Policy, or to ask that written confirmation be provided by the Defendant that the long-term finance would be provided. Mr Hodell's explanation for this was that it was not the way he did things, at the time.

79. In Paragraphs 94 – 96 of Mr Hodell's first witness statement he suggests that a credit memo appearing amongst the Defendant's records dated 9 April 2010, prepared by Mr Moakes, provides support for his case that long-term finance was to be provided by the Defendant. The credit memo however refers to the interest rate of 2.56% above LIBOR being charged on existing facilities for so long as the First Policy remained in place and Mr Hodell being of the view that, given that the facilities were for a maximum of 3 years there was little point in him seeking to fix the interest rate, rather than remaining on a variable rate, a view that the writer of the credit memo (Mr Moakes) agreed with. Whilst the memo confirms that the Defendant was providing a reduction in interest rates to 2.56% above LIBOR on existing facilities (consistent with the Defendant's case) it does not support Mr Hodell's case that the Defendant had agreed to provide long-term finance, at least to the Claimants. In fact it tends to undermine that suggestion, as no reference is made to the availability of any facilities, beyond the existing facilities which are for 3 years.

80. Mr Hodell was taken to a facility letter issued by the Defendant, in relation to GI on 26 April 2010 which related to a facility of £700,000. The facility letter clearly provides for full repayment of that facility on the 3rd anniversary of utilisation. Mr Hodell was asked why he had not insisted, when signing the facility letter, on referring to the assurance that he says he received from Mr Anderson and Mr Moakes that long-term finance would be available for GI. Mr Hodell said that, with the benefit of hindsight, he should have done that. I think it unlikely, given the importance which Mr Hodell attached to obtaining long-term finance for the Claimants and others, in April 2010, during the "credit crunch" that he would simply sign and return the facility letter of 26 April 2010 which provided only for a three-year facility, without reminding Mr Moakes/Mr Anderson in writing that they had agreed to provide facility letters on a rolling basis to achieve the 22 year finance that he wanted and which matched the longevity of the First Policy.

81. There is then a document produced from the defendant's records dated 18 April 2010 , which records a request being made by Mr Hodell to convert the Brewster facility into an interest only facility for 3 years. Mr Hodell was asked whether he accepted that he had requested that the three-year Brewster facility be converted to interest only, he denied it, although he could not explain why the defendant's records would include reference to such a request by him if he had not made it.

82. Mr Hodell refers, in his first witness statement, to emails passing between Zürich and Mrs Peacock or her assistant, Joe Davison, in which Zürich ask for evidence of borrowing by Mr Hodell and his companies to support the taking out of life and serious illness cover for a period of 22 years. Mr Hodell refers to an email of 22 January 2010 from Julie Suffolk of Zürich, to Joe Davison, in which she says that she needs, to pass on to the reinsurers, the average terms left on the mortgages so that they could be sure that the outstanding mortgages roughly tie in with requested term of 22 years. Mr Hodell refers to an email of 19 March 2010 from Julie Suffolk to Joe Davison in which Julie Suffolk refers to the facilities with the Defendant totalling £3.5 million and that this was insufficient to justify £8 million in life cover for Mr Hodell

83. When Mr Hodell was cross-examined regarding these emails, he suggested that documentation had been lost by the Defendant which would clearly show that Zürich were insisting that it had to be demonstrated that Mr Hodell and his companies either had or would have loans which would last for 22 years and specific reassurance on that being given by the defendant. Having considered all the email exchanges between Joe Davison and Julie Suffolk at Zürich however, it appears to me that what was supplied by Joe Davison to Julie Suffolk of Zürich, on 18 March 2010, was the existing facility letters between the Defendant and the Claimants, totalling £3.5 million, all of which are short-term loans. Subsequently, on 19 March 2010 Joe Davison confirmed to Julie Suffolk "with regard to the term of the loans, I can confirm loans will have a review date but will generally be renewed on a rolling basis", and, on 23 March 2010 Joe Davison sent to Julie Suffolk details of the outstanding loans with NatWest. Nowhere in any of these emails, was Zürich told that there was any commitment or any expectation that the Defendant would provide 22 year loans (or long-term loans) to the Claimants (or to anybody else associated with Mr Hodell. Given that Zürich were clearly wanting comfort that there were long-term debts for which the proposed 22 year life policies would provide cover, it seems to me that if Joe Davison or her line manager, Mrs Peacock had that understanding, then they would have told Julie Suffolk of Zürich this, but there is no evidence of this in the emails that have been disclosed, nor is it apparently from the emails that have been disclosed, that there is email correspondence, between Mrs Peacock/Joe Davison and Zürich which is missing.

84. Mrs Peacock's wrote a letter "to whom it may concern" on 19 November 2013. In her witness statement of 25 January 2018, Mrs Peacock confirms that the contents of that letter are true and accurate to the best of her knowledge. In the letter Mrs Peacock says (a) "when the policy went on risk, a large amount of commission was received by Clydesdale bank, with some of this used to offset the repricing of loans over the next 22 years."; (b) "It was a requirement from Clydesdale bank that Mr Hodell had protection in place for the loans. It was also discussed and agreed during the meeting that this arrangement would continue over the term of 22 years."; and (c) "I fully understand the difficulties Clydesdale bank has faced over the past couple of years, however Mr Hodell has been an excellent client of the bank and I feel it is wrong how he has been treated from a personal perspective. Mr Hodell now has no life and illness

cover which concerns me greatly, and that the original arrangement for these loans has not been honoured."

85. Mrs Peacock letter of 19 November 2013 suggests that she was aware that the Defendant had offered or represented that it would provide Mr Hodell with loans over 22 years and that the Defendant did not honour that agreement. Mrs Peacock accepted however, in response to questions that I asked, that she had not seen any of the loan documentation setting out the terms on which facilities were provided by the Defendant to the Claimant's (although she said it was forwarded to Zürich, as it was by Joe Davison on 18 March 2010) and that she could not recall at any time Mr Moakes or Mr Anderson providing any assurance to Mr Hodell that the Defendant would provide 22 year loans to the Claimants. She did say that, during a lunch with Mr Hodell and Mr Anderson they had talked about Mr Hodell's long-term plans for the future but that was as far as Mrs Peacock's evidence went, as to her recollection of any occasion on which Mr Anderson or Mr Moakes provided Mr Hodell with any reassurance about the Defendant providing long-term lending to the Claimants.

86. What Mrs Peacock did not do therefore was support Mr Hodell's case that, at a meeting in March 2010, at which she was present, Mr Hodell raised a query with Mr Moakes, as to why the terms of the loan he had been offered were not 22 years, and that Mr Moakes said that the Defendant would grant 3 – 4 year loans on a back-to-back rolling basis.

87. In his statement Mr Moakes says, of the meeting that Mr Hodell says took place in March 2010, that it is inconceivable that he would have indicated to Mr Hodell that the Defendant would grant Mr Hodell back-to-back loans to provide 22 years of finance because he had no delegated credit authority at that time to make any property lending and he would never offer a customer a facility without ensuring that full credit sanction was in place first. He also says that there would be no prospect of the bank's credit team agreeing to grant "back to back" loans. He explains that the bank's credit team would consider each renewal of the facility on its merits at the time that the renewal was sought. He also says that in March 2010 he was having a great deal of difficulty in getting sanction, even for a basic renewal of commercial real estate loans and the expectation was that, on expiry of commercial real estate loans, the customer would be asked to repay the bank rather than the loan being renewed. Mr Moakes was cross-examined on the question of whether he had told Mr Hodell that loans would be renewed on a rolling basis adding up to a total of 22 years. Whilst Mr Moakes accepted that he may have been present at a meeting in March 2010 with Mr Hodell, Mrs Peacock and Mrs Burfoot and that he could not rule out, long-term finance having been discussed, he remained adamant that he would not have said that the Defendant would renew facilities on a back-to-back basis. Mr Moakes said that there could never be any guarantee that facilities would be renewed, the position had to be considered by credit at the time that the application for renewal was made. I found Mr Moakes' answers convincing and I accept that he would not, for the reasons that he gives

in his witness statement, and in cross-examination, have told Mr Hodell that the defendant would ensure that the 3 – 4 year loans which had been offered to the Claimants would be rolled over, on a back-to-back basis to give the Claimant's 22 years of finance..

Did Mr Moakes's statements at the alleged meeting in March 2010 amount to contractual offer of long – term finance as alleged?

88. I have found that Mr Moakes made no promise or offer, at the meeting in March 2010, that finance would be made available by the Defendant, to the Claimants beyond the period of the existing facility letters.

Did Mr Hodell enter into the First Policy as consideration for the alleged promises or did he do so for personal reasons?

89. As I have found that none of the basis, upon which the Claimants assert that a contractual promise or offer was made to provide long-term finance to the Claimants (and possibly others) are made out, it follows that Mr Hodell could not have entered into the First Policy, as consideration for any promises made on behalf of the Defendant.

Did the Defendant reduce the interest rates on certain loans made to the Claimants because of the contract alleged by the Claimants?

90. The answer to this question is no for 2 reasons:

    (a) I have found that there was no contract in the form alleged by the Claimants; and

    (b) I am satisfied that, in accordance with what Mr Moakes refers to as the Defendants "pricing policy" , the Defendant was prepared to reduce and did reduce the interest rates on the Claimants' existing loans, as a result of Mr Hodell entering into the First Policy on 1 April 2010. It is common ground between the parties that the rate of interest charged on the loans to Brewster, Tower and the Hodell partnership were reduced to 2.56% above LIBOR and that this was backdated to the date from which Mr Hodell entered into the First Policy. The facility letters for Brewster and Tower of 18 August 2010, as I have already noted, provide that the reduction in interest rate is linked to the continuation of the First Policy.

If the contract alleged by the Claimants is found to have been concluded, did the Defendant breached the contract?

91. As I have found that the contract alleged by the Claimants was not concluded, this question does not arise.

MISREPRESENTATION

Did Mr Anderson make the representations at the alleged meeting in October 2009 as asserted by the Claimants?

92. I have already found, as a fact that the representation that Mr Anderson made at the meeting in October 2009 was that he was optimistic that the Defendant's credit approval process would approve long-term facilities for the Claimants at least in respect of those development sites which were already being funded by the Defendant and that Mr Hodell's entry into a life insurance policy would assist with this process.

93. What the Claimants allege is that Mr Anderson represented that it was the intention of the Defendant, in October 2009 to enter into long – term facility agreements. This is a different representation from that which I have found that Mr Anderson made and therefore I have not found that the representations alleged by the claimants were made.

If Mr Anderson did make the representations asserted at the meeting in October 2009, were those representations actionable and if so were those representations false and if they were false, did Mr Anderson have reasonable grounds to believe that they were true up to the time that Mr Hodell entered into the first policy?

94. In light of my findings that the representations asserted by the Claimants were not made at the meeting in October 2009 by Mr Anderson, these question does not arise for determination.

If Mr Moakes did make the representations asserted at the alleged meeting in March 2010, were those representations actionable, if so were those representations false and if they were false, did Mr Moakes have reasonable grounds to believe they were true up to the time that Mr Hodell entered into the First Policy?

95. In light my findings that the representations asserted by the Claimants were not made by Mr Moakes, at the alleged meeting in March 2010, these questions do not arise for determination.

BREACH OF THE SECOND ALLEGED CONTRACT

Did Mr Moakes, at a meeting in December 2011 make a contractual offer that the Defendant would convert the £909,000 loan to the Hodell partnership to interest only payments for the remainder of its term and the Claimants would be provided with the long-term loans which had been promised already, on an interest only basis?

96. Mr Moakes accepts that the Defendant agreed that, if Mr Hodell entered into the Second Policy, then the Defendant would convert the existing loan in his name into an interest only loan for the remainder of its term and Mr Moakes says that the Defendant's credit team approved the conversion of the existing loan to an interest only loan and this change was implemented. On Mr Moakes

case therefore the Defendant honoured the promise that was made in return for Mr Hodell entering into the Second Policy

97. In paragraph 132 of his witness statement, Mr Hodell sets out what happened at the meeting that he alleges took place with Mr Moakes, in December 2011, Mr Hodell asserts that, during the meeting, Mr Moakes told him that, if he entered into a Second Policy, the Defendant would convert the October 2009 loan in Mr Hodell's own name, into an interest only loan for remainder of its term and would provide Mr Hodell with the long-term loans that the Defendant had promised on an interest only basis. It goes on in the same paragraph however to say "The promise of long-term loans was not specifically discussed in this meeting but, as we had discussed it on numerous occasions beforehand, I felt it was now an implied condition and we all knew that was what the "deal" was". The Claimant's plead, in paragraph 22A of the amended particulars of claim that Mr Moakes promised Mr Hodell that if he entered into the Second Policy, the Defendant would convert the £909,000 loan to the first Claimant, into an interest only loan for the remainder of its term and would provide the first Claimant with the long-term loans that had been promised, on an interest only basis. The assertion in paragraph 22 A of the amended particulars of claim cannot be made out, on the basis of the evidence contained in paragraph 132 Mr Hodell's witness statement, because he says that the long-term loans were not even discussed during the meeting and therefore there cannot have been, a promise by Mr Moakes at that meeting, that "the long-term loans" would be provided on an interest only basis.

98. Mr Hodell was asked, in cross-examination about emails passing between Mr Moakes and himself, on 16 December 2011. The first email of that date, is an email from Mr Moakes to Mr Hodell headed "loan account in your own name – move to interest only". Mr Moakes says "good news: I have spoken to Chris, our credit executive, and subject to your proceeding with the life policy for the sum assured initially discussed (I think the monthly premium was about £1,300), then we are agreeable to moving this loan across to interest only, for the remainder of the loan period (the loan incidentally has a maturity date of 31.10.12)." Mr Hodell replies, on 16 December, "hi Richard great news. Can I ask when the new agreement will come into force and is it possible to extend the term?"

99. There is no reference , in either email to any other loan being converted to interest only and, given that Mr Moakes' email of 16 December talks about the Defendant's credit executive agreeing to move Mr Hodell's loan, to interest only in return for Mr Hodell entering into the Second Policy, this strongly suggests that only one loan was being moved to interest only, in consideration of Mr Hodell entering into the Second Policy. The 2 emails, when taken together are also inconsistent with Mr Hodell's case, that the Defendant had already agreed to provide long-term finance to all of the Claimants because, if that were the case, then there would be no point in Mr Hodell asking whether his personal loan could be extended, because on his case, the Defendant had already agreed to provide 21 or 22 year loans to him on a back to back basis.

100. Mr Moakes also sent an internal email to a Mr Taggart on 4 July 2012 indicating that Mr Hodell had asked if the Defendant could consider extending the 2 loans that expire in October 2012 by a further year to give him time to seek a remortgage or sell. Mr Hodell was asked whether the email is correct in saying that he had asked whether the loans could be extended by further year. His response was that even though he considered that he had an agreement to provide lending on a long-term basis he accepted that the loans would have to be renewed and that they would have to be taken to credit and pass the credit criteria to be renewed. He said that the loans to him and lenders associated with him, would always pass the credit criteria because the value of his sites comfortably exceeded the value of the lending. This does not however answer the point as to why Mr Hodell was asking for a year's extension to the loans which were due to expire in October 2012 so that he could seek a remortgage or sell them, when his case was that he had had a commitment, since at least October 2010 from the Defendant to provide all of the Claimant's with long-term funding in exchange for him entering into the First Policy. Also, Mr Hodell's acceptance that, in order for loans to the Claimants to be renewed, they still had to pass credit criteria is inconsistent with Mr Hodell's case, that he had an offer of finance for 21 or 22 years to be provided on the back to back basis.

Did Mr Hodell enter into the Second policy as consideration for the alleged promise or did he do so for personal reasons?

101. I accept that part of the reason for Mr Hodell entering into the Second Policy may have been the agreement by the Defendant to convert the loan to Mr Hodell into an interest only loan. So far as that was part of the consideration for Mr Hodell entering into the Second Policy, the Defendant complied with that agreement. I have not however accepted that Mr Moakes promised at the meeting in December 2011 that long term loans would be provided in relation to the Hodell partnership or any of the other Claimants. Mr Hodell could not therefore have entered into the Second Policy as consideration for a promise of long-term finance to any of the Claimants.

If the contract alleged by the Claimants is found to have been concluded, did the Defendant breached the contract?

102. As I have found that the contract alleged by the Claimants was not concluded, this question does not arise for consideration.

UNFAIR CREDIT RELATIONSHIP

Are the insurance policies linked transactions within the meaning of section 19 (1) (C) of the Consumer Credit Act 1974 and related agreements within the meaning of section 140C (4) of the Consumer Credit act 1974?

103. I am satisfied that the insurance policies are linked transactions, within the meaning of section 19 (1) (c) of the Consumer Credit Act 1974 (and therefore related agreements within the meaning of Section 140C (4)), so far as the

Defendants lending to Mr Hodell and the Hodell partnership is concerned. So far as Brewster, Tower and GI are concerned, these are corporate entities and their loan agreements cannot be credit agreements falling within the Consumer Credit Act 1974, to which the insured's policies can be linked transactions within the meaning of Section 19 (1)(c).

104. The reasons why I consider that the insurance policies entered into by Mr Hodell are linked transactions to the loans made by the Defendants to Mr Hodell and the Hodell partnership are:

(a) section 19 (1) of the CCA 1974 provides that a transaction entered into by the debtor with any other person ("other party") is a linked transaction in relation to an actual or prospective regulated agreement of which it does not form part if: ….(c) the other party is a person mentioned in subsection (2) and a person so mentioned initiated the transaction by suggesting it to the debtor who enters into it: (i) to induce the creditor to enter into the principal agreement.

(b) the "other party" to the insurance policies is Zurich. Zürich satisfies the conditions set out in section 19 (2) (C) of the CCA 1974 for being the "other party" because Zurich will have known, at the time that the First Policy was initiated (and therefore also at the time that the Second Policy was initiated) of the existence of the principal agreements between the Defendant and Mr Hodell/the Hodell partnership, because Lisa Davion sent copies of the Defendants facility letters to Zürich; and

(c) the persons who suggested the life policies to Mr Hodell were Mrs Peacock and Mr Bloomfield, each of whom it appears were IFA's employed by the Defendant, or associates of the Defendant. The Defendant is the creditor and therefore is a person mentioned in section 19 (2); and

(d) Mr Hodell entered into the life policies, at least in part to obtain, in relation to the First Policy, the benefit of a reduced interest rate for Mr Hodell/the Hodell partnership, and in relation to the Second Policy, on my findings, to induce the Defendant to convert the loan for £900,000 to Mr Hodell into an interest only loan. The First Policy is therefore linked to the lending to Mr Hodell and the Hodell partnership and the Second Policy to the loan to Mr Hodell.

Was the relationship between the Claimants (or at least Mr Hodell and the Hodell Partnership) and the Defendant unfair, within the meaning of Section 140A of the Consumer Credit Act 1974?

105. Paragraph 33 of the amended particulars of claim sets out those respects in which the Claimants say that the relationship between them and the Defendant was unfair:

(a) that the Defendant procured Mr Hodell's agreement to the insurance policies, on the basis of a promise to provide him and the other Claimants with long-term funding. I have found that there was no promise of long-term funding to Mr Hodell or the other Claimants, therefore this ground for unfairness is not made out;

(b) the Defendants had created a situation where such funding was necessary by reducing the amount available under the Tower Development loan in 2009, citing reasons which the Claimants are unable to understand, as set out in paragraph 7 of the amended particulars of claim. I have found, not only that the Defendant was entitled to reduce the 2008 facility, in accordance with its contractual terms but that, even if it had been required not to act in an arbitrary, irrational or capricious manner, that it did not do so, for the reasons I have already given. I am satisfied that the temporary reduction of the 2008 facility which the Defendant imposed, in January 2009, in accordance with its contractual rights, does not mean that there was unfair relationship between the Claimant's and Defendant;

(c) the Defendant procured Mr Hodell's agreement to the insurance policies at least in part because of the large commission it would receive from insurers. It is common ground that the Defendant received commission of in excess of £80,000 as a result of Mr Hodell's entry into the First Policy and no doubt a further material commission (although lower) as a result of Mr Hodell entering into the Second Policy. In **Plevin v Paragon Personal Finance Ltd [2014] Bus LR 1257** Lord Sumption stated, at paragraph 17 "An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters."

(d) Mr Hodell, on his own case is a very experienced property developer, he confirmed that he was well known to all of the relationship managers, at various banks in Portsmouth. The lending was commercial lending to enable Mr Hodell and the Hodell partnership, to acquire sites and develop them. Mr Hodell was aware that the Defendant would receive a commission on his entering into the life policies and he was, on my findings offered a reduction in interest on existing facilities for the Claimants and GI , in consideration of his entry into the first policy and the conversion of his personal loan to interest only, in consideration of his entering into the 2nd policy. I consider that Mr Hodell was well able to balance the cost of entering into the 2 policies against the advantages that I have found were obtained by him, the Claimants' and GI in terms of variation of their loan terms and the advantages that he obtained in terms of insuring his life, for the benefit his dependents. I do not consider, in those circumstances, that the fact that the Defendant earned a commission (even a substantial one) as a result of Mr Hodell entering into the life

policies made the relationship between the Defendant and Mr Hodell unfair;

(e) the Defendant failed to honour the promise to provide funding beyond the initial 3 to 4 years despite that being the purpose of the lending and the taking of the insurance policies. I have found that there was no promise to provide funding beyond the terms of the existing facility letters and this ground for unfairness is therefore not made out; and

(f) the Defendant has created a situation in which the Claimants required the funding that was promised to them by the Defendant, but the Defendant refused to offer it to the Claimants and has, by treating the Claimants as being in default of their obligations, made it difficult if not impossible for the Claimants to seek funding elsewhere. I have found that the Defendant did not promise funding to the Claimants, which they did not provide, and on that basis, this ground for unfairness is not made out

If an unfair relationship is proved, what order should be made under section 140B of the consumer credit act 1974?

106. In light of my findings this question does not arise for consideration.

(After further submissions)

JUDGMENT ON COSTS

107. JUDGE RAWLINGS: In relation to costs, having made the finding that I have that all claims of the Claimant are dismissed, two points are made to me. One, made by the Claimants, is that the Defendant should not have its costs for the whole of the period but only from the date on which the re-amended defence was filed and served, which is 14 November last year, and the Defendant says that not only should it have – all its costs throughout, but it should have them on an indemnity basis for three reasons that I shall come to. But for convenience I will deal firstly with the Claimant's point that costs should only be awarded from the time of filing of the re-re-amended defence. That is 14 November last year, and the basis for that is until that point the Defendant had not put forward a positive case as to what its position was in relation to the various claims advanced by the Claimant and that therefore it should not have its costs prior to that date.

108. It seems to me that procedural costs orders would be made in relation to the amendments to the defence and that, so far as the Claimant's case is concerned, this has always been brought forward on the basis that various promises have been made, based upon the view that was taken by Mr Hodell that promises were made to him. The claims really stood or fell, on his evidence put into the context of the available documents, so I do not consider that the Claimants and Mr Hodell in particular were in any way misled by the way in which the Defendants may not have put a positive case prior to 14 November 2017. This

case was always about whether Mr Hodell could make out his case that promises had been made at various stages which the Claimant pleaded and I don't see that there is a legitimate basis upon which I should therefore award costs only from the point at which the Claimant says that the Defendant put forward a positive case in November last year.

109. So, I will award costs throughout to the defendant. As to whether those should be on a standard or on an indemnity basis, it does require the Defendant to show me that this case goes outside the norm and it is put forward on three separate bases that this case does go outside the norm: firstly that in relation to one aspect of the matter, that is that a facility was reduced by £300,000 this was advanced on the basis that, Mr Moakes had put forward an entirely spurious reason for reducing the facility and that position was maintained even after Mr Moakes's witness statement had been received by the claimants and there had been disclosure and that it should have been apparent to the Claimants following receipt of disclosure and Mr Moake's statement that that was not a case that could be maintained, yet it was maintained right up to the cross-examination of Mr Moakes; secondly that the implication of the promises which it was alleged that Mr Anderson and Mr Moakes, had made was that they had departed from the general standards which they are expected to comply with as bank employees and that they had breached their duties and had been involved in creating misleading documents; thirdly that Mrs Peacock, who provided a letter in 2013 as to her understanding the position was then asked to sign a witness statement without being shown any of the documents produced by the bank which would have enabled her to have the opportunity to test her recollection of events against those documents.

110. In response to that it is said that this case does not fall outside the norm; it falls within the normal rough and tumble of most or some litigation and the points raised by the defendant would not justify the making of an indemnity costs order.

111. I do think that the point made in relation to the maintaining of the allegation that Mr Moakes had given an entirely spurious reason for the reduction of £300,000 in the value of the 2008 facility was an allegation which should not have been pursued but I take the point that only a relatively small element of the case relates to the cost of that.

112. In relation to the other matters, so far as Mrs Peacock is concerned, yes, she should have been shown documents but there are reasons to criticise the Defendant in relation to the disclosure that they have given and as to the times at which they have given it. As to the promises which Mr Hodell asserts were made, my assessment of Mr Hodell was not that he was necessarily being dishonest in relation to the promises that he put forward, but merely that he tends to see promises where promises are not made and therefore I haven't taken the view that Mr Hodell has brought forward a case in relation to promises being made to him knowing full well that no such promises were made, but I think that he has blown reassurances and conversations that he had up into promises and the fact that he maintained those promises to trial, in circumstances where he feels very strongly that the Defendant has acted in an

unreasonable way towards him does not, in my view, justify my making a costs order on an indemnity basis against the Claimants and for those reasons the order will be made on the standard basis but throughout the proceedings and so it will be that the Claimants shall pay the Defendant's costs of the proceedings to be assessed on a standard basis if not agreed.