Neutral Citation Number: [2019] EWHC 2327 (Ch)

Case No: E30BM206
E30BM207

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Business List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 03/09/2019

Before :

HHJ DAVID COOKE
Sitting as a Judge of the High Court

- -

Between :

Promontoria (Henrico) Ltd	**Claimant**
- and -	
Gurcharn Samra	**Defendant**

- -
- -

Thomas Samuels (instructed by **Walker Morris LLP**) for the **Claimant**
Simon Hill and **Tara Sallar** (directly instructed) for the **Defendant**

Hearing dates: 30,31 July, 1 August 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HHJ DAVID COOKE

HHJ David Cooke:

1. The claimant, which claims to be the successor in title to Clydesdale Bank Plc ("the Bank", which traded under the name Yorkshire Bank) seeks money judgment for sums of approximately £640,000 alleged to be due pursuant to an overdraft facility letter dated 27 March 2013 ("the 2013 overdraft") which was the last in a series of facilities granted by the Bank to Mr Samra, together with orders for possession of two commercial properties in Coventry over which Mr Samra had created charges in favour of the Bank to secure those facilities.

2. Mr Samra's position, as advanced at trial, is firstly to put the claimant to proof of the effectiveness of the assignment from the Bank on which it relies for its title, and secondly if that is established that the relationship between him and the Bank was "unfair" for the purposes of s 140A Consumer Credit Act 1974 and in consequence the court should exercise its powers under s 140B of that Act so as to put him in the position he would have been in if, instead of having facilities repayable on demand under the overdraft facility, he had long term finance ultimately repayable by November 2022 and at lower interest rates, with the effect, he submits, that his total liability would be reduced and the claimant should not yet be entitled to possession of the properties.

Factual background

3. The following is a general and abbreviated summary of the factual background, to set the scene without at this stage going deeply into those aspects that are controversial. Page references are to the trial bundle. Mr Samra was originally an automotive development engineer. In 1987 he took voluntary redundancy from Rover Cars and set up his own business selling and installing car stereo systems from premises at 118 Arbury Rd Coventry, which he acquired and refurbished with finance from Barclays Bank. In 1990 he moved the business to larger premises at 4 Watling Court, which he bought with finance from Lloyds Bank, retaining Arbury Rd which he let to a commercial tenant on a 15 year lease. In 2003 he effectively merged his business with that of a company called Car Electronics Ltd ("CEL") in an arrangement structured as a franchise agreement, and moved into that company's premises, renting out Watling Court to another tenant.

4. In 1998 however he fell into dispute with CEL and looked for other premises to move to. He identified an empty property called Jesson House in Coventry and approached the Bank. He purchased the remaining 67 years of a leasehold interest in Jesson House with the aid of a loan of £100,000 from the Bank, secured by an "all monies" legal charge dated 27 November 1998, which is one of the securities now relied on. He moved his car stereo business into a workshop at Jesson House and set about refurbishing and renting out the remainder of those premises.

5. In 2000 Mr Samra refinanced his borrowings from Barclays and Lloyds banks by taking further loans from the Bank, secured on the properties at Arbury Rd and Watling Court.

6. In about 2005 Mr Samra became interested in setting up a business providing a wedding venue and identified a property at Torrington Avenue in Coventry that he considered could be refurbished and converted for the purpose. On 13 February 2006 the Bank gave him a facility letter ("the 2006 Torrington facility") providing for a loan of £330,000 to purchase a leasehold interest in that property with (then) 53 years

remaining. Repayment was to be made in monthly instalments over 15 years of which the first two years were to be on an interest only basis and the remaining 13 years paying interest and capital. He purchased the property using this facility in April 2006, at the same time selling Watling Court and granting an "all monies" charge over Torrington Avenue to the Bank, on which the claimant now relies.

7. The wedding business did not however proceed after Mr Samra withdrew his application for planning permission for it, and he instead sought to refurbish Torrington Avenue and let it as office space. In 2007 he received a demand for £30,000 for dilapidations at the CEL premises, which he was unable to pay without further finance, and so he approached the Bank to extend his facilities.

8. On 8 November 2007 Mr Samra signed a facility letter with the Bank ("the 2007 facility letter") providing for facilities of up to £575,000 available by way of eight possible options, expressed to be secured on the Bank's existing charges over Jesson House, Torrington Avenue and Arbury Rd together with a charge over a new 15 year term life insurance policy issued by Aegon to Mr Samra on his own life, which was put in place through the agency of Mr Ronald Cameron, an employee of the Bank. The letter provided that whatever options were taken up, all the facilities had to be repaid in full by a "Final Maturity Date" five years after the first utilisation.

9. The following day Mr Samra drew down funds under the 2007 facility letter using two of the available options:

   i) A "Variable Range Rate Loan" of £350,000, which was coupled with a "cap and collar" hedging instrument effectively limiting the interest rate payable to specified minimum and maximum levels, and

   ii) A "Variable Rate Loan" of £210,000 on which interest was to be charged at a margin of 1.7% over base rate, without any hedging.

10. Both options provided for payment of interest only over the five year term, at the end of which (ie on 9 November 2012) the capital became repayable in full. It is Mr Samra's case however that by virtue of his discussions with various individuals on behalf of the Bank at this time there was an understanding, referred to in his pleadings as "the Common Intention", that at the end of this five year period the Bank would provide him with further facilities by which he could make payments of interest and capital so as to discharge the loan over a further ten years ending in November 2022. The foundation of his case is that the relationship between himself and the Bank became unfair when the Bank did not give effect to that understanding. I will refer later in more detail to the factual allegations and matters Mr Samra relies on, but for the moment continue with the broad outline of the facts.

11. In 2008 there was a rent review in relation to Jesson House as a result of which Mr Samra faced a substantial liability for backdated increased rent, which again he could not pay without further finance, which he sought from the Bank. On 5 September 2008 he signed a further facility letter ("the 2008 facility") which was in broadly similar terms to the 2007 facility letter save that it provided for an increased total amount of £610,000 available in only two options, being those already utilised, and a Final Maturity Date of the fourth anniversary of first utilisation. In practice it seems no change was made to his hedged loan or the supporting hedging instrument, which was treated as continuing under the terms of the 2008 facility, and the increased total was made available under the unhedged Variable Rate loan. The Bank also treated

these facilities as repayable in November 2012, the date applicable under the 2007 letter, although that was slightly more than four years after the 2008 letter.

12. In April 2011 the Bank commissioned valuations of the properties it held as security, which showed that the loan to value ratio (LTV) was now 79%, in breach of a covenant in the 2008 facility to maintain LTV below 55%. On 6 April 2011 the Bank wrote noting the breach of covenant and offering two options;

    i) Repayments continue as interest only with an increase in margin from 1.7% to 4.25%, or

    ii) Switch to repayment of interest and capital from May 2011 with an increased margin of 3.7%

13. Mr Samra disputed these valuations and there was evidently considerable discussion with the Bank, some of which took place by email although not all of that correspondence has been made available in these proceedings. It is clear however that he negotiated a better outcome than either of the options offered, as a letter of 5 May 2011 records a verbal agreement that the loans would remain on the existing terms (ie interest only repayments) with an increased margin of only 2.5%.

14. In May 2012 the Bank notified Mr Samra that following a "strategic review" it was proposed to transfer its commercial property loan portfolio to its parent company, National Australia Bank Ltd ("NAB"). An email from the relationship manager on 4 September 2012 confirmed that NAB would be managing the loan from then on (without apparently any formal transfer) and that as a result of NAB's strategy of "exiting the property book through repayment and natural run off" it was "key that you start planning for this now as maturing loans are unlikely to be renewed so you will need to start making arrangements for your loan facilities that are currently due to expire on 9th November 2012".

15. Mr Samra had kept up the interest payments due but did not make any repayment of capital and on 9 November 2012 the outstanding capital balance of £610,000 was debited to his personal bank account, causing it to be overdrawn. On 12 November 2012 the Bank provided him with a letter setting out a temporary overdraft facility of £610,000 at an interest rate of 5% over base rate, or 5.5% for amounts in excess of that limit or unpaid when due, available for one month only until 9 December 2012. That was extended on two occasions on similar terms, the final extension being by way of the 2013 overdraft letter, signed by Mr Samra on 27 March 2013 and expiring on 15 June 2013. When that date came however the Bank did not take any action to demand repayment or enforce its security. It is evident there was a considerable amount of discussion and negotiation, with Mr Samra seeking to reach agreement that the Bank would accept a reduced amount (he offered £320,000) in full and final settlement.

16. In December 2013 Mr Samra sold the Arbury Road property and the net proceeds of just under £112,000 were paid to the Bank under its security, reducing the balance outstanding to about £495,000.

17. Mr Samra made a claim for compensation under the FCA's scheme for review of hedged products in relation to the hedged part of his facilities. He was considered to be a "non-sophisticated" customer as defined by the FCA for that purpose. The review found that there was insufficient evidence on file that he had been provided with

sufficient information about the features benefits and risks of the product (though in other respects the advice and information given was found to have been satisfactory) and accordingly was offered "basic compensation" of a refund, with interest, of the additional costs paid by him over those he would have borne without the hedge in place. In December 2014 he accepted a formal offer of some £81,000 "in full and final settlement of any potential claims or causes of action arising from the sale of the [hedged] product taken out by me". He exercised his right under the FCA scheme to have this paid to him rather than applied to his overdrawn balance, and has since not used it to make any further payment to the Bank.

18. After receiving the compensation Mr Samra made an increased offer of £425,000 in full settlement, which was not accepted. It appears that at about this time Mr Samra ceased paying the monthly interest on his account, he says because the Bank ceased to debit it on the statements he was sent. The Bank sent a letter dated 6 March 2015 notifying him that his facility under the 2013 overdraft letter was cancelled, recording that the then balance on his account was £500,229.58 but stating that the Bank did not currently intend to take any steps to recover the debt, while reserving its right to do so at any time.

19. On 1 May 2015 the Bank wrote to notify Mr Samra that his debt and all related rights had been sold to the claimant, and that a formal transfer to the claimant would be made "in due course" (p427a). That transfer was, on the claimant's case, made by a deed of assignment dated 5 June 2015, which I refer to in more detail below. Notice of assignment was given by the Bank in a letter of the same date (p440a), which also stated that the claimant would be appointing an agent trading as Engage Commercial ("Engage") to manage the account and collect payments on its behalf. Engage wrote to introduce itself on 8 June 2015 (p489). The claimant wrote on 29 June 2015 (p492) stating that the 2013 overdraft facility had been cancelled and all amounts due under it were due and payable immediately, but without making demand.

20. Demand was not made until a letter of 20 July 2017, at which date the balance due was stated to be £656,028.09. Mr Samra did not make any payment and disputed the claimant's entitlement to make any claim against him. He complained to the Financial Ombudsman about the fact that the Bank had sold his debt to the claimant, and that the claimant had refused to accept his offer of settlement. On 5 October 2017 the Ombudsman rejected this complaint (p453), stating that the Bank had been entitled to sell the debt and, although the claimant was not a regulated body and so he could not consider complaints against it, the claimant was not obliged to accept his offer.

21. These proceedings were issued in October and November 2017.

Evidence

22. The claimant's evidence was provided by Mr Mark Winser, an employee of Engage, though he had no direct knowledge of events prior to the assignment to the claimant and could only speak to documents generated from the computerised information transferred by the Bank to the claimant in connection with the assignment and to matters related to Engage's own dealings with Mr Samra thereafter.

23. The claimant appears to have very little in the way of contemporary documentation passing between the Bank and Mr Samra. Most of the documentation in the bundle before me has been disclosed by Mr Samra, either from documents he had retained or, he told me, that which he had obtained himself from the Bank pursuant to subject

access requests. That documentation is evidently incomplete, both in respect of records the Bank must have held (in particular the management notes relating to the account are only provided from 2013 and so do not include those that must have been made when the facilities were extended in 2007 and 2008) and Mr Samra's own correspondence with the Bank. There was no exploration before me of why this was the case. Mr Samra provides a certain amount of material in relation to his attempts to negotiate a discounted settlement but very little that is contemporaneous with the events he relies on in 2007. He maintained that this is explained because rather than writing or emailing he would simply telephone or meet his relationship manager, which may be a partial explanation, but there is one email from him in particular, dated 27 June 2011, that must have existed because it is referred to in another that has been disclosed. Mr Samuels submits that it is evident from those references that this email must be damaging to Mr Samra's case, as appears below, and an adverse inference should be drawn from his failure to produce it. Mr Samra did not in my view provide any convincing explanation why he could find other emails from him sent about that time but not this one.

24. Mr Samra was the only witness called for the defence. He is plainly an intelligent and astute businessman who showed, in my view, a comprehensive and detailed understanding of the transactions and documentation in the case. He answered questions in cross examination confidently and in detail in most instances. This was not the case however, it seemed to me, when the answers might have caused difficulty for his case, or where his pleaded case or written evidence was not consistent with such documentation as is available. In those matters he struck me as vague and even evasive at times. I was not, I regret to say, satisfied that his evidence could be necessarily relied on where truthful or complete answers would not have been in his interest.

Unfair Relationship- the law

25. The relevant provisions of the Consumer Credit Act 1974 are as follows:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.

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

140B Powers of court in relation to unfair relationships

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

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

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

(9) If… the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

140C Interpretation of ss. 140A and 140B

(1) In this section and in sections 140A and 140B ‘credit agreement’ means any agreement between an individual (the ‘debtor’) and any other person (the ‘creditor’) by which the creditor provides the debtor with credit of any amount.

(2) References in this section and in sections 140A and 140B to the creditor or to the debtor under a credit agreement include—

(a) references to the person to whom his rights and duties under the agreement have passed by assignment or operation of law…

(4) References in sections 140A and 140B to an agreement related to a credit agreement (the ‘main agreement’) are references to—

(a) a credit agreement consolidated by the main agreement…

(7) For the purposes of this section a credit agreement (the ‘earlier agreement’) is consolidated by another credit agreement (the ‘later agreement’) if—

> (a) the later agreement is entered into by the debtor (in whole or in part) for purposes connected with debts owed by virtue of the earlier agreement…
>
> (8) Further, if the later agreement is itself consolidated by another credit agreement (whether by virtue of this subsection or subsection (7)), then the earlier agreement is consolidated by that other agreement as well"

26. It is not in dispute that the 2013 overdraft facility is a credit agreement to which these provisions are capable of applying. Mr Samuels accepts that by virtue of s 140B(9) the onus is on the claimant to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (ie personal) to the creditor and debtor. This onus on the claimant does not however mean, in my judgment (and Mr Hill did not contend) that where Mr Samra makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence.

27. So far as judicial consideration of these provisions is concerned, counsel are agreed that the principles to be applied are very general, as stated by Lord Sumption in the judgment of the Supreme Court in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 at para 10:

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

> the generality of such relationships should be liable to be reopened for that reason alone."

28. They further agree that a helpful but non-exhaustive list of potentially relevant matters is set out in the judgment of Hamblen J in *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) as follows:

> "345 In considering the test of unfairness guidance is provided by the following authorities in particular: *Maple Leaf Macro Volatility Master Fund & Aor v Rouvroy & Or* [2009] EWHC 257 (Comm) ("*Maple Leaf*"); *Paragon Mortgages Ltd v McEwan-Peters* [2011] EWHC 2491 (Comm) ("*Paragon Mortgages*"); and *Rahman & Ors v HSBC Bank Plc & Ors* [2012] EWHC 11 (Ch) ("*Rahman*").
>
> 346 These authorities suggest that the matters likely to be of relevance include the following:
>
> (1) In relation to the fairness of the terms themselves:
>
> a. whether the term is commonplace and/or in the nature of the product in question (*Rahman* [277]);
>
> b. whether there are sound commercial reasons for the term (*Rahman* [278]);
>
> c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position (*Maple Leaf* [288]);
>
> d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face (*Maple Leaf* [289]);
>
> e. the scale of the lending and whether it was commercial or quasi-commercial in nature (*Rahman* [275]) (a court is likely to be slower to find unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers); and
>
> f. the strength (or otherwise) of the debtors bargaining position (*Rahman* [275]);
>
> g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis (*Rahman* [275]);
>
> (2) In relation to the creditor's conduct before and at the time of formation:
>
> a. whether the creditor applied any pressure on the borrowers to execute the agreement (if an agreement has been entered into with a sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor) (*Maple Leaf* [274]);

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

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

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

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

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

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

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

29. Mr Samuels further submits that the court is to be concerned only with actual rather than potential unfairness in the relationship, and that in exercising the wide powers given by s140B the court's object is to remedy the unfairness found. Mr Hill does not dissent from these propositions.

30. It was Mr Samuels' submission that the relevant credit agreement was the 2013 overdraft facility letter, and the only "related" agreement was the overdraft facility that immediately preceded it, so that consideration of terms and unfairness of terms could only be made in relation to those two agreements. I do not accept that; each of the facility agreements in this case provided for the refinancing of debts outstanding under its predecessor so that the effect of s 140C (7) and (8) is that each agreement "consolidates" its predecessor and all of them are "consolidated" in the last, ie the 2013 overdraft. In any event, it would be open to Mr Samra to contend that the relationship established by the 2013 overdraft was unfair by reason of its terms including an obligation to repay on demand because of promises or assurances he had been given in the past (whether contained in previous facility documents or the sort of oral assurances he relies on) and to rely on these as "things done" before the entry into the 2013 overdraft, pursuant to s 140A(1)(c).

31. It is accepted that, to the extent Mr Samra could have shown any defence against a claim by the Bank, or can establish that his relationship with the Bank was unfair such that the court makes an order reducing his liabilities, the claimant acquires no greater

right than the Bank would have had, so that any such matter may be taken into account as against the claimant in reduction of his liability.

The Assignment

32. The claimant relies on an assignment made by deed dated 5 June 2015 between NAB defined as "the Seller"), the Bank ("Clydesdale") and itself ("the Buyer"). It provided a copy to Mr Samra, redacted so it said to obscure commercially sensitive information and to exclude from the schedules, which would otherwise have been very extensive, information that did not relate to Mr Samra. Mr Samra has made great play of these redactions, alleging that the copy produced cannot be relied on in consequence of them. He produced at trial what he said was an unredacted copy obtained from court files in a different case run in Scotland. It was apparent however that that was a different document, dealing presumably with assets in Scotland, though evidently very similar in its drafting. He also produced at trial what he said was another copy obtained from court files in another case in England, which he said had been differently redacted. That too was a different document (dated in September 2015) though also similar in form. None of the additional wording that could be read in those documents, even assuming that similar wording was also in the assignment of 5 June 2015, added anything to the points made on his behalf.

33. The relevant operative provisions of the assignment are as follows:

    i) By cl 2.1 "Subject to the terms of this Deed and in consideration for the payment by the Buyer to the Seller of the Purchase Price for each Relevant Borrower Asset Group, with effect on and from the Effective Time in relation to each Specified Loan Asset comprised within that Relevant Borrower Asset Group: (a) each of the Seller and Clydesdale assigns absolutely to the Buyer the following in relation to each Specified Loan Asset …(i) all of its right, title benefits and interests under in or to each Relevant Document; (ii) each of the Seller's and/or Clydesdale's rights in its capacity as Lender (if any) under… the Relevant Documents to demand, sue for [and] recover… all monies payable… to it in its capacity as Lender… "

    ii) By Cl 1.1 " 'Specified Loan Asset' means: … a loan asset or debt claim described in Schedule 1…"

    iii) " 'Relevant Documents' means, in respect of a Specified Loan Asset, each facility, loan or credit letter or agreement… [and] security document… relating to that Specified Loan Asset…"

    iv) " 'Effective Time' means the Settlement Date immediately following the receipt by the Seller of the Purchase Price for the Specified Loan Assets."

    v) " 'Settlement Date' means 4 June 2015 or such other date as may be agreed by the Parties in writing."

    vi) There is an entry in Schedule 1 as follows: "Tranche 1. Connection ID: 2350. Connection Name: Mr Gurcharn Samra. Borrower ID: 51003473. Borrower Name: Mr Gurcharn Samra …"

34. Mr Hill made a number of submissions in support of his contention that this document is not sufficient to demonstrate an effective assignment of the right to sue for the

debts now claimed. In dealing with these, I make the general point that any exercise of construction of this document is to be approached on the basis of determination, on the normal principles, of what the parties to it intended to achieve. The court is not obliged to approach it on the basis of a hostile assessment by a third party on the premise that anything that is not expressly stated or which may be argued to be subject to some theoretical ambiguity is of no effect. Further, in determining whether an effective assignment has or has not taken place between those parties, the court is entitled to have regard to the totality of the evidence before it, and is not limited to the construction of the assignment document itself. The points raised were:

i) The assignment was subject to a precondition of payment of the purchase price, and no evidence of been provided that the price had been paid. But the operative provisions of clause 2.1 do not provide that payment of the price is a precondition for the assignment to take effect, they merely record that the assignment is made in consideration of that payment.

ii) The assignment was stated to operate "with effect on and from the Effective Time", which was a moment in time on the "Settlement Date" after payment of the purchase price had been made, but since there was no evidence of whether or when the purchase price of been paid it was impossible to determine what that time was or even whether it had yet occurred. The stated "Settlement Date" was the day before the date of execution of the agreement, and it was impossible for the agreement to have retrospective effect. But, as Mr Samuels pointed out, there was an express provision in the deed that the parties might agree a different Settlement Date. Further, it is not disputed that both the assignor and the assignee gave notice to Mr Samra that an assignment of his debt to the claimant had taken place with effect from 5 June 2015, so it is safe to conclude on the totality of the evidence that, as between them, that had been agreed to be the operative date of the assignment, without having to go into the minutiae of how they followed through the contractual mechanism they had provided for. That date was not a date that preceded the deed, but even if it had been it does not seem to be that this would create any particular difficulty; no doubt the assignment would only operate in law on the date it was executed, but the "with effect from" provisions would mean that the parties to the assignment would be obliged to treat it as between themselves as having taken effect on the earlier date, and account to each other for payments and receipts accordingly.

iii) The page containing the extract from Schedule 1 did not have a page number, and so could not be linked to the preceding and following pages in the copy document provided. I do not consider that there is anything suspicious in this at all; the surrounding pages are part of a word processed document containing the text of the deed of assignment and its execution clauses, and the schedule, which was evidently a very lengthy list, is likely to have been printed separately and inserted into that document. It would not be at all surprising if it did not have a page number, or, if there was one, that it would be out of sequence with the body of the document. But in any event, I am entitled to rely on the fact that the claimant has provided this document as part of its disclosure, thereby putting it forward as an authentic document, without any objection being taken to its authenticity in response to that disclosure. The amended defence puts the claimant to proof of the effectiveness of the assignment, but does not make any allegation that the copy of the deed of

assignment produced is not a true copy of the document that was actually executed. Further, I can safely infer from the fact that both parties the assignment gave notice to Mr Samra that his debt had been assigned that the schedule did contain a reference to that debt. I also have the direct evidence of Mr Winser who said, in response to questions, that the electronic transfer of information to Engage from the Bank after assignment included details of Mr Samra's liabilities by reference to the connection ID and borrower ID recorded in the copy schedule provided, from which it can reasonably be concluded that those details were in fact in the schedule to the deed of assignment as executed.

iv) The claimant was required to prove that each individual loan that had been made to Mr Samra had been assigned, and it was not possible to establish this from the schedule which identified the Relevant Loan Asset only by identifying the name of the connection and the name of the borrower. In support of this, he argued that when the 2008 facility letter was put in place the £350,000 hedged loan had already been advanced and it was not repaid re-advanced as a new loan under the new facility letter. This argument is, with respect to Mr Hill, hopeless. Firstly, it is in my view perfectly clear that the effect of the 2008 facility letter is to provide that from the time it came into force the facilities provided to Mr Samra were to be governed by the terms of that letter and not any previous facility letter, and that it was effective to achieve that without it being necessary for Mr Samra to repay his outstanding borrowings and have them advanced again, even if that might have been achieved by an accounting exercise. Secondly, in any event, by November 2012 all of the facilities had come to the end of their contractual term such that Mr Samra was under an obligation to make immediate repayment of the full amount. The contractual terms on which he was permitted to defer that repayment were set out in the successive overdraft facility letters. By the time of the assignment, therefore, there were no separate loans outstanding but only his obligations arising from the last of those agreements, i.e. the 2013 overdraft facility letter.

Further, even if there had been obligations outstanding under more than one document, it would not be the case that the Bank could not as a matter of law assign its rights against Mr Samra except by separate reference to each of those documents, and there is no foundation in the deed of assignment for the suggestion that the Relevant Loan Asset identified in the schedule must be limited to rights arising only under one agreement. If there had been multiple loan agreements outstanding, and the asset assigned was identified by reference only to the identity of the borrower, the only sensible construction of the deed would be that it assigned all rights against the borrower, whichever of the loan agreements they arose under. The alternative would be that it was ineffective to assign any rights at all, which was plainly not the intention of the parties to the deed of assignment.

35. None of these points, in my judgment has any force. I am satisfied that as a matter contract the Bank's rights against Mr Samra at the date of this assignment were governed by the 2013 overdraft facility letter, and that those rights were effectively assigned by the deed of assignment to the claimant. That was, by its express terms, an absolute assignment, and it is not in dispute that written notice of assignment has been given to Mr Samra. It is thus an assignment effective at law pursuant to s137 Law of

Property Act 1925 and the claimant is entitled to sue to enforce against Mr Samra all the claims that the Bank would have had against him.

The "Common Intention"

36. Mr Hill accepted that Mr Samra's case does not put the alleged common intention or understanding high enough to amount to a contractually binding promise on the part of the Bank to provide further facilities after the 2007 facility expired in 2012, and that the contractual terms were only those set out in the 2007 facility letter. This is so despite Mr Samra's evidence in his witness statement that when the facilities were arranged in a lengthy meeting on 1 November 2007 "[i]t was agreed that the total loan duration would be for 15 years, with the first 5 years interest only… Given the long term nature of my business plans it was critical to me that the borrowing was secured over the agreed 15 year period" (witness statement at para 47-8, p 211). If that factual allegation were made out it would support a plea for rectification, but no such case has been pleaded or made.

37. The facility letter was produced a week later and dated 8 November 2007. Mr Samra's oral evidence was that he had not been sent a draft of it before that date, and that when he went to the Bank on 8 November the letter was printed off there and then and he signed it without reading it, trusting that it would reflect what had been orally agreed. Mr Hill accepts that its terms provide expressly for payments of interest only over 5 years and then for repayment of the capital in full at the end of that period, though he submits that it is a complicated document and Mr Samra could not be expected to have understood these terms even if he had read it.

38. Mr Samra's pleaded case is apparently put on the basis of a common intention established at the time of the 2006 Torrington facility that his borrowings would be repayable over 15 years. He pleads that he took that loan only because he had 15 years to repay it (Defence at para 26.4, p 43) and that the 2007 facility letter "did nothing to diminish the Common Intention present at the outset when [the Bank] agreed a 15 year term for repayment of the Torrington Loan."

39. However, it is not the case that prior to 2007 all his borrowing was for a 15 year term. It does not appear that such a term ever applied to anything other than the £330,000 specifically lent in 2006 to purchase Torrington Avenue. Mr Samra has given no evidence of the terms of his earlier borrowings from Barclays and Lloyds. Nor has he said that when their funding was transferred to the Bank in 2000 it was on the basis of a 15 year term. Nor do the Bank's facilities appear to have been on an interest only basis; in his witness statement he says (para 18 p207) that at the time of transfer his total borrowing was around £250,000 but that he was making loan payments of around £3,000 per month (para 21) and (para 22) "by 2005 my total borrowing had been reduced, as a result of my monthly repayments on the loans, to around £160,000".

40. At the same time as he took the 2006 Torrington facility his previous borrowings were evidently renegotiated and new terms set out in a second facility letter also dated 13 February 2006 (p237). That letter provides for facilities of £156,413 over a term of 5 years (not 15) with repayments of interest only over the first two years (£850pm) and thereafter capital and interest (£4,800pm) for three years. A covering letter (p230) sending both facility letters refers to this as "the Bank's formal facility letter allowing the transfer of your existing loan to 2 years interest only".

41. It appears therefore that at the time he took on the new loan to purchase Torrington Avenue Mr Samra negotiated a reduction in his payments on his existing borrowings from £3,000 pm to £850 by temporarily reducing those payments to interest only. He has made no complaint about the 5 year term of the revised facility relating to those borrowings, implying either that this was consistent with what was already in place (the covering letter suggests the main change is only as to the payments required) or that he was comfortable with a change to a five year term.

42. When he came to agree his increased facilities in November 2007, therefore, Mr Samra cannot have been under the impression that this element of his then existing borrowing was already on a 15 year term. If he asked for all his facilities to be put on a 15 year term he was seeking to improve his position, not maintain it. Further, he would have been aware that in just over 3 months' time the repayments due on the £156,000 element would increase by almost £4,000 pm. At or about the same time, repayments on the 2006 Torrington loan were due to rise by £1,350 pm from £1790 pm to £3,140 pm because the interest only period on that facility was coming to an end (p233). It is apparent from his witness statement that he was in a difficult financial position because of the £30,000 liability for dilapidations, so it was a considerable benefit to him, and presumably attractive, that he was able to secure an arrangement under which his total borrowing would be allowed to increase by £30,000 and yet his monthly payments would not rise to almost £8,000 pm but remain of the order of £2,500 pm for a period extended by almost five years.

43. Mr Samra sought in his written and oral evidence to present himself as having been subject to a "hard sell" by the Bank over an extended period to persuade him to take an interest rate hedging product, to which he had reluctantly had to succumb in 2007. Mr Hill submitted that the was an unsophisticated layman unable to resist this pressure or understand the risks involved, partly based on his having been categorised as "non- sophisticated" for the purpose of the FCA review and partly on a reference in the Bank's notes much later when he was seeking to negotiate settlement to his not being, in the opinion of the employee considering his proposals, "at all experienced in property". Whatever the degree of Mr Samra's expertise as a property investor or the definition used for the FCA review I am satisfied that he throughout had a good understanding of what an interest rate hedge entailed.

44. In his own witness statement he said (para 26, p 208) that in 2004 the then assistant manager at the Bank, Mr McCabe, had tried to sell him an interest rate hedging product as he thought rates might rise but "I wasn't convinced by what he was saying so I decided not to take the product he was offering". Mr Samra evidently evaluated what was offered and took his own view of possible future movements in interest rates and his own decision to decline a hedge. He said that when he arranged the loan to buy Torrington Avenue in 2006 "Jonathan (Nicholls, the relationship manager at the time) kept mentioning interest rate hedging products and pushed them quite hard as part of the new loan. I remained unconvinced however and decided to maintain my borrowing on standard variable rate products instead." There evidently was some discussion of hedging at that time, and I can accept that Mr Nicholls was urging Mr Samra to take it up; the 2006 Torrington facility letter contained a "special condition" (p233) that "You undertake and covenant to us that interest rate hedging will be considered" and his covering letter said "As discussed I would be interested in discussing the possibility of providing a fixed interest rate and suggest we get together over the coming weeks to discuss". Again Mr Samra was able to take his own decision to decline hedging, even when he needed additional finance, and if there was

any later meeting or discussion such as Mr Nicholls was seeking he must have continued to do so.

45. When he came to need additional borrowing in 2007 to pay the dilapidations claim, Mr Samra said (witness statement at para 44, p211):

> "I went to see Jonathan and he explained that in order for the Bank to lend me any more money, I would have to take an interest rate hedging product. I was still not keen to do so and told Jonathan this. I did need the extra money though and could not easily raise it elsewhere, so I was in a difficult position.
>
> In order to try and convince me, Jonathan agreed to reduce the Bank's margin to 1.7% reduced from 2%. He then agreed to move all of my borrowing is to interest only for five years to help my cash flow… I was still reluctant, as I explained that I had no idea what the interest rates or the economy in general were doing and what is not comfortable trying to guess. Regardless of my hesitation, it became apparent that the only way I was going to get the additional loan was to take some interest rate hedging.
>
> Despite the hard sell pressure from Yorkshire I still had reservations about interest rate hedging, but in order to secure the finance I needed, I agreed a compromise position with Jonathan during a meeting with him, Peter Horsley and Ronald Cameron… During the meeting, Peter Horsley filled out a Treasury Solutions Questionnaire Checklist… Although Ron attended the meeting as an independent adviser, he had been introduced to the process by Yorkshire… As far as I was concerned, Ron was part of the Yorkshire team of representatives with whom I was dealing…
>
> At the same time … Yorkshire insisted that I should also take out life insurance for the duration of the loan. I spoke to Ronald Cameron on first November and he subsequently produced a Review document summarising our discussions … Ron's summary confirmed that the total loan amount was £570,000 and the term was 15 years. I agreed to take out a term policy, through Ron, to cover the 15 year loan period.
>
> When the paperwork for the interest rate hedging product was provided to me, it was far from clear. It was my understanding that I was signing up for a 15 year loan (five years interest only and 10 years capital repayment). I had no idea at this time that the loans would automatically terminate after five years and that I would need to refinance all of my borrowing at that time. "

46. It is accepted that this meeting was on 1 November 2007. Mr Samra described it as taking place over several hours at the Bank's office during which, he said, various people went in and out of the room. One part of that meeting was evidently a discussion between Mr Samra and Mr Cameron; Mr Cameron wrote a letter

afterwards dated 5 November 2007 (p256). He describes himself as "Partner, Financial Planning" and records that he had been asked for "advice regarding arranging protection for your new Commercial Loan" but that the advice requested had been expressly limited to "Debt Protection". A schedule attached records that Mr Samra wished "to arrange life cover only for the following facility: Type- interest only… Term- 15 years. Loan Amount- £570,000". He recommends a term life policy with Aegon and concludes "I have recommended the above policy expires in 15 years in line with the expected term of loan."

47. Mr Cameron also completed a form entitled "Business Client Information" at the meeting, which he sent to Mr Samra with his letter. That form records (p259c) that the liability to be protected is a commercial loan of £570,000. The "Type of liability" is described as "Level" with an "End date- 30/09/2022". Under the heading "Objectives" he notes "To comply with the terms of the Bank's support, you require life cover for the full amount of the loan facility. Cover is required on a level basis as the loan from the Bank on an interest only basis for the first five years…".

48. Mr Samra relies on these documents as showing that it was represented to him on behalf of the Bank that he would have a facility for 15 years, and that the reference to interest only payments "for the first 5 years" must imply that there was some different basis that was to apply thereafter. It was put to him that these documents however did not come from Mr Nichols, with whom he was discussing the terms of his facilities, but from Mr Cameron who was brought in to provide advice on life assurance, and so were likely to show only what Mr Cameron understood from what Mr Samra told him about his needs and objectives, rather than to set out on behalf of the Bank what facilities it was offering.

49. Mr Samra accepted in cross examination that it had been he who had provided information to Mr Cameron, except in relation to the terms of the loan, as to which he said he "would have expected him to do his due diligence" and that Mr Cameron had been in and out of the meeting on 1 November and so would have set out his own understanding of the commercial terms. He did not however give this evidence in a convincing manner, being very vague about when he had spoken to Mr Cameron and whether anyone else was present at the time, and I do not consider it likely to be correct. It is evident from his documentation that Mr Cameron's role was limited to provision of advice on insurance products. Mr Samra himself describes him as being introduced as an "independent" adviser, for which purpose he would have to act so far as possible independently of those providing the terms of proposed facilities and would be likely to need to discuss privately with Mr Samra what his financial position, needs and objectives were.

50. Insofar as there are references to the terms of the loan, they are inconsistent- the statement that it is to be on an interest only basis "for the first five years" is some support for Mr Samra, but not in my view strong as it says nothing about what would happen thereafter. Mr Samra's evidence is that it was agreed at the meeting on 1 November there would be a 10 year period of capital repayments, but Mr Cameron's documents are not consistent with his being aware of this- he states that "cover is required on a level basis" (the alternative would be cover reducing as the debt was paid down) and notes in one place that the loan liability is "level" until 2022 and in another that it is "Interest only…15 years". It has never been Mr Samra's case that he was offered interest only terms for 15 years.

51. Mr Cameron completed an application to Aegon for a business protection life policy (p259i) that included a statement that the loan to be protected was for £570,000 for a term of 15 years (p259o) and that the benefit sought was "level" (as distinct from "reducing") life cover over 15 years in the amount of £490,000 (p259q).

52. These documents, in my view, are more consistent with Mr Cameron having been told that interest only terms had been agreed for 5 years but that after that the position remained to be agreed. He plainly was told that there was at least a possibility that the debt would be outstanding for up to 15 years, and if so it would be understandable that he would recommend taking a 15 year term policy at the outset to guard against subsequent deterioration in Mr Samra's health and consequent increased cost if he needed to extend. But these documents do not show that this information came from his commercial colleagues and are at least as consistent with it having been given to him by Mr Samra, in which case any continuation after five years may have been no more than his own hope or expectation.

53. The documents disclosed include a manuscript note (p277) obtained by Mr Samra from the Bank's files and apparently made by Mr Horsley, with whom he accepts he discussed hedging terms during the meeting on 1 November. It is undated but evidently records information provided for the purpose of quoting for hedging products. It reads:

> "Gurch Samra.
>
> Customer has commercial property portfolio.
>
> Current debt sitting at 490 K.
>
> Looking for five years int[erest] only.
>
> Wants to retain some flexibility to make over payment.
>
> [Sees] rates floating within a range and wants to be able to enjoy lower rates should they fall.
>
> Sent pricing on fixed, capped & range. "

54. Mr Samra denied that this note recorded any indication given by him that he had expressed his own wish to take a hedging product, or stated any objectives of his own in taking such a product, but he did not put forward any alternative explanation for it and it is difficult to read it in any other way.

55. It seems likely that this note was made by Mr Horsley during a further meeting or discussion with Mr Samra on 7 November 2007. Mr Horsley sent an email on that date (259ff) thanking Mr Samra for his time and setting out pricing proposals "based on £350,000 interest only for five years." The various options offered were for a fixed rate of 5.9% plus lending margin, for a capped rate either 6.25% or 6.5%, which he noted would allow the borrower to "enjoy lower repayments should rates fall", reflecting Mr Samra's recorded objective, and two different options for a range of rates with a minimum of 5.25%. He concluded by saying "hopefully the above information gives you all the information you need to make a decision" and promising to contact Mr Samra the following day "to get your thoughts and answer any questions you may have."

56. The reference to Mr Samra "wanting to maintain flexibility to make overpayment" appears to relate to the fact that Mr Samra did not wish to enter into hedging arrangements for the whole of his borrowing, but to maintain a substantial part on normal variable rate terms so that he could make repayment as and when he wished. I infer from that that Mr Samra was well aware at the time that would not be free to make repayments of a hedged loan without incurring an obligation to pay breakage costs.

57. Further, his expressed wish to be able to take advantage of lower rates if they fell shows that he was aware that if he accepted a hedge with a minimum rate he would be bound to pay that rate even if rates generally fell below it.

58. On the following day, 8th November, Mr Samra went to the Bank and signed the 2007 facility letter. That letter did not oblige Mr Samra to take any part of the total available facility by way of a hedged loan, since he could have elected to draw the whole amount under the first stated option for a variable rate loan facility, i.e. one subject to payment of the specified margin over LIBOR for the time being whatever that might be. It is not clear whether Mr Samra spoke to Mr Horsley on that day, but he accepts that he did so on the day after, 9th November, when he agreed that £350,000 would be drawn as a hedged loan, the hedge providing for a minimum LIBOR rate of 5% and a maximum of 6.25%. That range was not in fact either of the options that Mr Horsley had proposed, nor was it the option for a hedge limited to a cap that Mr Samra seemed to have indicated was his preference in the previous conversation, so there evidently must been some further discussion as a result of which Mr Samra elected for the option was eventually put in place. The range he selected had a lower minimum than Mr Horsley had proposed, with a higher cost, so Mr Samra must have thought that cost worth incurring. In electing not to take a "cap" but proceeding with a "collar" he presumably also thought that reducing the minimum rate payable under the collar gave him sufficient protection against rates falling in future and was prepared to accept the risk that they might in fact fall further.

59. The facility letter provided for a Confirmation document to be issued in respect of any option selected, which was to include a schedule setting out the repayments to be made. Such a document has been disclosed for the £350,000 hedged element (p277a). It is in the form of a letter addressed to Mr Samra recording a telephone conversation that day at which terms were agreed and setting out the terms of the loan including the hedge. These include the statements "Final Repayment date of this loan: 9 November 2012" and "Repayment profile: Refer attached schedule". A two page schedule is attached setting out projected monthly payments of about £2000 for interest but zero amounts for capital until the final payment which shows £350,000 for capital in addition to interest.

60. Mr Samra's evidence is that he did not receive this document at the time, though he accepts the telephone conversation referred to took place in which he agreed the hedging terms. He points out it is addressed to him at Jesson House and not his home address, but there seems no reason to believe it would not have reached him if sent there. According to his witness statement he was still using those premises as a storage and distribution facility, so it was occupied by his employees and one would expect them to recognise and pass on correspondence addressed to him.

61. There should also have been a Confirmation for the variable rate element of the lending, but Mr Samra denies receiving one and there is no copy of such a document among those disclosed.

62. Mr Horsley's documents suggest that Mr Samra set out his own objectives in taking interest rate hedging and took his own decision about it, to the extent of taking a more expensive product than had been suggested to him. That is not inconsistent with the Bank being keen that he should take a hedging product, but does not support his contention that he was forced to do so, still less that he did not understand what he was doing. The manuscript note also suggests that Mr Samra's objective in respect of the terms of his facilities other than hedging was to secure a five year interest only period and that he did not mention to Mr Horsley anything about what would happen thereafter. I do not place any great weight on this by itself however, as it is quite possible that Mr Horsley would only have been interested in that part of the facility that involved hedging.

63. Neither the facility letter nor the documents produced by Mr Horsley therefore provide any support for the suggestion that the Bank either agreed to provide a facility for 15 years but only documented one for 5 years, or agreed a 5 year facility but gave Mr Samra an assurance, in whatever terms, that it would be extended for a further ten years when it expired. His case that he was unaware that the facility letter did not in fact provide for facilities beyond 5 years depends on his evidence that he did not read that letter and did not receive the Confirmation sheet produced by Mr Horsley.

64. I do not consider it plausible that Mr Samra did not read the 2007 facility letter, or that if he did so he did not understand its terms. He did not strike me as the sort of person who would sign documentation such as this, which was essential to the continuation of his business and, on his own account, the product of considerable negotiation and discussion, without reading it. Although not the very simplest of documents, it is not in my view so complex, as Mr Hill suggested, that only a trained lawyer could make sense of it. It is true that the term Final Maturity Date is one that is defined in a schedule, but so are many other terms necessary to explain the principal text, and I am quite satisfied Mr Samra has the intelligence and experience to appreciate that he would need to refer to those definitions, and to be able to understand them when he did so. For the reasons given above, I think it unlikely that he did not receive the Confirmation document sent to Jesson House. If he did receive it, it makes abundantly clear that the £350,000 is repayable after five years.

65. Mr Samra's witness statement gives very little information about how he came to arrange the extension of his facilities in 2008, beyond the fact that he needed further funding to pay the backdated rent increase. The 2008 facility letter is dated 20 August 2008 and similar in form to the 2007 letter, save that it provided only two options instead of 8, being the two he was in fact using. It states that it supersedes the 2007 facility which is deemed cancelled when the 2008 facility is first utilised. It again provides that all loans must be repaid by the Final Maturity Date, now defined as the fourth anniversary of first utilisation.

66. Mr Samra signed this document on 5 September 2008 (p289). It was put to him that he had 14 or 15 days to read it and ask questions if he did not understand anything. He became, in my view, vague and evasive in his responses, saying "they might have posted it, it might have been delayed, I don't know", and that he had not paid attention to the large warning above his signature that he should consider taking legal advice as "it's the same on all documents". He agreed that the final maturity date defined was effectively the same as in the 2007 letter "but that’s only the interest only period". There would be no support for that interpretation if he had in fact read the document.

67. The next significant event was a further meeting with Mr Cameron in 2010 at which the life insurance was reviewed. They met on 27 July 2010 and Mr Cameron completed a further client information form (p293). That document records Mr Samra's liabilities as being two commercial loans of £260,000 and £350,000 respectively, each of which is described as "Level" and having an "End Date-30/11/2012". Under the heading "Objectives" Mr Cameron wrote:

> "Gurch would like us to rebroke the cover on his borrowing with a view to reducing the overall cost…
>
> The term was originally set at 15 years which was based on the expectation that the borrowing would have a 5 year interest only period and 10 year capital and interest repayment term.
>
> The actual borrowings have risen to £610k and Gurch has accepted that it would be sensible to increase the cover accordingly. The borrowing is due for review in Nov 2012 but it is expected that at that time a capital and interest repayment term will be agreed for at least another 10 years. Accordingly, we are asked to arrange the cover to coincide with a term to Nov 2022.."

68. Mr Hill submits that this document shows that the Bank and Mr Samra shared an intention in 2007 that there would be a further 10 year capital and interest payment period, but I do not agree. On the contrary it shows that Mr Cameron is recording the actual end date of the existing facilities, ie that they expired in November 2012. It is most likely that information, as with the other facts recorded about Mr Samra's circumstances, was provided by Mr Samra at the meeting in 2010. No doubt Mr Cameron could have obtained it from the Bank's records, but I think that unlikely- if he had done so he would not have entered an end date of 30 November 2012, which does not correspond with any of the documentation. It is more likely to have been an approximate date given to him by Mr Samra.

69. Mr Cameron refers to there having been an "expectation" of a further 10 year period, but in the context, this is most likely in my view to be his recording what Mr Samra explained to him as his own expectation, and not setting down on behalf of the Bank what the expectation of his commercial colleagues had been.

70. Similarly, his note of a "review" in November 2012 and an expectation that a further period "will be agreed" shows in my view that Mr Samra told him what he expected to happen. In doing so Mr Samra acknowledges that any further term is a matter the Bank has yet to agree, though no doubt he is expressing his expectation that they would do so. He appears to have told Mr Cameron that this extended period would be "at least" 10 years, a further indication that it was not a period already agreed but one he hoped to arrange, perhaps for even longer than the 10 years he had previously envisaged.

71. On 29 June 2011 Mr Oliver sent Mr Samra an email (p298). It followed the Bank having obtained property valuations showing a breach of the LTV covenant, and in part addressed Mr Samra's disagreement with those valuations. It referred to two emails from Mr Samra, the first of which was dated 16 June 2011. That email was produced by Mr Samra at trial, and it deals only with issues relating to the valuations.

72. Mr Oliver goes on however to refer to a second email, saying:

> "Turning to your email of 27 June 2011. In respect of the maturity of the loans next year it is sensible that you are thinking about these now and acknowledge that repayment of the debt needs to be considered. If the Bank is to consider offering new loans to replace the existing debt then these are most likely to be on a repayment basis so you need to factor this into your affordability calculations now. The difficulty for us looking beyond next year is the fact that the properties [Torrington Avenue] and Jesson House will have only 53 years and 47 years on their leaseholds respectively. Once a property has less than 50 years on its leasehold carries no value to the Bank. Clearly this raises all sorts of valuation issues again as Jesson House would have no Bank Value and [Torrington Avenue] would only retain value for a further three years. If this is to be applied to your current debt levels then margins would change and would probably be looking at interest margin of between 5 to 6% on term of three years. We could though consider repayments on a 10 year profile as you request and your monthly payment would be circa £7000 per month…
>
> Please … have a think about next year's options and let me know your thoughts "

73. Mr Samra has been asked to produce the email that this refers to, but has not done so. Asked about it in cross examination he said that he believed he had forwarded it to his lawyers, but that he had only found it in the last couple of days, and that he could not remember whether he had forwarded it to Mr Hill or someone else. After an adjournment of about 15 minutes, Mr Hill was able to confirm that no copy of such an email had been sent to him.

74. Mr Samuels put it to Mr Samra that Mr Oliver's email showed that he had himself stated to Mr Oliver that he needed to consider repayment of the loans next year. He seemed to acknowledge this, saying "that is what it says". Mr Samuels suggested that he must have known that repayment was a possibility, but Mr Samra would only say "I knew the five-year term was coming to an end" but that repayment "was not what he indicated, he is talking about a 10 year profile". He acknowledged that when Mr Oliver said "if the Bank is to offer new loans" this must indicate that they were not already agreed. However when it was put to him that "we could consider repayment on a 10 year profile as you request" indicated that this was a request now being made by Mr Samra, he would only say that Mr Oliver "was not involved in 2008" and that he "did not agree" that this represented a request by himself.

75. Mr Samra's answers to these questions were in my view given in an evasive and unconvincing manner. He has no good explanation for failing to produce his own email, and that failure became all the more inexplicable when he said that it had been in his possession within the last few days but he could not now produce it and could not remember to whom he had sent it. It is in my judgment only possible to read Mr Oliver's email as indicating that Mr Samra's email of 27 June 2011 showed that he:

    i) was aware that the existing loans matured in 2012 and that he needed to consider repayment at that date,

ii) had asked the Bank to consider offering new loans to replace the existing debt, and suggested that these might continue to be on an interest only basis, and

iii) had proposed as an alternative that the new loans might be made repayable over a ten-year period.

76. None of this is remotely consistent with Mr Samra believing that his existing facility documents already provided for a total term of 15 years including a ten-year capital repayment period. Nor is it consistent with Mr Samra believing that, despite the written terms of the facilities, he had already been promised, or given an assurance in any terms, that the facility would be extended for such a ten-year period when it expired. If he had thought that, it is impossible to believe he would not have reminded Mr Oliver of it and urged the Bank to honour what he considered to be the commitment or expectation that it had given. He cannot have made any such point to Mr Oliver, or it would have been responded to in the email of 29 June.

77. Mr Samra has disclosed correspondence between himself and the Bank prior to the assignment, and between himself and Engage on behalf of the claimant after the assignment, in which he sets out grievances as to how he has been dealt with and as to the fact that his debt has been assigned so that he is being pursued by an assignee, and seeks to negotiate a reduced payment in full and final settlement. Among the matters he put forward in support of his position were his long term relationship with the Bank and his good faith behaviour as a customer who had kept up the payments due over a long period, and he made considerable play of the duty he said the Bank was under to act in a socially responsible manner. If he considered that the Bank was resiling from a commitment or understanding entered with him, he had ample opportunity to say so and it would have been in keeping with the position he adopted to have done so. But nowhere in that correspondence does he allege the existence of any agreement or understanding that his facilities would either last for longer than five years, or be extended beyond their five-year term. Nor is there any reference in the copies of the Bank's internal notes from that period to such an allegation having been made orally.

78. Mr Samra did not make any such allegation in his complaint to the Financial Ombudsman, although the substance of that complaint was that his treatment by Engage and/or the claimant had been unfair.

79. Nor does any such allegation appear in the first version of his defence in the claim relating to Torrington Avenue, dated 24 November 2017 (p23), or the first version of his defence in the claim relating to Jesson House, dated 5 January 2018 (p26). Both of those documents focus on putting the claimant to proof of the effectiveness of the assignment in its favour. It is only in his amended defence filed in the consolidated action and dated 20 March 2018 that he makes the allegations on which he now relies. All of these documents were prepared at a time when he was advised by solicitors, and two of them bear the signature of counsel (not counsel now appearing).

Unfair relationship- discussion and findings

80. In these circumstances, and taking all the evidence into account, I find that there was no common intention or understanding such as Mr Samra alleges. Further, I find that Mr Samra was at all times aware that the facilities he agreed in 2007 were for a maximum of five years and that he would have to either repay them at that time or negotiate new facilities for an extended term. I do not doubt that Mr Samra gave

thought in 2007 to what would happen at the end of that five year term, or that he expressed to Mr Cameron what he thought or hoped would be agreed. But insofar as he discussed it at all with those at the Bank responsible for agreeing the terms of the loan (which did not include Mr Cameron) there is no basis to find that anything was said on behalf of the Bank further than that it would be a matter for agreement at the time. It is plausible to think that it might also have been said that the Bank was a keen lender to the commercial property market, for it is accepted that that was the case, and perhaps also that there was no reason at the moment to think that would change. But I reject Mr Samra's evidence that anything was said to the effect either that the Bank was agreeing there and then to a longer facility than five years, or committing itself, to any degree, to do so in the future.

81. I reject therefore Mr Samra's principal contention, that the relationship was unfair because the Bank resiled from that alleged common intention or understanding. Insofar as the Bank may have given any indication of its attitude to property lending in 2007 from which Mr Samra formed his own hope or expectation that it would be willing to give him facilities for a further ten years in five years' time, in the absence of any commitment to him to offer those facilities it was not unfair for the Bank not to do so when its commercial strategy changed. In fact, the Bank appears to have been willing to discuss such facilities in June 2011, as Mr Oliver's email of 29 June 2011 shows, but Mr Samra does not appear to have taken that up, perhaps because of the level of repayments it would have entailed.

82. A range of other matters were raised as showing or evidencing an unfair relationship, not all of which had been referred to in the amended defence. Firstly it is said that when the facilities were extended in 2007 the leases on Torrington Avenue and Jesson House had more than 50 years to run. However by the time the Bank obtained valuations in 2011 that was no longer the case in relation to Jesson House. It is said that it was unfair of the Bank to allow Mr Samra to put himself in the position that he gave up facilities available for 15 years and took on facilities with a shorter date, when the Bank knew or should have known that when it came to negotiating an extension the security would have been given no weight in one case and a much reduced weight in the other.

83. There is no evidence that the individuals Mr Samra was dealing in 2007 were aware of this point, let alone that they took it into account. Mr Samra has not made any case that the Bank was under any duty to act as his adviser in relation to the facilities he was seeking, or that he was in any way misled on this point in his negotiations. The Bank thus cannot be said to have been in breach of any duty to Mr Samra in failing to prevent him placing himself in a disadvantageous position, if that is what he did, nor in my view can be said to have been unfair for the Bank to fail to point out to Mr Samra a matter which might be to his disadvantage at a later date.

84. Further, it is not in fact the case that Mr Samra would have been in any significantly better position even if all of his borrowings had been transferred to terms corresponding to the 2006 15 year facility, which is the effect of what he contends the Bank agreed or assured him it would do. That facility itself included a 50% LTV covenant (p234) and provision for regular revaluation of security (p233), and provided that if the covenant was breached the Bank could review the facilities and upon review increase the interest margin to 5% and/or withdraw the facility. Thus, the reduction in security value arising from the shortness of the lease term would have

entitled the Bank to withdraw the facility by 2012, even if it had been initially expressed to be for 15 years.

85. It is not the case in any event that in 2007 Mr Samra gave up long-term facilities in favour of short-term ones, since a substantial part of his existing borrowing was already repayable within about three years. Further he achieved substantial advantages to himself through the renegotiated facilities in respect of the increased amount, which he urgently needed, and a considerable extension to the interest-free period that put off for almost 5 years a very substantial increase in the repayments due from him at a time when, it appears, he would have been in difficulty otherwise. I see nothing unfair in the Bank agreeing to grant him facilities that gave him those advantages, even if they might have entailed a possible future disadvantage in relation to the security value, or in the Bank failing to offer him even more advantageous facilities that would have conferred on him all of the above advantages and in addition extended the whole of his borrowings to a 15 year term.

86. Secondly it is said that the relationship was unfair because the terms of the 2007 facility and/or the later overdraft facilities permitted the Bank to assign or transfer the benefit of his account to an entity such as the claimant, which is not a bank and so not able to offer him further banking facilities and is not regulated by the FCA, and/or because the Bank has in fact made such an assignment.

87. It is certainly the case that all of the facility documents contain express provisions permitting the Bank to transfer both its rights and obligations in relation to the facilities granted to a person such as the claimant, which need not be a bank and need not be regulated by the FCA. Even without such a clause however the Bank would have been entitled under the general law to assign its rights of action against Mr Samra (such as the right to recover the debt he owed) to anyone without limit.

88. The specific terms of the facility letters provide an additional right to transfer the Bank's <u>obligations</u> to any such person, which would otherwise only be possible under a novation to which Mr Samra had agreed. But I cannot see that this has been the cause of any actual unfairness to Mr Samra; he has not alleged that such a provision is in breach of any regulatory obligations owed by the Bank to the FCA, and in fact by the time the assignment was made the facilities he had been given had expired so that he would not have been in a position in any event to require the Bank to perform any future obligations to him such as to operate a banking account or allow him to draw on facilities.

89. Insofar as the assignment has meant that the management and recovery of his debt is now a matter for the claimant rather than a regulated bank, it is common ground that insofar as they are regulated matters, in order to be able to perform those functions lawfully the claimant is obliged to do so through the agency of a regulated body such as Engage. He has not alleged any difference in the regulatory regime that would mean that Engage is permitted to take any action that the Bank would not be. Insofar as he has any complaint about the conduct of Engage he has the same right of redress by access to the regulator or to the Financial Ombudsman as he would have had if still dealing with the Bank. He has of course exercised that right, and had his complaint rejected.

90. Asked by Mr Samuels to explain what disadvantage he felt he had suffered by virtue of the fact that he was now dealing with the claimant, Mr Samra said that if he had still been dealing with the Bank, matters would not have got as far as litigation and it

would all have been sorted out through a complaint to the ombudsman. But he did not explain why that was the case; insofar as he is aggrieved that his proposals to pay a reduced amount in settlement have not been agreed, the Bank would be under no greater obligation, either to its regulator or for any other reason, to accept any such proposals. Mr Samra may feel that he would have had a better commercial prospect of negotiating such a settlement with the Bank, but it seems doubtful if that is the case since he had already tried for an extended period to reach such an agreement with the Bank itself without success, and even if it was there can be no unfairness per se in a commercial creditor pursuing its own interests in such negotiations, irrespective of its identity.

91. It was suggested that the relationship was or became unfair because Mr Samra was forced or cajoled into accepting a hedged product which was found in the FCA review to have been mis-sold to him. Mr Samuels objected that this point was not pleaded, and in any event should not be open to Mr Samra because of the terms of the settlement agreement that he made when he accepted the offer of compensation. Setting aside those points however, in order to take the matter at its highest from Mr Samra's point of view, I do not consider that there was any unfairness involved.

92. I am satisfied for the reasons given above that Mr Samra knew full well at all times what an interest hedging product involved and what the advantages and disadvantages to him might be, including the minimum interest rate that he would have to pay (which he himself specified) even if interest rates fell and the fact he would be liable for breakage costs if he sought to bring the hedge to an end before its term. He was not forced to take a hedging product, but given a facility letter which left it open to him to decide how much, if any, was drawn as a hedged loan, and if he decided to take such a loan, on what terms any hedge would be put in place. It is no doubt the case that that letter was put in place after he had indicated in principle that he was prepared to hedge part of the borrowing, but he negotiated a substantial benefit to himself for giving that indication, in that he secured a worthwhile reduction in the interest margin payable.

93. Insofar as it transpired that the hedge worked out to his financial disadvantage he was fully compensated by the Bank, although on the basis of the material before me it must be doubtful whether, had he been obliged to pursue that through a claim in court, he would have been successful. Although in his statement he has made vague allegations that he considers the loss to him to have been much greater that the compensation paid, he has not put forward any credible reason why this is so, and did not take up the opportunity he was given to seek enhanced compensation for additional losses when the basic compensation offer was made. It is no doubt the case that whilst he was servicing his loan the interest payments made under the hedge were greater than would have been the case without it, but he has not given evidence that if his interest repayments had been lower he would have voluntarily made any payments to reduce the capital outstanding. In any event, if that had been his intention, he had the opportunity to pay down the amount of his borrowing from the compensation received, but did not do so.

94. I do not consider it necessary to go through the list of factors that Hamblen J referred to (see above) in every case, or particularly useful to do so in a case such as this where the allegations of unfairness are somewhat diffuse. But, addressing them generally, insofar as the complaint about the length of the facility is considered a complaint about a term of a relevant agreement, it was one of the central commercial

terms and not an ancillary right, and as I have found it was expressly negotiated and agreed in a commercial context with a commercially aware borrower who sought and achieved considerable advantages to himself in agreeing those terms. There is no evidence of any pressure by the Bank to accept those terms; having rejected Mr Samra's evidence that the Bank in fact agreed longer terms I have no basis to conclude he even asked for such terms, but if he did he must have been aware the Bank did not agree to provide them. Insofar as he may have been under pressure or urgency to accept what was on offer, it was because of his financial position and not because of anything unfair done by the Bank.

95. To the extent the Bank sought to persuade Mr Samra to agree interest rate hedging, that may be considered a matter of conduct, but there is no indication there was anything unfair in such persuasion. The Bank offered him improved terms if he agreed hedging, but it has not been suggested the terms otherwise available (which would have continued the margin he had previously agreed) were made artificially strict so as to force him to accept what he would not otherwise have done. Mr Samra in fact knew what hedging involved, and could if he wished have taken legal advice.

96. There can be no realistic suggestion that anything done in relation to the assignment of the debt or its enforcement has been unfair. Nothing in relation to the assignment has increased Mr Samra's liability in any way, or deprived him of any opportunity to pay or any defence against liability. There is no improper motivation behind recovery of the debt, and far from leaping to enforcement Mr Samra has been given very considerable indulgence both by the Bank and the claimant, for periods now totalling almost seven years since his term facilities expired.

97. In this judgment I have referred only to submissions made by Mr Hill for Mr Samra. Ms Sallar made written submissions at the end of the trial, but I do not consider they added anything material to the points Mr Hill had raised, To the extent Ms Sallar raised additional arguments, they did not seem to me to be founded on the evidence or pleadings in this case.

Conclusion

98. I reject the claim that the relationship between Mr Samra and either the Bank or the claimant is unfair. There will be judgment for the claimant for the amount claimed (less the amount of approximately £53,000 of default interest that the claimant agreed at the hearing to waive) and for possession of the two properties charged as security.