

Case No: HC13A05488

Neutral citation number 2015 EWHC 1431 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BEFORE MR CHARLES HOLLANDER QC SITTING AS A DEPUTY JUDGE

BETWEEN:

NATIONAL WESTMINSTER BANK PLC

Claimant

And

(1) ANTHONY DAVID TUMMOND (2) KIERAN THOMAS (3) RICHARD CARTER
Defendants

FRANCIS COLLACO MORAES (instructed by Berwin Leighton Paisner) appeared on behalf of the Claimant

The Defendants each appeared in person assisted by Mr David Beard as McKenzie friend

Judgment

21 May 2015

Hearing date: 5-8 May 2015 -----

DEPUTY HIGH COURT JUDGE CHARLES HOLLANDER QC:

1. Introduction

1. By this action National Westminster Bank plc (“the Bank”) seek declarations in relation to the priority of their legal charge (“the Charge”) over 17 Craven Park London NW10 8SU (“the Property”).
2. The First Defendant (“Mr Tummond”) was the Bank’s customer. The Second Defendant (“Mr Thomas”) claims to have taken an option to buy the Property from Mr Tummond which, having been exercised, is said to have priority over the Bank’s claim as an overriding interest. The Third Defendant (“Mr Carter”) is the assignee of Mr Thomas’ option to buy.
3. The case of the Defendants was that at the time of the Bank’s charge, Mr Tummond, who was the registered proprietor of the Property had entered into a lease and option to buy in favour of Mr Thomas over the property as security for a loan of £200,000 made in the course of 2005. The Defendants case is that the Bank were aware of these interests, as they were disclosed by Mr Tummond to the Bank’s representative Mr Robey. For present purposes, the key interest was the option to buy. It is not suggested that this interest was registered, but the Defendants say this was an overriding interest which binds the Bank.
4. The Bank say they knew nothing of any such interests and there are real questions as to whether a number of the documents in question were genuine. Even if (which they

dispute) Mr Thomas' interest was binding on them, they say the option was never validly exercised.

5. The Defendants are unrepresented, although they have plainly had legal advice in the past. On the first morning I granted leave for Mr David Beard, a former barrister, to present the case before me on their behalf (I gave a separate judgment as to the circumstances in which I allowed that application). I am very grateful to Mr Beard, who only was asked to assist at the last minute and has no personal connection with the matters in dispute, for the considerable assistance I received from him, taking on a difficult matter with very little notice. I should also pay tribute to the valuable assistance I received from Mr Moraes, who acted for the Bank.
6. It appeared to me at the outset that if the Bank were correct in their contentions, I might ultimately take the view that some or all of the Defendants had sought to perpetrate a fraud on the Bank. Thus I indicated in the course of opening submissions that I was minded to give Mr Tummond (the only one of the Defendants to give oral evidence before me) a warning about self-incrimination. I gave Mr Tummond that warning when he gave evidence. When similar issues appear to arise when Mr Matthews was recalled, I gave him a similar warning.

2. Factual Summary

7. In this factual summary I treat the documents before me at face value (without generally using such words as "purported") then subsequently consider their authenticity as necessary.

8. On 28 October 2004 Mr Tummond granted a legal charge over the Property in favour of Bank of Scotland in return for a loan. Bank of Scotland wanted their loan paid off and Mr Tummond approached the Bank at the end of 2007. The introduction was made through Mr David Matthews, already a client of the Bank. Mr Tummond spoke to Mr Robey of the Bank and credit approval was obtained in principle.
9. A meeting took place over lunch between Mr Robey and Mr Tummond on Friday 11 January 2008 at the Red Lion, Coleshill. Mr Robey says this was largely a social lunch. He was keen to obtain business both from Mr Tummond and from Mr Matthews. There is an issue as to whether Mr Matthews, and possibly Mr Thomas, was present.
10. Mr Tummond's evidence is that at the lunch meeting he provided a series of documents to Mr Robey which showed that there were existing interests on the Property. He says in his witness statement:

“At this meeting I showed Mark Robey the original promissory note, unregistered mortgage deed, lease rider containing the option to purchase and the original first lease signed 1 March 2006. Mark Robey asked whether any of the documents were registered at the Land Registry, to which I responded “no.” “

11. Mr Robey's evidence was that he knew nothing about any other interests and no documents were produced to him at the lunch. Mr Tummond says his evidence is supported by a fax dated 8 January 2008 to Mr Robey which states as follows:

“Mark,
Further to your fax I confirm lunch for this coming Friday.

How does the Red Lion sound in Coleshill? Say 12.30.

I will bring all the documents discussed re: the lease and loan docs

Regards
Tony”

12. Mr Robey says he has no recollection of receiving this fax. The Bank does not have a copy. The Bank do not accept this fax is genuine. Mr Robey says that had he been shown documents at the meeting he would have asked for copies, and denies that he was shown them. What was said to be the original of the fax was produced on the second day of Mr Tummond’s evidence.
13. The Bank required a number of steps to be taken before the loan and charge were completed.
14. On 8 February 2008 a report was prepared by DTZ, who conducted an inspection of the Property on 22 January 2008 through Mr Jacks and Ms Monk. The report states:

“1.3 Description

The existing property comprises a bare development site which probably originally contained a single dwelling house, and lies between two doublefronted detached houses that have now been converted into flats.

Access onto the site is not possible due to the existence of hoardings fronting the pavement, although it is clear that the site is almost completely overgrown with vegetation. Tony Tummond has informed us that all buildings on the site have been removed....

1.5 Condition

Whilst we were not able to gain entry onto the site, our inspection from the pavement indicated that there are no buildings on the site and the land is completely overgrown with vegetation.

...

1.7 Services

The Borrower has informed us that all mains services are available to be brought onto the site at no extraordinary or ransom cost.

...

1.10 Tenure

We have not been provided with a copy of the Report on Title. We understand that the property is held freehold, free from rent charge, restriction as to use, title or occupation and free from any other restriction which may affect value. We have not had sight of the title deeds.

1.11 Occupational leases

As far as we are aware, the property is not affected by any occupational tenancies. Our valuation assumes full vacant possession.”

Photos of the Property show that in substance it contained an open space between two adjacent properties and was boarded up.

15. Mr Jacks gave oral evidence, effectively verifying his report.
16. Hodders solicitors, through Mr Clothier, acted for Mr Tummond and for the Bank. They were sent the DTZ Report. The following documents are relevant.
17. On 25 January 2008 Hodders signed the following Acknowledgement in relation to documentation received from the Bank:

“Included with the enclosed Documentation you will find a Declaration of Occupancy with Lease/Tenancy Summary. You should ask the Mortgagor(s) to sign this Declaration after completing all relevant sections and schedules. You will be required to confirm that all terms and provisions of the relevant Lease or Tenancy Agreement as advised by the Mortgagor(s) are correct.

Please refer to the paragraph headed “Other Interests in the Property” with regards to any proposed occupants of the Property who may claim proprietary rights, in which case, you will require to provide us with a copy of the signed and completed Declaration immediately you receive the same. Failure to provide this may result in the drawdown of facilities to the Borrower(s), secured by the proposed Legal Charge over the Property, being delayed.

...

Valuation Report

A copy of the Valuation Report for the Property will be forwarded to you by the Bank’s Branch/Office as soon as this becomes available. Please contact

the Bank's Branch/Office by telephone in the event that the Valuation Report is not made available to you two weeks prior to the scheduled settlement/completion date."

18. Mr Tummond signed the Declaration of Occupancy on the same day in the following terms:

"I/we confirm that the legal title of the Property is or will be vested in my/our name(s) and that the only Occupiers of the Property are or will be as stated below:

Vacant"

19. A Declaration of Leasehold Provisions was also on the same day signed by Mr Tummond to the effect that this was a vacant development site, including a negative response given by him to the question whether there were leasehold interests over the property.

20. On 25 January 2008 Hodders thus sent to the Bank:

- (a) The signed Acknowledgment
- (b) The Declaration of Occupancy
- (c) The Declaration of Leasehold Provisions.

21. On the same date (erroneously dated 25 October) Mr Clothier of Hodders signed a Report on Title which provided:

"4. To the best of our knowledge the Estate Owner is not creating any other mortgages or charges.

5. There are no matters (including limitation) covenants, conditions, agreements, stipulations, restrictions, reservations, rights, easements, encumbrances, charges, registrations or statutory or local orders schemes or proposals) affecting the Property which could be adverse to

the Bank's interests or which should be brought to the Bank's attention save as set out on the attached sheet(s) numbered

...

9. The Property is or will on completion
✓ remain unoccupied

...

10. The Legal Charge in favour of the Bank
✓ has been signed by the Estate Owner

...

We also confirm that all other requirements for the Bank to be provided with effective security over the Property in accordance with its instructions have been fully satisfied.”

22. On 5 February 2008 Towers Associates confirmed acceptance of the Bank's offer for them to be monitoring surveyors on the Property. The Executive Summary states:

“A The development comprises of a vacant plot of land with main road frontage with the benefit of planning permission for the construction of 8 no. self contained flats.”

23. On 12 February 2008 the Bank lent Mr Tummond £516,999 by way of a Land Loan.

24. On 19 February 2008 Mr Tummond signed the Bank's Charge. This provided:

“Restrictions on Charging Leasing Disposing and Parting with possession

3.1 The Mortgagor will not without the Bank's prior written consent:-

3.1.1 Create or permit to arise any mortgage charge or lien on the Property the Charged Assets or the Goodwill

3.1.2 Grant or accept a surrender of any lease or licence of the Property the Charged Assets or the Goodwill

3.1.3 Dispose of or part with or share possession or occupation of the Property the Charged Assets or the Goodwill

3.2 If the Bank does consent to the creation of a mortgage or charge on the Property it may require a priority agreement or deed with the mortgagee or charge. In the case of Registered Land this will require registration and will be a public document.

3.3 The Mortgagor applies and agrees that the Bank may apply for a restriction to be entered on the Register of any Registered Land that no disposition of the Registered estate by the proprietor(s) of the Registered estate or by the proprietor(s) of any Registered charge is to be registered without a written consent signed by the proprietor for the time being of the charge created by this deed in favour of the Bank referred to in the Charges Register.”

Mr Clothier of Hodders signed in the following terms:

“I confirm that I am a solicitor/licensed conveyance/legal executive acting for the Mortgagor and that prior to the execution of this deed I explained its nature, content and effect and the practical implications of signing it to the Mortgagor and he/she informed me that he/she wished to proceed with the transaction.”

25. The Charge was executed on 19 February 2008 and registered on 3 March 2008.

26. On 27 February 2009 a further report from Mr Jacks of DTZ stated:

“The subject property comprises a bare development site which probably originally contained a single dwelling house and lies between two doublefronted detached houses that have now been converted into flats.

We were informed by Tony Tummond that all buildings on the site have been removed. Upon our inspection on 4 February 2009, a hoarding had been erected on the site had deteriorated and it could be seen that the site had been cleared of all buildings and was almost completely overgrown with vegetation.”

27. The Land Loan was not repaid. On 30 November 2009 the Bank appointed fixed charge receivers (“the Receivers”) over the Property.

28. On 7 December 2009 Mr Tummond wrote to the Receivers:

“Further to your letter of 2nd December and our subsequent telephone call this morning, I confirm my willingness to assist you to obtain the best possible sale price for the Receivers.

I confirm that there is a lease on the site, details of which I will provide you in due course.”

29. This information was conveyed to the Bank on the same day. In response to an internal email asking him about this Mr Robey responded:

“I have no knowledge at all of this...? The site is derelict, there is nothing on the site-how can there be a tenancy...?”

30. On 10 February 2010 Mr Tummond instructed BP Collins, solicitors, to draft a lease for him and Mr Thomas for the Property (“the 2010 Lease”). The 2010 Lease provided for a Commencement Date of 1 March 2006. It provided as follows:

“1.1.9 “Permitted Use” for storage with ancillary office accommodation
...
1.1.17 “the Yearly Rent” EIGHT THOUSAND POUNDS per annum
 from and including the Commencement Date
...

3.1 Rent

To pay the Yearly Rent at the times and in the manner aforesaid without any deduction or set off whether legal or equitable and to pay the Yearly Rent by direct credit transfer or banker’s standing order (at the option of the Landlord) if so requested PROVIDED THAT for as long as Kieran Thomas is the Tenant the Tenant may offset any rent due under this Lease against any money due to the Tenant from the Landlord under a promissory note dated 1st March 2006.”

It was signed by Mr Tummond (witness David Matthews) and Mr Thomas (witness Carol Browne). The front page has a date of 1 March 2006 written in manuscript by Mr Tummond and has a certification from Mr Sudeep Chi of Pain Smith, solicitors dated 16 February 2010 in the following terms:

“I certify that this is a true copy of the original.”

There is nothing in the 2010 Lease which enables the reader to ascertain that it was only executed in 2010. It appears to have been executed in 2006. Thereafter, as

appears below, it was consistently held out by Mr Thomas and Mr Tummond and those acting on their behalf as having been executed in 2006.

31. On 15 February 2010 Mr Hardy of BP Collins emailed Mr Tummond as follows:

“Dear Mr. Tummond,

Further to our telephone conversation on Friday, I attach a draft lease, which I have prepared in accordance with your instructions. You should read through this carefully, and I suggest that we go through this first thing tomorrow morning, with a view to agreeing the lease, and preparing final versions for signature.

However, if there is anything you would like to discuss today, I am at home for most of the day. My phone number is – 020 8248 8988.”

32. The Property was to be offered for sale by the Receivers at auction to take place on 16 February 2010.

33. On the same day, PainSmith, solicitors, wrote to Berwin Leighton Paisner (“BLP”) solicitors for the Receivers. In that letter they asserted they acted for Mr Thomas and stated as follows:

“We act for Mr. Kieran Thomas. Mr. Thomas has a commercial tenancy of the above-named property. A copy of that tenancy agreement is attached to this facsimile. There is also a supplemental agreement between our client and his landlord to waive payments of rent. A copy of this agreement is attached.

We understand from our client you have instructions to sell this property by auction from the receivers who have taken control of it from our client’s former landlord, Mr. Anthony Tummond. We also understand that the auction particulars do not contain details of our client’s lease.

The loan secured against the property was made in full knowledge of the existence of our client’s lease and the receivers have no right to disclaim the same or otherwise to act as if it does not exist.

Unless the sale particulars are amended forthwith or the property is withdrawn from sale our client will seek an injunction preventing the legal transfer of the property being effected without his interest being noted. Our client will also

make a complaint to the local authority under the terms of the Property Misdescriptions Act 1991.

Our client has no objection to the same provided that his interests are protected but he will not allow any sale to occur which does not properly note his interest.

Given the urgency of this matter we will telephone your office to discuss a way forward in the morning.”

34. The letter thus enclosed a certified copy of the 2010 Lease and a Promissory Note between Mr Tummond and Mr Thomas dated 1 March 2006 (“the 1 March Promissory Note”). The 1 March Promissory Note, also witnessed by Mr Matthews and Ms Brown (but now spelling her name without an “e”) provided as follows:

“I ANTHONY DAVID TUMMOND of 67 Dukes Wood Drive, Gerrards Cross, Bucks (“Mr. Tummond”) do herein acknowledge for value received payments made to me by KIERAN THOMAS of 7 Basing Hill, Wembley, Middlesex (“Mr. Thomas”) in the sum of £200,000 (two hundred thousand pounds) and I herein promise to repay the same and on the basis of the following terms.

1. That monies referred to above be repaid by the off setting of rents due to Mr. Tummond from Mr. Thomas in relation to a commercial lease at 17 Craven Park, London, NW10 8SU granted on 1 March 2006.
2. That Mr. Thomas be given the option to purchase the site known as 17 Craven Park, NW10 8SU at any time during the lease at a value given by professional valuers less any monies still owing to Mr. Thomas from Mr. Tummond by way of this agreement with monies still owed being given consideration and deducted from the sale price.

IN WITNESS whereof the hands of the parties have been hereunto set this *first* day of *March* 2006.”

The Bank say they had never seen these documents before.

35. In the circumstances the sale offer planned by the Receivers did not go ahead.
36. On 7 October 2010 Mr Tummond was made bankrupt. He was discharged on 26 October 2011.

37. A report by Gibbs Gillespie dated 14 December 2010 for Mr Thomas on the Property states as follows:

“The site has been boarded up for a considerable number of years since the property was demolished, but a steel container has been positioned to the front left corner of the site, and this could well be used for storage purposes.”

38. Mr Thomas then instructed Lennon & Co. as solicitors. On 11 October 2010 Lennons provided to the Receivers:

- (a) a letter dated 17 January 2005 between Mr Tummond and Mr Thomas as follows:

“Dear Tony,

Re: Loan

Good to see you Friday. I am able to loan you the monies for your various project. However, I would like to cap this at £150,000. I do have some other savings but would like to retain this.

I would suggest we work the process on a Thursday as you have to pay the workmen and trades people on Friday.

I will issue you with a receipt and you must sign for the money. Once I have handed you the money it's your responsibility.

I will give you a copy of the receipt on the same day.

Let me know if t his works for you.

Regards,

Keiran”

- (b) A letter dated 15 February 2005 as follows from Mr Thomas to Mr Tummond:

“Dear Tony,

Loan

To confirm I can loan up to £200,000 but this really takes all my savings.

With regards to interest, shall we say 7% pa? We should also discuss a proportion of the profit from your development.

Can you organise a document of loan when you have received all the money. I need this just as a safety net in case something should happen.

Regards

Kieran.”

(c) A series of 27 receipts for sums totalling £200,000 dated between 8 March and 7 December 2005

39. On 10 February 2012, Ahmud & Co, now instructed for Mr Thomas, wrote to BLP as follows

“We confirm that we are now holding the original Lease and Promissory Note which we have received from our client’s former solicitors. In order to arrange an appointment to inspect the aforementioned at our offices, you may contact Ms Keiu Kadarik in order to arrange a mutual convenient appointment so that you may inspect the documentation under supervision.”

40. On 2 April 2012 BLP wrote to Ahmud & Co stating that the Property was to be placed for sale in an auction on 29 to 31 May 2012.

41. On 18 May 2012 Lennons applied on behalf of Mr Thomas to register a unilateral notice on the charges register to protect an ‘option to purchase the [Property] in accordance with a promissory note dated 1 March 2006 made between Mr Tummond and Kieran Thomas’ That unilateral notice was registered on 21 May 2012. They exhibited a copy of the 2010 Lease and 1 March Promissory Note.

42. On 22 May 2012 Lennons served notice on the Bank of a request on behalf of Mr Thomas for a new tenancy.

43. Thereafter there were a number of letters drafted by Mr Tummond but purportedly signed by Mr Thomas, the address given being Mr Tummond’s address. Mr

Tummond said he had authority from Mr Thomas, who was ill or abroad much of the time. Mr Tummond said some of these letters were signed by him in Mr Thomas' name, some signed by Mr Thomas if he was available.

44. Such a letter dated 28 May 2012 (which Mr Tummond says was signed by Mr Thomas) to the Receivers states:

"I am further advised that my Lease and Promissory Note signed as a Deed overreaches the Bank's legal charge and is a matter entitled to remedy. There is also a Statutory Declaration given by Mr. Anthony Tummond, a copy of which is enclosed.

Further note within the legal pack that the Bank have inferred no knowledge of the Lease. This is untrue, and I am informed that the Bank were made aware of encumbrances by way of correspondence. I trust this error will be rectified.

What is also of great significance is that not only do I have the "option to buy" under the terms of the Lease and Promissory Note but also by virtue of a recent House of Lords ruling by Lord Neuberger under the Lease Enfranchisement Law."

This letter also encloses what is described as a Statutory Declaration by Mr Tummond but is in fact a draft Statutory Declaration as follows:

"...

2. On 27th February 2006 I entered into a Promissory Note with Kieran Thomas ("KT") to repay the sum of £200,000 (see Exhibit "ADT 1").
3. KT had loaned me these monies in advance of rent due relating to the Property which I had agreed to grant to him as well as consideration for an option to purchase the Property. I obtained these loans to continue with various building projects I was undertaking at the time.
4. On 1st March 2006 I entered into a lease with KT (see Exhibit "ADT2") for a term of seven years from 18th March 2006 at an annual rent of £8,000 per annum for storage with ancillary accommodation."

45. In response to BLP pointing out that the declaration was in draft, a manuscript letter dated 1 August 2012 purportedly from Mr Thomas but drafted by Mr Tummond states:

“Mr Tummond can also produce a signed copy of the statutory declaration and will further swear to the lease being provided to the bank.”

46. On 11 September 2012 Mr Thomas wrote as follows (the letter being drafted by Mr Tummond) :

“I would bring to your attention that two firms of solicitors one chartered surveyor and myself have sought to “compromise and negotiate” over a period approaching three years.

My lease is for a period of seven years which in itself constitutes an overriding interest. The lease highlights the promissory note which in turn refers to the option to purchase; again an overriding interest in its own right which I would suggest is a mirror image to my own position. I would respectfully guide you to WEBB v. POLLMOUNT [1966].

I have now had the opportunity of discussing all of the issues with Mr. Tummond who for the avoidance of doubt has provided further evidence and an affidavit which are themselves self explanatory.

...

Not for the first time I provide you with the lease and loan documents which were executed by deed therefore nullifying your client’s power of sale.”

47. This letter enclosed a signed Statutory Declaration from Mr Tummond. This stated:

“5. I agreed a £200,000 (Two Hundred Thousand Pounds) loan from Mr. Thomas with the following provisos

- a. Mr. Thomas be granted a lease (exhibit ADT1) on Craven Park at an annual rent of £8,000 (Eight Thousand Pounds) with payment of the rent offset against the loan monies.
- b. A promissory note (Exhibit ADT2) be signed by myself in favour of Mr. Thomas to give him further security for the monies borrowed.
- c. An option to purchase the site at a prevailing valuation, less any monies owed to Mr. Thomas to be included within the promissory note/lease.

...

11. [After the end of 2011] Contact resumed between myself and the bank, with Mr. Robey sending me a list of valuers by facsimile (Exhibit

ADT3) enquiring if I had any preference and inviting me to lunch the following Friday 11th January 2008.

12. I accepted the invitation by facsimile (Exhibit ADT4) and suggested the Red Lion Public House in Coleshill Village which was convenient for us both and the landlord being a personal friend of mine would guarantee that we would be well catered for. I also confirmed that I would provide originals of the documentation that had been previously requested, i.e., the lease, the loan document and the promissory note.
13. I met with Mr. Robey at the Red Lion Public House, Buckinghamshire 2008 at approximately 1230 where Mr. Robey provided Heads of Terms, we sat and discussed the finalising of the Banks facility.
14. I provided Mr. Robey with the requested documents and informing him that I would be requesting Mr. Thomas to vacate the property prior to completion.
15. I did not approach Mr. Thomas at this time as I did not have the funds available to redeem his loan.
16. Mr. Robey perused the documents whilst we remained sat having lunch, returning them to me thereafter suggesting the valuer not be made aware of them.
17. For the avoidance of doubt Mr. Robey and the Bank were at all material times aware of the lease and the loan agreement between myself and Mr. Thomas but did not make further enquiries to Mr. Thomas at any time or indeed request the completion of Land Registry Form D1 (Disclosable Overriding Interest)."

48. The Statutory Declaration enclosed the following (so far as material):

- (a) The 2010 Lease
- (b) A Promissory Note dated 27 February 2006 in the same terms as the 1 March Promissory Note but not witnessed ("The 27 February Promissory Note")
- (c) The fax from Mr Tummond to Mr Robey dated 8 January 2008

The Bank say they had never previously seen (b) or (c).

49. The Property was now placed in an auction to be held on 11 September 2012.

50. On 21 September 2012, Mr Thomas executed a TR2 apparently transferring the Property to himself. The Land Registry by letter dated 30 October 2012 wrote to the Bank concerning an application to register a sale pursuant to a mortgage deed between Mr Tummond and Mr Thomas said to be dated 1 March 2006 (“the 2006 Mortgage Deed”). The 2006 Mortgage Deed was provided to BLP by the Land Registry on 21 November 2012. The copy provided by the Land Registry is signed by Mr Thomas and Mr Tummond (witnessed by Neville Stanley and Carol Browne). There is a further copy of this Mortgage Deed in the bundles which omits the signature of or reference to Mr Stanley.
51. The application of Mr Thomas was cancelled on 19 December 2012 by the Land Registry.
52. By a letter dated 16 February 2013, (but received on 17 January 2013), sent to the Receivers and the Bank, Mr Thomas purported to exercise an option to purchase the Property. This letter (written by Mr Tummond) produced two documents titled ‘Option to Buy Property Agreement’ and the “Rider to Lease Agreement” (“the Lease Rider”) . Both were dated 1 March 2006.
53. The Option to Buy Property Agreement provided as follows:

NOW IT IS HEREBY AGREED SUBJECT TO VAUATION as follows:

- 1) In consideration of the sum of £1 (one pound) (the “Option Payment”) receipt of which is hereby acknowledged by [Mr Tummond] upon execution of this agreement, [Mr Tummond] grants [Mr Thomas] the exclusive option to buy the Property for the following price and on the following terms (the ‘Option’): Purchase Price £

The purchase price shall be a sum calculated by the value of the land at the time the option is exercised less the amount of monies owing by [Mr Tummond] to [Mr Thomas] at that time

The loan monies referred to and outstanding in the promissory note dated 27th of February 2006 plus interest accrued at 12% per annum shall be deemed to be the monies owing by the “Seller” to the “Buyer”. The most recent valuation of the property shall be deemed to be the valuation by which the purchase price be calculated.

- 2) The Option Payment will be credited against the purchase price of the Property if the Option is exercised by the “Buyer”.

- 3) If after signing the agreement [Mr Tummond] becomes insolvent [Mr Thomas] by way of this option agreement shall have the right to exercise ('the option') by way of transfer of title to [Mr Thomas] or nominee of his choice for the further sum of £1 (one pound).
- 4) The Option Period will be for 84 months from the date of this agreement ("the Option Period"). The Option shall be exercised by the service of written Notice by [Mr Thomas] on [Mr Tummond] at any time within the "Option Period". 5)
 - ii. The Standard Conditions of sale (Forth Edition) shall apply and are incorporated herein save that this Option Agreement is assignable.

It was signed by Mr Thomas and Mr Tummond and witnessed by Mr Matthews and Ms Browne.

54. The recital to the Lease Rider states as follows:

"1.1 The option agreement ('the option') annexed hereto and referred to in clause 3.1 of the lease is deemed to be incorporated within the lease in its entirety and shall form a binding contract between the parties and any successors in title."

It was again signed by Mr Thomas and Mr Tummond and witnessed by Mr Matthews and Ms Browne.

55. The Bank say this was the first time they saw these two documents.
56. On 28 February 2013, the term of the 2010 Lease expired (seven years from 1 March 2006). Mr Thomas had applied to the Willesden County Court to renew it. That application was resisted on the basis that no business activity was carried out at the Property, and by a consent order those proceedings were disposed of upon an agreement that the term of the 2010 Lease ended on 28 February 2013.
57. On 20 March 2013, the Bank obtained an expert report from Dr Audrey Giles that suggested that manuscript letters purporting to have been written and sent by Mr Thomas had in fact been written by and signed by Mr Tummond. When this was put to them, Mr Tummond and Mr Thomas admitted that Mr Tummond had written the letters and emails said to be from Mr Thomas between 28 May 2012 and 18 April 2013. In evidence Mr Tummond said he was authorised by Mr Thomas to write on his behalf, and where he signed his name, he was authorised to do that too.

58. On 12 August 2013, Mr Thomas assigned any option he had to purchase the Property to Mr Carter.
59. On 25 November 2013, BP Collins wrote to BLP stating that Mr Tummond had retained that firm to draft the 2010 Lease on 12 February 2010. With the consent of Mr Tummond, extracts from the file of BP Collins were provided to the Bank. The Bank was not aware that the 2010 Lease had been drafted and executed subsequent to 1 March 2006 until then.
60. Mr Tummond and Mr Thomas on 7 April 2014 admitted in a response to a request for further information, that the 2010 Lease had not been executed on 1 March 2006 as it purported on its face.
61. On 5 May 2015 Mr Matthews, who was in England, no doubt for the purpose of giving evidence, retrieved a large sealed box from storage at the house of his parents in law containing documents relating to Mr Tummond and Mr Thomas (“the Box”). The Box contained what was said to be the lease originally executed in 2006 (“the Original 2006 Lease”), and which incorporated the Lease Rider and the Option to Buy Agreement. This document was in the following parts:

1) Particulars

This was a two page summary of terms which provided as follows:

“4.	DEMISED PREMISES (see First Schedule)	:LAND AT 17 CRAVEN PARK LONDON NW10 8SU AS THE SAME IS MORE FULLY DESCRIBED IN THE FIRST SCHEDULE AND SHOWN COLOURED ON THE FIRST SCHEDULE
5.	DATE OF COMMENCEMENT	1 MARCH 2006
6.	LENGTH OF TERM	7 YEARS FROM AND INCLUDING 1 MARCH 2006

7. RENT :£800 per annual and
Notwithstanding the subsequent
Clauses in this Lease the Tenant
Has paid to the Landlord 7 years
Rent in advance and this is hereby
Acknowledged by the Landlord.
8. RENT COMMENCEMENT :1 March 2006
9. SPECIFIED USER :STORAGE, PARKING, OFFICE
AND OCCASIONAL OVERNIGHT
ACCOMMODATION
10. LEASE RIDER The lease to be subject to the LEASE RIDER
ANNEXED HERETO
11. OPTION TO BUY The Lease be subject to the option to buy
PROPERTY AGREEMENT property agreement annexed hereto.”

2) A standard form lease with five schedules. Although the definition of the Building referred to the Property, the definition of the Demised Premises in the first schedule related to different property. It provided as follows:

**“THE FIRST SCHEDULE hereinbefore referred to
(Definitions of the Demised Premises)**

The land at Millstream Way Wooburn Moor High Wycombe HP10 0NL being the land shown coloured pink on the plan annexed forming part of Title Number BM272746

**THE SECOND SCHEDULE hereinbefore referred to
(Rights and Easements Granted)**

The right (in so far as the Landlord has power to grant the same) for the Tenant the Tenant’s servants agents and visitors in common with the Landlord and those authorised by the Tenant and all others having the same right of free and uninterrupted passage of water and soil through the pipes drains and watercourses and of electricity and gas through the cables wires and pipes now serving the Demised Premises and passing in under through and over any adjoining or neighbouring land and a right of access over the land coloured green on the plan annexed.

THE THIRD SCHEDULE hereinbefore referred to

(Rights and Easements Excepted)

The following rights and easements are excepted and reserved out of the Demised Premises until the Landlord and the Landlord's tenants and the occupiers of any adjoining or neighbouring land and/or premises and all other persons authorised by the Landlord having the like rights and easements."

- 3) A signature page which contained a further First Schedule and Second Schedule
(notwithstanding the previous contents) as follows:

"FIRST SCHEDULE

Particulars of lease or other tenancy

SECOND SCHEDULE

The Assignee"

3. Issues in the case: Legal Analysis

(a) summary

62. The Defendants assert that Mr Thomas had the benefit of an option to purchase the Property that is binding on the Bank.
63. There was no real dispute as to the legal analysis relevant.
64. S29 and 30 of the LRA 2002 provide that a registration of a registered charge granted for valuable consideration has priority over unregistered interests.
65. As the option to purchase was not registered, it will only bind the Bank if Mr Thomas can establish an overriding interest.
66. In order to establish an overriding interest, the Defendants must show:

- (a) That there was a relevant interest at the date of the registration of the Charge – 3 March 2008: see *Ruff and Roper, Registered Conveyancing* 17.012, and
- (b) That the individual with the benefit of the interest was in actual occupation of the Property at the date the Charge was created, namely 19 February 2008: see *Ruff and Roper Registered Conveyancing* 17.013

See also *Abbey National Building Society v Cann* [1991] AC 56 at 87C-D and 88E-H per Lord Oliver, and 104H and 106D per Lord Jauncey.

67. If an option existed and constituted an overriding interest, then the option must have been validly exercised.

68. LRA 2002 Schedule 3 paragraph 2 provides:

“2 An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—

- (a) an interest under a settlement under the Settled Land Act 1925 (c. 18);
- (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
- (c) an interest—
 - (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
 - (ii) of which the person to whom the disposition is made does not have actual knowledge at that time;
- (d) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition.”

69. The issues therefore are:

- (a) Whether the option to purchase existed in favour of Mr Thomas in February 2008
- (b) whether Mr Thomas was in actual occupation at the date of the execution of the Charge, and

- (c) if Mr Thomas was in actual occupation whether the Bank falls within the exception detailed in Schedule 3 paragraph 2(c) of the LRA?

(b) *Actual occupation*

70. Actual occupation requires:

- (a) Physical presence, although the physical presence need not be personal, provided the presence is that of an employee or agent.
- (b) If the person in actual occupation is not physically present at the relevant time, it will usually be necessary to show that his occupation was manifested and accompanied by a continuing intention to occupy.
- (c) The occupation is to be considered in the context of the nature of the land and the surrounding facts.

See: *Thompson v Foy* [2009] EWHC 1076 at [127] per Lewison J and *Chaudhary v Yavuz* [2013] EWCA Civ 1314 at [32] per Lloyd LJ.

(c) *Exception Schedule 3 paragraph 2(c)*

71. To fall within this exception the Bank has to show:

- (a) That the occupation of Mr Thomas would not have been obvious on a reasonably careful inspection of the Property at the time of the granting of the Charge, and
- (b) The Bank did not have actual knowledge of the interest of Mr Thomas.

The test is an objective test; see *Thomas v Clydesdale Bank plc* [2010] EWHC 2755 at [40]

72. It is actual knowledge of the option to purchase that is relevant, not knowledge of the occupation or other some other interest; see: *Thomas v Clydesdale Bank plc* [2010] EWHC 2755 at [49].

(d) *Exercise of the option*

73. As Mr Tummond was made bankrupt, on his bankruptcy the Property vested in the Official Receiver pursuant to s283 of the Insolvency Act 1986. It follows that after the

making of a bankruptcy order, the notice under the option to purchase should be served on the Official Receiver; see *Barnsley's Land Options 5th Edition at 11-004 (last paragraph)*. Mr Thomas sought to exercise his option to purchase by serving a notice on the Receivers (see his letter purportedly dated 16 February 2013 but received on 17 January 2013) the Bank say such notice is not a valid exercise of the option: See also *Sheffield & Regional Properties Ltd v Wright* [2004] 1 P. & C.R. DG2. The Receivers are special agents of the borrower Mr Tummond, but they are not agents of the Official Receiver; see: *Dolphin Quays Developments Ltd v Mills* [2008] EWCA Civ 385 at [27].

(e) *The Defendants' case*

74. The Defendants' case was in summary as follows:

- (a) The Lease, Promissory Note, Mortgage Deed, Lease Rider and Option to Buy Property Agreement (which I shall refer to cumulatively as “the 2006 Documents”) were all entered into on 1 March 2006
- (b) Mr Tummond disclosed the existence of the 2006 Documents to Mr Robey no later than January 2008; he had previously referred to them in discussions with Mr Robey and then produced them at the Red Lion meeting on 11 January 2008
- (c) Although the Option to Buy Property Agreement was not registered, it was an overriding interest because in February 2008 Mr Thomas was in actual occupation of the Property, running a storage and parking business through Mr Tummond
- (d) Notice was properly given of the exercise of the Option to Buy Property Agreement, which was thus binding on the Bank

(f) *Standard of Proof*

75. On behalf of the Defendants I was reminded as to the appropriate way of approaching the standard of proof where serious allegations are made as set out by Lewison J in *Mullarkey v Broad* [2007] EWHC 3400 (Ch) at [47].

4. Findings of Fact

(a) Preliminary comments

76. In relation to the matters that follow, the process of decision making involved reaching conclusions in the light of all the evidence and my observation of the witnesses. I should make clear that whilst I give reasons for specific findings, in reality my findings on different points are interrelated, and rely on each other for support.
77. I should say at the outset that, for reasons I set out below, I found the two key witnesses who gave evidence on behalf of the Defendants, Mr Tummond and Mr Matthews, deeply dishonest and I was unable to place reliance on anything they said. It was apparent to me that a number of documents were created for the purpose of putting forward a dishonest case. It was also apparent that many of the statements made in documents were made in order to provide a foundation for the dishonest case being put forward in court. As for Mr Tummond, I formed the view in the course of his oral evidence that he would be willing to make any statement which he thought would assist the case he was putting forward, irrespective of whether it contained a shred of truth.
78. Neither Mr Thomas nor Mr Carter gave evidence. Mr Carter served a Defence which adopted Mr Tummond's Defence and he was in court through the trial. Mr Thomas served a Defence with a Statement of Truth signed by Mr Tummond, adopting Mr Tummond's Defence, and I admitted his witness statement under the Civil Evidence Act. Apart from this, and authorising Mr Beard, he played no part in the trial. However, many of the documents and letters from Mr Thomas were equally created for the purpose of putting forward a dishonest case. I suspect the motivation for this largely came from Mr Tummond, but Mr Thomas was party to them. Mr Thomas is in my view equally complicit in serious dishonesty.

(b) *The 2010 Lease*

79. On 12 February 2010 Mr Tummond instructed Mr Hardy of BP Collins to draft a 7 year lease on the Property commencing on 1 March 2010 at a rent of £8000 per annum. The instruction was that it needed to be done urgently. A draft was produced by Mr Hardy on 15 February and it was signed on 16 February. Mr Tummond dated it 1 March 2006.
80. A notable feature of the 2010 Lease is that Mr Matthews witnessed Mr Tummond's signature.
81. On 16 February the 2010 Lease was sent by Pain Smith, solicitors acting for Mr Thomas, to the Receivers, asserting that any sale of the Property needed to be subject to this lease. Pain Smith asserted that the Bank's loan was made in the full knowledge of the Lease. In my judgment different solicitors were used because BP Collins knew the 2010 Lease had just been drafted and thus would not if asked have been willing to write in the terms that Pain Smith wrote.
82. There was no suggestion in the many documents written by or on behalf of Mr Tummond or Mr Thomas that the 2010 Lease had been drafted other than on 1 March 2006 and the attempt (a) to pass off the 2010 Lease as an original lease entered into in 2006 and (b) to persuade the Receivers and the Bank that the 2010 Lease had been disclosed to the Bank in 2008 involved an attempt to defraud the Bank. This attempted fraud was not uncovered until the Bank themselves discovered on 25 November 2013 from BP Collins that the 2010 Lease had been drafted in 2010.
83. Mr Tummond said that the 2010 Lease was created for "administrative convenience", because the Original 2006 Lease was in storage, only Mr Matthews had access to it, and Mr Matthews was in New Zealand. Thus he sought, he said, to create the 2010 Lease as a mirror image of the Original 2006 Lease. There are a number of problems with this explanation, which I reject:
- (a) The 2010 Lease bears no resemblance to what is now alleged to be the Original 2006 Lease, so the suggestion that it was an attempt to recreate a mirror image is not true

- (b) Between its creation in February 2010 and the discovery by the Bank in November 2013 that it had been created in 2010, the 2010 Lease was consistently held out by Mr Tummond and Mr Thomas and those acting for them as the lease created in 2006, and said to have been shown to Mr Robey in 2008, which was self evidently an attempt to defraud the Bank
- (c) The 2010 Lease refers to an annual rental of £8000 per annum, the 2006 Lease £800.
- (d) If the purpose of the creation of the 2010 Lease was that in Mr Matthews' absence in New Zealand the 2006 Lease could not be accessed from storage, how does Mr Matthews' signature appear on the 2010 Lease as a witness?
- (e) The timing shows that the 2010 Lease was created in a hurry to thwart a planned sale of the Property on 16 February 2010.

84. The correspondence with the Receivers and the Bank consistently holds out the 2010 Lease as an original document, which itself involves a fraud not discovered by the Bank until 25 November 2013, when BP Collins informed them of the true position. The parties to this fraud were in my judgment Mr Tummond, Mr Thomas and Mr Matthews.

(c) *The Lease Rider*

85. The Lease Rider was first produced to the Bank in January 2013. It is referred to in and said to be annexed to the Original 2006 Lease. It makes reference to the Option Agreement which it states is referred to in Clause 3.1 of the lease of the Property. However, the Original 2006 Lease contains no Clause 3.1. Mr Tummond said that this was referring to Clause 3 of the Original 2006 Lease. This evidence was obviously both untrue and dishonest; Clause 3 of the Original 2006 Lease is nothing to do with this and the attempt to get over the problem by this pretence was a vivid and obvious example of Mr Tummond trying to get over problems by making things up as he went along. It seems to me that it was intended to refer to Clause 3.1 of the 2010 Lease which although it does not refer to the Option Agreement, refers to the 1 March Promissory Note, which does itself refer to an option to purchase. It was submitted on

behalf of the Defendants that this simply represented an error, and was no more sinister than that. This seems to me far fetched in the extreme. On the one hand, it is said that it was a simple error that the bespoke Lease Rider incorporated into the Original 2006 Lease referred to a Clause 3.1 that did not exist. On the other hand, the Defendants had sought to pretend that the 2010 Lease was the Original 2006 Lease, and the 2010 Lease does have a Clause 3.1 which can be assumed to be what was referred to in the Lease Rider. The Lease Rider was therefore in my judgment referring to a document created on 15 February 2010, and thus must itself have been created after that date.

86. If therefore, as I find, the Lease Rider was created after the 2010 Lease, it is relevant to note that it purports to be signed by Mr Tummond and Mr Thomas and witnessed by Mr Matthews.

(d) The Option to Buy Property Agreement

87. This document is incorporated by reference into the Original 2006 Lease and the Lease Rider. It was first produced at the same time as the Lease Rider. I find that it was drafted at the same time, namely after February 2010.

(e) The dates on which the documents were first seen by the Bank

88. The Bank say the following documents were produced to the Bank (or the Receivers) for the first time on the dates set out in the table:

The 2006 27 February Promissory note	11 September 2012 (original never produced)
The 2010 Lease	16 February 2010
The 2006 1 March Promissory note	16 February 2010
The Mortgage Deed	Produced by Land Registry on 21 November 2012 (after an application made on behalf of Mr Thomas)
The Lease Rider Agreement	17 January 2013 (original produced 5 May 2015)
The 2006 Option to Buy Agreement	17 January 2013 (original produced 5 May 2015)

Fax dated 8 January 2008	11 September 2012 (original produced 6 May 2015)
The Original 2006 Lease	5 May 2015

By contrast, it is said by the Defendants that all the 2006 Documents were supplied to Mr Robey at the Red Lion lunch on 11 January 2008.

89. If the Lease Rider Agreement and the Option to Buy Property Agreement had been in existence earlier, it is to be expected that they would have been produced at some stage in the course of the various correspondence with the Bank and the Receivers in 2010-2012. Similarly the Mortgage Deed. That is another reason why I find these documents were not created at the time of the Bank's charge.

(f) Mr Thomas

90. Mr Thomas' evidence was admitted as a hearsay notice. I was referred to the factors to take into account in giving weight to his evidence under s4 of the Civil Evidence Act. Whilst I have those factors in mind, in the case of Mr Thomas I have significant additional contemporaneous material to take into account in determining the veracity and reliability of his evidence.
91. In Paragraph 3 and 6 of his witness statement Mr Thomas states that Mr Tummond approached him for a bridging loan of £200,000 in late 2005 and he made the loan over a period of three months *after* 1 March 2006. This is wholly inconsistent with the documents produced by Mr Tummond in 2010 which appear (if genuine) to evidence a loan agreed in early 2005 and made in 27 instalments over a 9 month period in 2005, but in any event prior to 1 March 2006.
92. Mr Thomas makes clear in his evidence he was kept informed by Mr Tummond. He refers in detail in his witness statement to the 2010 Lease but makes no reference at all to the fact that it was consistently passed off by those acting on his behalf as well as letters apparently written by him as being created in 2006. Because the 2010 Lease was passed off by Mr Thomas and those acting for him as being created in 2006, it follows that Mr Thomas must have been a party to what I have made clear was an attempt to defraud the Bank. There is no reference in his witness statement to the

creation of the 2010 Lease in 2010 or the circumstances in which this occurred. This omission is nothing short of extraordinary.

93. Mr Thomas signed the 2006 Documents. There is nothing in his statement which even acknowledges the collection of inconsistent documentation which was the focus of the trial. He does not seek in any sense to disown any of the documentation or statements written on his behalf by Mr Tummond. He put in a Defence which was signed by Mr Tummond on his behalf repeating Mr Tummond's Defence.
94. The conclusion which I reach therefore, is that Mr Thomas was party to Mr Tummond's attempt to defraud the Bank and put forward a knowingly false case. I am unable to say how far Mr Thomas was simply a cipher for Mr Tummond, but it is relevant that Mr Thomas was a signatory to all the 2006 Documents and the 2010 Lease.

(g) Mr Matthews

95. Mr Matthews started his evidence by expressing inability to read his own writing as to the date on which his first witness statement was signed. It is notable that the handwriting differences between the signatures and dates on his first and second witness statement suggest strongly that the same person did not sign both documents. In the absence of evidence from a handwriting expert I do not think it is open to me so to find, but Mr Matthews' inability to explain the curious paragraph 11 of his first witness statement (see below) suggests that Mr Tummond may have been heavily involved in the drafting of Mr Matthews' first statement.
96. Mr Matthews was asked about his communications with Jamil Ahmud of Ahmud & Co, solicitors who acted for Mr Thomas, and said he had known him for some years and had recommended him several times to others but denied that he had contacted him about these matters. However, he was then shown the email dated 1 March 2012 which provides as follows:

“Dear David,

17 Craven Park, London, SW10 8SU (“the Property”) Thank

you for your email of today.

There has been some developments where the solicitors for the Administrators contacted us in order to attend our offices to carry out an inspection of the Lease. After having arranged the appointment for the solicitors to attend our offices, due to unforeseen circumstances, it had to be cancelled. When the appointment was re-arranged, the solicitors for the Administrators stated that they could re-arrange an appointment for an inspection or they would be content for us to scan and email a copy of the original Lease. A copy of the original Lease was emailed to them and we have not heard further. Today I have chased the solicitors asking them to confirm what is their client's position, failing which, the appropriate Application will be made. I enclose for your attention, copy of our letter which I trust is self-explanatory.

I will of course keep you informed of all developments.”

That email was written in response to an email from Mr Matthews which Mr Matthews did not disclose. It is apparent from the terms of Mr Ahmud's reply that he is writing to someone who is fully familiar with the details of the attempts to persuade the Bank's lawyers of the veracity of the 2010 Lease, and has no need to provide him background information. He also promises to keep him informed “of course”. It is clear from this email that Mr Matthews knew very much more than he was letting on, and that his answers in cross-examination on this point were untrue, and deliberately untrue.

97. Mr Matthews was asked about his signature witnessing Mr Tummond's signature on the 2010 Lease. In cross-examination he confirmed that it was his signature and that he had seen the whole document before witnessing Mr Tummond's signature. It was then pointed out that the 2010 Lease was signed in February 2010 after he had emigrated to New Zealand. He was asked to produce his passport overnight (which he never did) but confirmed, when recalled next morning to deal with his location at the time of creation of the 2010 Lease, that he had been in New Zealand at the time, and he had been sent a pdf of the signature page and sent it back. Notably he did not produce the pdf he sent or received, although it was apparent that he was saying he had accessed them to give his answer.
98. It follows that:
 - (a) Mr Matthews' original answer was untrue about witnessing Mr Tummond's signature and in my judgment deliberately untrue

- (b) On his own evidence (second time around) he did not witness Mr Tummond's signature on the 2010 Lease although he signed a document to the effect that he had done so
 - (c) Although it is fair to point out that there was no order requiring Mr Matthews to produce documents, it is striking that he produced no emails to support what he said even though it must have been obvious that they would show the true position
 - (d) Although Mr Matthews claimed to know nothing about Mr Tummond's dealings with the Bank, Receivers and BLP in relation to the Property, and the attempt to satisfy the Bank as to the 2010 Lease, the email of Mr Ahmud shows this evidence to have been entirely untrue. In fact, he appears to have been aware of the details of what was happening.
99. In my judgment Mr Matthews, although on the face of it somewhat more sophisticated than Mr Tummond, was a willing party to Mr Tummond's attempt to deceive the court and the Bank. I can equally place no reliance on anything he said.
- (h) The 11 January 2008 meeting with Mr Robey*
100. The allegation by the Defendants that Mr Robey of the Bank knew about the 2006 Documents is based on the following:
- (a) Mr Tummond and Mr Matthews' evidence as to the meeting on 11 January 2008 when both allege the 2006 Documents were shown to Mr Robey
 - (b) The fax dated 8 January 2008 from Mr Tummond.
101. No copy of the 8 January fax has been found on the Bank's files. There is no reference to any lease or loan documents in any correspondence from the Bank.
102. If any of the 2006 Documents had been provided to Mr Robey at any stage prior to the execution of the charge, it would be quite extraordinary for Mr Robey not to have drawn them to the attention of his colleagues or to have acted on them. He would have been in serious dereliction of his professional duty. Identifying possible charges or problems in the property which provided security for the Bank's loan is an important

part of the function of any bank officer. The only reason suggested for Mr Robey behaving in this manner was his desire to obtain the business of Mr Tummond and Mr Matthews. It was contended that in the heady pre-crash atmosphere in February 2008, it would have been unsurprising for Mr Robey to have so acted to win business. I reject this, having heard Mr Robey and the other evidence in the case, and do not consider that this motive, which could be said to apply in almost every case, could explain what would have been reckless conduct on his part.

103. In his statutory declaration Mr Tummond stated that Mr Robey indicated to Mr Tummond that this information should be kept from the valuer of the Property, which would be an allegation that Mr Robey acted dishonestly as against his employers in that regard. This was a particularly serious allegation to make against Mr Robey. However this allegation came to be made, it was not pursued by Mr Tummond in evidence (or in his witness statement).
104. Before the Bank made the loan to Mr Tummond it obtained the following documents:
 - (a) The signed Acknowledgment
 - (b) The Declaration of Occupancy
 - (c) A Declaration of Leasehold Provisions.
 - (d) The Report on Title
105. These documents, signed by Mr Tummond and Mr Clothier of Hodders, are all inconsistent with either the existence of, or the Bank being notified of, the 2006 Documents. Mr Tummond said that Mr Clothier was well aware of the existence of the 2006 Documents, and must have been sloppy, and when he (Mr Tummond) signed documents he would not have looked at what he was signing. Mr Clothier was not called.
106. It seems to me that it is inconceivable that a solicitor would sign or permit his client to sign documents so fundamentally at odds with the true position and I find that these answers of Mr Tummond in evidence were deliberately untrue: the obvious reason for these documents being signed in this form is that Mr Clothier was not made aware of

any such interests or documents; on the contrary, he must have asked and been told that no such interests existed.

107. One obvious reason for Mr Clothier not being made aware of these documents or interests would be that the documents did not exist at the time. At any rate, the signing of these various documents by Mr Clothier and Mr Tummond is wholly inconsistent with the allegation that the 2006 Documents were provided to Mr Robey in January 2008. Again, I regard Mr Tummond's evidence on this issue as another example of making things up as he went along to suit his case.
108. Mr Matthews gave evidence that he was present at the meeting on 11 January 2008 and recalls Mr Tummond handing the 2006 Documents to Mr Robey. It might be thought very surprising that Mr Matthews recalled years later exactly which documents were provided by Mr Tummond to Mr Robey on a matter where his involvement was allegedly so limited. Para 11-12 of his witness statement provides as follows:
11. ...During the course of this meeting Mr Tummond provided a number of documents to Mr Robey. These documents included a lease, which I had assisted Mr Tummond in drafting some 2 years earlier. I made a mental note that I too would be required to provide similar documents with regard to the development I was considering purchasing with the Bank's financial assistance.
- “12. The documents that Mr. Tummond provided to Mr. Robey were a lease, lease rider, promissory note, mortgage deed and option to purchase. After briefly perusing the documents Mr. Robey enquired of Mr. Tummond if any were registered at the Land Registry to which Mr. Tummond replied no.”
109. The statement at the end of para 11 is extremely odd. It looks like a disingenuous explanation created for the purpose of providing a justification for remembering something which no one would expect to remember. It was not surprising that Mr Matthews was unable in evidence to provide any sensible explanation of what he had said in his witness statement as to what it meant. I find that it was a deliberately untrue statement, almost certainly drafted by Mr Tummond.
110. The other evidence given as to the meeting on 11 January came from Mr Ullman, who was the now-retired licensee of the Red Lion. His witness evidence dated 6 March

2015, was served late by the Defendants on 23 March 2015. I allowed an application for relief from sanctions to permit his evidence to be served late. When the matter was put before me by Mr Beard on the first day of the trial, I asked for a witness statement setting out the circumstances in which Mr Ullman's evidence came to be served late before determining the application. Next day Mr Tummond put in a second witness statement to the effect that, because Mr Ullman had retired, he had been unable to trace him until February 2015, and thus his evidence was then prepared and served promptly. On the basis of that evidence, I gave relief from sanctions and allowed in the statement.

111. Mr Ullman was once a solicitor and (quite apart from that fact) there is no reason to doubt that he was an honest witness. Mr Ullman, when questioned in cross-examination about his contact with Mr Tummond, said that he had been contacted by

Mr Tummond before Christmas 2014, and had been in contact with him then. There was no doubt about the timing in his mind. However, as stated above, Mr Tummond had given evidence in his second witness statement that contact was not made until February 2015, just before the Ullman statement was served. Mr Tummond was recalled to deal with the suggestion he had lied about this in his second witness statement and said his recollection was accurate and Mr Ullman was wrong. I find this was another lie by Mr Tummond, the lie being created to improve the prospects of getting in Mr Ullman's evidence.

112. Mr Ullman said that he recalled that he had been asked to book a table for *four* on 11 January 2008, the booking being necessary because Mr Tummond wanted a private part of the public house, and Mr Ullman had checked this against his office diary (not produced). The four were the bank representative, Mr Tummond, Mr Thomas and Mr Matthews. Mr Ullman did not particularly remember Mr Thomas but knew that the table was booked for him and remembered the meeting.

113. However, by contrast, Mr Ullman's witness statement stated:

"A day or two prior to the 11 January 2008 Mr Tummond had phoned me to book a table for 3 people for lunch on Friday 11 January 2008. I recall suggesting a table in the corner of the restaurant as I did for anybody wishing to have a private business meeting. Mr Tummond informed me that the bank

representative (Bank) and Mr Matthews would attend. ... Mr Tummond and Mr Matthews arrived early and as we were not busy at that time I had the opportunity to have a chat about the meeting. Mr Tummond informed me that he had approached the (Bank) for a remortgage and he was to provide any documents relating to the property. “

114. Mr Ullman’s evidence was given confidently and he was, as I said an honest witness. But no one had ever otherwise suggested that the table was booked for four or that Mr Thomas was there. And, as can be seen, this directly contradicts his recently-prepared witness statement.

(i) 11 January 2008 meeting –conclusions

115. I have no doubt that none of the 2006 Documents were produced to Mr Robey at the meeting. Mr Robey was an honest witness. Mr Robey’s conduct is inexplicable if he had been shown any of the documents and he would have been in serious dereliction of his professional duty for no discernable reason. The subsequent documentation in relation to the Land Loan and the Bank’s Charge is not consistent with the 2006 Documents being shown either to Mr Robey or Mr Clothier of Hodders, and indeed (to put it at its lowest) casts considerable doubt as to its existence at the time. As I have made clear, I am unable to place any reliance at all on any evidence of Mr Tummond or Mr Matthews and consider either would have said whatever they thought would assist Mr Tummond’s case. As for Mr Ullman’s evidence, which is more difficult to reconcile, I wonder whether his recollection is quite as clear as it seems to him, and it may be that his recollection has been influenced by what Mr Tummond has said to him recently. It is possible that Mr Matthews was at the meeting, although that would be contrary to Mr Robey’s recollection and there is no suggestion that Mr Matthews was present in Mr Tummond’s statutory declaration. Whether or not Mr Matthews was there, I find that no documents were provided to Mr Robey by Mr Tummond on 11 January 2008.
116. As for the faxl dated 8 January 2008, which supports what Mr Tummond said in evidence, I am not satisfied that this is a genuine document. What was said to be the original was produced in the course of the trial for the first time. For reasons similar to those set out above in relation to Mr Robey, if Mr Robey had received this document

he would have inevitably said “what lease”. This document was disclosed to the Bank or Receivers for the first time on 11 September 2012. Mr Robey’s email response on 7 December 2009 when he was told about the lease is telling: either he was astonished, or he was immediately aware that he had done something which involved a serious breach of duty and at once sought to dissemble. I find the former is the correct position.

117. I should add that the allegation made in the statutory declaration by Mr Tummond that Mr Robey suggested that the valuer not be told about the 2006 Documents was an unpleasant and gratuitous serious allegation which was wholly and deliberately untrue.

(j) The business carried on at the Property

118. The case put forward by the Defendants was that Mr Tummond was running a business at the Property for Mr Thomas at the time of the Land Loan and the Charge.

This is explained at para 7 of Mr Thomas’ witness statement, that Mr Thomas accepted Mr Tummond’s suggestion that he operated a business from the property. Descriptions of the business included match day Wembley parking, placing a container on the site, use of the structure at the back of the site as an office, and evidence from Mr Doyle, Mr Flynn and Mr Masters, as well as Mr Tummond. Mr Doyle provided a delivery note for a portaloos addressed to Mr Thomas.

119. It is apparent from the evidence that from time to time over the years there was some activity on the site which could be regarded as economic activity: occasional car parking, use of the block as an office, placing of a container and storage. I regarded all of Mr Doyle, Masters and Flynn as honest witnesses and I pay regard to their evidence. However I also take into account what was said about the Property:

- (a) In the DTZ Report
- (b) In a report by C&D Real Estate for Bank of Scotland dated 2 May 2007, which also indicated that the site was vacant
- (c) In the Towers Associated report
- (d) In the 2009 DTZ Report

- (e) In a letter dated 16 July 2009 written to the Bank on behalf of Mr Tummond
- (f) In a Site Safety Inspection and Risk Assessment dated 7 December 2009 by Humphrey and Gray suggesting that the site was derelict, covered in rubbish and rat infested
- (g) In relation to notices sent by London Borough of Brent dated 14 August 2008 and 13 February 2009 requiring removal of rubbish, rats and mice

120. These documents are all difficult to reconcile with the contention that a business was being carried on at the Property. Further:

- (a) There has been no disclosure of any monies earned from such a business
- (b) The only document disclosed which provides any support at all for the contention that a business was being carried on was the delivery note for a portaloo
- (c) For reasons previously expressed, I am not able to place any reliance on any evidence given by Mr Tummond or Mr Thomas in this regard

121. It was argued on behalf of the Defendants that there was evidence from the witnesses called to support the contention by Mr Thomas and Mr Tummond that a business was being conducted on the site from 2007 onwards. My conclusions on this point are as follows;

- (a) This was a derelict site which appears to have been infested not merely with rats and mice but also subject to regular fly-tipping and used as a dumping ground
- (b) The various contemporaneous documentary reports are all inconsistent with the carrying on of a business on the Property
- (c) The documents signed before execution of the Bank's Charge are equally inconsistent with the carrying on a business on the Property by Mr Thomas (or at all)
- (d) There is no documentation to support the carrying on of a business on the

Property

- (e) The suggestion that a business was carried on only surfaced, as with everything put forward by the Defendants in this case, at a late stage
- (f) I do not accept that anything which could properly be described as a business was carried on from the Property
- (g) In any event I do not accept that a business was carried on in February/March 2008
- (h) I also do not accept that the business was carried on by Mr Tummond as agent for Mr Thomas. I regard that as a fiction created by Mr Tummond and adopted by Mr Thomas when it became apparent that needed to be proved to succeed in the case
- (i) Equally I do not accept that in February/March 2008 either Mr Tummond or Mr Thomas was in occupation of the Property

(k) The documents discovered on 5 May 2015

- 122. On 5 May 2015, just before the start of the trial, Laura Rodier, a trainee solicitor, was called by Mr Matthews to witness the opening of the Box by Mr Matthews in the house of his parents in law. The Original 2006 Lease, The Lease Rider and the Option to Buy Property Agreement were discovered in the course of the opening of a sealed box in the garage. If this was indeed the genuine opening of a box sealed before Mr Matthews went to New Zealand, it went a long way towards proving at least that the 2006 documents were all authentic in the sense that they were all created in 2006.
- 123. For reasons I have already given, I am satisfied that any the Option to Buy Agreement and the Lease Rider were created after February 2010. It follows that the Original 2006 Lease must also (because it refers to them) have been created after 2010.
- 124. I appreciate that this judgment may read as though I reached my conclusions about the Option to Buy Agreement and the Lease Rider being created after 2010 before considering other relevant evidence, such as the 5 May 2015 Box opening. In fact, I have taken that evidence into account in reaching my conclusions and, as I have said above, in fact my conclusions are interrelated.

125. As I have also made clear, I consider that Mr Tummond and Mr Matthews would be willing to do anything, however dishonest, to assist Mr Tummond proving this case, and whilst Ms Rodia's evidence proves that the box was indeed opened on 5 May 2015, in my view that was a stage managed exercise for the purpose of deceiving the court and it does not affect my view that the Option to Buy Agreement and the Lease Rider were created after 2010. Because the Original 2006 Lease refers to the Option to Buy Agreement and the Lease Rider, I find that the Original 2006 Lease, at least in the form in which it appeared in the Box, was created after 2010.

(l) Mr Tummond's evidence

126. I summarise my principal reasons for the view I have taken of Mr Tummond and his evidence:
- (a) The 2010 Lease is accepted (now) to have been created in 2010 and was put forward by Mr Tummond (and Mr Thomas) as created in 2006, the purpose being to commit a fraud on the Bank: see [79]
 - (b) Mr Tummond's evidence that the 2010 Lease was created as a mirror image of the Original 2006 Lease was obviously untrue: see [83]
 - (c) Mr Tummond's evidence as to the reference to Clause 3.1 was obviously untrue: see [85]
 - (d) Mr Tummond made an extremely serious allegation against Mr Robey in his statutory declaration which was obviously untrue (and not pursued. The effect of his evidence about the 2006 Documents being shown to Mr Robey would have involved a dereliction of duty by Mr Robey for no reason: see [103]
 - (e) His evidence about the 2006 Documents was at odds with the documents he signed and Mr Clothier signed prior to execution of the Bank's Charge and his evidence that Mr Clothier was sloppy and he did not read the documents obviously untrue : see [104]-[106]

- (f) His evidence about the occupation of the Property in 2008 and the business then carried on was at odds with the documents he signed and Mr Clothier signed together with the various inspections of the Property: see [104][106], [119]
- (g) His evidence of Mr Matthews witnessing the 2010 Lease was shown to be untrue: see [97]
- (h) All the documents produced were produced at a late stage: see [88]

(m) *The Promissory Notes*

- 127. I do not consider that (either) Promissory Note is itself an option to purchase the Property. It refers to such an option, but it is not itself capable of acceptance and does not in law fulfil the requirements of an option in itself.
- 128. I do not consider that I need to speculate on why there were two promissory notes, one dated 27 February and one dated 1 March.

(n) *Exercise of the Option*

- 129. The Bank say that even if there was a genuine option, it was not validly exercised. That is because, after Mr Tummond had become bankrupt, the appropriate person on whom to effect service of the exercise was the Official Receiver and that was never done.
- 130. It was argued on behalf of the Defendants that the correspondence indicates that the Receivers accepted the notice of exercise the option, that no point was ever taken on this, and that therefore all parties treated the option as having been validly exercised. This point might be regarded as technical, and in the light of my other findings, it does not matter. However, in my judgment the Receivers had no authority to accept notice of exercise of the option, and therefore the purported exercise was invalid.

(o) *Requirements for Overriding Interest*

- 131. My conclusions are as follows:

- (a) I am satisfied that the Option to Buy Property Agreement and the Lease Rider had not been created in 2008
- (b) I find that none of the 2006 Documents (if any of them existed) were shown to Mr Robey prior to the creation of the Bank's charge in 2008
- (c) I find that no business was carried on at the Property in 2008
- (d) Neither Mr Tummond nor Mr Thomas was in occupation of the Property in 2008
- (e) Thus the Bank had no actual or constructive knowledge of any interest in the Property other than that of Mr Tummond in 2008 and no means of knowing (if any such interest existed).
- (f) I find therefore that the Bank did not have notice of any business carried on at the site in 2008 or occupation of the Property
- (g) Even if the Option to Buy Property Agreement was genuine, it was not validly exercised prior to the end of the lease.

(p) *Mr Carter*

132. Mr Carter sat in the back of the court throughout the trial and his Defence adopted Mr Tummond's Defence. He did not give evidence. I am not able to say any more about Mr Carter.

5. Conclusions

133. For the reasons I have given, the Bank are entitled to the declarations sought. No argument was made before me as to the wording of the declarations.
134. As I have made clear in the course of this judgment, I am satisfied that Mr Tummond, Mr Thomas and Mr Matthews have all been parties to what can only be described as a conspiracy to defraud the Bank and to mislead this court. I consider that I have been consistently lied to by Mr Tummond and Mr Matthews, and although Mr Thomas did

not give oral evidence, he was also in my judgment a party to these extraordinary deceptions.