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Case No: HT-12-357

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
London EC4A 1NL

Date: 10th July 2014

Before :

MR. JUSTICE EDWARDS-STUART

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Between :

The Governor and Company of the Bank of Ireland	**Claimant**
- and -	
Faithful & Gould Limited	**Defendant**
- and -	
CBRE Limited	**Third Party/ Part 20 Defendant**

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- -

Sean Brannigan Esq, QC and Mrs. Jennie Gillies
(instructed by **Watson Burton LLP**) for the **Defendant**
Simon King Esq (instructed by **Clyde & Co LLP**) for the **Third Party**

Hearing dates: 1st - 3rd April 2014; 8th and 9th April 2014; and 13th June 2014
Additional written submissions: 16th May 2014; 20th May 2014; 10th June 2014; and 11th June 2014

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Judgment

Mr. Justice Edwards-Stuart:

Introduction

1. In 2008 the Claimant ("the Bank") lost over £8 million when a developer to whom it had lent money to build a tower block in Manchester containing 130 residential apartments went into administration. It sued the Defendant ("F&G"), the project monitor that it had engaged to advise it in relation to the development. F&G joined the Third Party ("CBRE"), whom the Bank had engaged to value the property as security for its loan.

2. In January 2014 F&G paid the Bank £3.35 million plus costs in settlement of its claim. This is F&G's claim for contribution under the Civil Liability (Contribution) Act 1978 ("the Act") against CBRE in respect of its liability to the Bank.

3. F&G is a quantity surveying and project management practice. CBRE is a firm of surveyors who advise on commercial property. Both were engaged by the Bank to give advice or provide services in relation to the financing of the development, which was known as the "Sarah Tower Development". The developer of the Sarah Tower Development was a special purpose vehicle called Issa Developments Ltd ("Issa Ltd" or "the borrower"). Issa Ltd was wholly controlled by Mr. Bashir Issa, who was also undertaking other developments in Manchester at the time.

4. CBRE denied liability on a number of grounds. First, it said that its valuation of the gross development value ("GDV"), although (as it later accepted) not carried out with reasonable care, was within the appropriate bracket for a valuation of this sort. Second, it denied that any damage sustained by the Bank as a result of its advice was the "same damage" within the meaning of the Act as that caused to the Bank by F&G. Third, it denied that the Bank had relied on its valuation of the market value of the site and, so far as its valuation of the GDV was concerned, it contended that the loss sustained by the Bank was not a loss that fell within the scope of CBRE's duty when valuing the GDV (this is what is known as a *SAAMCO* defence[1]).

5. The first defence was abandoned in the course of the trial when CBRE's expert revised his opinion about the correct value of the GDV. The second defence was rejected by me in a ruling that I gave on the third day of the trial following the opening submissions. The second part of the third defence was upheld by me in the same ruling.

6. So as far as primary liability is concerned, therefore, the only live issues addressed in this judgment are those of reliance and causation in relation to CBRE's valuation of the market value of the site. The other issues in this judgment concern questions of contributory negligence by the Bank and apportionment under the Act.

The facts in outline

7. The Bank initially lent Issa Ltd about £4.4 million in June 2005 in order to finance the purchase of the site. Prior to agreeing to make this loan the Bank had been advised by F&G, who had carried out a review of the cost information provided by Mr. Issa, and by Drivers Jonas, who had provided a valuation of the market value of the site with the benefit of planning permission in March 2005. The amount of this valuation was £6.3 million. Initially, in December 2003, Drivers Jonas had valued the site at £6.9 million. They later revised this valuation downwards to £6.3 million and, as a result, the Bank reduced the amount that it was prepared to lend Issa Ltd to enable it to buy the site.

8. Two months later the Bank agreed in principle to lend Issa Ltd a further £8.715 million towards the costs of the development, making £13.115 million in all. This was agreed in the light of advice already given by Drivers Jonas in the March 2005 report that the GDV of the project was £31 million. Of this sum, £28.4 million represented the estimated sales of the apartments; the balance was made up of the value of retail units on the ground floor and car parking spaces in the basement, together with other items such as the value of the ground rents.

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[1] See *South Australian Asset Management Company v York Montague* [1997] AC 191.

9. F&G was formally appointed to carry out a development appraisal and project monitoring services by a letter dated 10 August 2005. However, although F&G produced its report in November 2005, at this stage the loan for the development costs did not go ahead.

10. Work on the development began in about late 2005, although at that stage it was being funded solely by Mr. Issa. Mr. Issa told the Bank that he came from a wealthy family which had steel interests in Abu Dhabi. His ability to start and carry out a substantial amount of the work without a loan must have reinforced this impression.

11. By the end of the year the Bank's solicitors were still chasing documents such as the deeds of appointment of the professional team from Mr. Issa's solicitors. In March 2006 the Bank asked F&G to provide an updated report. By this time F&G was checking invoices but had not started to issue monthly monitoring reports.

12. On 3 October 2006 CBRE was retained as the Bank's appointed valuer in place of Drivers Jonas[1]. It was instructed to produce a report providing, amongst other things, an assessment of the GDV of the project and a valuation of the open market value of the site as at the date of its valuation.

13. The discussions for the development loan were revived in late 2006. It had been a condition of the original offer of the development loan that the Bank's appointed valuer, Drivers Jonas, would confirm its valuation of the GDV and would provide a valuation of the site once the substructure and underground car park was complete. There was also a condition that F&G would carry out a full feasibility report on the site development costs.

14. CBRE prepared a development appraisal and gave the Bank its figures for the valuation of the GDV and the market value of the site on 7 December 2006. For some reason it had not been instructed to carry out a valuation of the site once the substructure and car park was complete. Its assessment of the GDV was about £34 million and their valuation of the site was £8.9 million. Shortly afterwards the Bank received a copy of CBRE's development appraisal, which explained how its valuations had been arrived at.

15. In the light of this the Bank confirmed its earlier decision in principle to advance a further £8.715 million (including rolled up interest), making a total loan of £13.115 million in all, on 18 December 2006. On 21 December 2006 the Bank advanced £891,793 to Issa Ltd by way of a first drawdown on the facility. Many other payments followed.

16. Unfortunately, it all went wrong. Mr. Issa turned out to be a rogue, and Issa Ltd's contractor, BS Construction Ltd ("BSC") went into administration in May 2008. Following a demand for about £14.25 million by the Bank, Issa Ltd went into administration in July 2008. The Bank failed to recover over £8 million of the money that it had advanced to Issa Ltd towards the costs of the development.

17. In its claim against F&G the Bank alleged that F&G had advised it in December 2006 that Issa Ltd had provided materials for the development which were stored off-site within the UK to the value of about £4.5 million when no such materials existed, or at least not to anything like that value.

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[1] The reason for this change of valuer was not disclosed. However, nothing appears to turn on it.

18. As I have already mentioned, in January 2014 F&G agreed to settle the Bank's claim for £3.35 million plus its reasonable costs. This settlement was made without any admission of liability, and at a time when F&G had already made a claim for contribution against CBRE.

19. In the claim against CBRE it was alleged that its valuations of the GDV and of the market value of the site (which was derived from the GDV) were negligent, with the result that the value of the Bank's security was far less than it had been led to believe. Since CBRE also owed a duty to the Bank, F&G submitted that CBRE was liable for the "same damage" within the meaning of section 1(1) of the Act as that for which F&G must be taken to have been liable (there is no dispute that it would have been liable if the facts alleged against it were true).

The procedural course of the hearing

20. It was apparent from the written opening submissions of the parties that CBRE was raising a threshold point that it was not liable for the "same damage" as F&G. If that contention was correct, F&G's claim for contribution under the Act would fail.

21. Early on during the parties' opening submissions it was proposed that I should decide this point following the conclusion of those submissions, since the relevant facts were not in dispute. I agreed to do this, but only on the basis that it could be done without undue disruption to the progress of the hearing should the issue be decided against CBRE.

22. Having heard the parties' submissions during the first two days of the hearing, the first witness of fact was called in the afternoon of the second day and the evidence continued for the whole of the third day. At the conclusion of the evidence of Mr Huggett, at about 12:45 pm on Thursday, 3 April 2014, I gave my ruling on the issue of principle raised by CBRE, together with other issues that had been explored in the opening submissions. This ruling was by way of a series of numbered points giving my conclusions on the issues together with very brief reasons. It was given in this way because the time available did not allow for the preparation of a proper judgment and it was on the basis that the reasons for my ruling would be amplified where necessary in this judgment[1]. The ruling is attached as an appendix to this judgment. I shall return to it in more detail later.

The evidence

23. F&G called the project monitor, Mr. Huggett, and CBRE called the valuer who carried out the actual appraisal, Mrs. Siobhan Fraser. They were the only witnesses called who were not experts.

24. No witnesses were called from the Bank. It appears that the Bank was not prepared to take any part in these proceedings, having settled with F&G, and was not willing to cooperate to the extent of providing witness statements or by providing any other form of assistance. In these circumstances, F&G was compelled to make its case against CBRE on the basis of the documents disclosed by the Bank in the main action.

25. For reasons which will become apparent later in this judgment, neither side's valuation expert was called. In the event, therefore, the court heard only from the two lending experts, Mr. Hamilton and Mr. Hiscock, and the two expert quantity surveyors, Mr. Crossley and Mr. Hill.

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[1] I have corrected an error in the formula at paragraph 9, which was pointed out by counsel for CBRE.

The role of F&G

26. F&G's letter of engagement of 10 August 2005 required them to verify Issa Ltd's drawdown requests "to check that all constituent amounts are justified and have properly been incurred in connection with the development of the property". An important aspect of these requests was the amount that Issa Ltd had expended on construction costs and the amount that it had paid for materials intended for the development which were stored off-site. Although the letter of engagement used the word "verify", I understood it to be common ground that when carrying out their duties under the letter of engagement F&G had to exercise the degree of care and skill of a reasonably competent project monitor.

27. So far as the performance of F&G is concerned, the factual inquiry at the trial concentrated on the period at the end of 2006 leading up to the decision to make the development loan and the first drawdown under it of £891,793 made on 21 December 2006, and the period in early 2007 leading to the decision to increase the amount of the facility to £15 million in February 2007 and the further substantial drawdowns that took place during February and March 2007.

28. The main, but not the only, allegations against F&G in relation to the first drawdown were broadly as follows:

    i) F&G should have advised the Bank that the Issa companies did not have sufficient experience of developments of this size or the necessary resources to do it and that as a result there was a serious risk that the development would not be completed either on time or on budget.

    ii) F&G should have drawn the Bank's attention to the absence of any formal contract between the developer and the contractor and that, in the event of insolvency of the contractor, issues might arise as to the ownership and identity of the materials for the development. Further, it was alleged that F&G should have advised that in reality it was Mr. Issa who was carrying out the development with his own resources. This meant that there was no contractor with whom the development risk would be shared.

    iii) F&G failed competently to quantify the expenditure incurred by Issa Ltd, in that F&G advised the Bank that by the end of December expenditure by way of development costs on the project totalled about £8 million, when in fact materials to the value of about £4.5 million were not in the UK. As a result the requirement for expenditure of at least £6.67 million by Issa Ltd before the drawdown of any money under the facility was not in fact met.

29. The allegations that I have set out above are distilled from those in the Particulars of Claim served by the Bank in July 2012. In that claim the Bank claimed £8.2 million plus interest. These allegations were subsequently amplified and draft Amended Particulars of Claim were served in December 2013. Although both F&G and CBRE agreed to these amendments, the permission of the court to make the amendments was never obtained prior to the settlement between F&G and the Bank.

30. I should say at once that I do not think that there was any merit in the allegation that F&G failed to draw the Bank's attention to the absence of any formal contractual arrangements between the developer and the contractor. It is quite clear that the Bank was well aware of the situation and its implications and appeared to be untroubled by

it. Further, the Bank was being advised by solicitors and does not appear to have received any advice from them that the contractual arrangements were unsatisfactory.

31. In addition, I do not consider that the first allegation, namely that F&G did not advise that the Issa companies did not have sufficient experience of developments of this size, is very much better. Mr. Rainford's Credit Paper Memorandum dated 27 June 2005 considered the borrower and the background of the Issa companies in very great detail. There was a discussion about previous schemes carried out by Mr. Issa, a breakdown of the middle management team in the Manchester office and the fact that previous schemes had been successfully built out on a construct, design and manage basis. Further, the Bank was well aware that Mr. Issa's company, BSC, had not completed a large scale project like the present one. The only item of Further Information given in relation to this allegation was that F&G did not carry out company searches of any of the Issa companies and, if they had done so, they would have found that the companies were not substantial. That does not seem to me to take matters very much further; I did not understand there to be any suggestion that any of the Issa companies had substantial resources. It was the perceived wealth of the Issa family upon which the Bank relied so strongly.

32. CBRE's expert project monitor, Mr. Richard Hill, said in his report that he had looked at three CVs which had been disclosed in the litigation and, although he was unclear if they related to the same individuals that were mentioned in F&G's first report, he noted that two of them appeared to be interior designers and third an accountant. None appear to have any construction experience. But Mr. Hill's own caveat about this leaves its relevance uncertain.

33. Whilst I would not say that this allegation has nothing in it, it does not seem to me to be one of the stronger allegations made by the Bank against F&G. The reality is that this operation was controlled by Mr. Issa and it was his personality and ability that was likely to make it succeed or fail. Mr. Rainford, who must have met Mr. Issa on a number of occasions, had clearly formed his own view about his capabilities and resources.

34. At trial the allegation was not pursued that materials worth £4.5 million that Issa Ltd claimed had been paid for, and were stored on site in the UK, were not in fact in the UK in December 2006. Instead, through the medium of its expert's report, CBRE made, amongst others, the following allegations:

    i) The vesting agreements for off-site materials submitted by Issa Ltd were not in the form that F&G and the Bank's solicitors had advised. The sample vesting agreement provided to Issa Ltd was drafted on the basis that the ultimate supplier was vesting ownership of the materials in the main contractor. In fact, the certificates as presented by Issa Ltd were provided by BSC and were addressed to BSC itself. In addition, the vesting agreement did not provide a description of the materials in terms that were anywhere near precise or detailed enough for them to be identified with any degree of certainty. This was a point that had been raised specifically by F&G in correspondence.

    ii) When carrying out the inspection of the premises at which the off-site materials were stored F&G should either have satisfied itself that the materials seen were set aside and marked for the Sarah Tower project and were the materials described in the vesting agreement or, if not satisfied of this, should have advised the Bank to exclude those materials from the calculation of any drawdown.

iii) F&G did not provide the Bank with any explanation as to why Issa Ltd was procuring materials so far in advance of the need for them to be on site. Such advance procurement should only have included materials with long lead in periods. In fact, by the initial report of November 2005 F&G advised the Bank that Issa Ltd would establish a cost plan for the project and that contracts would be let and materials procured "… against this cost plan at times to suit the overall construction programme".

35. As I have mentioned, Issa Ltd had been told by F&G (on more than one occasion[1]) that applications for drawdown that were based wholly or in part on the value of off-site materials would have to be supported by a detailed list of the materials claimed for and a vesting certificate in the form that had been approved by the Bank's solicitors.

36. The version of the vesting certificate that was subsequently approved by the Bank's solicitors was based on a draft that had been provided by F&G. This draft certificate took the form of a letter from a supplier of materials addressed to the main contractor confirming that title to the goods described in the letter vested in the contractor.

37. It is quite clear from the documents that the first application submitted by Issa Ltd did not comply with these requirements in two significant respects. First, there was no list of the materials in a form that would have enabled anyone to identify them with any precision, save possibly for the steelwork - where the quantity was given in tonnes. Second, as I have already said, the form of vesting certificate submitted by Issa Ltd purported to come, not from the supplier of the materials, but from the main contractor, BSC, and was also addressed to BSC. In effect, therefore, it was a letter from the main contractor to itself. The most that can be said for it was that it might have prevented BSC from asserting subsequently that the materials identified in the certificate (assuming that they were sufficiently identified) belonged to someone else. From the point of view of protecting the Bank's interest as against the supplier of the materials it was almost worthless.

38. However, as I have already said, this was not a point that was ever formally taken against F&G in the pleadings. Mr. Hill, the expert quantity surveyor instructed by CBRE, said in his report that the vesting certificates were not in the form that had been agreed with the Bank's solicitors, and he noted that the letter was "… little more than a letter that placed the title of the materials in BSC and did not provide either Issa Ltd or [the Bank] with any security over the off-site materials". A similar point was raised also by CBRE's lending expert, Mr. Hiscock. Mr. Sean Brannigan QC, who appeared for F&G, said that he did not intend to take any point based on the pleadings provided that F&G was given a proper opportunity to deal with any allegations that had been made subsequently. I consider that F&G did have a sufficient opportunity to deal with this allegation.

39. Mr. Huggett, the quantity surveyor employed by F&G who was the appointed project monitor, was asked about the defects in the vesting certificates during cross-examination and his response, eventually, was that they were in a form approved by the Bank's solicitors. If this had been factually correct, it would have been a good answer. But it was not, not least because amongst other things the certificates as issued came from the wrong party.

40. I consider that a project monitor in F&G's position ought to have satisfied itself that the first vesting certificate provided by Issa Ltd was in the form that had been

[1] For example, by e-mails from Mr. Huggett on 8 October, 20 November and 8 December 2006.

approved by the Bank's solicitors, which should not have been difficult, it being, in effect, F&G's own form. Since on its face the certificate was not in the form that F&G had suggested, I consider that they should have drawn this to the attention of the Bank and advised it to check with its solicitors whether or not the proffered certificate was acceptable (which I find it would not have been). This was not done.

41. However, the defects in the form of the certificate apart, I consider that F&G should have pointed out to Issa Ltd that the specification of the materials in the vesting certificate was not in accordance with the requirements set out in F&G's previous e-mails. For example, the description "M&E Order: at Manchester warehouse and Issa Ltd Quay development - £1,456,000", fell far short of the level of itemisation that Issa Ltd had been asked to provide. Further, if some of the materials were not in boxes that were clearly marked in the manner required, any prospect of subsequently establishing that any particular box of materials had been allocated to the Sarah Tower project would have been greatly reduced.

42. In his witness statement, Mr. Huggett described the inspection of the materials that he carried out on 12 December 2006. The materials were stored in four separate locations, and not in one warehouse as Mr. Huggett might have expected. These were: a rented warehouse at Higher Ardwick ("the Ardwick warehouse"), the basement of the Issa Quay development, a site at Great Ancoats Street, Manchester("Sarah Village"), and a rented yard in Orchard Street, Salford.

43. Mr. Huggett said that the Ardwick warehouse was extremely congested and the materials were stored in a fairly haphazard fashion and were not always set aside in clearly defined areas. The materials at the Ardwick warehouse included windows and glazed panels, which were stored on pallets, some of which were not accessible; mechanical and electrical materials contained in boxes; metal studs; glass wall insulation stacked on pallets, which were not accessible for inspection; scaffold boards and poles; and kitchen equipment which Mr. Huggett assumed had been ordered for another development. In the case of the Ardwick warehouse, Mr. Huggett thought that about 50% of the materials had not been separately set aside and marked as allocated to the Sarah Tower project.

44. The materials at Issa Quay were stored in a basement car park. The materials there included more mechanical and electrical plant and scaffolding materials. According to Mr. Huggett, all these materials were much more accessible and were readily identified. The same was true of the storage at Sarah Village, much of which consisted of partitioning studs and insulation. The materials at Orchard Street were stored in an open yard, where there was steelwork, pre-cast concrete floors and a small amount of scaffolding. Mr. Huggett noted that the quantity of steelwork could not possibly represent the full amount required for the development (approximately 900 tonnes), and he queried this with Mr. Issa at the time who said that he would go back and check his records.

45. In the vesting certificate, which was dated 19 November 2006, the following materials were described:

> "1. External 20 cm thick brickwork; in transit from Beijing; £792,234.00
>
> 2. M&E order; at Manchester Warehouse & Issa Ltd Quay development; £1,456,000.00

3. All scaffolding; at Manchester Warehouse & Issa Ltd Quay development; £280,436.00

4. Windows Package; at Manchester Warehouse; £1,090,150.00

5. Glass Wall and all metal studs; at Manchester Warehouse; £434,980.00

6. Concrete floor slabs; at Salford Land; £619,470.00

7. Steel; 50% at site/Salford Land, rest is in transport; £1,200,000.00"

The reference to "Salford Land" appears to have been a reference to the site at Orchard St.

46. In its letter to the Bank dated 19 December 2006 F&G wrote:

> "The Borrower has provided us with a Vesting Certificate for the materials purchased from overseas and currently stored off-site. This has been based on a draft certificate provided to the Borrower following discussions between the Bank's solicitors and ourselves. A copy of the certificate is appended to this letter. We have the following comments on the certificate
>
> a) The certificate identifies that some of the overseas materials are still in transit to the UK, namely the brickwork for the external walls and 50% of the steelwork. Given that the bank has requested that only landed materials are included in the assessment of costs incurred to date we have excluded these items from our assessment figure in 1 above.
>
> b) We visited the sites at Great Ancoats Street and Issa Ltd Quay, the Borrower's warehouse at Unit 1, Thames Industrial Estate, Ardwick and the land at Orchard Industrial Estate, Salford with the Borrower to see the stored materials on 12 December 2006 and confirm that the claimed materials were stored in the stated locations. Notwithstanding these statements in the vesting certificate we would advise that in our view the materials were not in all cases separately set aside and identified with 'Property of BSC for Sarah Tower'. This is particularly the case for the materials stored in the warehouse at Ardwick, where access to the building is restricted by the amount of materials stored there and there does not appear to be an ordered distribution of the materials within the warehouse. The Borrower has confirmed that he has recently employed a storeman who will be tasked with keeping an up to date inventory of all materials at each location and with arranging the materials within the stores to suit their planned use on site. Although we are concerned that the materials are not always clearly identified we would confirm that this is not quite so important as would be the case if the materials were stored on property not belonging to the Borrower (i.e. at other supplier's warehouses or stores). We would suggest that the Bank take a commercial view on the vesting certificate and the inclusion of these materials in the total expenditure to date."

(My emphasis)

47. Mr. Huggett was cross-examined at some length about these paragraphs. Whilst acknowledging that F&G was, on the face of the letter, confirming that the materials were in storage as Issa Ltd contended, he thought that this confirmation was qualified by the text that followed it. Mr. Huggett said, at Day 3/23:

> "Q. The warehouse was extremely congested, wasn't it?
>
> **A. Yes, that's right, yes.**
>
> Q. It was not easy to find a way through so you could look at everything, was it?
>
> **A. That's right, yes.**
>
> Q. Not everything was boxed or packaged with labelling to indicate what it was or what it was for?
>
> **A. Right, yes I would agree with that, yes.**
>
> Q. And, as you put it in your witness statement, there did not appear to be an ordered distribution of materials within the warehouse?
>
> **A. Right.**"

A little later he said this, at pages 31-32:

> "MR. JUSTICE EDWARDS-STUART. But you are saying here, as has just been pointed out, that you are confirming that the claimed materials were there in effect.
>
> **A. Yes, I suppose that is true, yes, sir.**
>
> MR. JUSTICE EDWARDS-STUART. Your confirmation seems to be going wider -
>
> **A. Than what I actually saw.**
>
> MR. JUSTICE EDWARDS-STUART. - than what you could actually verify.
>
> **A. As I said, I think it needed to be read in conjunction with what I said afterwards.**
>
> MR. JUSTICE EDWARDS-STUART. Nevertheless it could be read by the bank as saying it is in a bit of a muddle but we can confirm it is all there, rather than saying it is in such a muddle it may be there but we cannot be sure.
>
> **A. Yes.**
>
> MR. JUSTICE EDWARDS-STUART. You see the difference?
>
> **A. Yes, I do.**"

48. The expert project monitor instructed by F&G, Mr. Garry Crossley, dealt with this very briefly in his report. After referring to F&G's letter of 19 December 2006 and the relevant paragraph in the witness statement of Mr. Huggett describing his inspection of the materials on 12 December 2006, Mr. Crossley expressed his conclusions in these terms:

> "13.3.1 I consider that advice on the expenditure incurred in relation to materials purchased, including cautionary notes, was given to [the Bank] by F+G which was based on the information which had been provided and the inspections/verifications carried out.
>
> 13.3.2 I therefore consider that the advice given by F+G complied with the requirements of [the Bank's] Letter of Instruction and was advice that a reasonably competent monitoring surveyor, asked to undertake the tasks set out in [the Bank's] Letter of Instruction, would have given if acting with the requisite amount of skill and care."

49. This conclusion seems to me to be devoid of any reasoning whatever. Mr. Crossley has simply summarised what F&G did and then concluded that it complied with what a competent project monitor would have done. Further, this is not confined simply to the letter of 19 December 2006 but to the advice given in respect of all the drawdowns.

50. In the light of the evidence of Mr. Huggett and the complete lack of any itemisation of the materials in the vesting certificate it seems to me that F&G's advice in its letter of 19 December 2006 fell below the standard that could reasonably be expected from a competent project monitor in F&G's position. For a start, it is not clear whether the Bank was being invited to take "a commercial view" as to whether materials to the value confirmed were present, or whether this related only to the fact that some of the materials were not properly marked as destined for the Sarah Tower project.

51. I have to say that on my first reading of the letter I thought that it was the latter, but I accept that the former is an available meaning of the relevant paragraphs. But even if the Bank could be expected to read the letter as suggesting that it should take "a commercial view" about the likely true value of the off-site materials, it is hard to see how it was really in any position to take such a view without a more constructive steer from F&G - no one from the Bank was present at the inspection. Since the Bank in effect accepted the claim for the off-site materials in full (less the sums in respect of the brickwork for the external walls and 50% of the steelwork, which F&G had omitted from their valuation), it seems that it must have understood F&G's letter as providing sufficient comfort that the materials were present as claimed and that the arrangements for their storage were acceptable.

52. A further matter that was not touched on by F&G in their letter of 19 December 2006 was why such a large quantity of M&E equipment, windows and glazing materials had already been delivered and paid for when the development had not even reached the stage of completion of the substructure. Much of these materials cannot have been required for many months. This did not accord with the advice that F&G had given in its initial report in November 2005 that procurement of materials would be at times to suit the overall construction programme.

53. Mr. Crossley said in evidence that he thought that F&G had provided an explanation for this, but he was unable to remember when this was. Accordingly, I asked him to

look for the relevant document after he had completed his evidence and then arrange for my attention to be drawn to it through counsel. In spite of a reminder, I have not been provided with any reference in response to this request.

54. I have to confess that I find it surprising that a project monitor in F&G's position should have recommended - for that is what I find they did - their client to advance such a large sum of money against such unsatisfactory verification and without offering any explanation as to why Issa Ltd had chosen to tie up such a large amount of much needed cash in the advance purchase of materials. If there was a good reason for this, it seems that it was not given to the Bank.

55. I readily accept that the Bank must share a substantial part of the responsibility for accepting advice that was on its face unsatisfactory. But that does not absolve F&G for their failure to discharge their duty to the Bank.

56. If F&G had given proper advice to the Bank in December 2006, they would in my judgment have advised the Bank to allow no more than 50% of the claimed cost of the off-site materials at that stage. This assumes, in favour of F&G, that Issa Ltd, if pressed, would have been able to provide a vesting certificate in a satisfactory form and, in particular, one that gave sufficient details of the materials that were the subject of the certificate. In addition, Issa Ltd would have had to demonstrate that the materials were all properly marked as allocated to the Sarah Tower project.

57. As Mr. Huggett said in evidence, a proper check of the materials would have taken at least a week, but it was not suggested that F&G were under any obligation to do that. However, it shows that a check that lasted only a day could not have been sufficient to provide a reliable estimate of the value of the materials in storage. It was suggested also, with some force in my view, that F&G should have advised the Bank that it would be worth carrying out a further check of all these materials once the storeman that Issa Ltd had recently employed had had an opportunity to make a proper inventory of them. But what the outcome of any such inspection might have been is of course a matter of speculation.

58. On 9 January 2007 Issa Ltd made a request for a further drawdown. This was supported by an invoice dated 4 January 2007 stating that the goods listed had been shipped from China to Manchester. The goods included "doors and skirtings", to a claimed value of about £340,000, and "final door touches, door frames, locks", to a claimed value of £145,000. No vesting certificate was provided for any of these materials.

59. In response to this further request F&G wrote to the Bank on 17 January 2007 in the following terms:

> "It should be noted that the above sum includes £493,234 for the purchase of doors, door frames, ironmongery and skirtings from China. The doors and frames are now in storage in the UK. The Borrower has confirmed that the skirtings are still in transit from the supplier to the UK. We have not received a vesting certificate for the materials. Given the above we would recommend that the Bank review whether or not they wish to include the value of these materials in the current drawdown."

Whilst this recommendation was somewhat cryptic, I do not consider that it was one that a reasonable project monitor in F&G's position should not have made in the circumstances. In any event, the Bank seems to have taken it as advice to exclude the

sum identified from its calculation of the amount that it was prepared to let Issa Ltd drawdown.

60. On 8 February 2007 Issa Ltd made a request for a further drawdown, supported by a vesting certificate (in the same form as the first one), claiming that "kitchens" to the value of almost £400,000 were in storage at the Ardwick warehouse and claiming £484,000 in respect of "doors & skirtings".

61. In F&G's letter of recommendation for Drawdown No 3 dated 15 February 2007 they allowed a sum of £418,000 for the kitchens (which included shipping costs of about £18,000). Whilst F&G made it clear that they had not inspected the kitchen units, they made no observation about the fact that such a significant quantity of kitchen units had been ordered and paid for so far in advance of the time when they would be needed on site. I consider that they should have done because there was no obvious reason why these items, which are often prone to damage in storage (for example, by careless handling or damp), had been ordered so far in advance. Kitchen units would be amongst the last items to be installed in a development such as this.

62. In the meantime, the Bank agreed to increase the amount of the development loan to £15 million, an increase of £1,885,000. This was confirmed in the Bank's facility letter to Issa Ltd dated 5 March 2007. For no obvious reason, Mr. Rainford of the Bank agreed to advance this additional amount in full to Issa Ltd on 12 March 2007.

The appointment of CBRE

63. In its Facility Letter dated 10 August 2005 the first two conditions precedent imposed by the Bank were as follows[1]:

> "1. Bank Appointed Valuer (Drivers Jonas) to confirm Gross Development Value on line with the Appraisal contained in their previous valuation report for Bank of Ireland dated March 2005 and likely uplift in site value once sub-structure/underground car park is complete.
>
> 2. A full feasibility report on the site/development costs from the Bank's nominated Quantity Surveyor must confirm adequacy of detailed costings, acceptable provision for contingencies, plans in line with planning/building regulations, PI cover and appropriateness of collateral warranties and comment on construction timetable/ robustness of detailed development cashflow (to be provided by the Borrower) with regard to the build programme/peak debt requirement."

64. It was the first of these conditions that led to the engagement of CBRE in October 2006 (it is not clear why CBRE was instructed in place of Drivers Jonas, but nothing turns on it). However, and somewhat curiously, CBRE was never asked to carry out the second valuation. Instead, by its letter dated 3 October 2006 the Bank requested CBRE to value the "Property/Site" on the following bases (as defined by the RICS): first, Market Value of the site with the benefit of detailed planning consent for the proposed scheme and, second, Gross Development Value for the proposed scheme. These valuations were to be prepared as at the date of the report, that is to say well after construction works had started on site.

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[1] This facility letter was subsequently replaced by a fourth facility letter dated 13 September 2005, which made a slight reduction to the interest rate. Otherwise, nothing turns on the differences between the two letters. For convenience, I will refer to the August 2005 letter.

65. The Bank's letter of 3 October 2006 said also that CBRE's report was to include the following:

> "5. Advice on any other factors that you consider are likely materially to affect the status of the site as security, e.g. rights of way, or, rights of light.
>
> 6. Confirmation that the site has separate road access and could be sold as a stand-alone development site.
>
> ...
>
> 9. An opinion on current developer demand for the property.
>
> ...
>
> 11. A statement as to the valuation method you adopt and an indication as to the extent to which you have been able to have regard to comparable market transactions, and in the case of property valued on a residual basis, the significant material figures and assumptions made as to construction cost, fees, financing costs, contingencies, and rents/sales on completion, the programme for the project, and an indication of the consequences of material changes thereto.
>
> ...
>
> 14. Any other aspects, other than the usual legal investigations, which you consider require further consideration or investigations by or on our behalf.
>
> You may rely upon any information provided by the Bank and/or the customer relating to tenure, leases and all other relevant matters. However, please advise in you (sic) Report if you become aware of information which appears to be at variance with that provided."

(My emphasis)

66. The person handling the account at CBRE was a Mr. Gareth Rees, who was then a director in CBRE's Manchester office with responsibility for the North West Valuation Team. In fact, although his witness statement had been served, he was not in the event called as a witness. The only witness called on behalf of CBRE was Mrs. Siobhan Fraser, who had joined CBRE's Glasgow office in 1999. She was moved to Manchester at the beginning of November 2006 and went straight into this project. She had no previous experience of the property market in Manchester, although she had carried out development appraisals of this type elsewhere.

67. Her recollection of her first involvement with this project was being required to attend a meeting with Mr. Issa on 7 November 2006. On the day before the meeting she was sent some floor plans for the various apartments by Mark Newman, a colleague at the Manchester office to whom they had previously been sent by Mr. Issa. However, these were for a different scheme on the site involving 156 apartments.

68. Very shortly before the meeting Mrs. Fraser was sent further floor plans, this time of the ground floor and the two basement levels. The ground floor plan showed two retail units, one very much larger than the other. The rest of the space on the ground floor was shown as being used for other purposes: for example, a courtyard garden

for the residents, a lobby area, two car lifts, internal lifts and staircases, and so on. The two basement level plans showed 33 numbered parking spaces.

69. At about the same time Mrs. Fraser was sent an Area Schedule. This showed a breakdown of the proposed development and the floor areas for each unit. In addition, it stated that there were parking spaces for 47 cars: 32 on Basement Level 1 and 15 on Basement Level 2. The two retail units on the ground floor were shown as having areas of 695 ft² and 2,524 ft², respectively. It seems that this Area Schedule had been first sent to someone else in CBRE on 14 September 2006 by DS One Architects, who were acting for Mr. Issa. Either at or shortly before the meeting on 7 November 2006 Mrs. Fraser was told that the scheme had been changed from the one involving 156 apartments to a scheme involving 130 apartments.

70. Although Mrs. Fraser said in her witness statement that she had been told initially that there was to be parking on two basement levels, with 33 parking spaces on each level, her note of the meeting of 7 November 2006 records that Mr. Issa mentioned a figure of 49 spaces: he told her that there were to be 16 on basement Level 1 and 33 on basement Level 2. This corresponded, although not exactly, with the figures on the area schedule that Mrs. Fraser had been sent earlier that afternoon. With the benefit of hindsight it seems that what Mr. Issa may have done was to look at the highest parking space number on each level, having overlooked the fact that on Level 2 the numbering started at 17. What the plans showed was that there were only 33 parking spaces in all (16 + 17). Following that meeting Mr. Issa sent CBRE an earlier Drivers Jonas report dated December 2003. This referred to there being parking spaces for "approximately 60 vehicles".[1] That report assessed the GDV as being in excess of £29.5 million and the current market value of the site as £6.95 million (at that stage the site was being used as a car park). The proposed development considered in that report also involved 130 apartments.

71. The documents provide no explanation as to why Mr. Issa chose to send this report, and not the later report that was prepared in March 2005 (save possibly for the fact that in the later report the site value was reduced to £6.3 million). Mrs. Fraser said that she did not ask for it because they would not be concerned with the advice given by another valuer. Mrs. Fraser prepared a letter to the Bank dated 7 November 2006 acknowledging the instructions but, on the instructions of Mr. Rees, this letter was never sent. It stated that CBRE confirmed that it had the appropriate skills and experience necessary to carry out the instructions and that it met the requirements of an Independent Valuer. It is not clear why Mr. Rees instructed Mrs. Fraser not to send the letter. However, F&G invites the court to infer that it was because CBRE did not meet the requirements of an Independent Valuer because not long beforehand it had formed a joint venture with Hamptons, who were the agents who had been instructed by Issa Ltd in connection with the sale of the apartments.

72. Whilst, strictly speaking, this point may be correct, there is no evidence that the Bank was not aware of the position when it instructed CBRE. One would have thought that the association between CBRE and Hamptons must have been well known in the property market. But irrespective of this, Part IV of CBRE's valuation report was a market overview by "CB Richard Ellis Hamptons International" which came on paper bearing a joint logo of CBRE and Hamptons. If the Bank was not aware of this association when it instructed CBRE, it could not have failed to become aware of it when it read CBRE's report. If this came as a surprise to the Bank, there is no

[1] This was consistent with, and may have been derived from, the outline planning permission, which allowed for 60 parking spaces.

mention of it in the documents. I therefore consider that there is nothing in this point (which, in any event, was not pleaded).

73. On the following day, 8 November 2006, Mrs. Fraser made contact with Claire Ralston of Hamptons. By an e-mail sent on the same day Ms. Ralston sent Mrs. Fraser a schedule setting out Hamptons' estimated selling prices for the various apartments. This e-mail concluded by saying:

> "Double check any area schedules you have as they are constantly changing."

74. On Sunday, 26 November 2006, Mr. Issa sent CBRE a further Area Schedule. This showed parking for 34 cars on Level 2 and for 32 cars on Level 1, making 66 parking spaces in all. This area schedule also showed three retail units on the ground floor. The first two units had the same areas as before, but there was now a third unit with a floor area of 2,713 ft² - which was the largest of the three. This produced a total floor area for the retail units of 5,932 ft². Like the previous area schedule, this said "Measurements based on drawings 098/01/00-09". Since there was no reference to the revision number of these drawings, this statement was rather unhelpful. How this area schedule came to state that there were 66 parking spaces and a floor area for the retail units of 5,932 ft² is a complete mystery.

75. By this stage Mr. Issa was starting to chase CBRE for its report. On 6 December 2006 Mrs. Fraser was chased by Mr. Issa for her figures; he confirmed in his e-mail that the development was for 130 units (and not 156 units, which was the version of the scheme to which he said that Hamptons were still working). Mrs. Fraser sent an e-mail to Mr. Issa shortly afterwards saying that she had "run initial figures" based on 130 apartments, but that she would like Ms. Ralston to have a look over her figures "to ensure consistency". In fact, she had sent her draft revised pricing schedule for the apartments to Ms. Ralston earlier that day, commenting that she thought it reflected a more realistic level of pricing. Ms. Ralston replied about an hour after Mrs. Fraser's e-mail to Mr. Issa expressing concern at the pricing of the three bedroom units. She referred to a development on the other side of the Piccadilly basin in Manchester where three bedroom units were being sold for significantly less. Mrs. Fraser then reduced the prices for the three bedroom apartments in the light of Ms. Ralston's comments.

76. Pausing there, I should observe that in my view this shows that Mrs. Fraser and Ms. Ralston had up to then behaved with complete propriety. At one point F&G appeared to be suggesting that Hamptons might have been inclined to inflate the rental income: any such suggestion is contradicted by these events.

77. In the meantime, Mr. Issa had asked Mrs. Fraser to send him a draft of her figures before sending anything to the Bank. By an e-mail timed at 16:20 on 6 December 2006 Mrs. Fraser sent her draft evaluation appraisal to Mr. Issa, telling him that the site value was £8 million. Mr. Issa replied at 19:25 that evening saying that everything was fine, except that one large item had not been accounted for. That was the ground rent for the apartments, which Mr. Issa estimated at £350 per unit which, for 130 units, amounted to an annual revenue of £45,500. Mr. Issa asserted that this would have a capital value of £600,000-700,000. He asked Mrs. Fraser to include that in her appraisal before sending it to the Bank.

78. The following morning Mrs. Fraser prepared a revised appraisal which she sent to Mr. Issa. This included Mr. Issa's suggested value of the ground rents. Mrs. Fraser can perhaps be criticised for taking Mr. Issa's valuation of these at face value without

any critical appraisal, but in fairness to her she was then under considerable pressure to release her figures.

79. Mr. Issa then sent an e-mail to Mr. Rainford and to Mr. Huggett of F&G (timed at 10:06) in which he referred to CBRE's figures in the development appraisal, although the hard copy of the e-mail in the trial bundle does not show that the appraisal itself was attached to the e-mail. Mr. Issa said that the appraisal highlighted, amongst other things, the following:

> "3. They have concluded a land value of 8.9 m which leaves the development really under geared & allow for a [sic] opportunity to explorer [sic] LTC farther
>
> 4. The GDV amount has increased to the right market level which would accommodate all the above. Bear in mind that £390 a feet [sic] seems high however 80% of the development capital values are between 130k-190k which is very affordable levels & achievable. That was driven by a developer designing the scheme efficiently."

LTC stands for "loan to cost". The other abbreviations that appear frequently in the documents are LTeV, which stands for "loan to end value", and LTV ("loan to value"). The latter is sometimes also in place of the former.

80. Later the same day, 7 December 2006, Mrs. Fraser notified the Bank by e-mail of her figures for the two valuations, which were £8.9 million for the site valuation and £34,380,085 for the GDV. She did not attach a copy of her appraisal.

81. On the following day, a Friday, Mr. Rainford asked if she had a breakdown of the GDV and a copy of her appraisal. Mrs. Fraser sent it to him the following Tuesday, 12 December 2006, together with a schedule showing the floor area and price for each apartment.[1] This was the schedule (or a forerunner of it) that contained the very significant unexplained arithmetical errors to which I refer later in this judgment. The appraisal was a three page document, effectively a spreadsheet, which contained the breakdown of the figures making up the GDV and leading to the residual market value of the site. The first page consisted of a set of parameters, such as the construction start and finish dates, the rate of interest and the profit on cost: 15%. Apart from the stated parameters and those figures calculated by the spreadsheet itself, I understood that all the variables in the appraisal were based on valuations or assumptions made by CBRE, apart from the value of the ground rents: that was taken as £350 per apartment as advised by Mr. Issa. The construction costs were estimated by reference to standard rates per square foot, and not on the figures that were currently being used by F&G.

82. I shall have to discuss these e-mails more fully later in this judgment. However, at this point, it is convenient to look at Mrs. Fraser's appraisal and the methodology behind it in rather more detail.

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[1] Some of the figures in this appraisal were very slightly different from those in the appraisal attached to the subsequent report dated 20 December 2006, but the differences are small and nothing appears to turn on them.

CBRE's appraisal and its methodology

83. The GDV is the aggregate of the selling prices or market values of the various components of the development on completion. CBRE's valuation of it was as follows:

Sale of apartments (130)	£31,397,799
Sale of parking spaces (66)	£990,000
Value of retail units (5,932 ft²)	£1,318,222
Value of ground rents	£674,074
GDV (before deduction of purchaser's costs of £114,806)	£34,380,085

84. This estimate was, as I will explain, a serious over estimate. It was more than 20% over what I have found to be the correct value for the GDV (£28,180,000 - see paragraph 113 below). This was caused mainly by a combination of over estimating the prices that the apartments would fetch, taking the wrong number of car parking spaces, adopting too large an area for the retail units and the very substantial and unexplained arithmetical errors in CBRE's schedule of rents for the apartments that I have already mentioned.

85. In the appraisal summary CBRE derived a site "Acquisition Price" of £8,897,303, subsequently rounded up to £8.9 million. This, I was told, was a figure calculated by the appraisal software on the basis that the developer's profit was to be 15%. I have already mentioned that almost all the other variables in the appraisal were either the product of CBRE's valuations (together with their estimate of the construction costs) or the adoption of conventional lump sums or percentages for ancillary expenses such as marketing, agents' fees and so on. As I understood the position, the residual site value or acquisition price was one generated by the spreadsheet after the values for all of the other variables had been put in by CBRE (usually either as a rate or as a percentage).

86. Thus, on the assumption that CBRE's property valuations and assessment of development costs were correct (as well as the various percentages or allowances for the ancillary expenses), and on the basis of a 15% allowance for the developer's profit, the acquisition price or residual market value would be the figure that a hypothetical developer in the open market would pay for the site in order to achieve a profit on the development of 15%. Arithmetically, as the experts were agreed, the site value is derived as follows:

GDV - (construction costs + professional fees + developer's profit)

In other words, it represents the proceeds of the development when completed less the costs of achieving it (excluding the cost actually paid for the site).

87. It is common ground that this market value of the site was very sensitive to the assessment of the selling prices of the completed apartments. It was also sensitive to any changes in the construction costs; albeit, on a percentage basis, rather less so. If the figure for the proceeds of the sale of the apartments was reduced by, say, £3

million, the acquisition price of the site would go down by a similar amount (but, owing to the way in which the arithmetic worked in the spreadsheet, not quite pound for pound). I take it that this is why the acquisition price or site market value derived in this way is often described as having been made on a residual basis (eg. as in paragraph 11 of the letter of instruction to CBRE of 3 October 2006). Mr. Thomas O'Neill, F&G's valuation expert, said in his report that altering the GDV by 10% in either direction would produce a corresponding change in the market value of the site of 51% in either direction. I would add that altering the construction costs (and hence professional fees also) by 10% in either direction would produce a corresponding change in the market value of the site of the order of 20% in either direction.

88. It is for this reason that Mr. O'Neill said that a valuer should carry out a "sense check" of the residual market value of the site by reference to the price paid for comparable development sites in the area.

89. I consider that the sensitivity of a residual market value to the assessment of the GDV is a matter of which any competent lender would be well aware. But even if this were not the case, CBRE gave the following warning in its report dated 20 December 2006 (immediately after giving their figure for the site value):

> "Residual site valuations can be extremely sensitive to changes in the key assumptions and variables such as floor areas developable, sale prices, construction costs, timing, developer's profit etc. The Bank will no doubt take account of this in its lending policy."

90. However, in this case it is clear that Mr. Rainford, the Bank's Relationship Manager, was aware of this before he received CBRE's report because in his Credit Paper Memorandum dated 8 December 2006 he noted that the increased GDV "… drives a higher site value of £8,900k". Since he understood this, he must have understood also that under-estimated construction costs could also "drive" a higher site value.

The valuation evidence and the performance of CBRE

91. The initial position of the two experts, Mr. Thomas O'Neill, instructed on behalf of F&G, and Mr. Derek Nesbitt, instructed on behalf of CBRE, was as follows:

Valuation	O'Neill	Nesbitt
GDV	£28,420,500	£30,725,263
Market Value	£3,875,811	£5,014,615

92. These valuations are to be compared with CBRE's valuation of £34,380,085 (before purchaser's costs) for GDV and £8,890,426 for market value. On Mr. Nesbitt's initial figures, the GDV was overvalued by CBRE by 13.7%. On Mr. O'Neill's figures, the overvaluation was by 22.9%. The market value of the site was overvalued by 60% and 129%, respectively.

93. It was Mr. Nesbitt's position that the permissible "non-negligent" bracket for the valuation of GDV for a project such as this was +/- 15%. Mr. O'Neill's view was that the permissible bracket was no more than +/- 10%. Thus, so far as GDV was concerned, CBRE's case depended on Mr. Nesbitt's view of both the valuation and the bracket being accepted.

94. However, as things turned out this became irrelevant because during the course of the trial Mr. Nesbitt revised his opinion and concluded that the GDV should be £29,544,895 - about £1.2 million lower than his original figure. On this basis CBRE overvalued GDV by 18.3%. Accordingly, it had to concede that it could no longer contend that its valuation fell within the non-negligent bracket or that its valuation was carried out with reasonable care and skill.

95. CBRE was forced to make this concession not only because of the extent of the overvaluation but also because it could not maintain the alternative case that, even if its valuation was outside the permissible bracket, it was nevertheless reasonably arrived at. This was because its figures contained the significant and unexplained errors in the schedule of estimated rents to which I have already referred and which alone resulted in an overestimate of the residential GDV by more than £2.5 million. Mrs. Fraser was wholly unable to explain how this error in the rental values came about and no amount of subsequent forensic analysis has provided an explanation.

96. Thus, by the conclusion of the trial, CBRE's only available defences were of reliance/causation - in relation to market value - and that the loss claimed fell outside the scope of any duty owed - in relation to GDV. Unfortunate though Mr. Nesbitt's change of view may have been for CBRE, he is to be commended for his integrity in revising his opinion as he did.

97. But the valuation story does not end there. During the careful and penetrating cross examination of Mrs. Fraser by Mrs. Gillies, two further errors were exposed. First, CBRE had based its valuation of the retail area on the basis of the revised Area Schedule, apparently produced by Issa Ltd's architects and provided to Mrs. Fraser on 26/27 November 2006, which showed three retail units on the ground floor with a total area of 5,932 ft², in place of the two retail units that had been shown on earlier schedules.

98. When Mrs. Fraser was taken to the relevant floor plans, it became clear that it was probably impossible to include a third retail unit of the size indicated on the area schedule (2,713 ft²) without losing areas such as those designated for the lobby and the concierge. Faced with this Mrs. Fraser accepted that her reliance on the revised area schedule meant that she had included 2,713 ft² of retail space that should not have formed part of her appraisal. She said, candidly, that with hindsight she should have checked the plans more carefully (Day 3/130).

99. The effect of this error was that GDV was overestimated by a further £466,500.

100. In addition to this, Mrs. Fraser also conceded that her appraisal should have allowed for only 33 car parking spaces, and not 66 spaces as shown on the later Area Schedule provided by Mr. Issa[1]. This was because the relevant floor plans for the basement showed 16 spaces on Level 1 and 17 spaces on Level 2.

101. The effect of this was that an additional 33 car parking spaces were included on CBRE's appraisal for which there was not sufficient space on the drawn floor plans.[1] This error increased CBRE's assessment of the GDV by £577,500.

102. Accordingly, the effect of these two errors was that CBRE's proposal was a further £1,044,000 too high. I have some sympathy for Mrs. Fraser, whom I found to be a

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[1] Mrs. Fraser may have been further confused by the fact that the original outline planning permission allowed for 60 car parking spaces.

[1] See paragraph 104 below.

candid and completely honest witness, because she was clearly being fed inaccurate information at a time when she was under great pressure to complete her appraisal. Whether or not she was deliberately misled, I cannot say, but her mistakes were certainly understandable.

103. Further, as Mrs. Gillies pointed out in cross examination, the reason why the number of apartments in the development had at some point been reduced from 156 to 130 was because some of the studio and two bedroom apartments had been combined to form three bedroom apartments. Mrs. Fraser said that the latter were probably aimed at young professionals with a young family. She agreed that they would be potential purchasers who could be expected to require a parking space, so that it would be important to have an adequate number of parking spaces in the development (Day 3/117).

104. Although neither of the valuation experts was called to give evidence, each of them dealt with the question of the number of car parking spaces in his report. Mr. O'Neill noted that CBRE had been provided with floor plans of the two basement levels and the ground floor and that these clearly showed only 33 parking spaces. He said that it was not clear whether these plans, which were provided to Mrs. Fraser on 7 November 2006, related to the 156 apartment scheme or to the 130 apartment scheme. However, he said in his report that whichever scheme was adopted would probably not have made much difference to the accommodation available on the ground and two basement floors. This seems to me to be likely. In the light of the conflicting figures that had been provided to Mrs. Fraser and, in addition, of the fact that the outline planning permission was for 60 spaces, Mr. O'Neill was critical of CBRE for adopting a figure of 66 spaces. He also pointed out that if it was considered appropriate to rely on the Area Schedule which showed 66 parking spaces, it would have been equally appropriate to advise the Bank that this was more than the number of spaces for which planning permission had been given.

105. Whilst Mr. Nesbitt adopted a figure of 66 spaces for his own valuation, he did say that CBRE should have commented in their valuation on the varying information that had been provided regarding the number of parking spaces. In their joint statement the two experts agreed that CBRE should have sought clarification of the position in relation to the car parking spaces.

106. Even without these views of the experts, I would have concluded that CBRE ought to have queried the change in respect of the number of car parking spaces because this conflicted directly with what Mrs. Fraser had been told by Mr. Issa at the meeting on 7 November 2006. Further, she had been provided with no explanation of the significant increase in the number of car parking spaces (as between the first and the most recent area schedule). Had she raised a query about the correct number of parking spaces, it would have become apparent that the basement plans showed 33 car parking spaces only and that this was the number that should have been used in her appraisal.

107. In addition, I agree with the point made in cross examination (and which had also been made by Mr. O'Neill in his initial report) that, from a valuation point of view, CBRE should have paid particular attention to the number of car parking spaces having regard to the change in the configuration of the apartments. The 130 apartment scheme included 46 three bedroom apartments so, if each owner of a three bedroom apartment required a car parking space, with only 33 car parking spaces there would not have been enough parking for the occupiers of those apartments, let alone for the occupiers in the remainder of the development. This is a further reason

why I consider that Mrs. Fraser should have investigated the position about the car parking spaces. In addition, it will be recalled that Ms. Ralston had warned Mrs. Fraser to check the area schedules since they were constantly changing.

108. In these circumstances, I consider that it was negligent of CBRE to include 66 parking spaces in the appraisal. Had it raised the point with Mr. Issa and the Bank, I consider that it would have emerged that there was only room for 33 car parking spaces.

109. In relation to the area of the retail units, I consider that the position is less clear. For a start, neither of the valuation experts picked up this point in their initial reports. As far as I can tell, it was first picked up by Mr. O'Neill in his Supplemental Report dated 20 March 2014 - ten days before the start of the trial. This is not a promising start for an allegation of professional negligence.

110. Unlike the position with the car parking spaces, Mrs. Fraser had no information about the retail units from any source other than the area schedules and the floor plans that had been sent to her on 7 November 2006. Whilst under the microscope of cross examination it appeared clear that those floor plans could not accommodate a third retail unit of the size proposed, I do not consider that Mrs. Fraser was negligent in failing to attempt a reconciliation between the floor plans which had been provided earlier and the later Area Schedule. If she had thought about it, I consider that it would have been reasonable for her to assume that the architects who had prepared the area schedule had produced revised floor plans to reflect the new areas of the retail units set out in the last Area Schedule. When she made her candid concession during cross-examination (that with hindsight she should have looked at the floor plans more carefully), I think that she was being too hard on herself. I would be slow to conclude that it was the duty of a valuer in Mrs. Fraser's position to go through historic plans with a toothcomb in order to see whether or not a proposed change put forward by the borrower's architect appeared to be feasible. In the absence of expert evidence tested by cross examination, I am certainly not prepared to do so.

111. In these circumstances, I consider that the error - which I find it to be - in relation to the area of the retail units is not one that can be categorised as a negligent error. However, in terms of the outcome of this case I doubt whether anything turns on this finding because when assessing the shortfall in the amount of the available security, the court is concerned with the true value of the property at the time of the valuation, not with the highest non-negligent valuation: see *SAAMCO*, per Lord Hoffmann at 221 G-H. What I understood to be a submission to the contrary by Mr. Simon King, who appeared for CBRE, must therefore be rejected.

112. The revised assessments of GDV (before purchaser's costs) put forward by each of the experts were as follows:

Valuation	O'Neill	Nesbitt
GDV	£27,954,000	£29,544,895
GDV - adjusted for correct number of parking spaces and retail units	£27,954,000	£28,408,645

113. For the revised figures, the difference is fairly marginal. Having not heard either of the expert valuers I was invited by the parties to split the difference between the residential components of the valuation. I therefore assess the correct GDV (that is,

as adjusted for what I find to be the correct number of parking spaces and retail units) as being £28,180,000.

114. As to the residual market value of the site, there was again, on the figures as initially revised, a fairly small difference between the experts - about £400,000 - and so I find that the true value of the site (undeveloped) was £3,500,000. In a post trial submission it was suggested by Mr. Nesbitt that the site value should be increased to reflect the work carried out by December 2006. Mr. O'Neill produced a post trial report to similar effect. This is not a point that was tested by cross examination and Mr. Hiscock's evidence in his report to the contrary (which I cite at paragraph 199 below), which was not challenged at the time, is in my view to be preferred since it concerns the point of view of the lender. To calculate the residual market value more accurately would require a spreadsheet but, for reasons which will become apparent, greater precision in deriving the true figure will not actually affect the outcome.

The scope of CBRE's duty of care

115. It is now well established, since the speech of Lord Hoffmann in *South Australian Asset Management Company v York Montague* [1997] AC 191 (as summarised by and explained by Lord Nicholls and Lord Hoffmann in *Nykredit Mortgage Bank Plc v Edward Erdman (No 2)* [1997] 1 WLR 1627, at 1631F-1632A, and 1638C-H), that a valuer is not liable for every foreseeable loss that his client may suffer if he enters into an agreement to lend money as a result of a negligently overstated valuation of a building. Like everyone else, I will refer to the *South Australian* case as *"SAAMCO*".

116. For present purposes, the most important limitation of the scope of a valuer's duty is that he/she is not liable for losses that would have been suffered by the lender even if the valuation had been correct: see, for example, *SAAMCO* at 214 C-E, 216 A-C; *Nykredit* (as above).

117. In this case the Bank claimed against F&G its losses from December 2006 onwards, which amounted to £8,211,908 plus interest (just under £10 million in all as at May 2012). This left out of account the Bank's initial advance for the purchase of the site (£4.4 million) and its recovery on the sale (£2.7 million). The £8.2 million was the loss that it suffered as a result of entering into the agreement to lend money for the development of the site. It has been referred to as "the basic loss" and I will use that expression.

118. As Lord Hoffmann pointed out in *SAAMCO*, in each of the appeals before the House of Lords there were two common features. The first was that if the lender had known the true value of the property, he would not have lent. The second was that a fall in the property market after the date of the valuation greatly increased the loss which the lender eventually suffered. In relation to the submission that the appeals were about the correct measure of damages, Lord Hoffmann said this (at 211 A-B):

> "I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide <u>for what kind of loss he is entitled to compensation</u>. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action."

(My emphasis)

119. Lord Hoffmann then went on to say, at 211 D-F:

> "The valuation tells the lender how much, at current values, he is likely to recover if he has to resort to his security. This enables him to decide what margin, if any, an advance of a given amount will allow for a fall in the market, reasonably foreseeable variance from the figure put forward by the valuer (a valuation is an estimate of the most probable figure which the property will fetch, not a prediction that it will fetch precisely that figure), accidental damage to the property and any other of the contingencies which may happen. The valuer will know that if he overestimates the value of the property, the lender's margin for these purposes will be correspondingly less.
>
> On the other hand, the valuer will not ordinarily be privy to the other considerations which the lender may take into account, such as how much money he has available, how much the borrower needs to borrow, the strength of his covenant, the attraction of the rate of interest or the other personal or commercial considerations which may induce the lender to lend."

120. Lord Hoffmann stated his conclusion in these words, at 214 C-E:

> "... a person under the duty to take reasonable care to provide information on which someone else will decide on a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of the contract or as a tortious duty arising from the relationship between them."

(My emphasis)

121. In *Nykredit (No 2)* Lord Hoffmann emphasised this point when he said this, at 1638:

> "In order to decide when the cause of action arose, it is first necessary to recall, by reference to your Lordships' earlier judgment, precisely what the cause of action was. It was for breach of the duty of care owed by the valuer to the lender, which existed concurrently in contract and in tort. Your Lordships identified the duty as being in respect of any loss which the lender might suffer by reason of the security which had been valued being worth less than the sum which the valuer had advised. The principle approved by the House was that the valuer owes no duty of care to the lender in respect of his entering into the transaction as such and that it is therefore insufficient, for the purpose of establishing liability on the part of the valuer, to prove that the lender is worse off than he would have been if he had not lent the money at all. What he must show is that he is worse off as a lender than he would have been if the security had been worth what the valuer said. It is of course also the case that the lender cannot recover if he is, on balance, in a better or no worse position then if he had not entered into the transaction at all. He will have suffered no loss. The valuer does not warrant the accuracy of his valuation and the lender cannot therefore complain that he would have made more profit if the valuation had been correct. But in order to establish a cause of action in negligence he must show that his loss

> is attributable to the overvaluation, that is, that he is worse off than he would have been if it had been correct."

(My emphasis)

122. It was assumed for the purpose of the issues of principle that the Bank relied upon the valuation of both the GDV and the market value of the site (although CBRE did not accept the latter). It has been a constant theme of F&G's case that the Bank would not have entered into the transaction if these two valuations had been correct. That may be so (at this stage I make no finding about it), but that goes only to the causation of the basic loss suffered by the Bank. It does not address Lord Hoffman's point emphasised in the passage cited above or the question of whether that loss or any part of it was within the scope of the duty owed by CBRE. One must not forget that in each of the cases heard in the *SAAMCO* appeals, the lender would not have entered into the transaction but for the negligent overvaluation by the valuer. But in only one of the individual cases was the valuer liable for the full amount of the lender's basic loss.

123. In this case it is clear from the figures that things would have had to go very badly wrong for the Bank to lose money if the development was completed. For example, once sales of the apartments achieved a figure of about £20 million the Bank could probably have expected to recover its money, even if there had been further delays and therefore some increase in the amount of interest. But in this case the development never reached that stage. Issa Ltd ran out of money long before that and Mr. Issa did not have the resources behind him that the Bank had assumed.

124. Whether CBRE's valuation of the GDV was right or wrong, the Bank would have suffered the losses that it did as a result of entering into the transaction - in other words, the basic loss. As things turned out CBRE's estimate of the GDV was never tested and so the extent of any loss that the Bank might have suffered as a result of its being wrong can only be a matter of speculation.

125. The Bank's basic loss was caused directly by the fact that Issa Ltd was unable to complete the development as a result of its own defaults and lack of resources. That was not a loss caused by any overestimate of the GDV. However, in about May 2010 the Bank did sell the (partly completed) site for £2.7 million - very much less than CBRE's residual site valuation.

126. It is common ground that neither F&G nor CBRE could have been under any liability for the consequences of the Bank's decision to lend the £4.4 million for the purchase of the site; and the Bank never asserted the contrary. There is also no question in my mind that F&G would have been liable to the Bank in respect of the basic loss, subject only to its defence of contributory negligence. But for the purposes of this claim for contribution it is sufficient that F&G would have been liable to the Bank if the facts pleaded against F&G had been established at a trial. That is clearly the case and the contrary has not been suggested.

Reliance by the Bank

Events leading up to the making of the loan - £13.155 million

127. In this case, for the reasons I have already given, CBRE could not have been liable to the Bank for any overvaluation of the GDV, taken by itself, because the losses sustained by the Bank as a result of entering into the transaction would have been sustained in any event irrespective of whether CBRE's estimate of the GDV was right

or wrong. The Bank could only have had an arguable case against CBRE because it had asked CBRE to make an assessment of the market value of the site and CBRE's assessment of that value was a significant overvaluation (albeit arrived at by subtraction from the overestimated GDV).

128. In these circumstances, possibly fortuitously (because it was not the basis of valuation that the Bank had originally identified as being necessary), if the Bank relied on that valuation CBRE owed a duty to protect it from any loss caused by the overvaluation of the site up to the difference between the value as represented and the correct value. On the facts of this case, that is a figure of the order of £5.4 million.

129. It is clear from the Bank's internal documents that its Relationship Manager, Mr. Rainford, was very keen on this project. He had concluded that Mr. Issa came from a wealthy family which had both the willingness and the ability to commit substantial funds to the development. Indeed, in an e-mail dated 7 December 2006 Mr. Issa told Mr. Rainford that one of those who had already agreed to purchase apartments was "a relative" who was very wealthy with a net worth in excess of £30 million. He told Mr. Rainford that she had invested in his projects before.[1] Another was said to be a member of the Royal family of Kuwait, with vast interests around the world, and a third was a very successful private banker, whose father was very wealthy. Mr. Rainford, it seems, was content to believe all this.

130. When the Bank's Area Credit Department ("ACD") in London considered the proposal to offer Mr. Issa a development loan in August 2005 it had the second report from Drivers Jonas which valued the site at £6.3 million and assessed the GDV at £31 million. At that stage the Bank considered that completion of the substructure works would probably increase the site value to £7.5 million, but before committing itself to advancing any money it wanted a further valuation to confirm both the likely uplift in the site value and the existing GDV - as set out in the facility letter dated 10 August 2005. At that time it was willing to offer up to 55% in terms of LTC, subject to certain conditions being met. An internal report dated 8 August 2005 noted that there was a "meaningful level of equity going in upfront" and that the weight of the borrower's equity rendered the LTeV (44%) "a strong insulator against downside". The approval of any proposal was to be subject to an ongoing commitment of 110% contracted pre-sales.

131. Both the level of the borrower's equity and the level of pre-sales were factors to which it is clear the Bank attached considerable importance. I find that that remained the position throughout. As is made clear by the joint statement of the lending experts, to which I refer below, Mr. Rainford's assessment of the level of the equity put in by Issa Ltd was a serious over estimate.

132. So far as valuations are concerned, for over a year matters rested there. Then on 3 October 2006 the Bank instructed CBRE to prepare a report providing valuations of the market value of the site with detailed planning consent and GDV of the proposed scheme. As I have already mentioned, there was no request for a valuation of the site once the substructure works had been completed. The letter stated that the date of valuation was to be the date of the report.

133. As I have already noted, on 7 December 2006 CBRE sent an e-mail to the Bank giving CBRE's figures for the site value and the GDV. The exchange of emails between Mrs. Fraser and Mr. Rainford went as follows. Her e-mail, sent at 11:04 without any attachments, was in the following terms:

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[1] This investor was probably Mr. Issa's mother.

"Dave

I have now finalised the figures for the above site. Our site value is £8.9M and our GDV is £34,380,085. I am progressing with the report and should have it with you next week.

Should you need anything further just now please let me know.

Kind regards

Siobhan"

134. Mr. Rainford replied the following day, 8 December 2006, at 11:48:

"Fraser

Many thanks

Do you have a breakdown of the GDV and ideally a copy of you (sic) appraisal sheet. I assume that the scheme appraised is the current one i.e. 130 apartments

Regards

Dave"

(My emphasis)

The fact that Mr. Rainford addressed Mrs. Siobhan Fraser as "Fraser" in this e-mail shows just how little contact they must have had up to that point.

135. This e-mail suggests that, contrary to an assertion made by F&G in its Opening Submissions (at paragraph 58) that CBRE issued a revised development appraisal to the Bank on 7 December 2006 (at 10:06 hours), no appraisal appears to have been received by the Bank that day. If it had, Mr. Rainford would surely not have asked for a copy of the appraisal sheet or, one might think, for confirmation that this was the 130 apartment scheme (since that was the number of apartments shown in the appraisal in respect of the value of the ground rents). The e-mail to which F&G was referring in that paragraph of its submissions was the e-mail of 7 December 2006, timed at 10:06 hours, from Mr. Issa to "David" and Mr. Huggett, to which I have already referred, which began by saying "Please find the up to date figures for the development apprised (sic) by CBRE" and then set out various comments on the appraisal[1]. However, as I have mentioned the copy of this e-mail in the trial bundle does not indicate that any attachment was sent with it, which might suggest that Mr. Issa may have intended to attach the development appraisal but forgot to do so. It is clear that "David" was Mr. Rainford (because the copy in the trial bundle is one that was printed out by him).

136. Whilst this judgment was in the course of preparation I raised this point with counsel. I received a helpful reply from Mr. Brannigan and Mrs. Gillies enclosing the hard copy of the e-mail timed at 10:06 on 7 December 2006 which had been received by

[1] The reference in the bundle given by F&G at paragraph 58 is D8/2116, whereas for this e-mail it is D8/2020. This latter e-mail was referred to by Mr. Brannigan in opening (at Day 1/86) when he described the e-mail as sending "CBRE's work to the Bank". In her cross examination of Mrs. Fraser, Mrs. Gillies also referred to this e-mail (at Day 3/165), suggesting that Mr. Issa had got in first and sent the development appraisal to the Bank before she had had a chance to do it herself. In fact, Mrs. Fraser never really responded to this comment because it became subsumed in a further question.

Mr. Huggett (a copy of which was not in the trial bundle). Surprisingly, this copy of the e-mail showed that Mr. Huggett did receive the intended attachment ("CBRE appraisal. RTF").

137. A fairly cursory examination indicates that the documents in the trial bundle appeared to show that where an e-mail from Mr. Issa or Mrs. Fraser contains an attachment, that is indicated by a further line below the subject of the e-mail which has the side heading "Attachments": an example of the former is the e-mail of 26 November 2006 by which Mr. Issa sent Mr. Rees, of CBRE, the Area Schedule which showed the 66 car parking spaces and the third retail unit (entitled "CBRE Nov06 Copy of Area Schedule for 130 untis (sic) Rev A.xls"). An example of the latter is the e-mail dated 12 December 2006 by which Mrs. Fraser sent the development appraisal to Mr. Rainford. The copy of the e-mail in the bundle shows clearly that it had two attachments: a spreadsheet called "Final reported values" and a document entitled "amended appraisal RTF". In cases where an e-mail has been forwarded, the attachment to the e-mail being forwarded appears between double chevrons after the text of the forwarded message. The absence of any mention of an attachment on Mr. Rainford's copy of the e-mail dated 7 December 2006 is unexplained.

138. I should add that the version of CBRE's Development Appraisal dated 7 December 2006 has a manuscript note on its front sheet by Mrs. Fraser which reads "FINAL FIGS Emailed to Bashar and Dave Rainford 7/12/06". It is not clear from this whether the note meant that the whole appraisal had been e-mailed to Mr. Issa and Mr. Rainford, or only the relevant figures – the terms of her own e-mail on that day are consistent with the latter. But, as I have already observed, if the appraisal had been sent to Mr. Rainford on 7 December 2006, he would not have asked for a copy of it on the following day.

139. This is all very puzzling. My conclusion is that, whether or not the appraisal was attached to the e-mail received by Mr. Rainford at 10:06 on 7 December 2006, his computer (for whatever reason) did not show it and so Mr. Rainford was not aware of its existence. In my view no other explanation accounts for: (a) the absence of any reference to the attachment in the hard copy of the e-mail printed out by Mr. Rainford; and (b) the fact that he asked Mrs. Fraser for a copy of the "appraisal sheet" on the following day.

140. I have laboured this point at some length because in its Closing Submissions F&G suggests that it is "common ground" that the development appraisal was sent to Mr. Rainford on 7 December 2006. I have not been able to find any concession made by Mr. King to this effect, although I may have overlooked it. The importance of the point lies in the extent to which Mr. Rainford was able to take CBRE's appraisal properly into account when preparing his Credit Paper Memorandum dated 8 December 2006 which I discuss below. However, whether or not any such concession was made on behalf of CBRE I feel bound to conclude on the basis of the documents that a copy of CBRE's development appraisal was not knowingly received by Mr. Rainford on 7 December 2006; so far as Mrs. Fraser is concerned, I find that she sent it to Mr. Rainford for the first time on 12 December 2006 as she said in her witness statement.

141. In her witness statement Mrs. Fraser referred to her e-mail to Mr. Rainford of 7 December 2006, but did not mention his e-mail in reply. She said merely that in response to a query from Mr. Rainford she emailed the appraisal to him on 12 December 2006, together with her pricing schedule. She made no reference to any conversation with Mr. Rainford at around that time. Having sent her appraisal to

Mr. Rainford the following week she says that she finalised her draft report which was forwarded to the Bank on 11 January 2007. In cross-examination she was asked why her report was not ready until 11 January 2007 and whether or not she had had any conversations with Mr. Rainford about the likely delays in producing her report. She said that she did not recall having any conversations with Mr. Rainford (Day 3/179). I have no reason to doubt this evidence.

142. When Mrs. Fraser sent the Bank her Development Appraisal on Tuesday, 12 December 2006, it only provided the figures which lay behind the two valuations. There was no report at that stage. The subsequent full report was described as being "as at" 20 December 2006 but, as explained above, was not sent to the Bank in hard copy until 11 January 2007. Mrs. Fraser thought that an electronic copy of the report would have been sent by e-mail when it was completed. However, no such e-mail has been found. On the basis of the evidence provided by the documents, if it is the case that the report was sent to the Bank by e-mail, I am not prepared to find that this happened much before 11 January 2007.

143. Meanwhile, on 8 December 2006, Mr. Rainford prepared the Credit Paper Memorandum to ACD proposing a development loan of £13.115 million. This referred to the fact that CBRE had provided a valuation of the GDV in the sum of £34,380,000, in place of the £31 million that was the previous valuation, which, he said, "in turn drives a higher site value of £8,900k (previously £6,300k)". The paper referred to the project as involving a 130 apartment block, with 5,900 ft² of retail space on the ground floor and parking for 66 vehicles. Under the heading "Updated valuation" Mr. Rainford referred to the figures for the GDV and the site value in CBRE's appraisal, comparing them with the figures produced by Drivers Jonas in March 2005, and then said this:

> "Verbal discussions with valuers have confirmed final report with (sic) reflect positive commentary on location/market demand."

I take it that "with" is a misprint for "will". This sentence, with its reference to "location/market demand" refers in my view to the reliability of the GDV.

144. The covering Credit Application prepared by Mr. Rainford, which was dated and signed by him, also on 8 December 2006, described the facility as a "30 month Cash Advance (agreed 8/05). To be extended to 12/08 (40 months)". It noted that £4.495 million had already been drawn down. In a box headed "Security Held and in Order" it referred to a first legal charge on Sarah Tower, with an interest shortfall guarantee from Mr. Issa, and, below that it said:

> "Uplift from previous GDV £31,000k based on revised valuation undertaken by CBRE 12/06. Site value increased from £6,300k to £8,900k."

In the column in the same box headed "Value £000s" (of the security), it stated 34,380 (GDV)* (there was no explanation on that page of the meaning of the *, but on the first page of the Credit Paper Memorandum it was explained, in the context of LTV, as being based on residential GDV only). However, the figure of £8.9 million was not shown separately in the column for the value of the security.

145. The statement in the Credit Paper Memorandum that the LTV was based on residential GDV only was correct. The LTV was based on a residential sales value of £32.387 m, which is the figure in CBRE's appraisal. However, this was not a figure that was given by Mrs. Fraser in her e-mail of 7 December 2006.

146. Mr. Rainford's Credit Paper Memorandum stated that CBRE's "summary appraisal is enclosed" [1], although I have found that when he sent the e-mail at 11:48 on 8 December 2006 he did not have (or, at least, thought that he did not have) that appraisal. It is reasonably clear that it was not sent to him later that day by Mrs. Fraser, not only because that is not her evidence but also because she would not otherwise have sent it to him the following week. One possibility is that he asked either Mr. Issa or Mr. Huggett to forward it to him and that one or other of them did so later that day. However, that is only a possibility because there is no document which indicates that that might have happened (save for the fact that it is now clear that Mr. Huggett had received the appraisal on 7 December 2006).

147. However, assuming that Mr. Rainford did receive CBRE's development appraisal sometime later on 8 December 2006, it would be surprising if he was prepared to accept CBRE's residual site value as reliable since he must have seen that the figure for the total construction costs in CBRE's appraisal was just over £1 million less than the figure that he had taken, which was the one currently being advised by F&G. Mr. Rainford's figure for the development costs was derived from the summary of the original costs (that is, as set out in the note by ACD dated 8 August 2005), but with the figure for construction costs increased by £3.203 million - which reflected the advice given by F&G since the ACD's August 2005 note - to £18.618 million. The corresponding figure derived from CBRE's appraisal is £17.560 million.[1] On this basis alone CBRE's figure for the "acquisition price" (or residual site value) was, on the face of it, over £1 million too high.

148. One possibility is that Mr. Rainford received a copy of CBRE's development appraisal too late in the day for him to do very much with it. He may have been content to rely only on the figure for the GDV alone without analysing how CBRE had arrived at their residual figure for the site value. In the absence of any evidence from him there is simply no way of knowing.

149. Since the construction costs formed a crucial component of the assessment that led to the residual market value of the site, if the Bank was at all concerned with CBRE's site value one might have expected some discussion within the Bank - at least within ACD - of this discrepancy between the figure used by CBRE for the construction costs and the higher figure currently being advised by F&G and adopted by Mr. Rainford. In addition, it was F&G's pleaded case that the developer's profit of 15% was unusually low: Mr. Hamilton's evidence was that the normal figure was 20%. Whether or not he is right or wrong about this, the level of developer's profit was another matter on which one might have expected the Bank to comment.

150. It seems likely also that Mr. Rainford cannot have known whether CBRE's valuation of the site was in its condition in December 2006, which is the valuation that they had been asked to provide, or its condition prior to the start of construction works. He did not ask any questions about the basis of the site valuation in his e-mail of 8 December 2006 and it is not easy to infer from his Credit Paper Memorandum what he had assumed. The fact that he said that the higher GDV "drives" a higher site value suggests that he might have assumed that the site had been valued in its undeveloped condition, but the fact that he asked no questions about it suggests that it did not play any material part in his thinking - in contrast to the GDV, for which he did ask for a breakdown. To my mind, all this indicates either that Mr. Rainford was not interested

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[1] It stated also at the foot of the document that one of the appendices was "Revised Valuation Summary Appraisal - and CBRE".

[1] This is the total of the construction costs of £16,109,650 plus the contingency of £483,289 and professional fees of £966,579.

in knowing what assumptions CBRE had made when arriving at the residual site value or that he simply did not have the time to look into the matter and therefore paid little attention to it. However, in relation to the GDV he clearly was interested. Further, he could readily compare CBRE's residential GDV, and the average rent per square foot on which it was based, with the rates used in the appraisal attached to the Drivers Jonas March 2005 report (which was also on the basis of 130 apartment scheme, although whether it was precisely the same scheme is unclear).

151. It is apparent from the documents that by early December 2006 Mr. Issa was pressing the Bank for money. This is probably why the Credit Application has written at its top "Response requested by 15 Dec - dev drawdown requested". This suggests that Mr. Rainford did not hold on to it before sending it to ACD.

152. On 18 December 2006 ACD approved the proposal to advance a total of £13,115,000, but this was subject to four conditions over and above those proposed by Mr. Rainford. The approval was in a one page Decision Memo which contained the following Conditions/Comments:

> "Approval is confirmed for drawdown of development funding to proceed, subject to:
>
> - Completion of a vesting certificate to the satisfaction of the Bank's QS
> - Confirmation of insurance cover for materials now in the UK, to the satisfaction of the Bank's QS
> - Completion by the borrower of a "package cost breakdown" as required by the Bank's QS
> - Confirmation by the Bank's solicitor that the borrower has ownership of the canal-side
>
> Other conditions will be as recommended in your application.
>
> Two key issues will require particularly close monitoring in the coming months:
>
> 1. Satisfactory completion of the substructure
> 2. The provision of an adequate power supply for the building by April 2008
>
> Should developments arise that would give cause for further concern in relation to these matters, please report immediately to ACD. Our willingness to proceed (despite some uncertainty in relation to point 2 above) partly reflects the modest LTC and LTV, and this is something that we will be keen to maintain until these risks have been removed.
>
> A further report has been scheduled for **30/06/07**."

(Original emphasis)

153. The Decision Memo showed also that the project had been downgraded from 5 to 6 on the Bank's 13 point scale (in the Decision Memo of 10 August 2005 it had been

graded 5). However, it remained at 3 on the Bank's 7 point scale[1]. The reason for this change is not entirely clear, although it seems that in Mr. Rainford's Credit Paper Memorandum his views of Issa Ltd and the project team were rather less favourable than they had been before. In addition, the project was now suffering delay.

154. If those in ACD regarded the site value as an important factor in the decision, then one would have expected them to check how it had been derived. In the Bank's letter of instruction to CBRE dated 3 October 2006 the paragraph numbered 11 (the terms of which I have set out in full above) stated specifically that, in the case of a residual valuation, the Bank was concerned to know about the assumptions made in relation to matters such as construction cost fees, contingencies and so on. But since according to the documents there was no evaluation by ACD of Mr. Rainford's credit application beyond that in the Decision Memo (the relevant parts of which are above), it appears that the decision makers within the Bank were not interested in how the residual site value had been derived - otherwise they would surely have queried the discrepancy between CBRE's figure for the construction costs and that provided by F&G and used by Mr. Rainford. In my view these documents simply do not support a case that the Bank was at that stage particularly interested in the market value of the site.

155. In the context of reliance generally, F&G relied on the fact that in its Reply in the main action the Bank admitted (at paragraph 4.9) that it relied on the development appraisal dated 7 December 2006 provided by CBRE, but this admission was responding to an assertion that did not identify the date on which the Bank received the appraisal (see paragraph 108.6 of the F&G's Defence). In any event, since in the same sentence the Bank admitted that it relied also on CBRE's Valuation Report dated 20 December 2006, it is impossible to read this as an admission that the Bank received the development appraisal on 7 December 2006. The Reply was verified by a statement of truth signed by a fairly senior officer of the Bank and so Mr. Brannigan submitted that it could properly be relied on as evidence in the case. Whilst I accept that the introduction of statements of truth to confirm the contents of statements of case is intended to enable other parties to rely on what is asserted in a statement of case, I cannot see how it can carry any more weight than, for example, a disclosed copy of a signed witness statement. If the point for which the pleading is relied on is a contentious one, it seems to me that the probative value of the pleading is limited. The position would be different if the statement of case asserted a fact that had not been specifically put in issue but which a claimant was required to prove; for example, title to property. In that type of situation I can see no reason why the court should not accept the statement of case, if supported by a statement of truth by an appropriate person, as providing the required proof of title.

156. Further, Mr. Brannigan submitted that the first of the two numbered points in the Decision Memo shows that the Bank must have been very anxious to keep its options under review for the first few months: in other words, if the substructure was not satisfactorily completed within the next few months it wanted to have the opportunity to fall back on its security - presumably having offered Mr. Issa an opportunity to find an alternative source of funding. Because it had this possibility in mind when it agreed to make an advance to fund the development, submitted Mr. Brannigan, it must have been relying on CBRE's estimate of the site value.

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[1] The Bank's Statement of Credit Policy provided that projects with exposures of up to a maximum of £1.5 million would be graded by reference to a 7 point credit risk grading scale and those with exposures above £1.5 million would be graded under a 13 point grading system based on standard risk grading templates. It is not clear why in this case a rating was given for both scales. There was no evidence as to the reason for the downgrading on the 13 point scale.

157. There are two flaws in this argument. The first is that once the Bank had agreed to increase the amount of the facility to £13.115 million, it was bound by that commitment so long as Issa Ltd performed its side of the bargain. There was no unilateral right to opt out. In fact, the Bank did not issue a facility letter for Mr. Issa's agreement prior to permitting Issa Ltd to drawdown the funds in December 2006: the only facility letter that had been accepted by Mr. Issa was that dated 13 September 2005, many of the terms of which were no longer relevant or applicable, as Mr. Hamilton forcibly pointed out in his report. For example, under the terms of that letter the funding was to be available subject to completion of the substructure works and basement car park. In the circumstances, it is arguable that the only terms on which the loan was made was that Issa Ltd would carry out the work with reasonable diligence and would repay the loan, together with interest, on completion of the development. But whatever the precise terms of the contract, I am quite satisfied that there was no term by which the Bank could require repayment of all money advanced if the substructure works were not complete by a particular date.

158. Second, the fact that ACD proposed that the next review should take place on 30 June 2007 does not suggest that it was contemplating any serious steps in the near future. The terms of the Decision Memo suggest that the Bank expected that by that date the substructure would be complete, in which case a valuation of the site in a condition before any work started would have been of little relevance.

159. Finally, Mr. Brannigan's submissions are not assisted by the penultimate sentence of the passage quoted of the Decision Memo, which shows that the Bank was relying on the levels of LTC and LTV - although I accept that use of the adverb "partly" also shows that it must have been relying on other factors in addition.

160. I have already found that the Bank relied on two other factors in particular: the level of the borrower's equity and the level of pre-sales. In any event, as I have already stated, the first tranche of this facility was paid to Issa Ltd on 21 December 2006, in a sum of just under £900,000.

161. Since in my view these documents throw limited light on the thinking of ACD, at least in terms of demonstrating any reliance on the site value, when it took the decision of 18 December 2006, I consider that it is necessary to go back and look in more detail at the Bank's consideration of the original request for development funding in 2005.

The original offer of development funding in 2005

162. In March 2005 Drivers Jonas provided a report and valuation for the Bank. The valuation was of the market value of the freehold subject to the existing planning consent. Their valuation was £6.3 million (reduced from £6.9 million, which was the figure given in the December 2003 report).[1] Drivers Jonas made it clear that they had assessed the value of the property from a residual appraisal based on the development that was currently proposed. They said that they did not consider that a comparative method of valuation was appropriate. Their development appraisal was attached to the report. They considered that a GDV in excess of £30.9 million was achievable.

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[1] As a result of this reduction in the site value, the Bank decided to reduce the amount that it was prepared to lend Mr. Issa for the purchase of the site. F&G placed some reliance on this as showing that the Bank did in truth rely on its valuer's estimate of the market value of the site. However, I consider that the position was quite different when the Bank was considering a loan to enable the borrower to purchase the site from the position when the Bank was considering whether or not to fund a development, the borrower having already purchased the site. I would agree that in the former situation the valuer's assessment of the market value of the site is likely to be crucial.

163. Under the heading "Security for the Loan", Drivers Jonas said this:

> "The site has planning consent for a landmark residential development in a rapidly improving area of Manchester City Centre. The proposed development envisages accommodation providing quality specification and fittings together with attractive aspects and panoramic views over the city.
>
> There is established evidence of consistent sales [of] similar developments at the level of prices we have adopted within our appraisal and our estimated construction costs are representative of a development of this type and size.
>
> The market for such schemes is good and there is established demand for residential apartments in the area.
>
> We note the details of the proposed loan, which comprises the majority of the development costs, estimated by the customer. Our estimated development costs are higher than those within the developers own appraisal but on the assumption that the loan will be drawn down in phases throughout the development period as authorised by your monitoring surveyor we consider that the premises represent satisfactory security.
>
> We note that it is intended that the principal will be repaid from the sales of the completed dwellings and we consider that this is achievable."

(My emphasis)

164. Issa Ltd acquired the site at the end of June 2005 (for a total cost of about £7 million[1]). At about the same time Mr. Rainford prepared a Credit Paper Memorandum dated 27 June 2005 seeking approval to convert the 12 month cash advance for the purchase of the site into a 30 month cash advance of £15 million (including rolled up interest) to fund the development costs. There were two variants of the proposal, one involving the borrower contributing 60% towards the development costs and the other involving a contribution of 70%.

165. The proposal assumed a GDV from the residential sales only of about £29.5 million. On a 60% contribution from the borrower the LTeV was 47.6%. The key credit issues were identified as: the ability of the developer to deliver on time and budget; the strength and capabilities of the internal management team, the external professional team and the appointed subcontractors; the sustainability of residential demand in Manchester city centre; and the liquidity of the borrower/promoters and their ability to cover cost overruns.

166. The proposal contained a lengthy summary of the borrower and the background. Amongst other things this described Mr. Issa's father as banking with Barclays International in Knightsbridge and holding cash balances in excess of £50 million: however, later in the report it was noted that the Bank had no specific evidence of the father's means and that he had refused to provide a bank status report, but that there was clear evidence that he had made sizeable contributions to other projects managed by Mr. Issa. It was noted that he would be making an upfront contribution to the development costs of this project of a sum in excess of £5 million. So far as the

[1] This was made up of about £4.3 million, representing the price of the land and the balance being Stamp Duty, professional fees and costs.

construction of the development was concerned, the key risk issue identified was the project management capability of BSC, in relation to which "comfort" had been taken from F&G's comments.

167. The overall costs of the development, including the acquisition cost (which was said to be £7.024 million), were estimated at £23.350 million. This was against a total estimated GDV of about £31 million.

168. Under the heading "Security", it was noted that the Bank had a first legal charge over the property and that in respect of the £350,000, which was the part of the purchase price that had been deferred, there was a second mortgage on the land in favour of the vendor. It then went on to consider the additional security that would be required for the development funding in the form of "… assignments over (sic) collateral warranties provided by the professional team" and subcontractors and an assignment of the proceeds of pre-sales with a minimum of £7.4 million.

169. The recommendation was that a facility of up to £15 million should be offered subject to, amongst other things, confirmation by Drivers Jonas of the GDV and confirmation by the Bank's QS of the reasonableness of the costs. In addition, the latter was to comment on the capabilities of the management team and proposed subcontractors and was then to be retained to provide an ongoing monitoring brief during the course of the development. There was also a reference to the Bank carrying out due diligence in terms of warranty provision and the standing of proposed subcontractors. The borrower's contribution was to be put in ahead of the Bank's funding.

170. It is of interest that there was no reference to the valuation of the site, either in its present condition or once the substructure and car park had been built. Of course, the Bank knew what Mr. Issa had paid for the site, namely about £4.3 million, of which it had funded £4.1 million (excluding interest). Taking the documents as a whole I can find no hint of any significant reliance on the site value when this proposal was put forward.

171. The proposal was considered again in August 2005 and there is a long note prepared by Mr. Cullen in ACD dated 8 August 2005. This also refers to the mortgage over the site, noting that its undeveloped value was £6.3 million and the GDV £31 million. The author of the report regarded the construction risk as "High", but noted that this could be mitigated by ensuring that all of the substructure works, including the underground car park, were completed on budget and that all the steel for the project was delivered to site at expected cost prior to the first drawdown. This was to be a condition precedent to drawdown. The substructure works were expected to increase the site value to £7.5 million.

172. The conclusion to this note did not mention the security afforded by the site, but noted that a "meaningful level" of equity going in upfront and the completion of the substructure prior to first drawdown would mitigate Bank's concerns. The author concluded by noting:

> "By incorporating an ongoing requirement for 110% contracted pre-sales we believe we have sufficiently mitigated this risk. Equally importantly the LTeV at 44% provides headroom for both cost overruns and price reductions if necessary.
>
> ...
>
> Conditions Precedent

...

2) Bank Valuer to confirm GDV, demand, price points as well as the likely uplift in the value of the site once the substructure/underground car park is complete;

...

5) All substructure works (inc. underground car park) should have been satisfactorily completed to the satisfaction of Bank QS ...

...

7) Contracted presales (non-refundable deposits/no buyer concentration). Min. 10% presales (13 apts/£3.0 m) before any drawdown of the development facility. Thereafter Borrower can have up to 55% LTC availability provided at all times governed by overriding CP requiring minimum 110% presales cover for the development debt. Any funding shortfall due to deposits timing (arising from 5% + 5% arrangement) is to be met by Promoter. "

173. Mr. McDaid endorsed the proposal in the following terms:

> "We were originally asked to participate at £15m in this transaction but held out for further equity (of c. £2m). The development/ marketing risks have been closed out so far as is possible and the weight of equity renders the LTeV a strong insulator against downside. With family liquidity clearly evident we also can feel relatively protected against the risk of overruns."

174. I consider that it is reasonably clear from this document that what the Bank was really concerned about was to have an up to date valuation of the GDV, together with confirmation that demand remained good and that the proposed sale prices were realistic. A valuation of the site once the substructure works had been completed may have been required because it was not until the substructure had been completed that any development funding would become available. That no funding would become available until this had happened was made completely clear by the facility letter dated 10 August 2005, which was issued on the day that the loan was approved. It seems that the Bank was not prepared to assume (if it is a valid assumption) that the value of the site on completion of the substructure works would necessarily have increased by the same amount as the cost of the work carried out. If it thought that, it would not have considered that it needed a further valuation of the site when the substructure was complete.

The position by the end of 2006

175. By the end of 2006 the Bank had not only agreed to extend the original facility for the purchase of the site to a facility to provide funding for its development but also had permitted Issa Ltd to drawdown £891,793 under it. The Bank had irrevocably committed itself to advancing £13.115 million.

176. Since there was no evidence from any employee of the Bank, in seeking to draw conclusions as to why the Bank acted as it did the court must draw such inferences as it can from the documents and make any findings of fact on that basis in the light of all the circumstances. The documents before the court were derived from the

disclosure given by the Bank in the main action and so it is reasonable to assume that, so far as the Bank's files are concerned, there has been full disclosure.

177. Having regard to its own procedures and the terms of the letter of instruction to CBRE, I find it remarkable that the Bank was prepared to extend the facility in this way without waiting for CBRE's valuation report. This means that the decision was taken without knowing:

i) The precise basis on which CBRE had made its valuation of the site (namely, whether in its actual condition as at December 2006 or an assumed condition prior to the start of work). In its report, CBRE stated expressly for the first time that it had assumed that "the development commences in January 2007".

ii) CBRE's views on any of the matters listed in the letter of instruction, apart from the bare figures for the market value of the site and the gross GDV and the breakdown of the GDV as revealed by the Development Appraisal.

178. As I have already said, I find it very surprising that there is nothing in the Decision Memo about the differences between the figures for the development costs used by Mr. Rainford in his Credit Paper Memorandum and those used by CBRE in its Development Appraisal.

179. In his supplemental closing submissions[1] Mr. Brannigan relied strongly on many of the numbered points on which the Bank sought advice in its letter of instruction dated 3 October 2006 as pointing to the fact that the Bank must have relied or would rely on CBRE's site valuation as well as its valuation of the GDV. However, any force that these submissions might otherwise have had is completely undermined by the fact that the Bank was prepared to agree to an additional facility for development funding in December 2006 without even waiting for CBRE's report. In short, having asked for advice on all the numbered points it was prepared to make a decision without waiting for that advice.

180. Mr. Rainford's reference in his Credit Paper Memorandum of 8 December 2006 to the GDV driving the higher site value indicates that he, and therefore ACD also, assumed that CBRE's figure for the site value was the product of a residual appraisal rather than being a freestanding valuation by reference to comparable sites. They must all be taken to have known, therefore, that the site valuation would depend not only on the GDV but also upon other variables, such as construction costs, that were fed into the calculation. In this context it is relevant that the paragraph numbered 11 in the letter of instruction to CBRE specifically asked for the assumptions that had been made by the valuer when assessing the costs of construction. However, at the moment of decision any need for this information was ignored.

181. In these circumstances I find it impossible to conclude that the Bank placed any real weight on CBRE's assessment of the site value when the decision was made on 18 December 2006 to extend the facility to fund the development costs up to a total amount of £13.115 million. I am satisfied that CBRE's assessment of the GDV played an important part in the decision, but I am unable to conclude any more than that.

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[1] A further short hearing was held at my request after the initial closing submissions because I wished to give the parties an opportunity to address the court on two authorities that had not been referred to in the opening or closing submissions and in relation to the Bank's reliance on CBRE's site valuation.

Events leading up to the increase in the loan – to £15 million

182. On 15 January 2007 Mr. Rainford made a further proposal for an increase in the loan to £17 million on the ground that the client wished to renegotiate the facility in the light of the increase in construction costs and the higher GDV. This proposal involved increasing the LTC to 63% and the LTeV to 52%. The application referred to the increased site value of £8,890k and GDV of £34,939k[1]. The request concluded by noting that "lend parameters remain comfortable acknowledging acceptable level of contracted sales to date and enhanced site value/GDV". Someone in ACD appears to have written "No" against the LTeV of 52%.

183. In response to this proposal, a Mr. Leonard, in ACD, prepared a draft Credit Opinion dated 29 January 2007. This referred to CBRE's GDV as being possibly "overgenerous". It noted that the proposal involved a higher LTC and LTeV and lower cash equity than the original proposal. It concluded as follows:

> "**Conclusion/Recommendation**:
>
> The BCB proposal to fully fund a material costs over-run, combined with a lower cash equity level (both in real and % terms), against a back-ground of significant delays, and significant development/sales risks remaining is considered inappropriate. Key positive is the ability of the borrower to fund out the over-runs to date. (For discussion - my preference is to keep LTC at 55% (£15 m). Would like to see sub-structure risk closed out. Maybe a trade-off against higher level of pre-sales."

184. A further version of the Credit Opinion was prepared on 7 February 2007 and followed a telephone conversation between Mr. Leonard and Mr. Rainford, during which the draft Credit Opinion had been discussed. It was prepared for signature by both Mr. Leonard and Mr. Harry McDaid, the Bank's Credit Director for Business Banking UK. The main body of the document was in largely the same terms as the draft (although the reference to the GDV being possibly overgenerous was removed), but the Conclusion/Recommendation was in these terms:

> "The BCB proposal to fully fund a material cost over-run, combined with a lower cash equity level (both in real and % terms), against a back-ground of significant delays, and significant development/sales risks remaining is considered inappropriate. Key positive is the ability of the borrower to fund out the over-runs to date. Following discussion with the ECB, the following alternative proposal is put forward:
>
> - Initial "step 1" increase in the facility to £15 m, with requirement for minimum equity of £11 m to remain. This level of funding will see the Bank maintain its original 55% LTC position, with the £3.4 m cost increase met Bank £1.9 m, Borrower 1.5 m, although it will also release out of the scheme equity of c £1.1 m based on the current level of equity funding. 110% pre-sale cover control for development facility drawings will remain. Based on updated BPV report, LTeV will be 46%.
>
> - Step 2. Upon Bank QS confirming that the sub-structure work is complete (expected late 3/07), at which stage

[1] Whilst this figure appears in the development appraisal, it is not the figure for the GDV. It appears that Mr. Rainford simply took the wrong figure.

> development risk is substantially reduced, facility limit to be increased to £17 m with two key structural amendments. to avail of the facility, firstly a higher pre-sale level will be required. For purposes of control of release of the development facility, the first £3 m of pre-sales will be excluded from the calculation of 1.1 x cover. Rational for this is that the extra £2 m funding is covered off by £3 m of pre-sales. In addition, BCB has agreed to CDL proposal that we seek a £2 m "top-slice" PG from B Issa Ltd.
>
> On basis of the revised structure, prepared to support. Close monitoring will be required and best endeavours should be used to obtain an enhanced fees for the increase (at least the £2 m) proposed."

It is to be noted that there was no discussion in this document about the site value, although it was shown (along with the GDV) in the box at the top of the document entitled "Security". By contrast, the references to LTeV were to the residential GDV as assessed by CBRE.

185. On 12 February 2007 Mr. McDaid wrote an internal memo in the following terms to Mr. Leonard:

> "I am uncomfortable with the way this transaction is developing. We are two years into the deal, with two years still to run to its effective completion. There have been very significant delays reflected in the substructure delivered one year late.
>
> I'm still unclear as to what BI's cash equity is - £12.8 m, £9.2 m or £8.8 m.
>
> We have twice shifted on loan structure and reduced the pricing.
>
> BI's competency to accurately price and build out the project is now under legitimate scrutiny. The cost overrun figure is substantial by any measure (what has given rise to it is not fully amplified), and how it slipped the net of our BPQS needs to be better understood. Bear in mind it was only £860K in October, now increased to £3.1 m.
>
> My worry, and it is a real one based on concerns as regards the "in-house" team, is that there may be further shocks ahead.
>
> Our position is that <u>if</u> we increase the line to £15 million, it must be on the basis that
>
> 1. Our BPQS confirms with a high level of confidence that together with the equity participation, the project will thus be fully funded. We will <u>not</u> further increase availability later in the project, no matter what the circumstances.
>
> 2. No equity is to be released and whatever additional equity may be needed (to balance the funding) is to be in/evidenced and used prior to our uplift.
>
> 3. Any anxieties over the efficacy of the electricity supply are to be dealt with now, rather than later.

4. Linkage of availability to pre-sales as reflected in the Credit Opinion should continue.

This deal was promoted to us by BI as a comfortable, low ltc transaction, largely a case of fit out post superstructure, and this on the basis of strong pre-sales. We now have to ensure that the risk is re calibrated to reflect our original expectations. It would not at the outset have been approved at £17 m and will not now. Our task is to ensure that at £15 m, we can deliver a finished and largely pre sold infrastructure. Failure on our part to do this (prior to any further material drawing) should trigger a refinance."

Once again, this is a document in which there is no reference whatever to CBRE's valuation of the site. I can find nothing in the final paragraph which suggests that Mr. McDaid was deriving any comfort from CBRE's valuation of the market value of the site.

186. The following day, 13 February 2007, the request was approved at the reduced level of £15 million. The Decision Memorandum enclosed the Credit Opinion dated 7 February 2007 and Mr. McDaid's memo of 12 February 2007 (although it was referred to as being dated 13 February 2007).

187. It is apparent that Mr. McDaid's understanding at that stage was that there had been a further increase of about £2.25 million in the costs since October 2006 (i.e. £3,100,000 - £860,000). If so, one would have expected him to understand that this might well involve a corresponding reduction in the residual site value, assuming that Mr. McDaid's figure for the October costs corresponded with the figures taken by CBRE. In fact they did not: a discrepancy that Mr. McDaid (if he noticed it) did not appear inclined to investigate. This is not consistent with the Bank placing any reliance on the site value at the time when the facility was approved.

188. CBRE's case, supported by the evidence of its expert Mr. Hiscock, was that the development loan would have gone ahead even if CBRE had provided a correct assessment of the market value. This is because, it was said, when deciding whether, and if so on what terms, to make the development loan, the Bank was concentrating on the GDV, not the market value. CBRE relied, understandably, on the Bank's concentration on the ratio of the loan to cost ("LTC") and of the loan to the end value ("LTeV") as the crucial variables in the decision making process.

189. In addition, CBRE also relied on the fact that the Bank had already advanced £4.4 million (£4.1 million plus interest) for the purchase of the site and so to compel its sale would have meant taking a loss, on the basis of my finding as to the correct site value, of the order of £1 million (plus the costs of disposal). The only alternative to this would have been to stay with the project, make the development loan that had been conditionally offered and hope that the project would be completed so that the Bank would recover its money in full.

190. But, in addition to these points, there is in my view the central fact that the Bank had committed itself to funding the development when it approved the first proposal to lend up to £13.115 million in December 2006. That involved agreeing to fund Issa Ltd to the extent of a further £8.715 million. I have some difficulty in seeing how, when agreeing to lend a further £1.885 million, the Bank can have placed any reliance on CBRE's site valuation of £8.9 million. It was already in a position when the amount of the promised funding greatly exceeded CBRE's assessment of the site value. Once the Bank had agreed to advance £13.115 million, the level of security

provided by the site was exceeded by a substantial margin. Yet again, the Credit Application of 15 January 2007 showed the value of the security as £34.38 million, which suggests that it was the GDV only in which the Bank was interested. In my view both the documents and the logic of the situation point strongly to the conclusion that the valuation upon which the Bank was relying at this stage was that of the GDV alone.

The expert evidence

191. Both sides called expert evidence on lending practice. Mr. Stewart Hamilton was called on behalf of F&G and Mr. Steven Hiscock was called on behalf of CBRE. I found them both to be impressive experts who gave their evidence dispassionately.

192. In their helpful joint statement, the experts said this (at paragraphs 6.3 and 6.4):

> "6.3 The Bank's calculations were consistently incorrect as a result of its decision to permit the initial drawing under the Development Facility based on errors made by Mr. Rainford, who had over-stated the Borrower's equity by some £3.4 million. These errors were not corrected.
>
> 6.4 Had the Bank not acted on the incorrect analysis of Mr. Rainford referred to in paragraph 6.3 above and had the Bank carried out a correct evaluation of the sums eligible for drawing, no development funding would have been provided. Accordingly, the Bank's total exposure would have been limited to 4.1 million plus interest."

I consider that this conclusion is entirely consistent with the Bank's documents, which show that the level of the borrower's equity was a crucial factor in the Bank's decision making process. Mr. Rainford's error went to the heart of the decisions to advance funds for the development in December 2006 and February 2007.

193. Under the heading of matters not agreed, the experts said this:

> "If, as a matter of fact, which is for the Court to determine, the Bank relied upon CBRE's valuation then we each make different comments as follows:
>
> **Stewart Hamilton** considered that the CBRE valuation had provided the impression of an increased contribution by the Borrower, which mitigated the effect of cost increases and provided more comfort to the Bank, first, to commence development funding and, secondly, decide to increase its facility to £15 million.
>
> **Stephen Hiscock** noted that, by the time the CBRE report was provided, the Bank had already financed the site acquisition and development of the substructure was under way.
>
> He considered that the new residual valuation had no bearing on the Borrower's actual cash contribution to the project, nor on the contribution to the funding that would be needed from the Borrower to reach completion. However, it was reasonable for the Borrower to derive comfort from the increased GDV, in confirming that there was still a good margin between the anticipated costs and the anticipated sales receipts. That margin would have remained within the Bank's

> guidelines (60% loan to end value) down to the value of £21,858,000.
>
> **Stephen Hiscock** agreed that the Bank may have derived comfort from the GDV when increasing the limit to £15 million, but noted that the Bank should still not have allowed any drawing under the development portion of the facility, because insufficient contribution to the funding had been provided by the Borrower in order to complete the project (see Section 6 above)."

194. At paragraph 9.10, on page 27 of his report, Mr. Hamilton said:

> "The valuation by [CBRE], rather than Drivers Jonas, was referred to in the Credit Paper Memorandum dated 8 December 2006. This valued the site at £8.9 million, an increase from the figure of £6.3 million provided by Drivers Jonas, and substantially greater than the purchase price for the Site, thereby providing the impression of an increased contribution from the Borrower, mitigating the effect of cost increases, and providing more comfort to the [Bank]."

In his opinion to this section of his report, Mr. Hamilton said, at page 28:

> "I consider that there was a lack of coordination by the [Bank] in ensuring that its professional advisers were working with the same information; and that the [Bank] failed to question [CBRE] in relation to the lower levels of profit on cost and contingency assumed by [CBRE] in its appraisal and valuation, the effect of each of which was to inflate the residual value of the Site and to give the impression of the higher level of contribution by the Borrower."

I agree with this opinion, although I would add a reference to the failure to query the discrepancy in the construction costs between the figures taken by CBRE and the up to date estimate provided by F&G.

195. At page 40 of his report Mr. Hamilton said:

> "Having required a report and valuation from [CBRE], I consider that the [Bank] was entitled to rely upon it and that it was reasonable for the [Bank] to have so relied."

This statement appears to overlook the fact that the Bank made its decision to provide funding for the development on 18 December 2006 without having received CBRE's report. However, he then went on to note that CBRE's report was not sent to the Bank until 11 January 2007 and that it should have been reviewed by the Bank before it allowed Issa Ltd to draw down any money under the facility. He then said:

> "... and, if such consideration had not taken place, I do not consider that the [Bank] acted as a reasonable and competent lender in permitting drawings prior to consideration of [CBRE's] Report and Valuation. However, I note that all subsequent drawings after the first drawing under the Development Facility took place after receipt of [CBRE's] Report and Valuation, upon which the [Bank] was entitled to rely."

196. So in this last passage Mr. Hamilton is clearly recognising that the Bank had approved the funding of the development in December 2006 without having seen CBRE's report. I have already mentioned that Mr. Hamilton was also critical of the fact that CBRE adopted a developer's profit margin of 15%, as opposed to what he said was

the usual 20%, as well as a reduced contingency on the construction costs of 3%, rather than 5%. He said, on page 40 of his report, that these figures should have been the subject of enquiry by a reasonable and competent lender.

197. Mr. Hamilton noted also that the latest facility letter in existence at the time when the decision to advance the development funding was made in December 2006, which was the letter dated 13 September 2005, did not reflect the terms of the Decision Memo of 18 December 2006. He said, at page 42:

> "The purpose of a facility letter or loan agreement is to record, in a contract with the borrower and other parties, such as a guarantor, the terms applicable to a lending arrangement; and a reasonable and competent lender should ensure that any material variation to an agreement is documented. The [Bank], however, failed to update its facility letter to reflect changes to the terms, which it had agreed, or to impose the terms contained in its facility letter, which it had not agreed to waive."

I agree entirely with these observations. Although the Decision Memo approved the funding on the basis that it would be subject to the conditions recommended in Mr. Rainford's application, together with the further conditions set out in the Decision Memo, no document was produced at the time which set out those conditions. What happened quite simply was that three days later the Bank advanced the first tranche of £891,793 without any documentation at all.

198. In cross examination Mr. Hamilton was asked what he considered the Bank would have done if told that the GDV was of the order of £28-29 million and the site value was in the region of about £4.3 million. He said this (Day 4/67):

> "The fact at that stage is that the bank would have had outstandings of just over £4 million, £4.5 million to be precise, round figures. The value of the asset charged to it would have been some £4.2 million. Its loan to value would have been in excess of 100%, rather than the 70% which applied at the outset. And that together with the various difficulties which had been experienced on this account I think would have led ACD to have ruled that it was not prepared to go ahead without further investigation into the transaction.
>
> It might have gone ahead on the basis that there was a restructuring of it. For example the availability of additional guarantees or security. But I think that in the circumstances there would have been considerable concern as to whether a young and inexperienced developer like Mr. Issa could carry on with this development against a background of significant delays, cost increases, and now it would appear a much reduced value of the site compared to what he had invested in it."

When asked what would have happened then, Mr. Hamilton said that he thought that the Bank would have asked Mr. Issa whether he could inject further funds into the scheme. If Mr. Issa could neither produce further funds himself nor arrange a refinancing of the scheme, then he considered that in the last resort the Bank would have to consider requiring a sale of the site.

199. At paragraph 5.8.1 of his report Mr. Hiscock said:

> "The difficulty with development loans is that, once work starts on site, the original value of the site plus the cost of the work to date

> cannot necessarily be recouped at any given time. The site only acquires a clear value again once it is complete and the units are being sold.
>
> It is with this in mind that the textbook approach sets lending ratios at 2/3rds of cost, applied individually to the land value and the infrastructure cost, and 50% of the building work in progress. Steady increases in house prices and increased competition have meant that this general rule of thumb has been relaxed. In the absence of any evidence to the contrary, I believe that the ratios set by [the Bank] of 70% LTC and 60% LTeV would have reflected market rates at the time and that there would have been pressure on these if the Bank wanted to continue winning business."

200. Mr. Hiscock then went on to consider the position if CBRE had reported a site value of £4 million and a residential GDV, including car parking, of £26.25 million. He said this, at paragraph 5.9.3:

> "The CBRE valuations did not change the LTC ratio.
>
> At £26,250,000 the residential GDV would have given an LTeV ratio of 50%. That compares with the Bank ratio of 40%, using the CBRE figure, and the policy maximum of 60%. A site value as low as £4,000,000 would have indicated that the Bank would have struggled to get back the money already committed, if it sought to realise its security without completing the development.
>
> Given that work had already started on site, and the Bank had convinced itself that Issa had adequate resources available to it, I believe it would have concluded that it had more, not less, reason to carry on and would have allowed draw down to commence based on the lowest range of figures in the table above."

The reference to the "figures in the table above" refers to the valuations that Mr. Hiscock had been asked to assume. I observe that the LTeV that the Bank was prepared to accept on the basis of the figures that it had was 46%, as against the 50% referred to by Mr. Hiscock.

201. In cross examination Mr. Hiscock said (Day 4/97) that the fact that the Bank had not asked for a valuation of the site with the substructure works complete suggested that the Bank was concentrating on the GDV. He then went on:

> "Everything I have seen indicates that they believed they were in this project. And getting out of it, bearing in mind that it could still be completed at a reasonable cost and within the GDV that was acceptable to them, was the most effective way forward."

A little later, he said that he thought that the site value was of marginal interest to the Bank at that point. It was suggested to Mr. Hiscock that the reason why the market value of the site was important was because the Bank also wanted to understand what security they had if for some reason the project "cratered" and did not go ahead. His response to this (Day 4/101) was:

> "I don't believe that that was a particularly strong concern at that point, because they had already lent the money, they were committed to the project. The essence of the project was to get to the end when they could sell the apartments to repay the loan in full."

202. Mr. Hiscock also pointed out that if the site valuation was about the same or less than the amount advanced for its purchase, to require a sale of the site would inevitably result in a loss, so that quite often the best way forward was to carry on and build out the development (Day 4/103).

203. Although the evidence of these two experts, which was notable for the care and objectivity with which it was given, is helpful, it is to some extent addressing questions that are matters of fact to be decided by the court, rather than matters of opinion. Since F&G called no evidence from any employee of the Bank, the court is left with the evidence provided by the contemporaneous documents, although its evaluation of that evidence may be guided and informed by the evidence provided by the experts. Fortunately, the evidence provided by the documents is fairly full although it does not always provide a clear picture of the approach and thinking of the decision makers within the Bank on every aspect of the transaction.

204. On balance, and to the extent that it is relevant, if the only evidence before the court on the issue of reliance was that of Mr. Hiscock and Mr. Hamilton, I would have been inclined to prefer the evidence of Mr. Hiscock. This is not so much because I reject the evidence of Mr. Hamilton, but rather because the basis of the hypothetical question that was put to him about what the Bank would probably have done if given certain information is too far removed from the facts as I find them to be. If correctly advised, I consider that the Bank would have been told that the site value and the residential GDV were substantially less than the £4.2 million and £28-29 million, respectively, assumed by Mr. Hamilton. Mr. Hiscock's figures of £4 million and £26.25 million, respectively, were rather closer to the true values.

Reliance and causation

205. It is clear from the documents (and the contrary was not suggested) that the decisions were being made by ACD in London and not by Mr. Rainford in Manchester, although it is apparent that ACD must have relied on much of the information provided by Mr. Rainford.

206. Taking their reports and memoranda as a whole, it is, I think, clear that Mr. McDaid and Mr. Leonard, of ACD, were particularly concerned at the level of LTC and LTeV. Mr. Leonard made it clear that he wanted to keep to a LTC of 55%, and it seems that neither of them was prepared to allow an LTeV of much above 45%, although they finally agreed to a figure of 46%.

207. I find that other factors of importance to Mr. McDaid and Mr. Leonard were the perceived ability of Issa Ltd to fund the cost overruns, the level of equity already put in by Issa Ltd (although, as agreed by the experts, this had been seriously over estimated by Mr. Rainford) and the level of pre-sales. Although CBRE's assessment of the site value was shown in the table in each of the Credit Opinions against the heading "Security", it was not shown in the table summarising the "Proposal/Transaction" and there was no more than a passing reference to it in either of the documents produced in December 2006; in particular, nothing was said about the level of security reflected by the site value.

208. In my view, the proposal was regarded as commercially satisfactory because the Bank had been advised that the sale of the apartments on completion of the development would yield over £31 million, well over twice the amount of the loan. In addition, the LTC ratio, which was unaffected by CBRE's valuations of the GDV and site, was an acceptable 55%. I can find no hint in the documents prepared by Mr. McDaid and

Mr. Leonard of either of them taking any comfort from CBRE's valuation of the site. Apart from anything else, they did not know the basis on which that site valuation had been made until after the decision had been taken in December 2006. I accept, of course, that in theory the value of the site in these circumstances should increase once work has been done on it, but if that was a matter that was in the mind of either Mr. McDaid and Mr. Leonard it was not reflected in anything that they wrote at the time. It is also relevant that the Bank never asked for a valuation of the site once the substructure works and car park had been completed, although this had been a condition of the August 2005 offer. The documents provide no explanation as to why this requirement was dropped. That valuation, I would have thought, would have been of more relevance to the Bank in late 2006 than a valuation of the site which, although made in December 2006, was based on its condition at some time in 2005 before any work had started.

209. Whilst the valuation experts considered that it was not unreasonable for CBRE to have adopted this approach, a point on which I express no opinion because it was not in issue prior to the hearing, this does not get round the fact that its assessment of the market value of the site in its Development Appraisal of December 2006 was in truth an entirely hypothetical valuation.

210. However, on this I accept the evidence of Mr. Hiscock, which was not challenged when he gave evidence, that once work has begun the site only acquires a clear value again when the work has been completed and the apartments can be sold. At no stage did the Bank show any sign that it had considered the possible effect on CBRE's valuation of the site of the fact that work had been going on for some 12 months, which was not the basis on which CBRE valued it. In the present case there was no evidence at the trial as to the value of the site in its actual condition in December 2006/January 2007, and I do not consider that the court can indulge in speculation about it.

211. However, as I have already mentioned, Mr. McDaid and Mr. Leonard were very concerned that the LTeV should not be much over 45%. In fact they agreed to go to 46%, but that was only on the basis of CBRE's assessment of the GDV at £34.3 million. If CBRE had provided a figure for the GDV that was of the order of £26 million, and a figure for the site value that was less than £4 million, I would not be prepared to find on the evidence that the Bank would have proceeded with the transaction in any event. But on the other hand, I am not prepared to find that Mr. Hiscock's opinion to the contrary is wrong. The short answer is that it is entirely a matter of speculation and without having heard evidence from the relevant decision makers in the Bank, I am not prepared to make a finding either way.

212. But, for reasons that I have now given in more detail, I held in my Ruling on the Issues of Principle given on 3 April 2014 that the Bank suffered no loss as a result of the GDV being inaccurate because the same loss would still have occurred if it had been correct. Accordingly, if the GDV had been the only valuation given by CBRE any claim by the Bank based on its inaccuracy would fail because the loss that it actually suffered was not of a type against which it was CBRE's duty to protect the Bank.

213. I therefore turn to the site value. If this was relied on by the Bank agreeing to advance money for the development costs, then I consider that the Bank did suffer a loss as a result of its inaccuracy. I have already found that the correct site value in December 2006, assuming (as CBRE did) that no work had started, was about £3.5 million. CBRE's valuation of £8.9 million was therefore about £5.4 million too high.

The effect of CBRE's valuation of the site being wrong was that the true value of the security available to the Bank (if work had not started, which was the basis of the valuation) was at least £5 million less than it would have been had CBRE's advice been correct.

214. So I must now state my conclusion on the question of whether CBRE's overvaluation of the site was relied on by the Bank. That is to say whether the Bank relied on CBRE's valuation of the site when it agreed in December 2006 to make the advance in respect of the development costs, or to increase the facility in February 2007 to £15 million. But this breaks down into two questions:

i) did the Bank rely upon CBRE's valuation of the site taken by itself? And, if not,

ii) since the site valuation was derived from CBRE's assessment of the GDV, is it sufficient that the Bank relied on the GDV even if it did not regard the residual site valuation as being of any relevance in itself?

215. In relation to the relevant test to be applied in relation to causation in cases such as this, I gratefully adopt what Eder J said in *Capita Alternative Fund Services v Drivers Jonas* [2011] EWHC 2336 (Comm), at [268][1]:

> "For the avoidance of doubt, the Claimants submitted and I accept that they need not show that the Defendants' advice was the only matter relied on in determining to acquire Dockside; it will suffice if the advice played 'a real and substantial, though not by itself a decisive part, in inducing' the Claimants to act as they did: see JEB Fasteners v Mark Bloom [1983] 1 All ER 582 where Stephenson LJ said at p589 '… as long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing a plaintiff to act, it is a cause of his loss and he relies on it, no matter how strong or how many are the other matters which play their part in inducing him to act' [emphasis added]. Whilst Stephenson LJ expressed the test in terms of the effect of a misrepresentation, this was in the context of a claim in respect of the negligent preparation of accounts. Further, the test has been adopted and applied in investment and valuation cases: see, eg, *Cavendish Funding v Henry Spencer* [1998] PNLR 122 at para 125, *Precis v William M Mercer* [2004] EWHC 838 at para 182. Moreover, where a client retains and pays a professional adviser to provide advice a rebuttable presumption will arise that, having sought, paid for and obtained such advice, the client relied upon it: see, eg, *Levicom International Holdings BV v Linklaters* [2010] PNLR 29."
>
> (Original emphasis)

216. In my opinion, CBRE's assessment of the market value of the site, £8.9 million, was a factor that might have been taken into account by the Bank in December 2006 but, for the reasons that I have already given, I am unable to say what weight, if any, the decision makers in the Bank attached to it. For the reasons that I have already given, I am not prepared to find that it played a real and substantial part in the decision that was taken on 18 December 2006. It may have played a real and substantial part in the mind of Mr. Rainford, but he did not take the decision. I do not consider that F&G has established that those who did take the decision, which in December 2006 appears

[1] The case went to appeal, but not on this part of the case.

to have been Mr. McDaid and Mr. Barry Gray, were concerned to any material extent with the valuation of the site. I therefore find that it has not been proved that the Bank relied on it when deciding whether and on what terms to fund the development in December 2006.

217. So far as the position in February 2007 is concerned, the decision makers appear to have been Mr. McDaid and Mr. Leonard. They were, quite understandably, concerned primarily about the level of LTC and the GDV of the completed project. In addition, it is clear that great importance was attached to the level of equity thought to have been put in by Issa Ltd (which appeared to include a very substantial sum in respect of the materials allegedly stored off site), as well as Issa Ltd's apparent ability to fund cost overruns.

218. If the site valuation played any material part in the considerations in February 2007, which I doubt, I find that it did not play a real or substantial part in the decision to make a further increase in the development funding. Any presumption that the Bank did rely on CBRE's valuation of the site when deciding whether and on what terms to advance money to fund the development (either in December 2006 or February 2007) is in my view rebutted by the contents of the contemporaneous documents and the fact that the Bank had already committed itself to the development funding in December 2006 without having seen CBRE's report. In addition, by February 2007 the Bank had already committed itself to lending up to a limit that was greatly in excess of CBRE's assessment of the value of the security in the form of the site.

219. I therefore turn to the question of whether the two valuations can be separated. I see no reason why not. Whilst the site value was derived from the GDV, there were other variables that formed part of the equation - such as construction costs, professional fees, marketing costs and developer's profit. Each of these had to be deducted from the assessment of the GDV before a residual site value could be arrived at. So if the GDV remained the same but one or more of these variables was adjusted, the residual site value would change: a GDV of X does not automatically result in a residual site value of Y. Indeed, on the facts of this case that was the position. CBRE took a figure for the construction costs which was significantly lower than the construction costs as assessed by F&G, with the result that its assessment of the site value was over £1 million higher than it would have been if F&G's figures for the construction cost had been adopted. However, its assessment of the GDV was quite unaffected by any increase in the development costs.

220. Whilst these two valuations were interconnected, it did not follow that if one was acceptable the other would also be acceptable. For example, taking the figures in this case, if CBRE's valuation of the income from the sale of the apartments, the retail space and the parking was reduced by 15%, the LTeV on a loan of £15 million would have been 55% - a figure well within the Bank's guidelines (albeit not necessarily one at which it would have been prepared to lend on a particular development). However, the effect on the residual site value would have been to reduce it to about £4 million, which would have been less than the sum paid of £4.4 million (with interest). If these figures had formed the basis of an initial proposal to the Bank before the site was purchased, I am sure that it would never have been prepared to advance £4.1 million towards the purchase of the site, whatever its views about the proposed borrower,[1]

[1] Indeed, the Bank reduced the amount that it was prepared to lend Mr. Issa for the purchase of the site when Drivers Jonas reduced its assessment of the site value from £6.9 million to £6.3 million. This was relied on by Mr. Brannigan in support of his submissions in relation to the relevance of the site value, but in my judgment the situation was completely different. This trial was concerned exclusively with events that took place after the purchase of the site.

although it is at least possible that it might otherwise have been prepared to contemplate a loan for the subsequent development costs with an LTeV of 55% if it had sufficient confidence in the resources and ability of the borrower.

Conclusions on liability

221. For all these reasons I consider that F&G has failed to prove that CBRE's valuation of the market value of the site played a real or any significant part in the Bank's decisions to advance money to fund the development in December 2006 and February 2007. Accordingly, I find that it has not been proved that the Bank relied on CBRE's valuation of the site in the sense described by Eder J in *Capita v Drivers Jonas*. However, in my opinion CBRE's valuation of the GDV did play a real and significant part in both decisions.

222. I consider that CBRE's valuations of the GDV and the market value of the site should be treated as separate valuations, so that the fact that the Bank relied on CBRE's valuation of the GDV does not mean that it relied also on CBRE's valuation of the site.

223. Since the Bank sustained no loss as a result of CBRE's valuation of the GDV being wrong, it has no claim under that head (as I have already ruled).

224. In these circumstances, F&G's claim for contribution against CBRE must fail. However, in case I am wrong about this I will deal with the issues relating to contribution.

The Civil Liability (Contribution) Act 1978

225. Sections 1 and 2 of the Act provide as follows:

> "1. Entitlement to contribution
>
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> ...
>
> (4) A person who has made or agreed to make any payment in bone fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
>
> 2. Assessment of contribution -
>
> (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having

regard to the extent of that person's responsibility for the damage in question.

...

(3) Where the amount of the damages which would or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to -

(a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;

(b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976;

(c) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above the required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced."

226. There is a very helpful analysis of the operation of the Act in the judgment of Mr. Justice Christopher Clarke (as he then was) in *Nationwide Building Society v DHL* [2009] PNLR 373. This judgment followed the decision of the House of Lords in *Royal Brompton Hospital Trust v Hammond* [2002] 1 WLR 1397. In the *Nationwide* case Christopher Clarke J said, at paragraphs 49 and 50:

"49 'The same damage' in section 1(1) means the damage, suffered by another person, for which both the person seeking contribution and the person from whom contribution is sought are liable. When section 2(1) speaks of 'the damage in question' it must be referring to the 'same damage', as specified in section 1(1), in respect of which rights of contribution arises the draughtsman cannot have intended the word 'damage' to have a different meaning in section 2 to that which it has in section 1. Further it is only section 1(1) which puts 'the damage in question' at all.

50 It is, however, necessary to distinguish between three different circumstances viz:

(a) D1 and D2 are not liable for the same damage because they are responsible for different things;

(b) D1 and D2 of both liable for the same damage and in the same amount;

(c) D1 and D2 are liable for the same damage but D2 is liable for less than D1, e.g. because he has available to him defences which reduce what would otherwise be his liability for the

> damage in question e.g. contributory negligence and contractual or statutory limitation."

I respectfully agree with these observations. I would only add, for the sake of clarification, that the facts may disclose a combination of (a) and (b) where the scope of D1's duty is more extensive than that of D2. Where Christopher Clarke J refers to a person being liable for the damage in paragraph 49, he is not referring to the amount of damages that the person would have to pay. It is quite clear from the authorities that "damage" in the Act is not the same as "damages". Other considerations apart, by virtue of section 2(3), the amount of "damages" for which a person is actually liable may, as a result of a contractual or statutory limitation, be less than the amount for which the person would otherwise have been liable. In sections 1 and 2 the Act does not speak of a person being liable in damages, but only of a person being liable in respect of damage. As Christopher Clarke J pointed out in *Nationwide*, if "the damage in question" meant the same as the "damages" recoverable, section 2(3)(a) would be deprived of any content.

227. In *Nationwide* the question of the application of the "*SAAMCO* cap" [1] did not arise, because the valuer had been guilty of fraud. But I note that that at paragraph (5) of the headnote in *Nationwide* it says that the "damage in question" was not "the total damage suffered but the damage for which both defendants were liable (though without reference to any agreed or common law limitation, which was relevant only as a cap on liability under s 2(3) of the Act)". I do not consider that this is a correct paraphrase of sub-section 2(3): the sub-section in fact refers to "any limit imposed by or under any enactment or by any agreement ...". This is different, in my view, to a limit imposed by common law on the recoverable damages by virtue of the nature and scope of the duty owed to the person who suffered the damage. The whole thrust of Lord Hoffmann's analysis in *SAAMCO* is that the valuer is not liable in law for the full amount of the basic loss that the lender suffers as a result of entering into the transaction, but only to the extent of the overvaluation.

228. However, I am satisfied also that the Bank suffered only one type of damage, namely the basic loss. In my judgment if the Bank relied on the advice given by both F&G and CBRE, then each of them is, as a matter of causation, responsible for the basic loss suffered by the Bank. This is because F&G and CBRE each gave advice concerning different aspects of the financial viability of the project. CBRE's contribution was its assessment of the prices that the apartments would fetch when the development was completed, together with its valuation of the car parking spaces and the retail units. F&G's contribution included advice about the cost of construction and the amount that Issa Ltd had actually put in, whether by way of construction costs or the procurement of materials stored off-site. In short, it is alleged that each of them provided information to the Bank in relation to the decision to advance funds for the development that was inaccurate.

229. But so far as any liability for the site valuation is concerned, CBRE's scope of duty and potential liability is limited by the principle in *SAAMCO*. That is to say that the only part of the basic loss for which CBRE could be liable is the amount represented by the difference between the true value of the site and its value as represented by CBRE. That is £8.9 million less about £3.5 million (which is my assessment of the

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[1] The expression "*SAAMCO* cap" is a little unfortunate in this context. It tends to suggest that the cap is some form of limitation of liability, when in truth it represents the amount for which a valuer can be liable having regard to the nature and scope of his duty.

correct value of the site on the basis on which CBRE valued it - see paragraph 114 above), namely £5.4 million.

230. Thus the basic loss suffered by the Bank would be capable of constituting the "same damage" within the meaning of the Act, assuming that the scope of the duty of care owed by F&G and CBRE was the same. But if CBRE is liable only up to the extent of the "*SAAMCO* cap", and that is less than the basic loss, then it would seem that the "same damage" within the meaning of section 1 of the Act should be that part of the basic loss for which CBRE is liable under the *SAAMCO* principle. Subject to contributory negligence by the Bank, that would be the amount that represents the common liability of F&G and CBRE.

231. The distinction between the two types of loss was put very neatly by Lord Millett in *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190, at 213 E-G, when he said:

> "It is necessary to recapitulate what this House has laid down in relation to the assessment of damages in cases of the present kind. Two calculations are required. The first is a calculation of the loss incurred by the lender as a result of having entered into the transaction. This is an exercise in causation. The main component in the calculation is the difference between the amount of the loan and the amount realised by enforcing the security.
>
> The second calculation has nothing to do with questions of causation: see the *Nykredit* case, at p. 1638, *per* Lord Hoffmann. It is designed to ascertain the maximum amount of loss capable of falling within the valuer's duty of care. The resulting figure is the difference between the negligent valuation and the true value of the property at the date of valuation. The recoverable damages are limited to the lesser of the amounts produced by the two calculations."

232. In the *Royal Brompton Hospital* case, which was decided after *Platform Home Loans*, Lord Bingham said this, at paragraph 6:

> "... B's right to contribution by C depends upon the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not."

233. In opening his submissions to the House of Lords in the *Royal Brompton Hospital* case counsel for the contractor gave an example arising out of the sale of the shares in a company, which was summarised by Lord Steyn at paragraph 29 of his speech in the following terms:

> "An accountant had negligently valued the shares at £7.5 m. The vendors warranted that the shares were worth the price of £10 m. In truth the shares were worth only £5 m. The vendor was liable for damages in the sum of £5 m. Counsel for the contractor said that the accountant could only be liable to the extent of the common liability i.e. £2.5 m. Counsel for the architect accepted this analysis is correct. Again, the architect is in difficulties because the example demonstrates the unavailability of a right of contribution to the extent that there is no common liability."

This example is not a case where the damages recoverable against the negligent accountant were subject to a limit imposed by or under any enactment or agreement made before the damage occurred, as provided for by section 2(3) of the Act. It is a case where, as a matter of law, the extent of the accountant's liability was only £2.5 million. That is the maximum amount which both the accountant and the vendors owed in law to the claimant and is therefore the amount which forms the subject matter of any claim for contribution.

234. In the light of these authorities I consider that the "same damage" for which a valuer and another adviser would both be liable to a lender for the purposes of the Act is the lower of the amounts for which each would be individually liable having regard to the scope of the duty owed by each of them to the lender (assuming that each gave advice or was otherwise in breach of duty that led to the lender sustaining the basic loss).

235. However, these amounts are to be assessed before consideration of any contractual or other limitation of liability imposed by statute that might restrict either party's actual liability in damages to some lower figure. In my view it is the larger amount which represents the "same damage" for which they are liable. It seems to me that this is in accordance with Lord Millett's analysis in *Platform Home Loans*.

236. Given that F&G was, subject to contributory negligence, liable for the full amount of the basic loss, the "same damage" for which both F&G and CBRE was liable to the Bank must be limited to £5.4 million - being the amount for which CBRE was potentially liable. In the absence of any contributory negligence by the Bank, that would be the sum that must be apportioned between them in the proportions that the court finds to be just and equitable.

The effect of contributory negligence by the Bank

237. However, this analysis has so far not addressed the question of any contributory negligence by the Bank and how this impacts on the claim for contribution. In the *Platform Home Loans* case (*supra*), Lord Hobhouse said, at 201G-H:

> "Thus, the first step is to establish what was the basic loss of the lender. The second step is to see whether that basic loss exceeds the amount of the overvaluation and, if it does, the lender's right of recovery from the valuer is limited to the extent of the overvaluation. The issue in the present case is whether the reduction in the plaintiffs' damages on account of their contributory negligence, here as usual expressed as a percentage, should have been applied to the plaintiffs' basic loss or to their loss as limited by the application of the [*SAAMCO*] principle ..."

238. It was held that the answer to the question was that the reduction for the contributory negligence of the lender should be applied to the lender's basic loss, not to the amount for which the valuer was liable as a result of the application of the *SAAMCO* principle. That approach was followed by Christopher Clarke J in the *Nationwide* case. I propose to follow it too.

The amount of the Bank's contributory negligence

239. I now turn to the amount of contributory negligence. So far as F&G is concerned, it is accepted that its settlement with the Bank was not only a bona fide settlement but also was a reasonable settlement. I agree. It reflects the facts that F&G had a liability to the Bank - which in my view it clearly did, not only on the basis of the facts pleaded

against it, but also on the merits - and that the Bank was guilty of a substantial degree of contributory negligence.

240. However, the settlement was made without any admission of liability. Whilst it may be open to F&G to contend that its true liability was less, I do not consider that any such argument is realistic. Having regard to my findings in relation to F&G's performance of its obligations to the Bank, it clearly had a significant share of the responsibility as between itself and the Bank for the losses sustained by the Bank. On further reflection (following the indication that I gave in the Ruling on Issues of Principle) and in the light of the evidence as a whole, I would assess F&G's liability as 35%.

241. I assess the Bank's total claim, with interest up to the date of settlement, as being about £10.3 million[1]. 35% of this is about £3.6 million. Accordingly, I find that the sum that F&G paid the Bank, £3.35 million, was a little below its true liability.

242. Following the approach taken by Christopher Clarke J in the *Nationwide* case, which I did not understand to be challenged, the figure of £3.6 million becomes the starting point for F&G's claim for contribution.

The amount of CBRE's contribution

243. The next step in the exercise to assess the proportion in which F&G and CBRE should contribute to the figure of £3.6 million.

244. I have found that CBRE's appraisal contained a number of errors that should not have been made and that the overall result was well outside the range of non-negligent valuations (as CBRE now concedes). However, as Mr. King submitted, CBRE's breaches of duty occurred over a two or three month period. The allegations made against F&G were in respect of a much longer period, although the most relevant period was probably from about mid 2006 to early 2007.

245. If it was established that the Bank had relied upon CBRE's valuation of the site when it confirmed the decision in December 2006 to advance development funding to Issa Ltd, then I would have concluded that CBRE's responsibility for the Bank's decision to enter into the transaction should be higher than F&G's having regard to both blameworthiness and causative potency.

246. F&G was to a large extent misled by Mr. Issa. Although I have found it was at fault in the manner in which it advised the Bank, some of the shortcomings in its advice were in part apparent on the face of its November 2005 report and subsequent letters. That is one reason why I regard the Bank as having the greater responsibility for what occurred.

247. CBRE was also misled by Mr. Issa, or by those whom he instructed, in relation to matters such as the car parking spaces and the area of the retail units. However, those were errors that could have been spotted and, in the case of the car parking spaces, I have found should have been queried by CBRE. On the other hand, as Mr. King pointed out, F&G also failed to spot these errors. The point in relation to the car parking spaces was pleaded against CBRE, but not against F&G, whereas the point in relation to the additional retail unit was not pleaded at all. Accordingly, it seems only fair to regard the point in relation to the retail areas as neutral.

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[1] The figure claimed by the Bank up to 7 May 2012 was £9.945 million. Interest at 2% (1½% over base) for just over 21 months to the date of settlement is about £350,000. The total claim is therefore about £10.3 million.

248. Mr. King makes the good point that CBRE was never sued by the Bank. Mr. Brannigan's answer to this was that the Bank would not know that it had sustained a loss until it sold the site, which it did not do until May 2010. But Mr. Brannigan's point is rather undermined by the fact that by a letter dated 8 April 2009 the Bank formally put CBRE on notice of a potential claim in negligence arising out of its valuation.

249. Mr. King also drew my attention to the Bank's internal report in August 2008 on the events concerning the Sarah Tower Development. This was scathing, and the Bank's investigators also noted that Mr. Rainford had greatly overestimated the amount of the equity put in by Mr. Issa. I have re-read that report since the final submissions and have taken it into account.

250. For the reasons given below, I would assess the apportionment of responsibility as between the Bank and CBRE as 50:50. This, I stress again, is on the assumption that the Bank relied on the amount of the valuation of the site as a significant factor when making its decision. Although I have no hesitation in saying that the Bank acted incompetently, it has to be said that there were gross errors by CBRE in the preparation of its development appraisal. As I have already indicated, some of them should have been picked up by the Bank - but by no means all of them. Short of carrying out a complete recount of the values of each apartment, the Bank would have been unlikely to spot the very substantial error in the valuation of the residential sales.

251. Since the "*SAAMCO* cap" is higher than both the settlement sum and what I have found to be F&G's true liability to the Bank, the cap is not engaged.

252. I therefore turn to the question of what amount it would be just and equitable for CBRE to pay by way of contribution if I had found that it was liable to the Bank. So far, I have considered the position up to December 2006. However, the allegations of negligence against F&G went beyond that and I have no doubt that F&G's conduct continued to permit drawdowns that should not have been made. Having regard to my assessment of each party's responsibility (both in terms of causative potency and blameworthiness) for the damage suffered by the Bank, I consider that it would be just and equitable for CBRE to pay rather more than F&G. Taking all the circumstances into account I consider that the fair apportionment would be 55:45 in favour of F&G.

253. I have already concluded that the "same damage" for which both F&G and CBRE are liable is £3.6 million. Of that figure 45% is F&G's share, namely £1.62 million. However, F&G has already paid £3.35 million and so it has overpaid £1.73 million. That is therefore the sum that it would have been entitled to recover from CBRE if I had found that CBRE was liable to the Bank.

The claim for contribution in respect of the Bank's costs

254. As already mentioned, F&G settled the Bank's claim for £3.35 million plus costs - that is, of course, the Bank's costs. F&G makes no claim in respect of its own costs of defending the Bank's claim.

255. F&G's submission is that the court has jurisdiction to make an order that CBRE should contribute to the Bank's costs, both under the Act and under section 51 of the Senior Courts Act 1981. It submits that the Bank's costs should be split in the same proportion as the settlement sum.

256. In supplemental closing submissions CBRE raised the point, for the first time, that regardless of other issues it would not be fair or just to impose on CBRE any liability in respect of the Bank's costs because those costs had been incurred, or at least increased very substantially, by F&G's conduct of the main action and arose out of F&G's decision not to settle the claim until a very late stage.

257. Mr. Brannigan's short answer to this, which I thought had some force, was that if F&G had offered to pay £3.35 million at an early stage in the litigation, it would never have been able to settle for the same sum months or years later. Implicit in this submission is the assertion that, if offered £3.35 million at an early stage in the litigation, the Bank would have refused to accept it. Whether or not this is so is a matter of speculation.

258. Mr. Brannigan referred me to the decision of Ramsey J in *Mouchel Ltd v Van Oord (UK) Ltd* [2011] EWHC 1516, in which, after a review of the relevant authorities, he summarised the position in the following terms:

> "23. First, where a party settles a claim made against it by a third party and in doing so pays costs to that third party, the court has a discretion and may order that a party liable to make a contribution to that other party should pay those costs under section 51 of the 1981 Act: *BICC* at [115].
>
> 24. Secondly, those costs may also give rise to a contribution under the 1978 Act. In *BICC* the Court of Appeal held that where there was an overall settlement figure in respect of all claims which included a sum attributed by the paying party to costs, such a payment could found a contribution claim under sections 1(1) and 1(4) of the 1978 Act: see *BICC* at [120] and [123]. That principle was adopted by Christopher Clarke J in *Nationwide Building Society* and by Judge Thornton QC in *Bovis Lend Lease*."

259. Ramsey J then went on to make some observations about what was meant by "contribution" under the Act. At paragraph 25 he said this:

> "I also consider that under the 1978 Act a 'contribution' is not limited to being a contribution in respect of 'damages' but includes a contribution based on 'liability for damage'. This can be derived from the wording of the following provisions:
>
> (1) Section 1(1) states 'any person liable in respect of any damages suffered by another person may recover contribution from any other person liable in respect of the same damage…'. That is not expressed in terms of contribution for liability for damages but contribution for liability in respect of damage.
>
> (2) Section 1(2) deals with the case where the contributing party has ceased to be liable in respect of the damage but states that a contribution can still be recovered 'provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought'. Again the use of the phrase 'the payment' is not limited to the payment of damages in respect of liability for damage.

(3) Section 1(4) provides that 'a person who had made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage … shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage…'. Again the use of the word 'payment' in settlement of a claim is not limited to damages and a contribution can be recovered in respect of that payment.

(4) Section 2(3) deals with the effect of any limit imposed by statute or agreement or any statutory reduction upon the amount of contribution. This subsection does refer to 'damages'. It states 'where the amount of the damages which have or might have been awarded in respect of the damage in question ... was or would have been subject to [a limit or reduction] the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.' This provision evidently limits the contribution so that only the damages, so limited or reduced, can be recoverable. I do not consider that that means that in other cases the contribution could not include both damages and costs. This is merely to give effect to agreed or statutory limitations or reductions on damages so that any contribution is similarly limited to that amount of damages so limited or reduced. Whilst it could be argued that this indicated that the contribution was always limited to damages, I do not consider that to be correct. The contribution required to be paid "in respect of the damage" is limited or reduced to the amount of damages. Whilst that might exclude a contribution for costs in excess of the limited or reduced damages, I do not consider that is inconsistent with there being the entitlement for a contribution of costs and damages in respect of liability for damage under the other provisions of the 1978 Act."

260. I agree with those observations and with Ramsey J's summary of the authorities.

261. As a general point, it is common experience that parties often enter litigation with inflated expectations as to their prospects of success. A good litigator knows that managing his opponent's expectations is a vital part of the successful conduct of litigation. It is often the case that, following an exchange of well drafted statements of case and then disclosure, the parties' expectations change and the confidence of success of one or other of the parties can be eroded.

262. From a defendant's point of view it can therefore sometimes be unwise to make an offer representing what it considers to be the true value of the claim against it too early. A claimant may be more inclined to settle for a lower figure than it had at first hoped to recover once it has appreciated the force of the points made against it and has seen the resolve of the defendant to fight the claim. Once an offer has been made and refused it is usually fairly rare for a claimant to be prepared to accept the same offer much further down the line. This is because it will then have difficulty recovering the costs that it has incurred in the meantime and may even be exposed to a claim in respect of some of the defendant's costs. This was effectively the point made by Mr. Brannigan. I am very conscious that, in the present climate of

understandable aversion to the very high costs of litigation, these may not be observations that will be welcome to many ears. However, that is not a reason for closing one's eyes to experience.

263. Accordingly, in some cases it may be that a defendant has to expend money on costs, in addition to increasing its own liability for the claimant's costs, in order to reduce the amount for which it can settle the claim. Of course, it does not by any means follow that the consequent saving on the settlement sum will be greater than the increased expenditure on (and liability for) costs. Obviously, much depends on the size of the claim and its realistic settlement value.

264. I therefore start from the proposition that it may not necessarily be fair or just to a defendant, being a claimant in third party proceedings, who has settled the claim against it in the main action for a reasonable sum to deprive it of any claim for contribution in respect of the costs of the claimant in the main action. Suppose, for example, that the claimant in the main action was insisting at the outset that it would accept nothing less than £5 million plus costs. The defendant eventually settles for £3.5 million plus costs. However, in the meantime the claimant's reasonable costs, which the defendant has agreed to pay in addition to the settlement sum, have increased by £1 million. By hanging on the defendant has saved £0.5 million in respect of its liability for the claim and the claimant's costs. Why is it fair that it should not recover any of the additional £1 million by way of costs that it has effectively had to pay to the claimant in order to reduce the settlement sum by £1.5 million?[1]

265. I am in no position to know whether or not such an analysis is applicable to the facts of the present case. There is no means of knowing what the Bank's internal position about settlement may have been at any particular stage of the proceedings. But looking at the case as a whole, I cannot help suspecting that the Bank initially hoped to recover from F&G rather more than one third of its basic loss since it appears to have held the firm view - for most if not all of the time - that it was F&G, not CBRE, that was responsible for its losses.[1]

266. This is not a case of which it can be said that a defendant ran a number of hopeless points against the claimant which had to be abandoned in the course of the litigation, thereby greatly increasing its liability for the claimant's costs. Although CBRE submits that the Bank's costs increased very substantially during the litigation as a result of F&G's delay in settling it, there is no allegation that costs were incurred by the Bank that were not connected with the true basis of F&G's liability.

267. In these circumstances it seems to me that the order that would have been fair and would have done justice to the case would have been to order that CBRE should contribute to the Bank's reasonable costs in the same proportion as I have found it would have had to bear in relation to the settlement sum, namely 55%. That is the conclusion that I reach exercising my discretion under section 51 of the Senior Courts Act 1981. However, I can see no reason for arriving at a different conclusion when considering the position under the Act.

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[1] The defendant's own costs of resisting the claim against it are not usually recoverable from a third party; they do not form part of the defendant's liability to the claimant.

[1] In a letter dated 3 September 2013 the Bank's solicitors said that it was their understanding of the Bank's evidence that "although it was pleased to see an increase in the GDV to £34.38 m it did not alter its decision making process going forward and [the Bank] would have been content with the GDV figure of £31 m remaining in place". However, when that letter was written the Bank must have been working on the assumption that the Drivers Jonas valuation was a reasonable valuation, whereas the evidence now before the court shows that it may have been just outside the non-negligent bracket.

Disposal

268. The claim for contribution fails and must be dismissed. I will hear counsel on any other questions arising out of this judgment, such as costs, that cannot be agreed.

APPENDIX 1

RULING ON ISSUES OF PRINCIPLE

(3 April 2014)

1. The basic loss sustained by the Bank was the money advanced after 18 December 2006 (assumed for these purposes to be about £8.2 m).

2. Subject to proof of reliance by the Bank on CBRE's valuations (which has been assumed for the purpose of this part of the hearing), the Bank's basic loss is a loss for which both F+G and CBRE are *prima facie* liable, because:

   i) both F+G and CBRE gave advice concerning different aspects of the financial viability of the project;

   ii) CBRE's valuation of the GDV went directly to the financial viability of the project, as did F+G's advice about the costs of construction;

   iii) CBRE's valuation of the market value of the land concerned the amount of security available to the Bank if the project failed, as did F+G's advice about the developer's equity contribution and the value of the materials stored off site and available for realisation if the project failed;

   iv) the consequence of that advice (subject to proof of reliance on CBRE's valuation) was that the Bank expended money on a project whose financial viability and level of security was not as represented by F+G and CBRE;

   v) accordingly, the damage sustained by the Bank was the money spent (from December 2006 onwards) on an investment that was not viable, or not as viable as represented ("the basic loss"); and

   vi) for that damage both F+G and CBRE (subject to reliance and proof of negligence) are in principle liable.

3. Both lending experts consider that if the Bank had observed its own policies and acted reasonably, it would not have advanced any or any significant sum after December 2006. In these circumstances a finding of substantial contributory negligence (N%) against the Bank is inevitable, where N is a significant % and, provisionally, probably between 40-60%.[1]

4. On the authorities, where L has advanced money to B following a negligent overvaluation by V of a property (or of a property that is to be developed) that is to be bought (or developed) by B, it is a necessary condition of the recovery of any damages by L from V in respect of the negligent overvaluation that L must show that:

   i) when making the transaction(s) by which he advanced money to B, L relied on the accuracy of the valuation; and

[1] This bracket does not imply that F+G's settlement was at the top of the relevant range. The apportionment against the Bank may well decrease as the number of parties between whom liability is to be apportioned increases.

ii) following the transaction(s), L suffered a loss or losses that he would not have suffered if the valuation had been correct.

5. The representations made in CBRE's valuation report in respect of matters such as independence and lack of information about floor plans go to the issues of reliance by the Bank and the reliability of the valuation. They do not widen the scope of CBRE's duty (although they may go to blameworthiness).

6. CBRE's valuation contained two elements: a GDV and a market value, both assessed as at December 2006. The latter was an arithmetic derivative of the former. The market value was arrived at by considering what the proposed development would be worth when complete and then deducting the estimated cost of construction (including professional fees) and a reasonable profit for the developer. The difference is the value of the undeveloped land with the relevant planning permission.

7. On the assumption that CBRE's valuation of the GDV was in excess of the reasonable bracket and was negligently arrived at, it follows that CBRE's market valuation of the land was also negligently made. The Bank would have suffered no loss if the only valuation requested and given had been the GDV, because it would have sustained the same losses even if that valuation (taken by itself) had been correct.

8. However, as a result of the (assumed) overvaluation of the GDV, the market value was also overvalued at £8.9 m. The correct value remains in issue, but on any view is significantly less. This resulted in a shortfall in the amount of security available to the Bank as against the position as represented.

9. On the assumption that CBRE's valuation of the market value of the land was a negligent overvaluation, CBRE was *prima facie* liable to the Bank in the amount of £8.2 m x (100-N)%.

10. F+G would also be liable to the Bank on the basis of the facts pleaded in the Particulars of Claim for the same amount (£8.2 m x N%).

11. Under SAAMCo principles, CBRE's liability for any negligent overvaluation is limited to the difference between £8.9 m (the market value as represented) and the correct market value of the land in December 2006.

12. If the application of the SAAMCo "cap" produces a figure lower than £8.2 m x N%, that figure is the limit of CBRE's liability to the Bank and is therefore the amount in respect of which F+G would be entitled to claim contribution.

13. On the assumption that CBRE's valuation of the market value was relied on and was a negligent overvaluation, CBRE is liable to contribute to the sum paid by F+G to the Bank (which is admitted to have been a reasonable settlement).

14. Although the court cannot at this stage make any apportionment of liability as between F+G and CBRE, on the material presently before it the court regards F+G's submission in its written opening note that CBRE's proportion should be 100% of the settlement sum as unrealistic.