Neutral Citation Number: [2023] EWHC 2389 (KB)

Case No: QB-2021-003619

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 September 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

HOPE CAPITAL LIMITED **Claimants**

- and -

ALEXANDER REECE THOMSON LLP **Defendant**

- -
- -

ANDREW NICOL (instructed by Penningtons Manches Cooper LLP) for the Claimants
TOM ASQUITH (instructed by Kennedys LLP) for the Defendant

Hearing dates: 12, 13, 14, 17, 18, 19, and 24 July

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 16:30 on Wednesday 27th September 2023.

Mr Justice Constable:

A. Introduction

1. Cedar House is a Grade II listed property, prominently situated in a plot of some 0.667 acres on the edge of the large village of Cobham in Surrey. The original brick and timber building was constructed in the 15th Century, with later additions in the 18th and 20th Centuries. It was valued at £4,000,000 within a report dated 14 February 2018 ('the Valuation') by Mr Jeremy Mussett then of the Defendant, Alexander Reece Thomson LLP ('ART') as security for a bridging loan. The loan was in the sum of £2,215,440 (£2,448,000 including interest and fees which would accrue during the term of the loan, i.e. gross), and was provided to St Anselm Heritage Properties Limited ('St Anselm'), by the Claimants (together, 'Hope') in circumstances described more fully below. St Anselm was a property company owned and controlled by Mr Evangelos Pieri, which had the benefit of a long lease on Cedar House from the National Trust, the freehold owner. St Anselm defaulted on the loan and receivers took possession of Cedar House on 12 November 2018. A number of issues arose, the most significant of which was the service by the National Trust of a (second) s146 Notice on 18 November 2018 requiring remedial work to the property in respect of breaches of the lease by St Anselm caused by irresponsible renovations. Cedar House was eventually sold on 2 October 2020 for £1,400,001.

2. Hope brings a claim against ART alleging that the Valuation was negligent, and that no transaction would have taken place if the valuation had reflected the true value of Cedar House. This, it says, was £2,150,000. It claims that its total loss caused by entering into the transaction was £2,527,749 (to 2 October 2020, plus interest). This is made up of the loss in capital (£875,401.40, including net costs of extraction), the loss of contractual interest on the loan (£1,293,149.68), and a claim for loss of profits which, it says, would have been realised by use of the lost capital in the intervening years in other successful bridging loans (£359,197.20). Hope accepts, on the basis of the principles laid down in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 ('*SAAMCO*') that its recoverable loss is capped by reference to the difference in value between the Valuation (£4,000,000) and what it says is the non-negligent 180 days valuation for Cedar House (£1,950,000). This is a total actionable loss of £2,050,000 plus its claimed Weighted Average Rate of 17.64% p/a of interest claimed from 28 March 2018 to date, which it claims equates to £3,982,933.21. Its alternative case based upon a Cost of Funds rate averaging 8.10% p/a is £2,937,571.37.

3. In its Closing Submissions, ART accepted it had acted in breach of duty for the first time. Whilst it contends that the true value was £3,175,000, it accepts that this fell outside a bracket within which a reasonably competent value should have fallen. It denies causation and loss, and alleges contributory negligence. Its primary case, reliant upon the analysis in the recent Privy Council case of *Charles B Lawrence & Associates v Intercommercial Bank* [2021] UKPC 30; [2022] P.N.L.R. 7, is that loss should be calculated as the difference between the value of the property (ignoring issues which were not within the valuer's scope of duty such as, in the present case, the impact of the National Trust's second s146 notice and the delay in selling the property) and the loan, less a discount for contributory negligence, plus statutory interest.

B. The Application to Amend

4. On the fourth day of trial, Hope applied to amend its Particulars of Claim pursuant to CPR Part 17.1(2)(b). The Amended Particulars of Claim:

   (1) At paragraph 7, added that '*…The Valuation Report stated 'We confirm we have had no previous involvement with the Property and therefore have no conflict of interest in accepting this instruction'.*

   (2) At paragraph 9, added a further particular of (as set out at the start of paragraph 9) breach of the implied term and/or negligence and/or breach of duty that '*Further and/or in the further alternative the Defendant carelessly stated (in a manner that no other competent and skilful valuer in its position would have done) that the Valuation Report was an independent report when (as revealed by the emails dated 13 June 2017 and sent by Mr Mussett for and on behalf of the Defendant to Chris Bickle of Savills) Mr Mussett was advising the Borrower and/or its director, Mr Pieri, in relation to the Property*.'

   (3) At paragraph 10, added that '*Had the Claimants been aware that (contrary to the statement contained in the Valuation Report and set out above) that the Valuation Report and Mr Mussett were not independent, the Claimants would not have relief on the Valuation Report at all, but would have commissioned a truly independent valuation report and relied on it in considering whether or not to make the Loan. In these circumstances they would have been provided with a competent and skilful alternative valuation report*'.

5. No other amendments were sought.

6. In light of the fact that negligence was, by the end of trial, admitted, on its face the relevance of the amendment appeared to fall away. However, it was pressed by the Claimants on the basis, as contended in its Written Closing that,

   '*the 'independence' provision in the retainer did remove the current case from the run of cases and did specifically widen the ambit of responsibility of the Defendant. Further, the breach of this particular requirement (unless the Claimants are alleged to have actionably failed to seek such an independent valuation themselves) does not permit any allegations of contributory negligence to arise in its wake*.'

7. Neither of these averments formed part of the sought amendments, or were advanced in an Amended Reply.

8. The part of the emails of 13 June 2017 referred to in the amendment to paragraph 9 above stated:

   '*I am assisting Evangelos with a counter proposal for TCC in an advisory capacity*'.

9. It is said by Mr Nicol, on behalf of Hope, that this document should have been disclosed by the Defendant, although he does not seek to go behind the explanation by the Defendant's solicitors that (as stated on its disclosure statement in September 2022) some of Mr Mussett's emails, which had been searched during the disclosure

exercise, had been irrecoverable. However, the emails which had been disclosed previously included an exchange between Mr Mussett and Mr Pieri in which included the following:

On 19 May 2017, at 09:41, Jeremy Mussett <jeremymussett@artsurveyors.co.uk> wrote:

Morning Evangelos

Hope you had a good break.

Are the trustees saying no to the funds?

Have you got rental or sale offers on Cedar, need any help with it?
Happy to help with this, if required.

Let's meet up next week

From: Evangelos Pieri [mailto:ep@futurepropertynetwork.co.uk]
Sent: 20 May 2017 08:17
To: Jeremy Mussett <jeremymussett@artsurveyors.co.uk>
Subject: Re: Loan

Morning Jeremy

Could you sell cedar house now

Its current use is restaurant bar hotel with wedding venue use

Or happy to exchange subject to change of use for resi house which I've got

Thanks

Evangelos Pieri
Director
Future property network LTD
ep@futurepropertynetwork.co.uk

On 22 May 2017, at 10:01, Jeremy Mussett <jeremymussett@artsurveyors.co.uk> wrote:

Morning

What are Chelsea saying?

Any offers at the moment to purchase it?

From: Evangelos Pieri [mailto:ep@futurepropertynetwork.co.uk]
Sent: 22 May 2017 16:39
To: Jeremy Mussett <jeremymussett@artsurveyors.co.uk>
Subject: Re: Loan

All offers are coming in this week from savills

To buy and rent

There has been back and fourth with counter offers

If you have any buyers that would be great

On 22 May 2017, at 16:51, Jeremy Mussett <jeremymussett@artsurveyors.co.uk> wrote:

> What's the best rental offer you've got?
>
> Any would you need to build an extension first in order to get that rent?
>
> Could then put it to an investor.
>
> Cheers

From: Evangelos Pieri [mailto:ep@futurepropertynetwork.co.uk]
Sent: 22 May 2017 16:53
To: Jeremy Mussett <jeremymussett@artsurveyors.co.uk>
Subject: Re: Loan

Highest rental is from Cotswold furniture company at 190k per annum plus turn over top up which is being finalised shortly

Still waiting on Chelsea offer if any at all

Thanks

Evangelos Pieri
Director

SUKI Group
Surrey UK investments LTD
Future property network LTD

Jeremy Mussett

From:	Jeremy Mussett
Sent:	22 May 2017 16:55
To:	'Evangelos Pieri'
Subject:	RE: Loan

What works would you need to do before signing the lease?

10. This exchange had also been referred to in the expert report of the Defendant's valuation expert, Mr Rusholme. He said: '*I have been provided with an email sent by the owner of the Property (the borrower) to Mr Mussett of the Defendant firm requestion that he 'immediately sells' the Property*.' Whilst 'immediately sells' is

not, in fact, a direct quotation, it is a fair paraphrase of '*Could you sell cedar house now*' and/or '*if you have any buyers that would be great*'.

11. Within the original disclosure there was also a series of exchanges on 16th June 2017 and 5th July 2017 between Mr Bickle of Savills and Mr Pieri, into which both Mr Mussett and Mr Mackernan were copied dealing with a negotiation of a lease for Cedar House with The Cotswold Company ('TCC'). It is clear from the email chains that it was into this overall exchange that Mr Mussett was inserted, at the request of Mr Pieri, on 13 June 2017 which led to Mr Mussett emailing Mr Bickle and introducing himself as assisting Mr Pieri in an advisory capacity in the email upon which Mr Nicol relies. Finally, there is a further exchange between Mr Mussett and Mr Bickle in the original disclosure on 3 November 2017, the day after Mr Mussett's inspection of Cedar House carried out initially for his valuation of the Property for Clarity Financial Ltd, and referred to as the date of inspection in the Valuation. Mr Mussett asks, '*What price are you quoting for the long leasehold interest*'; to which Mr Bickle replied, '*£3.25m*'.

12. In an unusual feature of the case, the email of 13 June 2017 was in fact discovered because it was in the possession of Savills, for whom the Claimants' valuation expert Mr Mackernan works (and who was, as the email exchange above, copied into the discussions contemporaneously). The Defendant's solicitors had been repeatedly seeking disclosure of the material Savills held relating to Cedar House from around November 2022 onwards.

13. I allowed examination/cross-examination of Mr Sealey, the principal shareholder of Hope, on the topic *de bene esse* on the basis that I would hear submissions and determine the question of amendment as part of the parties' Closing Submissions.

14. In examination (by way of re-examination), Mr Sealey – who had not yet seen the 'new' email of 13 June 2017 – gave evidence that he believed that Mr Pieri had had prior involvement in Cedar House, and that if he had known this at the time, it would have made a big difference to him because a conflict of interest would have existed. As such, Mr Sealey said that he would not have allowed ART to carry out the valuation.

15. In cross-examination, Mr Sealey confirmed that he considered that a conflict existed on the basis of documents which had been disclosed much earlier in the litigation, albeit he thought he had only seen those documents shortly before trial. Mr Sealey also confirmed that he had made his solicitors aware of his concerns that a conflict existed. Mr Sealey confirmed that knowledge of the substance of the type of exchange including in the original disclosure was sufficient in his mind to give rise to the concern about a conflict of interest. Mr Nicol contends that nevertheless that it is only on the basis of the 13 June email (the disclosure of which was not in its direct control) could the substance of the amendment properly be advanced. He contends this email demonstrates that Mr Mussett, at the date of the Valuation, was at the date of the Valuation intimately involved, or has been in the past, with the borrower and the property.

16. Mr Asquith opposes the application to amend on the basis that (1) there is no proper explanation for its (admitted) lateness; (2) the evidence given by Mr Sealey on the point in re-examination was not 'permissible' because it had not arisen out of any

cross-examination; and (3) a real unfairness arises out of the inability on the part of the Defendant to pursue related disclosure and scrutinise all relevant evidence. In Closing, it was contended that the only fair approach were the amendment to be allowed would be an adjournment.

17. As to the first point, I do not accept Mr Nicol's suggestion that the substance of the amendment could only have been advanced following receipt of the 13 June 2017 email. It is absolutely plain from the May/June exchanges in the original disclosure that there was a prior relationship between Mr Pieri and Mr Mussett. It is clear that he offers to, and is asked to, help sell Cedar House. He is then involved in the exchanges relating to the negotiations. If anything, it could be read into the disclosed exchange that Mr Mussett was acting as an agent or prospective agent ('*if you have buyers….*') – which could obviously conflict with acting as an independent valuer where the two roles were undertaken concurrently - whereas the 13 June email suggests that the relationship was not necessarily as agent but 'assisting in an advisory capacity'. To use Mr Nicol's phrase, the relationship revealed by the disclosed exchanges is no more or less demonstrative of an alleged 'intimate involvement' than the 13 June email. Indeed, this is precisely the conclusion that Mr Sealey of the Claimants came to, whose concerns about a conflict were predicated having seen the originally disclosed emails, not the 13 June email. In light of this, the late discovery of the 13 June email cannot amount to good reason for not having taken the point, if it was to be taken at all, much earlier. Secondly, whilst it is true that the 13 June email would have been within the ambit of the Defendant's disclosure, the solicitors made clear at the time that for technical reasons the emails retrieved from Mr Mussett's account were not complete. This was not criticised or questioned at the time, and there is no reason not to conclude that the Defendant complied fully with its disclosure obligations. The documents disclosed, at the very least, put the Claimants on clear notice that there may be emails demonstrating Mr Mussett's involvement with Cedar House within the documents held by Savills, and indeed within the professional email account of their own expert, Mr Mackernan, as ultimately turned out to be the case. Yet the Savills documents were only disclosed after significant pressure from the Defendant. Whilst technically, of course, the email was not within the Claimants' direct control, it was in the control of their expert and I consider there to be no good reason why Mr Mackernan had not provided full disclosure of his own involvement in the attempts to sell Cedar House much earlier. If fault lies anywhere for the late discovery of the 13 June 2017 email, it lies more with the Claimants' team than the Defendant's.

18. As to the second point, it is correct that the evidence was elicited in re-examination which did not arise out of cross-examination, and a marker was put down in that regard by Mr Asquith. If I was otherwise going to permit the amendment, this would not be sufficient an objection.

19. As to the third point, I accept Mr Asquith's submission that had the matter been raised sooner, it would have been open to seek disclosure relating in particular to the causation aspect of the case: whether, if Mr Mussett had said (as he should) that he had previously been involved in advising Mr Pieri, that Mr Sealey would necessarily have refused to permit Mr Mussett from carrying out the valuation. On the documentary evidence disclosed originally, it is quite clear that by November 2017, when Mr Mussett was carrying out the valuation for Clarity Finance Ltd (which

effectively became the Valuation), Mr Mussett was neither agent in relation to Cedar House nor 'intimately involved' in it: if it were otherwise, he would not need to write to Savills (who were the agents) asking what the price for the long lease was. At best therefore, the Claimants can allege that Mr Mussett had a prior involvement in the property and that it was wrong not to have disclosed this. However, the existence of a past involvement in the property does not itself create a present conflict and, indeed, may be perceived as a positive advantage: as Mr Asquith points out, Hope's own case in relation to the competing valuation expert evidence is that '*of any expert capable of assisting the court, Mr Mackernan had the most experience of how this property fitted into the market, and was therefore in a prime position to value the property in the market…..*'. In other words, prior knowledge of the property within the marketplace is explicitly relied upon as a positive attribute for the independent valuer. Whilst it is not necessary, of course, to form any view on the substance of this case for the purposes of the amendment application, it is clear as a minimum that the Defendant would be entitled to seek documentation from the Claimants (for example, their approach to other valuations on other properties) to test the causation plank of the prospective case pleaded at paragraph 10 that had Mr Mussett described his prior involvement, it would necessarily have led to the Claimants seeking an alternative valuer. The timing of the amendment deprives the Defendant of the opportunity to explore these issues, and allowing the amendment at this stage would cause real prejudice.

20. I therefore refuse the amendment.

C. The Factual Witness Evidence

21. The Claimants relies upon two factual witnesses, Mr Sealey whom I have already referred to, and Ms Katie Cowan, the Finance Director of Hope.

22. I regret to find that neither was an impressive witness. Mr Sealey's evidence, which was central to Hope's claim both for contractual interest and lost profits, was in many instances contrived and unconvincing. Whilst I deal with this in more detail in the context of the claims themselves, particularly unimpressive aspects of Mr Sealey's evidence included:

(1) Mr Sealey's evidence that '*We turned down every loan over £1m during that period because we knew that we did not have the funding in place…*', in circumstances where this was obviously contradicted by the loans recorded in what was called 'the data tape' evidence. His attempt to explain this part of his witness evidence away under cross-examination, when he realised the discrepancy, was extremely unconvincing;

(2) Mr Sealey's claim that in April to June 2018 that '*the business struggled hugely*' as a result of the subject loan, both in his witness statement and oral testimony, until he somewhat reluctantly agreed that the logic of his own case (that if the sums had not been lent to St Anselm, they would have been lent to someone else) meant that, if the business was struggling cash-flow wise during this period, it would have been struggling irrespective of the subject loan. His evidence about the business struggling to make loans in this period was, in any event, flatly contradicted by the evidence of Ms Cowan, whose evidence was at this time there was plenty of the Triple Point facility left;

(3) Hope's claim (verified by personal statement of truth from Mr Sealey) that the 'Data Tape' demonstrates a near total (approximately 99.3% excluding the relevant loan) redemption of all sums lent at full contractual rates, when it is plain, as explained later in this judgment, that it does no such thing;

(4) Mr Sealey's mantra of repeating Hope's case on the overvaluation of Cedar House, in answer to questions which were rightly testing the causation elements of his evidence did not readily suggest that Mr Sealey was focused on giving straight forward answers to generally straight forward (but, for Hope's case, difficult) questions;

(5) Mr Sealey's repeated denial that he was unaware of works going on at the property with a view to progressing a conversion to residential use by Mr Pieri, notwithstanding the emails he was sent at the time, was not credible.

(6) Mr Sealey's refusal (over 3 pages of transcript) to accept the obviously correct proposition that Cedar House was not, in fact, readily realisable security in light of the section 146 breaches, as demonstrated by (a) the time it in fact took to be realised and (b) Hope's own position that it acted reasonably in trying to realise the asset. Mr Sealey instead fenced with the questions, at times suggesting nonsensically that the reason it did not sell in 2019 and 2020 was because of Mr Mussett's valuation in February 2018.

23. As such, I cannot generally accept Mr Sealey's recollections unless clearly supported by contemporaneous documents, particularly in circumstances where it is inherently likely that such contemporaneous documentation would have existed. As the Claimants' disclosure demonstrates, Mr Sealey was plainly engaging in regular email contact with members of his senior team, and a myriad of third parties. It is in my judgment wholly improbable that if his evidence in relation to the supposed finite lending limits, the struggles to his business due to the inability to make loans and the rejected requests for increased lending limits from Triple Point is true, there would not be a single contemporaneous document by way of substantiation.

24. Whilst Ms Cowan was generally more straight forward with the Court, the consequences of many of her answers was that no real reliance can be placed on the key spreadsheets, or 'Data Tapes', produced by her which underlay Hope's case on its entitlement to contractual interest and/or lost profits on other transactions, as discussed later in this judgment. The most obvious example of this was her use of the word 'redemption' to mean different things at different times, notwithstanding accepting that she knew and understood the normal meaning of 'redemption'.

25. Before turning to the expert evidence, I note that the Defendant did not call Mr Mussett. The question of whether the Valuation was carried out negligently has turned upon the expert valuer's evidence, and Mr Mussett's absence is plainly far from determinative of this issue. However, it does mean that the Court has not been presented with the basis upon which Mr Mussett arrived at his conclusion, save insofar as this can be gleaned from the Valuation report itself.

D. Expert Evidence

26. The Claimants relied upon the expert valuation evidence of Mr Daniel Mackernan, of Savills, who had taken over from a previous expert valuer, Mr Clarke of Avison Young. The Defendant relied upon the expert valuation evidence of Mr Rusholme, of Chestertons.

27. In relation to lending practices, the Claimants relied upon the evidence of James Penman, and the Defendant relied upon the evidence of David Griffiths.

28. Whilst none of the experts' approaches stood up completely to scrutiny, I have no doubt that they were all generally seeking to assist the Court in accordance with their duties. As is clear from my judgment below, I neither wholly accept or reject any expert witnesses' evidence. I would add that the approach of Mr Mackernan to the disclosure of 'the Savills file' and related emails from the contemporaneous exchanges with Mr Pieri (and, indeed, Mr Mussett of the Defendant) was plainly unsatisfactory and incompatible with his role as an independent expert. These documents demonstrated that some parts of his summation of the Savills' marketing campaign were inaccurate. That said, I do not consider that these factors tarnished the entirety of his evidence, such that it must all be rejected. Mr Mackernan's conduct over the Savills' file was, in my judgment, more likely to have resulted from an unfortunate lack of proper reflection on the demands of his role as independent expert, rather than any conscious desire to obscure evidence from Court.

E. Chronology

29. The following paragraphs set out the factual chronology of the events, as I find them to be, surrounding the relevant history of Cedar House insofar as it affects the proper valuation of Cedar House, the making of the Valuation, the loan, its default and the events which follow leading to the sale of the property. This chronology will be drawn upon when addressing the agreed issues.

30. On 29 March 2002, the Lease between the National Trust and St Anselm was entered into. St Anselm was not at this stage owned by Mr Pieri. Pursuant to Clause 16 of the 99 year Lease, St Anselm covenanted to use the demised premises only as a high class hotel and restaurant and (ancillary to such use) the provision of a travel agency bureau from the hotel reception. The lease was on a Full Repairing basis with the tenant covenanting to keep the Property in good and substantial repair and condition including redecoration both externally and internally.

31. On 5 November 2010, a valuation company called Taylors produced a report and valuation on the Property for a proposed borrower, Mrs S Seery (or her NewCo), an experienced operator with a number of other catering/hotel businesses in Cobham. The description referred to the property as a former part fitted licenced hotel/weddings venue/restaurant which had been closed since early 2010, with 12 en-suite letting bedrooms of variable standard over split levels. Taylor's projected turnover for the 'rejuvenated' business was £800,000. They gave a market value of £1.875m - £2.5m depending on assumptions. As it stood, the value was £1,900,000.

32. In 2015, Cedar House was being marketed by Cattaneo with a rent of £225,000 per annum.

33. Mr Pieri purchased St Anselm in around 2016. At the time it was subject to a s.146 Notice from the National Trust ("the First 146") due to breaches of the lease. A s.146 notice is a notice served pursuant to section 146 of the Law of Property Act 1925 by a landlord to a tenant in the event a lease has been breached. If the breach is not remedied, the tenant is at risk of its lease being forfeited.

34. On 20 May 2016, Cedar House was valued by Mr Mackernan, the Claimants' valuation expert. He valued the property at £2m with vacant possession and assessed the market rent at £120,000 per annum. It was given a 180 Days market value (i.e. value on the basis it has a restricted sale period of 180 days) of £1,600,000; and a 90 Days market value of £1,200,000. Mr Mackernan's market value was derived from the market rent of £120,000 and a net yield of 6%. (£120,000/0.06=£2m). A version of this document was located within the Defendant's valuation file for the property, and it has various handwritten notes which are assumed to be Mr Mussett's. The notes would appear to suggest a thought process deriving (or justifying) an annual rent of £190,000 by multiplying the square footage of 6215 by a rate per square foot of £30.57.

35. On 30 June 2016, Mr Mackernan wrote to Mr Pieri '*with my thoughts on marketing of* [Cedar House]*...This appraisal sets out below an indicative marketing strategy and fee proposal for your consideration.*. Under 'Guide Price', the letter stated:

> '*Post refurbishment and reconfiguration we believe that a rent in excess of £200,000 per annum is likely to be achieved. We would recommend simply marketing with 'rental offers invited' but guiding serious buyers to offer in excess of £225,000 per annum should they be pushing for an indication of rent'.*

36. On 14 October 2016, Mr Mackernan emailed Mr Pieri about various issues relating to the First 146 so he could finalise Savills' report. In his reply, Mr Pieri confirmed that the National Trust had agreed to the works being done and the materials involved. Michael Davies of Groma Consulting confirmed later that day that there were about £60k left to spend on the works.

37. This exchange pre-dated another valuation by Mr Mackernan at a value of £2.1m (on assumption section 146 works were completed), and £1.9m on 180 days with a market rent of £134,000.

38. On 3 February 2017, a Savills marketing letter gave a guide price market rent of £225,000 per annum. This was in line with the marketing strategy advice from Mr Mackernan (but well above his valuation).

39. On 7 February 2017, Cedar House was valued by Davis Coffer Lyons. Their client was Dragonfly Finance, a company connected with Octopus Finance who provided the bridging finance to St Anselm which preceded the (re-)bridging with Hope. The valuation was for £3m on the basis of a 180 day marketing period, and £2.5m for the 90 day valuation. The rental value was said to be £175,000 per annum. The yield stated to be applied was 5.25%[1].

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[1] £175000/0.0525 = £3,333,000. From the arithmetic, it seems the valuer may have applied a 10% deduction for the 180 day valuation of £3,000,000. Thus, by way of comparison to the market value (not restricted by 180 or 90 day sale period) the value may in fact have been £3,333,000.

40. Also on 7 February 2017, Mr Glover of Richard Glover wrote to the National Trust stating all works referred to in the schedule of repair forming part of the s.146 works were satisfactorily complete with certain provisos ("provisions" in the letter). The letter suggests that the National Trust had agreed certain works did not have to be done to comply with the First 146 because work on those areas would be done anyway as part of the renovation works. I note that this is not the same as full compliance with the s.146: if the anticipated works were not, for example, carried out, there would remain matters to be remedied in order to discharge the s.146.

41. Later in February 2017, Mr Pieri and Mr Mackernan were communicating about the marketing of Cedar House. On 21 February 2017, Mr Mackernan wrote:

> '*Evangelos,*
>
> *Getting some feedback here and want to get an open day sorted soon. Will advise later this week.*
>
> *However many operators are asking for a guide. I am minded to say:*
>
> - *As existing in excess of £140k or % of turnover*
> - *Proposed in excess of £200k and depending on the landlord contribution to build/fit out base rent with turnover on top*
>
> *Operators also asking about the long leasehold. I know not your preferred route, but are we OK to say client not interested but if you want to make a substantial offer for the long leasehold interest we will report it.*

This was then slightly modified in an email 14 minutes later saying, '*Re below I meant in excess of £150k*'. After confirmation from Mr Pieri that he was interested in either long lease or to sell the lease, Mr Mackernan said:

> '*OK.*
>
> *If interest in long lease I shall guide in excess of £2.75m*'

To this Mr Pieri replied *'Much more please'* and Mr Mackernan responded, '*OK as existing substantially in excess of £3m'*.

42. In cross examination Mr Mackernan was keen to emphasise, not unfairly, that there was a difference between a valuation and a guide price, the latter potentially being different and higher than a true valuation. He also, fairly, agreed with the proposition that, '*a guide price is roughly what you might be looking to get'*, responding that it should be '*within the realms*'. Mr Mackernan also accepted the following:

> *Q….And the reality is the "in excess of 2.75 million" figure came from you, didn't it?*
>
> *A. Yes, that's what I suggested, yes.*

Q. Because you thought that was realistic as a guide price, didn't you?

A. I must have done, yes.

Q. So you actually thought at the time that this might sell for something in that region?

A. Yes. Quite possibly, yes.

Q. So whatever you might have thought in May 2016, or October 2016, by this time you thought this property was worth in the region of 2.75 million; correct?

A. Yes, I think that from May 2016, when I first looked at the property and they were doing works to it and then it was looking substantially different at the end of 2016 because of the additional works, because of theft, et cetera, and lead and all this, and nothing else onthe market. And then when we -- and then with looking at the King's Arms Hotel I probably had the view that there's nothing else on the -- there's limited stock on the market, this may be of interest to a lot of operators. We certainly thought -- the agents certainly thought this is interesting to take on. There could be some quite good interest in this property and that's probably why I reached that conclusion.'

43. According to Mr Mackernan, the Property went on the open market through Savills in early March 2017. Mr Pieri asked for it to come off the market on 29 March 2017 with all final offers by 21 April 2017. The lead contact for Savills during this period was Mr Chris Bickle.

44. On 22 May 2017, Mr Pieri wrote to Mr Mussett, as set out in above, in the context of the application to amend.

45. In around May 2017, The Cotswold Company ('TCC') offered to lease the Property for about £190,000 per annum. This would have required a change to the terms of the lease, given that TCC were intending upon using the property as a retail outlet. The offer was restated in November 2017.

46. On 12 June 2017, Mr Bickle wrote to Mr Pieri saying,

'*I got the clear impression the ball was in our court to reply to their proposal. It would be good to know your stance in advance of any further negotiations. If we don't secure TCC then unfortunately we are without any viable bidders at this stage. Do you have a plan to deal with this eventuality?'*

47. The following day, this exchange was forwarded by Mr Pieri to Mr Mussett, asking him to speak to Mr Bickle, as set out in the 13 June 2017 email discussed above. This led to the various exchanges in which TCC and Mr Pieri were negotiating in respect of the base rent (TCC having rejected £225,000) and the existence and timing of any break clause/penalty. In the following days, the various communications took place on 16 June and 5 July 2017 as also set out earlier. The negotiations appear to flounder at around this point.

48. On 28 September 2017, Elmbridge Borough Council granted planning permission for a change of use from Hotel (C1) to Residential (C3). A change of use of this nature would also have required the National Trust's consent for a change of use pursuant to the lease.

49. On 2 November 2017, Mr Mussett inspected Cedar House. The following day he asked for Savills' long lease interest price, and was told £3.25m. Mr Rusholme refers in his report to a valuation for Octane Finance Limited on 2 November, in the same form as one issued on 19 December 2017, for Clarity Financial Limited. This valuation was in materially identical form to what would, in due course, become the Valuation. This valued Cedar House at £4m (OMV and 180 days) and £3.8mk (90 days).

50. On 13 February 2018, Hope obtained an Experian search which reported that Mr Pieri's credit rating was Poor and that he had outstanding personal debt/hire purchase obligations of £83,193. On the same date, Hope provided non-binding Loan Facility Terms, on the basis of a loan amount of £2,600,000 to be secured on Cedar Lodge. The purpose of the loan was stated to be to refinance the existing loan with Octopus.

51. On 14 February 2018, Hope sent instructions to ART to value the Property. The estimated value was stated to be £4,000,000. This was also the estimated value stated on the loan application form by Mr Pieri. It is, of course, also the value which had been provided by Mr Mussett in November 2017 within the valuation for Clarity Financial Limited. The valuation instructions required ART to '*[p]rovide a valuation of the property based on its existing planning/condition excluding any 'hope' value or goodwill*'.

52. The Valuation was provided by return, citing an inspection date of 2 November 2017. It was plain that this was a repackaging of an existing valuation report. Paragraph 2.3 of the Valuation stated:

> '*We confirm that we have had no involvement with the property and therefore have no conflict of interest in accepting this instruction*'.

53. It is clear that this was not true, at least in respect of the absence of prior involvement. The Valuation will be considered in more detail when considering the issues in dispute.

54. The Valuation also made clear, at paragraph 5.3:

> '*We are advised that the Section 146 Notice has been complied with in full and we have valued the property on this assumption'*

55. On the same day, Laura Carr of Hope emailed a company called VAS to seek an audit of the Valuation.

56. On 16 February 2018, SRLV Accountants provided statements of assets for both Mr and Mrs Pieri. The documents showed 5 properties, with an aggregate value of £7,085,000 and a mortgage liability of £4,867,000, suggesting significant net worth. This showed that two properties (Cedar House and 34 Epsom Lane North) were in the names of SPVs, the clear implication being that the others were owned by Mr Pieri.

In addition, Mr Pieri listed £655,000 of other, non-property related assets including a loan of £230,000 to the PPA Academy, a company owned by his brother and sister in law. As set out in an email from Laura Carr of Hope four days later, however:

> '*As mentioned, the properties on the A&L report didn't show on the NCI report. We have done some searches on the properties that Mr Pieri has listed on his A&L.*
>
> ...
>
> *The 3 above he isn't the registered owner of. The covering letter from the accountant says that these are owned by his brother and sister in law. Mr Pieri has loaned monies to this company and the value given in the statement of assets is the balance owed to his company. This cannot be quantified so cannot really see how can be listed as an asset as no evidence to support this.'*

57. This is a somewhat surprising understatement of the position. Indeed, if Cedar House is removed (it being the subject of the loan agreement), together with the other properties which Mr Pieri did not own, there is only one property and that was owned through another SPV, with at most £125,000 of equity. It is plain that the 'Total Net Worth' of £2,873,000 was a gross exaggeration of the true position. It does not seem that any proper explanation how this came to be was either sought or given, and it did not appear to occur to the Claimants that their prospective client had, at least on the face of it, a questionable relationship with the truth in relation to what was, according to their Loan Facility Terms, a condition precedent for making the loan.

58. On 19 February 2018, VAS provided its review of the Valuation. The only concern raised was that no deduction from the £4m valuation had been made when providing the 180 day valuation. This led, the following day, to a series of questions by email to Mr Mussett relating to the Valuation. The last question and answer were as follows:

> '*The 180 day restricted sale value is assessed the same as market value. Given the degree of uncertainty about the costs and consider for residential use, the uncertainty of potential commercial market rent, the unique nature of the property, its size and leasehold stats, we would have anticipated some discount from the 180 day to guarantee a sale in such timeframe?*
>
> *Our market values in Section 9 are based on commercial use only. We are confident that £200,000 pa would be achieved on the open market. The valuation of £4m is based on existing use and existing lease terms. In this context there is very little uncertainty. Our investment calculation include 6 months marketing and six months rent.*'

59. The redemption statement from the previous mortgagee, Octopus, dated 23 February 2018, shows that Mr Pieri had not maintained its payments (in that 4 months' worth of £21,000 interest payments plus fees were outstanding at the point of redemption).

60. On 27 February 2018, Mr Pieri wrote to Hope about his exit strategy. He said:

> *"We would like to confirm we are aware that the term of the loan is 6 months and we intend to repay this loan from the refinance of Cedar House. That will either be after entering into the new head lease with National Trust for residential consent, or as an alternative we would let the property for its existing use and refinance with a commercial investment funder."*

61. The same day, an internal exchange within Hope stated:

> '*I have spoken with J* [Jonathan Sealey] *on this one and he is happy at £2.2 net.*
>
> *This pushes us to 64.5% of a 3.8m value. As previously mentioned, we have been informed a previous valuation is around this figure.*
>
> *This is an increase from being comfortable with the original £3.6m valuation following audit and we are increasing this to 3.8m to take out the Octopus refinance only (Gross loan £2,448,000).'*

62. On 28 February 2018 at 09:58, Ms Carr asked a number of questions of Brabners, Hope's solicitors to which she needed an answer "*from a legal perspective*". The first exchange is relevant to whether, as contended for by the Defendant, Hope should always have known that the stated exit strategy of a conversion to residential use was unrealistic:

> '*Our borrower is St Anselm Heritage Properties Ltd and the grant of a new lease would Need to be in the company name not as an individual.* NOTED. THE EMAIL FROM THE NATIONAL TRUST SPECIFICALLY REFERRED TO BEING GRANTED TO MR PIERI AS AN INDIVIDUAL SO QUERY WHETHER THE NATIONAL TRUST WILL CHANGE ITS MIND. I WILL RAISE THIS'

63. Brabners also said evidence would be required that the National Trust had confirmed withdrawal of the First 146. "*AGAIN WE WOULD NEED TO SEE THE LEASE AS A SECTION 146 NOTICE WOULD ALLOW A LANDLORD TO TERMINATE A LEASE IF NOT COMPLIED WITH. THE LEASE WOULD NEED TO INCLUDE A MORTGAGEE PROTECTION CLAUSE SO THAT WE WERE GIVEN NOTICE AS WELL AND WERE ALSO GIVEN THE OPPORTUNITY TO REMEDY THE BREACH*".

64. Various exchanges followed. On 2 March 2018, Brabners advised Ms Carr that Mr Pieri's solicitors had not provided a further update and then said:

> '*To me there currently appear only two options:*
>
> 1. *We proceed on the basis of the existing lease with no guarantee that a residential lease will ever be granted in favour of St Anselm. We would also need to understand the proposed exit if no lease was granted or if the lease would only be granted to Mr Pieri individually*
>
> 2. *We wait until the National Trust has gone through its governance approvals and we know the situation.*'

65. Three days later Ms Carr emailed Brabners stating:

> *"We have agreed to proceed on the first basis below:*
>
> ***We proceed on the basis of the existing lease with no guarantee that a residential lease will ever be granted in favour of St Anselm. We would also need to understand the proposed exit if no lease was granted or if the lease would only be granted to Mr Pieri individually.***
>
> *From our perspective, could we go back on the original point that our borrower is St Anselm Heritage Properties Ltd and the grant of a new lease would need to be in the company name not as an individual.'* [Emphasis in original]

66. On 6 March 2018, Brabners emailed Barlow Robins seeking the detailed explanation about repayment of the proposed loan envisaged in following the first basis.

67. On 27 March 2018, Hope provided to Mr Pieri updated Loan Facility Terms. This included a list of 'Conditions Precedent' which included the following:

> '*Mr Pieri to provide a statement of personal assets and liabilities certified by his accountant RECEIVED*
>
> *Mr Pieri to provide an up to date Experian credit report, to be no older than three months RECEIVED*
>
> *The lender's agent will undertake further inspections of the property during the term of the loan to provide a report to the lender of the status of the loan and the progress for exit. The cost of these reports will be the responsibility of the lender.'*

68. At around the same time, Hope produced its 'Investment Paper' which was provided for the benefit of Triple Point, Hope's institutional funder, who would be providing 85% of the capital for the loan. The Investment Paper indicated the value at £4,000,000 with an LTV of 56.2%, notwithstanding the fact that Hope themselves were working on a higher LTV because they were using a reduced valuation to reflect what they considered the 180 day valuation to be (£3.8m i.e. £4m less 5%). It also indicated that '*exit confirmation'* had been received; as had the '*A&L statement certified by accountant*' and the '*Experian report'*. It also stated that the '*Section 146 sign off received*'. This was on the basis of the Glover letter, dated some 13.5 months earlier, referred to above. Sign off had not, in fact, been achieved given that it had been expressed to be conditional on other work being completed, as to which no assessment had been undertaken.

69. On 28 March 2018, Hope wrote to Lendnet, part of Triple Point, asking to drawdown £1,912,255.20. Various transactional documents were executed in respect of the Loan, namely: charge in favour of Hope, an intercreditor deed with Clarity, the second chargeholder, who remained a mortgagee; debenture; and a personal guarantee from Mr Pieri.

70. During the following 6 months, Mr Pieri was still trying to renegotiate the lease with the National Trust and fell into default as regards the loan, which was due for repayment on 28 September 2018. During this time, work was also being undertaken

at Cedar House. It was put to Mr Sealey that he could and should have monitored the ongoing works, as indeed the Loan Facility Terms suggested would happen. When put to him initially, Mr Sealey's evidence was, '*I wasn't aware of the works that were ongoing or we would have done*'. However, that was plainly incorrect. On 11 April 2018, Mr Sealey was forwarded an exchange which related to the potential funding of the £600,000 lease premium being sought by the National Trust to change the use to residential. The email to Hope plainly refers to '*the ongoing works and the new head lease* [which] *will change your security into a conventional residential property.*' Mr Sealey was explicitly referred to '*Full details from Tom…below*' and asked '*What do you think…*'. Contrary to his evidence, it is in my judgment inconceivable that Mr Sealey had not read the exchange when responding substantively with his views in relation to the further £600,000 loan. Moreover, in June 2018, Mr Sealey was directly copied into an exchange in which Mr Pieri was being asked to provide the schedule of works, along with confirmation of works outstanding and works completed. I do not therefore accept the suggestion that Mr Sealey was unaware of ongoing works to progress the residential conversion, but note that they did not take steps to monitor them notwithstanding Mr Sealey's evidence that '*we would have done*'. I do not accept his later suggestion that asking Mr Mussett for another valuation (after default, referred to below) amounting to monitoring the ongoing construction works. It plainly did not.

71. On 1 October 2018, the Claimants sent a letter of demand to Mr Pieri. This went unsatisfied and on 4 October 2018, receivers were appointed over Cedar House. These were Daniel Richardson and Edward Gee of CG&Co. Drydens Fairfax acted as their solicitors.

72. On 25 October 2018, following an inspection on 22 October 2018, Mr Mussett valued Cedar House for Hope on the basis of a residential property. The valuation was £5,500,000 on 180 days and £5,250,000 on 90 days on the basis of a new 99 year lease.

73. On 16 November 2018, the National Trust sent a letter to a Ms Amy Sichani of Elmbridge Borough Council expressing concern about unauthorised works at the Property. It stated that "*The National Trust has not yet had the opportunity to inspect the works or to take specialist historic buildings or archaeological advice.*". Three days later, Drydens emailed CG&Co, attaching a schedule of permitted works which included a list of works which <u>had</u> to be completed to regularise the position with the National Trust. On 22 November 2018, the builder Olney sent a letter to Cs saying the outstanding works would cost £90,000.

74. On 23 November 2018, Savills sent the receivers an appraisal of the Property. They said "*we would recommend a Guide Price of £2,500,000, subject to contract, with a view to achieving offers in excess of £2,000,000".* It stated in manuscript: *"verbally advised with NT & Practical completion should achieve additional £500,000."* On 23 November 2018, Knight Frank provided a "*comprehensive report*" on the Property. They recommended putting it on the market for "*£2,500,000 - £2,750,000 which we believe will generate competition amongst buyers with a view to maximising this price*". The report went on to say that if works of £500,000-750,000 were spent, then the Property could be worth in the region of £4,000,000 to £4,250,000. The Report said that prices of prime properties "*have definitely softened within the past twelve months*". On 26 November 2018, a local agent called Grosvenor Billinghurst sent a

market appraisal report to CG&Co. This suggested a guide price of £2.95m and that offers from £2.75m should be considered. Within CG&Co's report to Hope of 26 November 2018, a further valuation, from Sotheby's, of £1,750,000 was referred to.

75. On 30 November 2018, a company called Invespek Ltd offered £2,035,000. This was not accepted.

76. The same day, Shoosmiths, solicitors for the National Trust, wrote to Mr Pieri stating that its client had become aware of a number of internal alterations to the Property which were in breach of the lease and without building consent having been obtained where appropriate. They enclosed a s.146 notice ("the Second 146"). The particularised breaches were as follows:

> *You are in breach of paragraph 28.1 of the Third Schedule to the Lease as you failed to apply for and obtain listed buildings consent, in accordance with the Planning (Listed Building and Conservation Areas) Act 1990, prior to undertaking:-*
> *9.1 the removal of the timber floor within the Medieval Hall and its replacement with York stone paviours; and*
> *9.2 the removal of original internal doors and door furniture and their replacement, and*
> *9.3 the removal of ceilings in the bedrooms.*

77. On 11 December 2018, Drydens produced a summary of position document. This set out the state of play at this time, as Drydens saw it.

> *"The Borrower appears to have carried out alterations to effectively turn the Property from a residential hotel into a residence. It appears that no consent from the NT was sought to these works. It also appears that no listed building consent was obtained for the replacement of the floor in the Medieval hall."*
>
> *"The works came to the notice of NT when a local resident contacted them."*
>
> *"Andrew Hill, the listed building consultant to EBC, has stated in his comments on the Application that "this application claims that the floor has been laid by specialist contractors, is of salvaged York Stone and has insulated under floor heating. Had this been the case such a floor would have been acceptable. A site inspection today revealed in fact the new floor is made up of new dimpled pressed concrete slabs with obtrusive wide pointing of double struck raised rib form. These slabs are more suitable for outdoor patios than the floor of a listed Medieval Hall. They are totally unacceptable alien feature"."*
>
> *…*
> *A further breach was that there was a failure to apply for and obtain listed buildings consent and the borrower has fixed blinds in the windows without first obtaining the NT's approval.*

19. The required action was to remedy the breaches within a reasonable time, being 9 January 2019.

20. The notice goes on to state that if the borrower fails to comply with the requirements set out in the notice within a reasonable time it is the intention of the Landlord to enforce the right of entry asset out in clause 15 of the Lease thereby bringing the Lease to an end and to claim damages for breach of covenant and/or take such further steps as it may be advised."

…

"24. The NT did not entirely rule out these scenarios but clearly in any sale the following matters need to be considered:

24.1 how to deal with the section 146 notice;

24.2 the cost of the works to be either funded by the Lender through the Receivers or carried out by a purchaser as a condition of a grant of any new residential lease;

24.3 costs of the premium will either by £600,000 or £850,000 depending on whether the NT insisted on full payment of both premiums;

24.4 the time involved in negotiating any sale terms and dealing with the 146 Notice.

25. Obviously the most urgent point is dealing with the 146 Notice. A Letter dated 10 November 2018 has been sent to Shoosmiths solicitors acting for NT asking them to confirm that the time limit for dealing with the 146 Notice can be extended to 7 March 2019 which was a date suggested by NT's solicitors in the Without Prejudice telephone conversation on 10 December 2018."

78. On 3 December 2018, Mr Pieri informed CG&Co that the offer had increased to £2.17m. On 31 December 2018, Mr Pieri is forwarding an offer from 'PBF' in the sum of £2.22m for Cedar House with 6 months completion. On 2 January 2019, Mr Sealey emailed Mr Pieri refusing the offer and stating:

"Full and final settlement will need to be £2.65m for us to consider any offer. If not, we will complete the works ourselves with the National Trust and look to sell the property later in the year."

79. On 31 January 2019, Drydens informed the receivers stating that the National Trust had raised further s.146 issues:

"*She has confirmed there are further items where they believe the Company has breached the lease but they are not intended to change the Section 146 notice schedule at the present time."*

"I believe the major issue is going to be agreement of a specification for the works as some of the descriptions in the Section 146 Notice are vague and it is not sufficiently precise what we are expected to do in relation to remediation."

80. On 8 February 2019, Drydens emailed Hope recommending an immediate marketing campaign

"*We confirmed that if the NT went ahead with their forfeiture proceedings it would effectively mean Hope Capital would lose their security.*

…Since the call on Monday we have had a discussion with the NT and they have indicated they would be prepared to consider:" an "as is" sale or more time for works.

…In light of all these issues, we strongly recommend an immediate marketing campaign based on the valuation "as is" and review whatever offers are obtained as against the potential risk to the existing security of Hope and the costs of remediation to the property."

81. On 21 March 2019, Cedar House went on the open market. On 4 April 2019, the receivers emailed Mr Sealey stating "*We have received a verbal offer of £2.1m for the Property."* On 12 April 2019, Hope entered into various agreements with Mr Pieri/Invespek. In short, Invespek took an option in respect of the Property. Mr Pieri also assigned a debt it was owed by the Bank of Cyprus. Further, Mr Pieri granted a promissory note in favour of Cs for £25,000. On 10 May 2019, the National Trust emailed the architect Peregrine Bryant a list of additional works/amendments to the schedule required by the National Trust.

82. Discussion around a further option took place. The counterparty was Clarity, alongside Mr Pieri, not Invespek. The plan was to take £45,000 per month by way of the option to fund the works required by the Second 146. The option was entered into on 11 June 2019, and the works to remedy the breaches of lease commenced. On 23 September 2019, ten months after the service of the second s.146 notice had been served, Shoosmiths confirmed on behalf of the National Trust that it was satisfied with the works done at the Property.

83. On 1 October 2019, a further option agreement was entered into with Clarity.

84. In early 2020, Hope procured various updated market appraisals. In summary they were as follows:

    (1) 15 January 2020: Jason Corbett of Sothebys: '*I firmly stand by my previous appraisal value of between £1,750 and £2,500. Whilst the political situation seems to have appeased, the market has not recovered and therefore I have no reason to suggest a change in value'*.

    (2) 17 January 2020: Richard Adamson of Allsop: '*If you take into account all the issues with this building then it would really need to be marketed with a guide price of £1.25, plus. I think that if we were able to achieve something around £1.5m we would be doing very well'*

    (3) 22 January 2020: Grosvenor Billinghurst (who knew the Property from having marketed it in some of 2019) recommended a guide price of £2.35m.

    (4) 27 January 2020: Savills suggested a £2m guide price.

    (5) 27 January 2020: Knight Frank suggested £2,250,000 "*and expect to achieve offers with [sic] 5-10% of this price*" on the basis that a new 99 year lease would be included.

(6) 18 February 2020, Hurst Warne – a commercial agent – valued the Property at £1.725m on the basis of the 81 year lease.

85. On 10 March 2020 at 17:58, Clarity through Carbon FC made an offer to purchase at £2,033,810. Clarity's offers began to go down in value from 26 March 2020. In an email of that date, Carbon said "*... the world looks very different from how it did 15 days ago...*" Cedar House was going to be auctioned by Allsop in early April 2020 but there was insufficient interest prior to the auction, so it was withdrawn on 1 April 2020. Various negotiations took place in July 2020. Finally, on 24 July 2020, Forsters, acting for Clarity, made an offer of £1,400,001. The parties exchanged that day.

86. On 4 November 2020, Mr Pieri went into bankruptcy.

F. The Issues

(1) On the date of the Valuation, what was the correct
  (a) Open Market Value ('OMV') of Cedar House?
  (b) 180 Day Valuation?
  (c) market rental value?

87. The true value of Cedar House remains relevant notwithstanding the Defendant's admission of negligence, because it remains relevant to the calculation of loss.

88. The market rental value plays a part, on both valuation experts' approaches, in determining the OMV. I shall therefore consider 1(c) as part of 1(a). 1(b) is then a derivative of 1(a), and depends on the discount (if any) that should be applied to the OMV to reflect a restricted sale period of 180 days.

89. At the conclusion of oral evidence, the position of the two experts was as follows:

(1) Mr Mackernan valued Cedar House at £2,150,000 by reference to a rental-yield calculation based upon market rent of £150,000 and a yield of 6%. There is then an assumption of a six month rent free period, void/marketing of 9 months, letting fees of 10% and deduction of purchaser's costs of 6.01%.

(2) Mr Rusholme, in a short supplemental statement clarifying his calculations following a point made in cross-examination, advanced an average calculation of £3,172,333, say £3,175,000. This was based upon an average of a restaurant use valuation of £3,317,000, a boutique style hotel valuation of £3,200,000 and a rental use valuation of £3,000,000.

90. In relation to Mr Mackernan's evidence, the following points support the conclusion that the true value is higher than his valuation of £2,150,000:

(1) In relation to the key rent/yield calculation, the use of 6% is too high. This is obvious from the fact, not least, that Mr Mackernan himself used a yield of 6% in valuing Cedar House in 2016 and he accepted that the market had improved (i.e. yields had decreased) between 2016 and February 2018. In fairness to Mr

Mackernan, his position, in the Joint Report, was softened slightly to 5.75%-6%. Mr Rusholme used a yield of 5.5% in his calculation.

(2) focussing on the Mute Swan and Refectory comparables which Mr Mackernan considered to be '*the most relevant*':

(a) the yield adjustment for the improving market to February 2018 at 0.25% underestimates the true movement in the market. Whilst appreciating Mr Mackernan's observations about the nature of the hotel market from which the data in Savills UK Hotel Investment Spotlight paper, the thrust of Mr Asquith's point in cross-examination that the drop in yields across related, albeit slightly different, sub-sectors was similar, and in the region of 0.75%, seems to be correct. Overall yields in the mainstream, institutional hotel sector are lower than in the small independent sector, as is plain from the Spotlight paper, but Mr Mackernan did not credibly explain why broadly similar improvements (from different starting positions) would not have been enjoyed between 2016 and 2020. I consider an adjustment of at least -0.5% to be more accurate (and if anything conservative);

(b) an adjustment against the Refectory for Grade II listing of 0.25% was wrongly applied, as in this respect the Refectory and Cedar House were the same;

(c) the assumption that a rent with an indexation or uplift would not be achieved is pessimistic in circumstances where the negotiations with both TCC and Coat Bar and Grill suggested otherwise, and there was no explanation why something particular about Cedar House would be different to the comparables in this respect. The adjustment of 0.25% in this regard is therefore not justified.

(3) This would suggest that the Mute Swan yield of 4.7% ought to be adjusted by at most 0.75% (making 5.45%) and the Refectory yield of 4.8% ought be adjusted by at most 0.5% (making 5.3%). On this analysis, therefore, a yield by comparison of 5.75%-6.0% is unsupportable. I also note that Davis Copper Lyons's independent valuation used a yield of 5.25%. All this suggests that a yield of 5.5%, as utilised by Mr Rusholme, is certainly more appropriate and, if anything, conservative.

(4) I also consider using market rent of £150,000 is pessimistic. Whilst Mr Mackernan is correct that the improved offer from Coal Bar & Grill in April 2017 was for £150,000, this was not taken forward in negotiations because the parties were concentrating on TCC. Whilst an offer in a retail context, TCC were offering £190,000. I accept Mr Asquith's submission that all the evidence suggests that no one (including Mr Mackernan and Mr Bickle of Savills at the time) thought that a change of use would be problematic, and I accept the logic of Mr Rusholme's evidence that this would only come at a premium if the change of use in fact generated an increase in value (which it did not). The retail context does not therefore make the TCC offer irrelevant, even when valuing on the basis of existing use. I accept Mr Rusholme's evidence that, on this basis, a rental of £175,000 is realistic. This would suggest a yield/rent calculation of £3,181,818[2]

[2] £175,000/5.5

(as opposed to Mr Mackernan;s £2.5m[3]) prior to the adjustments. Mr Mackernan took account of incentives, letting fees and purchasers' costs through the use of 'Argus' software and reduced his headline calculation of £2,500,000 to £2,150,000. Assuming the same approximate pro-rated adjustment, this would suggest Mr Mackernan's calculation would have arrived at a value of just under £2,750,000 had he used 0.5% and £175,000 as I consider he should have done.

(5) It is necessary to sense check this against other evidence. Whilst it is right that Mr Mackernan's lower valuation derived some support from, in particular, the Kings Arms Hotel in Hampton Court (which sold for £2m), I consider that he paid insufficient regard to other evidence pointing to a higher justifiable valuation, and in particular:

(a) The David Lyons Coffer 180 day independent valuation of Cedar House of £3m (or probably £3,333,000, taking the rent/yield calculation at face value and/or taking account of the fact that £3m is a 180 day value, and therefore lower than OMV). Mr Mackernan acknowledged they were specialists for whom he used to work. Even if the David Lyons Coffer valuation was at the high end of a non-negligent (15%) bracket, this would suggest a value of around £2.75m;

(b) Savills' own contemporaneous guide prices: Mr Mackernan's own suggested 'Guide Price' of £2.75m and his swift agreement to market 'substantially in excess of £3m', based upon feedback during the marketing campaign and Mr Bickle's figure of £3.25m in November 2017, when asked by Mr Mussett in advance of the Valuation. On the evidence of Mr Mackernan, he accepted that a guide price has to be '*within the realms*' and '*the aspirational end of reality*', and that Mr Bickle must have thought that £3.25 for a guide price was '*sensible*'. Recognising that a guide price may well be higher than a true value does not negate their relevance in the overall assessment. I consider they suggest, again, that a true value was somewhere between £2.5m and £3m.

91. I have referred to some aspects of Mr Rusholme's evidence above. In cross-examination, he conceded that his restaurant and aparthotel valuation (of £3.4m within the Joint Report) was wrongly calculated and this was revised to £2,750,000. The retail use assessment at £3m is the equivalent to the analysis above in which I consider the use of a yield of 5.5% rather than 5.25% is appropriate. As adjusted, I consider that these are more realistic than Mr Rusholme's higher valuation based on restaurant use or the restaurant/hotel from his First Report. It is also correct that Mr Rusholme has, in the round, not taken sufficient regard to some of the comparables identified by Mr Mackernan which suggest a lower valuation is appropriate.

92. My assessment of all the evidence is that in February 2018, the true OMV valuation of Cedar House was £2.75m.

93. As to the appropriate reduction to account for a 180 day valuation, I prefer the evidence of Mr Mackernan that a 10% deduction is appropriate (rather than Mr Rusholme's 5%). This conclusion is also supported by the approach which appears

[3] £150,000/6.0

to have been taken by the independent valuer David Lyons Coffer. VAS, the contemporaneous auditor of the Valuation, considered a deduction of 5-15% deduction from OMV to reflect a 180 day valuation would be justified. The true 180 day valuation was therefore £2,475,000.

(2) What was the appropriate bracket to be applied so far as the Valuation was concerned?

94. The valuation experts have agreed that in the context of the unusual and, indeed, unique nature of the property, the appropriate band of tolerance is 20%. Notwithstanding this, Mr Nicol has sought to urge upon the Court that a narrower band should be applicable on the basis that competent, specialist professionals might do rather better than a 20% tolerance. Given that liability has been conceded, the only potential remaining relevance of this issue is in order to assess the degree of culpability of ART when, if it is necessary to do so, considering contributory negligence.

95. It is important for the Court to recognise that the range will depend on the facts of the case, and the identification of the range should not be approached mechanistically. Notwithstanding this, I am reminded of the summary by Coulson J in *K/S Lincoln v CB Richard Ellis Hotels Ltd* [2010] EWHC 1156 (TCC) (and as set out at 10-071 of *Jackson & Powell on Professional Negligence* (9th Edn)), (a) for a standard residential property, the margin of error may be as low as plus or minus 5%; (b) for a valuation of a one-off property, the margin of error will usually be plus or minus 10%; and (c) if there were exceptional features of the property, the margin of error could be plus or minus 15% or even higher.

96. I readily accept that the Cedar House was a challenging property to value in 2018. It was an uncommon type of property, bound by the River Mole on one side and the A425 on the other. It was Grade II* listed, and the long leasehold contained restrictions on use. Whilst this might not necessarily preclude alternative bases of considering or checking the value, this would necessarily involve a high degree of uncertainty, both as to whether the National Trust would permit a change of use, or what premium if any the National Trust might seek. Indeed, this uncertainty is no doubt why Hope instructed Mr Mussett to value Cedar House based upon its existing condition/planning and without hope value. The property was not in a condition where it would compete seriously with beautifully fitted out boutique hotels, yet is located in a wealthy commuter village where such a level of luxury might well be expected. It had not been operating as a going concern for over 8 years, so there was little reliable track record to assess, and there were no truly obvious comparables.

97. However, notwithstanding the view of the experts, I am unable to accept that the property was so exceptional that the significant tolerance inherent in a plus/minus 20% range can reasonably be justified (as, indeed, Dove J also ruled out in *Barclays Bank Plc v TBS & V Ltd* [2016] EWHC 2948 (QB)). Such a bracket would have – in the context of a valuation of (say) £3m – permitted a non-negligent range from £2.4m to £3.6m, i.e. a range of between £1.2m. I consider (not least without any specific and express warning drawing this to the attention of the party retaining the valuer) that the recipient of expert, specialist valuation advice in respect of what was, after all, a property with an intended mainstream commercial use would be justifiably surprised with such a large, non-negligent tolerance. I accept that the appropriate bracket in the

present case was plus or minus 15%. Having said that, I note in the present case that, even if I am wrong about this, even using a more generous bracket of 20%, the valuation of £4m for both OMV and 180 days was significantly outside the bracket.

(3) Was the Defendant's Valuation competent?

98. No.

(4) Did the Claimants rely on the Valuation to advance the Loan?

99. Yes. There was no serious dispute otherwise.

100. However, the VAS audit pointed out to Hope that the 180 day valuation would generally be below the OMV. Internally, Hope in fact calculated its gross loan to value ('LTV') on the basis of a £3.8m 180 day valuation (2,448,000/3,800,000*100 = 64.42%). This was just within its lending criteria of 65%. It might be noted that this was on the basis of a 5% deduction from OMV to 180 day valuation. Initially, Laura Carr, the underwriter at the Claimants, saw it as necessary to use a 10% deduction (see e.g. her email of 22 February 2018), as indeed the Claimants' own expert does, and as I have found is appropriate. If 10% is used, the gross LTV would have exceeded the Claimants' 65% LTV criterion (2,448,3,800,000*100 = 68%). Nevertheless, on any view Hope relied upon the Valuation to produce their own 180 day valuation, against which they determined how much to loan.

(5) Would the Claimants have advanced the Loan had they been in receipt of a competent Valuation or, in the alternative, would they have advanced a different sum?

101. No. There is no dispute that this is a 'no transaction' case.

(6) Are the Claimants entitled to recover interest as damages and, if so, on what basis?

102. As a matter of principle, as set out in *Jackson & Powell on Professional Negligence* at 10-206,:

> '*There may be rare cases where the lender is able to prove that funds available to it for lending were limited, and that had it received a proper valuation it would not have lent to the borrower, but to a different and identified borrower who would have paid full contractual interest, but whose demand for finance from the lender could not be satisfied. In such circumstances, there would be the evidential basis for an argument by the lender that contractual interest should be awarded to reflect the loss of use of such capital. Recovery would be subject to such loss being reasonably foreseeable.'*

103. This is the exception, rather than the norm, on the basis of the reasoning within the House of Lords decision in *Swingcastle Ltd v Gibson* [1991] 2 A.C. 223 HL, where Lord Lowry made clear that the valuer did not warrant the accuracy of his valuation at [238F-G]:

> ‘*Where* [the lenders] *went wrong was to claim, not only correctly that they had to spend all the money which they did, but incorrectly that the value by his negligence deprived them of the interest which they would have received from the borrowers if the borrowers had paid up.’*

104. However, the existence of the exception is made clear within Lord Lowry’s judgment when, in finding that the high contractual rate of 36.51% and default rate of 45.619% were not applicable, he prefaced his conclusion with the words at [[239B-C]:

> ‘*In the absence of any evidence as to how the lenders financed the loan or evidence showing how the money, if not lent to the borrowers, could have been profitably employed….’*

105. That exception reflected one of the possible methods of assessment in a ‘no transaction’ case in Neill LJ’s judgment in the Court of Appeal, which was approved expressly by Lord Lowry (at [237A-B]), as follows:

> ‘*A number of approaches are possible, including the following…(b) The lender could be awarded a sum equivalent to the amount he would have earned by way of interested on another loan if he had had the money available for this purpose. In my view, however, such an award should not be made in the absence of evidence that the money lent would have been used for another transaction. This evidence would have to be directed to providing an unsatisfied demand for loans and I anticipate that such evidence might seldom be forthcoming. Moreover, even if evidence of a lost transaction were available, I see no reason why the interest should be at the default rate rather than at the ordinary rate provided for in a standard contract for this type of business….*’

106. Mr Nicol advanced the submission that the editors of *Jackson & Powell* stray into error in asserting that, having shown limited availability of funds, a lender had to evidence *‘a different and identified borrower who would have paid full contractual interest*’. If this passage is to be read as necessarily requiring a lender to establish by reference to a specific prospective borrower’s identity (i.e. company X or Mrs Y), then this overstates the position. If ‘identified’ is intended merely to emphasise the need to evidence which goes beyond the generic to the specific (even if in some circumstances it may not be possible to identify by reference to a named company or individual), then the statement is unobjectionable. Ultimately, as stated in *Swingcastle*, and as applied, for example, in *Mortgage Express v Countrywide Surveyors Limited* [2016] EWHC 1830 (Ch), the question is one to be determined on the evidence. Evidence of a specifically identified loan application of the equivalent amount to that lent which was turned down solely because of finite funding availability, substantiated by contemporaneous documents, would obviously be very likely to establish that but for the impugned transaction, the money lent would have been used for another transaction at contractual rates. However, the more general and generic the evidence, the less likely it is to establish that which is required to bring the claimant within the ‘rare’ cases in which such a claim may succeed.

107. It is, therefore, to the evidence that I turn in the present case.

108. Mr Nicol contends that there is compelling evidence of the triple elements of limited funding, unsatisfied demand and a demonstrable history of profitable operation. It is

the presence of these three elements which, he contends, makes this case rare. It is argued that the evidence demonstrates that had Hope's limited funding not been advanced to the St Anselm it is more likely than not that it would have been successfully advanced elsewhere; and that Hope's business model was a successful one with the overwhelming majority of its loans being repaid in full together with the associated fees charged.

109. In opening, it was suggested by Mr Nicol that this cannot be effectively challenged by a party that does not have any evidential basis on which to mount such a case. If intended as some form of proposition suggesting that a defendant in the present circumstances must call its own evidence, either factual or expert, it is not correct. As this case amply demonstrates, it is plainly open to a defendant simply to challenge through cross-examination the evidence tendered by the Claimants, upon whose shoulders the burden of proof rests.

110. The key elements of Hope's case are set out in various paragraphs of the Claimants' Further Information ('the CFI'), signed by a Statement of Truth by Mr Sealey:

'*(10) In relation to the loans that the Claimants did turn down, due to the lack of available capital caused by the failure of the Cedar House loan to redeem on time, because of the Claimants' Data Retention Policy the Claimants have no records of the potential loans they turned away, save for one spreadsheet of data they have collated for the period June to October 2018, before the Claimants' Data Retention Policy came into force;*

[This is cross-referenced to a spreadsheet, which I shall refer to as the 'Lost Loan Spreadsheet']

...

(13) The data set out in the spreadsheet referred to above shows that between June and October 2018 the Claimants turned down a total of approximately £73 Million worth of loan applications at a time when (as the relevant bank records reveal) insufficient funds were available to them to meet any such requests.

[This is also cross-referenced to the Lost Loan Spreadsheet]

...

(18) The Claimants did request, in conversations with TriplePoint, additional funding because of the failure of the Cedar House loan to redeem on time. TriplePoint refused these requests, stating that they would not be able to do until the Cedar House loan had redeemed and until they had a track record of successful lending with the Claimants.

...

(24) The Claimants' historic lending record (as set out in its Data Tape for the relevant period up to November 2022) demonstrates a near total (approximately 99.3% excluding the relevant loan) redemption of all sums lent (245 Loans totalling £99.6 Million) during that period at full

> *contractual rates, experience is consistent with that of the 2 year period prior to October 2018 in which loans totalling £35.1 Million were written and all of which were repaid in full (to include capital, fees and interest). This successful operation was only brought to a temporary halt by the pandemic in March 2020.'*
>
> [This is cross referenced to a spreadsheet, which I shall refer to as 'the Data Tape']

111. Reference in the CFI at (10) to the Claimants' Data Retention policy is made because the underlying database from which both the Lost Loan Spreadsheet is said to have been drawn no longer exists, and nor do any primary documents which may have sat underneath the data in the Lost Loan Spreadsheet. It is for this reason that Hope says that it is unable to particularise those potential borrowers' identities or their requests. There are also no emails or other correspondence supporting any loans. Hope pleads that the identities of such borrowers are irrelevant in circumstances in which it is statistically overwhelmingly likely that any such borrowers would have repaid any sums advanced to them in accordance with their contractual obligations.

112. The data was, Ms Cowan explained, lost when Hope moved from a cloud based server called Egnyte to a new system in early 2022. There are various aspects of evidence relating to the circumstances of this which it is not necessary for the purposes of this judgment to explore. However, it is on any view somewhat surprising that it came to pass that, at a time which this litigation was fully underway, a significant body of what would, if Mr Sealey's evidence is correct, be extremely supportive evidence, has been lost. It is not necessary for me to conclude, and I do not do so, that the explanation given as to the circumstances surrounding the loss of evidence is incorrect. However, to the extent that presents difficulties for Hope in proving its case, that is a matter which on any view sits with Hope themselves.

113. The derivation of the Lost Loan Spreadsheet referred to at paragraphs (10) and (13) of the CFI is dealt with at paragraph 64 of Ms Cowan's witness evidence. She states:

> '*I spoke to Jonathan [Sealey] to discuss what loans he recalled declining due a lack of funds caused by the Loan being made. He told me that he recalled all large loans, over £1 million, being turned down, after the Loan was made, until around the time the Property was sold in early October 2020. I then accessed Hope's CRM system, Bright Office, and Egnyte, and reviewed data relating to loans that had been refused. I then pulled out details of all loans around or over £1 million that were declined over the period July to October 2018, incorporated them into a spreadsheet, and then added, as an assumption, the reason for rejection was a lack of funds. I saved this summary and sent it to our Solicitors who disclosed it.*'

114. In oral evidence, Mr Cowan described it slightly differently, stating that the ones to which the 'assumption' - as she put it – was added '*are the ones that we couldn't actually see what had happened with them*'. Ms Cowen could not remember what level of detail existed in the underlying spreadsheet/database; for example whether the other categories of reasons for denying loans existed within the contemporaneous documentation.

115. In my judgment, whichever explanation from Ms Cowan is correct, the spreadsheet created in 2022 absent any ability to interrogate the data from which it was drawn is a wholly insufficient evidential basis for the conclusion it purports to support. First, as I have already identified, the statement made by Mr Sealey (upon which the creation of the spreadsheet was predicated, according to Ms Cowan's witness statement) that '*all large loans, over £1 million, being turned down, after the Loan was made, until around the time the Property was sold in early October 2020'* is demonstrably wrong. The Data Tape shows many loans being made in April 2018 and onwards, including the following for over £1m:

125: CA001629: £2.1m: 29.10.2018

127: CA001707: £3.43m 06.09.2018

128: CA001717: £1.35m 03.08.2018

133: CA001867: £1.42m 29.06.2018

135: CA001870: £1.155m 16.10.2018

139: CA001948: £1.522m 18.07.2018

(These are just up to October 2018. Large loans were also made from then on).

116. Second: if, contrary to the written evidence but consistent with Ms Cowan's evidence, the allocation was not made by reference to Mr Sealey's (incorrect) recollection, but by allocating them to the category 'Funding Cashflow Rejected' because they were '*the ones that we couldn't actually see what had happened with them*' this cannot possibly be sufficient to establish any meaningfully supportive evidence. I note, for example, that there does not appear to be a category of 'Application withdrawn', which could be a very simple explanation for all the loans which, whilst not declined or rejected for the stated reasons, did not proceed.

117. Turning next to the Data Tape itself, I also conclude that this is a document upon which no reliance can be placed. There are three fundamental reasons for this (although Mr Asquith identified other errors within the document which are supportive of this conclusion):

(1) Ms Cowan gave evidence that the column '*Redemption*' did not in fact record the fact that the loan had been redeemed, but merely that the security had been sold. That is plainly not the same thing as 'redemption' and is, itself, meaningless in the context of what the Data Tape was purporting to establish;

(2) The column 'Repaid with interest' was not drawn from the underlying data but added for the purposes of this litigation by Ms Cowan. Whilst intending to support the contention at CFI (24) that 99.3% of loans were repaid in full at <u>full</u> contractual rates, Mr Sealey's evidence in cross-examination was that

MR ASQUITH: Mr Sealey, I'm a bit troubled by something,

> *I am afraid, you said just before my Lord asked his question. Which was you said: we would have been paid some interest.*
>
> *A. Yes, it 's not uncommon for there to be a shortfall on loans. We will then take a commercial decision whether we pursue that, depending on how the borrowers acted and the level of shortfall that is levelled against that particular loan.*

In circumstances where the latterly added column simply means that *some* rather than full interest was repaid, this plainly does not support the proposition advanced at CFI (24)

(3) The Data Tape was demonstrably wrong in one particular case, the *'Jones'* case. The Data Tape suggested that the loan had been redeemed and repaid with interest, whereas it was plain from internet research carried out by the Defendant that the loan had been subject to litigation, and there was still a relatively significant shortfall in full repayment (notwithstanding success in the litigation). The difficulty with dismissing this as an isolated example, as Mr Sealey and Ms Cowan sought to do, is that in the absence of any underlying documentation by which the accuracy of the Data Tape can be interrogated, the fact that some externally obtained evidence happens to demonstrate that one entry involving significant sums is misleading undermines confidence in the document as a whole. Put another way, where evidence *does* exist by which the contents of the table *can* be interrogated, there is a 100% success rate in establishing the table is wrong.

118. In circumstances where, for the reasons I have given, I do not accept the evidence of Mr Sealey save where his assertions are supported by contemporaneous documents, I do not accept as reliable his generalised statements regarding the success of his business. This conclusion is also supported by the analysis of profits, considered further below.

119. Next, it is necessary to turn to the question of the allegation of finite Triple Point funding which is also a necessary part of the contention that the reason why loans were declined in the relevant period was the Cedar House loan outstanding rather than, for example, lack of demand.

120. There are a number of reasons why I reject Hope's evidence in this regard:

(1) there is absolutely no contemporaneous documentary evidence to support the assertion of discussions around requests for increases in the Triple Point facility and those requests being rejected. In light of my views on the unreliability of Mr Sealey's factual evidence, I cannot accept his (inherently surprising) assertions that all such interactions with Triple Point on this particular subject were dealt with orally. This is in contrast to various other interactions with Triple Point which have been disclosed by the Claimants which demonstrate that plenty of communications took place by email;

(2) there were in fact significant uplifts in the Triple Point facility during the relevant period: it was increased to £12,000,000 on 10 August 2018; to £17,500,000 on 13 November 2018 (when the Cedar House loan had already defaulted); and to £20,000,000 in late 2019 (again, post default and pre-resolution);

(3) in October 2019, the Claimants were exploring the ability to repay significant sums back to Triple Point, effectively so that it would not incur interest on these sums pending further demand for lending. This is completely inconsistent with the suggestion that there was, because of the sums loaned on Cedar House, no 'headroom' in the Triple Point facility in order to make other loans;

(4) as I have already found, Mr Sealey's evidence that all £1m+ loans were declined (because of the lack of Triple Point funds) is simply wrong;

(5) there are other inconsistencies in the evidence relating to the absence of cashflow: for example, the contradiction between Mr Sealey and Ms Cowan about the period in mid-2018. The former said that the Triple Point facility was maxed out at this point; the latter said there was money around at this point.

(6) Finally, whilst obviously far from determinative of itself, there is no witness evidence from anyone at Triple Point to support the proposition. This corroborative evidence would have been important given the lack of any contemporaneous documents and the alleged nature of oral discussions.

121. Against this, I do not consider that the generic evidence given by Mr Griffiths, the Defendant's lending expert. in answer to generic questions in cross-examination from Mr Nicol assists Hope's case. As I have already indicated, it is necessary to interrogate the nature and extent of the specific supporting evidence in the context of a particular company at a particular time rather than rely upon generalisations to establish the necessary elements of a contract interest as damages claim.

122. Finally, I turn to the question of profitability. In so far as the general assertions relating to the success and profitability of Hope rely upon the Data Tape, I have already found these to be unreliable. In relation to profitability more specifically, the unchallenged evidence of Mr Griffiths, the Defendant's lending expert, suggests that, notwithstanding the generalised assertions of Mr Sealey, the related Hope companies were not, when aggregated, particularly profitable. The net return on debtors taken from the balance sheets of Hope and Hope 2 over the last 5 years ranged from -1.43% to 1.54%. It is in this context that Hope's loss of profits claim should be viewed somewhat sceptically. It is alleged in this litigation that Hope lost net profits of £358,740.13 over a period from 18 March 2018 to 2 October 2020, on gross Cedar House loan of £2,448,000. This can be compared with annual profits ranging from £-104,543 to £249,172 on a loan book ranging in value from approximately £14m to £21m per year over the last 5 years. The suggestion that it was nevertheless the Cedar House loan which would have generated significant profit is wholly lacking in credibility.

123. In my judgment, therefore, I conclude that Hope has failed to establish, in the words of Mr Nicol, '*the triple elements of limited funding, unsatisfied demand and a demonstrable history of profitable operation [which] makes this case rare*'. Hope

has not established any entitlement to contractual interest or loss of profits as damages.

124. In these circumstances, it is not necessary for me to consider the detail of the Weighted Average interest calculation. However, were it necessary to, I would not conclude that I could reliably accept the calculation advanced by Hope. The problems that beset the Data Tape are replicated in the spreadsheet which seeks to set forward the calculation. The calculation appears to incur some large, non-redeemed loans and, as accepted by Ms Cowan, does not include costs associated with the recovery of loans such as litigation and other costs.

125. It is necessary to consider, separately, the question of whether Hope has established its alternative interest case, based on the Cost of Funds.

126. There is, in my judgment, an insurmountable difficulty with the claim advanced by Hope in this regard, arising from the fact that the Claimants' borrowings, from which they derive their Cost of Funds rate, is derived from both the Triple Point and High Net Worth lending costs. Whilst it is right that the Triple Point funding is in effectively ringfenced for lending purposes, the High Net Worth funding is not. It is, effectively, borrowing which is used to fund the operation of the business, including the bringing of legal claims including the present action and, for example, the Jones litigation. It is not possible to determine what the proper Cost of Funding would be after stripping out elements which should not be included in such a calculation.

127. In the circumstances, I conclude that any statutory interest which may be due should be recoverable at a reasonably foreseeable rate, namely that which would be typical for companies like Hope. Mr Penman, Hope's lending expert, agreed that this would be in the region of 3-4% over base. I therefore consider 3.5% over base to be appropriate.

(7) What was the Claimants' total transaction loss as a result of making the Loan?

128. Hope's case is that, prior to the application of contractual interest/profit, its net loss was £875,401.40. This is calculated as follows:

Capital Advanced:	£2,215,440.00
Plus Costs of Extraction:	£461,805.04
Less sale proceeds and funds received	(£1,801,843.64)
	£875,401.40

129. The Defendant's position is that this is (with cost of funding calculation replaced with 3-4% above base, with which I agree) the maximum total transaction loss. The Defendant contends that the costs of extraction are unreasonably high and/or were caused by the protracted sale process which itself was the result of the imposition of the second section 146 notice.

(8) What is the Claimants' total actionable loss (if different from the total transaction loss?)

130. The Claimants contend that the total actionable loss is recoverable subject only to the (conveniently described) 'SAAMCO cap', calculated by reference to the difference in value between the Valuation (£4,000,000) and what it says is the non-negligent 180 days valuation for Cedar House (£1,950,000). This is a total actionable loss of £2,050,000. Given my findings above, the total actionable loss is less than the cap, and so if the Claimant is correct, the maximum recoverable loss would remain £875,401.40 plus statutory interest, subject to any question of contributory negligence.

131. The Defendant contends that the total actionable loss is zero. It contends (taking the non-negligent valuation I have determined above) that the 180 day value of the security as at the date of default remained the same as it had been at the date of valuation, i.e. £2,475,000. This exceeded the loan (both net and gross) and no loss was therefore caused. It argues that the cause of loss of value in Cedar House between this value and the sale price in 2020, which it attributes principally to the Second s146 Notice running into the effects of COVID, was not within the scope of the valuer; and/or was too remote and/or was caused by a *novus actus interveniens*.

132. The response to this is that, as Mr Nicol puts it, '*this is one of those rare cases'* where the professional advisor is liable for all the foreseeable consequences of a commercial transaction entered into as a result of negligence advice. This is advanced on the basis that it was solely the perceived equity in Cedar House that was of crucial importance to the Claimants, their decision to lend and the ability to enforce the security. Had the valuation and appraisal been competently undertaken, it is said, the transaction would have ground to a halt. In the present case, Mr Nicol contends that given the crucial nature of the Valuation Report, this factor alone should mean that the valuer should be responsible for all the consequences of the lending transaction, not just the over-valuation. It is further said that the Defendant, through Mr Mussett and by reason of his dealings with Mr Pieri, was clearly aware of the nature of the Claimants' business and the fact that it advanced funds on a low LTV ratio for short periods at high rates of interest and that the value of the security i.e. Cedar House was the key consideration and crucial in their decision making. This, it is said, sets this valuer's negligence case apart from other reported cases.

The Law

133. As Lord Sumption put it in *BPE Solicitors v Hughes Holland* [2017] UKSC 21 the legal issue raised in this case is, in summary, what damages are recoverable in a case where (i) but for the negligence of a professional adviser his client would not have embarked on some course of action, but (ii) part or all of the loss which he suffered by doing so is said to arise from risks which it was no part of the adviser's duty to protect his client against.

134. Since SAAMCO, it has been clear that there is a distinction between losses which have been factually caused by a negligent act and those losses which are recoverable in law. As explained in *Hughes Holland* at [31-32] the first stage in a case such as this where the lender would not have entered into the transaction but for the breach of duty, was to compare the position had he not entered into it with his actual position.

This means comparing the amount of the loan with the value of the real and personal rights obtained. The second stage involves awarding only that part of the loss which was within the scope of the defendant's duty.

135. In this context, until *Hughes Holland*, the language generally used by the Courts sought to distinguish between advice and information. However, in relation to this, Lord Sumption stated at [39] – [42]:

> *'[39] Turning to the distinction between advice and information, this has given rise to confusion largely because of the descriptive inadequacy of these labels. On the face of it they are neither distinct nor mutually exclusive categories. Information given by a professional man to his client is usually a specific form of advice, and most advice will involve conveying information. Neither label really corresponds to the contents of the bottle. The nature of the distinction is, however, clear from its place in Lord Hoffmann's analysis as well as from his language.*
>
> *…*
>
> *[40] …If the adviser has a duty to protect his client (so far as due care can do it) against the full range of risks associated with a potential transaction, the client will not have retained responsibility for any of them. The adviser's responsibility extends to the decision. If the adviser has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client would not have entered into the transaction on a careful assessment of its overall merits, the fact that the loss may have resulted from risks B, C or D should not matter.*
>
> *[41] By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in Nykredit, the defendant's legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision.*
>
> *[42] What is clear is that the fact that the material contributed by the defendant is known to be critical to the claimant's decision whether to enter into the transaction does not itself turn it into an "advice" case. Otherwise all "no transaction" cases would give rise to liability for the entire foreseeable loss flowing from the transaction, which is the very proposition rejected in SAAMCO. […]'*

136. Thus, the crucial distinction is not between the labels of 'information' or 'advice' but rather, whether the person providing the service has assumed responsibility for the risk of the whole transaction, or just for part of it. Lord Sumption pointed out at [44] that categorisation was inevitably fact-sensitive.

137. In relation to valuers, he then proceeded to observe that '*A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann called "information"*.' This conclusion reflected an earlier passage in *Hughes Holland*, in which Lord Sumption had been considering Lord Hoffman's judgment in SAAMCO at [28]:

> '*He then referred to the nature of the valuer's duty in the case before him. The purpose of the valuation was to form part of the material on which the lender was to decide whether, and if so how much he would lend, what margin, if any would sufficiently allow for foreseeable valuation errors or a future fall in the market, accidental damage to the property and any other contingencies that may happen.*
>
>> *"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."*'

138. However, it is plain that care must be taken with this general statement in circumstances where every case is likely to depend on the range of matters for which the defendant assumed responsibility and, as Lord Sumption stated, no more exact rule can be stated.

139. Following *Hughes Holland* were the two Supreme Court decisions of *Meadows v Khan* [2021] UKSC 21 and *Manchester Building Society v Grant Thornton UK LLP* [2021] 3 WLR 81. The same panel of seven Justices heard both cases.

140. In *Meadows,* the negligent defendant general practitioner caused the claimant to consider that she was not a carrier of the haemophilia gene. His liability did not extend to all the additional costs of raising her son, including the costs associated with his autism. The claimant had approached the defendant with the specific purpose of discovering whether she carried the haemophilia gene, and that purpose determined the risks of harm against which the law would impose liability. Only a particular risk relating to pregnancy was the subject of the advice, and the law would not impose liability for unrelated risks which might arise in any pregnancy (here, the risk of giving birth to a child with autism).

141. In *MBS*, the context was professional advice given by expert accountants. The majority judgment was given by Lord Hodge and Lord Sales, with whom Lord Reed, Lady Black and Lord Kitchen agreed. Lord Leggatt gave a separate judgment, in respect of which the majority indicated at [3] that, '*we agree with much of it. In particular we find his explanation of valuer cases illuminating*', although the majority was unable to support Lord Leggatt's approach to SAAMCO and the question of the scope of duty of the accountants. Lord Burrows also gave a separate judgment.

142. The majority set out the questions to be asked at [6], reflecting the approach that had also been taken in *Meadows*:

> '*(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)*
>
> *(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)*
>
> *(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)*
>
> *(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)*
>
> *(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)*
>
> *(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)*'

143. The present debate centres upon the second and, related, fifth questions. As to the second, the majority stated at [12]:

> '*In some cases, a claim may be answered at stage 2 without the need to address the questions of breach and factual causation. However, in cases where the scope of duty question is relevant to the extent of loss of a particular kind, as in SAAMCO and Hughes-Holland, it is generally more appropriate to examine this after first ascertaining on a simple "but for" basis what is the extent of the loss which has flowed from the alleged breach of duty. Proceeding in this way means that one identifies the losses which are in fact in issue so that it is possible to focus with greater precision on the extent to which they fall within the scope of the duty of care owed by the defendant.*'

144. The central guidance for determining the scope of the duty of care in professional advice cases was then set out at [13] and [17]:

> '[13] *In our respectful opinion, the scope of duty question can and should be approached in a more straightforward way than is suggested by Lord Leggatt. In our view, the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given (and, as is often the position, including in the present case, paid for)…*
>
> [17] *Therefore, in our view, in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard*

against and then looks to see whether the loss suffered represented the fruition of that risk…'

145. The majority then approved Lord Sumption's analysis of the difficulties caused by the distinction between 'advice' and 'information' at [18] and again emphasised that, instead of seeking to shoe-horn a case into one of these categories, it is necessary to focus on the purpose to be served by the duty of care assumed by the defendant, and welcomed Lord Leggatt's proposal to dispense with the descriptions to be applied as terms of art.

146. At [23], the majority also echoed the earlier reservations identified by Lord Sumption in *BPE* as to the role of the counter-factual, it being a way to assist in identifying the extent of the loss.

147. In his 'illuminating' analysis of the valuation cases, Lord Leggatt made the following relevant observations at [86]-[88] and [93]:

> '*[86]…it is necessary to return to the purpose for which a lender commissions a valuation and the role which the valuation is reasonably expected to play in the lender's business decision. The purpose of the valuation is to provide the lender with an opinion on which it is entitled to rely of the current market value of the property offered as security for the loan. Clearly, the value of the security is an important consideration for a mortgage lender. It is, however, by no means the only factor relevant to the decision whether to make the loan. The lender will also need to assess the credit risk in lending to the particular borrower - a matter for which the valuer has no responsibility. In addition, the valuer is normally asked to assess only what the property is currently worth and not to forecast what it will be worth at a future date when the lender may need to enforce the security. As Lord Hoffmann said in SAAMCO at p 210F: "a valuer provides an estimate of the value of the property at the date of the valuation. He does not undertake the role of a prophet".*
>
> *[87] It is obvious that the value of the property mortgaged as security for the loan may subsequently go up or down. The risk that the value of the property will go down is a commercial risk which the lender takes. That does not mean that the lender's willingness to take this risk is unqualified. The lender may only be willing to take this risk on the understanding that the property is currently worth what the valuer advises it is worth: that necessarily follows where the lender proves that, had the property not been overvalued, it would not have made the loan. But what can be inferred from the fact that the lender did in fact make the loan is that the lender was willing to bear the risk (without relying in this regard on the valuer) that the property would in future be sold for less than the valuation figure in so far as this would have been so even if the valuation had been accurate. To that extent, any loss suffered by the lender can fairly be said to be a consequence of risks inherent in the lending transaction, including the risk of a fall in property prices, and not of the only risk for which the valuer can fairly be held responsible, namely, the risk that the valuation was overstated.*
>
> *[88] This is the underlying policy rationale for not shifting onto the valuer all the risks taken by the lender in making the loan and instead leaving the lender to bear the risk of loss which would have occurred even if the valuation had been*

correct. The aim is to allocate responsibility for any loss incurred by the lender in a way which fairly reflects the assumption of risk implicit in the service which the valuer agreed to provide.

…

[93]. It follows from the nature of this distinction that cases in which a professional adviser is liable for all the foreseeable consequences of a commercial transaction entered into as a result of negligent advice are likely to be rare. The position may be different where, for example, the claimant is a private individual relying on a financial adviser to recommend an investment. But in a commercial context it is unusual for a professional adviser to be asked to advise on the overall merits of a transaction or left to decide on the matters to consider in formulating their advice. It will usually be clear that the adviser's responsibility is limited to a particular area of expertise and that there will be other considerations relevant to the client's decision which are not for the adviser to assess. As Lord Millett observed in Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd [2001] UKHL 51; [2002] 1 Lloyd's Rep 157, para 62, in identifying the area of responsibility of a professional adviser, his or her profession will usually supply the answer.'

148. Lord Leggatt at [94] reiterated the conclusion reached by Lord Sumption in *BPE* that where material contributed to the defendant is limited in scope, the responsibility of the defendant is similarly limited even if the material which the defendant supplied is known to be critical to the decision to enter the transaction. To say that a fact misrepresented or not reported was critical or fundamental to the decision, or would have shown that the transaction was not viable, are:

'*all simply different ways of saying that, if the claimant had not received the advice it did, it would not have entered the transaction….Whether in such circumstances the defendant is liable for all foreseeable loss flowing from the transaction depends not on the gravity or causative potency of the defendant's error or omission but on the scope of the matters for which the defendant undertook responsibility.'*

149. As to the potential criticality of information as part of the overall analysis, it is also of relevance to consider the analysis of Lord Burrows. At [206] he concluded that it was fair and reasonable to impose a duty which extended to all foreseeable losses:

'*It was of critical importance to the society, in pursuing its business model, to know whether hedge accounting was acceptable or not. Grant Thornton advised the society that it was. The purpose of that advice was clear to Grant Thornton in that it knew that the society was explicitly relying on that advice in pursuing its business model. That in itself might, perhaps, not have been enough to reach the conclusion that the risks consequent on adopting that business model were appropriately borne by Grant Thornton. But the crucial additional factor that makes it clear that it was fair and reasonable for the risk of the loss to be borne by Grant Thornton was the negligent specific misrepresentation that there was an effective hedging relationship between the swaps and the mortgages. It was that specific misrepresentation, in the context of the advice on hedge accounting, that meant that the business model was pursued despite the society having insufficient*

regulatory capital. Clearly Grant Thornton knew that the purpose of that representation was to provide a true picture of the society's financial position on which the society would rely in pursuing its business model. In my view, therefore, the society has established (the burden of proof being on the society, as claimant) that the loss was within the scope of Grant Thornton's duty of care.'

150. It is important to note, notwithstanding the emphasis placed on this passage by Mr Nicol in his written submissions, that whilst referring to the criticality of advice given, the ultimate determining factor as articulated is the conclusion reached as to the *purpose* of the advice, echoing the emphasis placed by the majority upon analysing purpose when considering the scope of duty question. As made plain in *Hughes Holland*, and emphasised by Lord Leggatt, criticality of the information to the decision process cannot of itself mean that the information provider is liable for all the foreseeable consequences of the transaction, because in of itself it is merely a necessary part of the causal analysis as to whether the transaction would, or would not, otherwise have proceeded. However, it may play a role – no doubt necessary, but not sufficient in isolation - in establishing the *purpose* of the provision of information or advice.

151. Finally, Mr Asquith places significant emphasis on the case of *Charles B Lawrence & Associates v Intercommercial Bank Ltd* [2021] UKPC 30, a recent decision of the Privy Council applying *MBS* and *Meadows*. The claimant lent a borrower $3m, secured by a guarantee and mortgage. The guarantor obtained a valuation of the land from the valuer in which the land was valued at $15m assuming good title. The valuation was negligent and, assuming good title, the land was in fact worth $2.375m. The land did not, in fact, have good title so in reality the security was worthless. Having briefly summarised the importance of considering the purpose of the advice or information as set out in *MBS* and *Meadows*, the Privy Council, in a judgment from Lord Burrows and Lady Rose with whom the other justices agreed, set out its reasoning at paragraphs [14] – [17], which included the following:

'*[14] …. It is clear, not least from the assumptions expressly specified by Lawrence in the valuation report, that the purpose of Lawrence's report was to value the property on the assumption that there was good legal title to the Land. It was not the purpose of Lawrence's report to advise on, or give information about, the title to the Land. It is clear that the Bank was not looking to Lawrence's report to advise on, or give information about, the title to the Land. That was a matter for a lawyer not a valuer.*

[15] The Board is therefore seeking to exclude from the total loss factually caused to the Bank by Lawrence's negligence that element of the loss that is outside the scope of Lawrence's duty of care because it is attributable to the defect in title rather than to the overvaluation being based on commercial not residential use. That exclusion is satisfactorily achieved on these facts by taking as the starting point the loan made ($3m) and deducting the actual residential value of the Land at the date of the loan on the assumption that there was good title to the Land ($2,375,000)….

[16] …Comparing Meadows v Khan to the facts of this case, one can see that, just as the haemophilia loss, but not the autism loss, was within the scope of the doctor's duty of care so here the commercial, rather than residential,

> *overvaluation loss, but not the defective title loss, was within the scope of the valuer's duty of care. And in each case that conclusion follows from the purpose of the advice or information given by the professional and hence the risk that was being guarded against.*'

152. This gave rise to a loss of $625,000, from which the Privy Council agreed that it was then appropriate to deduct a percentage for contributory negligence, after which interest was to be applied from the date of loss to judgment.

153. The Privy Council also explicitly considered that this was a case in which consideration of a counter-factual did not assist or determine the outcome. At [19], Lord Burrows and Lady Rose stated:

> '*Applying that counterfactual test to the facts of this case would contradict our view, set out above, that the defective title loss was outside the scope of Lawrence's duty of care. Had Lawrence's valuation of $15m been correct, the Bank would still have entered into the loan, taking the mortgage over the Land as security, but would not have suffered the same (or indeed any) loss. This is because, as the Land would have been worth $15m (assuming no defect in title), the Bank would have had adequate security to cover the guarantor's default in repaying the loan. It may be that one could modify the counterfactual in order to reach the "correct" result but, in our view, this merely serves to reinforce the point made by the Supreme Court that the counterfactual is of second-order importance as regards establishing the scope of the duty and is a helpful cross-check of that scope in most but not all cases. This is one of the cases where it is unhelpful.*'

154. Mr Asquith contends that this case is directly analogous, arguing that the losses caused by the reduction in value to the security caused by the second 146 Notice, delays and COVID are not risks against which the valuer had a duty to protect the Claimants, and can be excluded, similarly, by assessing loss as the difference between the amount loaned and the actual value of the security. As the amount loaned was less than the actual value of the security, no loss has been suffered. Mr Nicol contends that the case is an 'outlier'.

155. I therefore distil the following from the foregoing review of the law:

    (1) Categories of 'advice' and 'information' are neither distinct nor mutually exclusive categories. The fact-sensitive question of categorisation is, instead, whether the person providing the service has assumed responsibility for the risk of the whole transaction, or just for part of it;

    (2) in answering this question, it is necessary to focus on the purpose for which the advice or information was provided;

    (3) criticality of the information provided by the professional (i.e. its causative potency) cannot of itself be determinative of the categorisation in circumstances where this will inevitably be the case in all 'no transaction' cases. However, it may be relevant to the question of purpose;

(4) it will usually be clear that a valuer's responsibility is limited to their particular area of expertise and that there will be other considerations relevant to the client's decision which are not for the valuer to assess. As such, cases in which a valuer is liable for all the foreseeable consequences of a commercial transaction entered into as a result of negligent advice are likely to be rare;

(5) assessing a counter-factual is but a tool, may be of secondary importance within the analysis and may indeed be unhelpful in some circumstances

What was the scope of the Defendant's duty in this case?

156. In my judgment, there is nothing which removes this case from the ordinary valuer's negligence case where the purpose of the advice was to provide the lender with an opinion on which it is entitled to rely of the current market value of the property offered as security for the loan. The valuation is undoubtedly a very important piece of information, and there is no dispute that it was in this case critical in the sense that there is no dispute that this is a 'no transaction' case. However, there is no evidence which elevates this into the 'rare' situation which a valuer's duty is taken to be one which extends to protecting the lender against all the risks of entering into the transaction.

157. The first factor relied upon by Mr Nicol is that '*the nature of the Claimant's business is singular and unusual both because of its position in the market and its scale*'. In describing its scale, it is suggested that it has no unused lines of lending or that it has never wanted for business, and that – predominantly by reason of the LTV ratios uses and the requirement to retain competent professional advisers – those lines of funding have been profitably deployed. The second factor is that (as known, it is said, by the Defendant through Mr Mussett) its business model was one in which it advanced funds on a low LTV ratio for short periods at high rates of interest and that the value of the security was the key consideration and crucial in decision making.

158. In essence, Mr Nicol contends, taking the two points together, is that that in light of the business model the *purpose* of the provision of the valuation by the Defendant was, as known to Mr Mussett, not just to provide an important piece of information about the value of security within a wider commercial transaction decision making process, but was the sole piece of information upon which entering into the transaction turned, such that responsibility for that information extends to the decision itself. Put another way, the purpose of the provision of the valuation was, and was known to be, the *only* light which had to be green for the transaction to go ahead: advice as to valuation was tantamount to advising on entering the transaction as whole.

159. This submission fails for a number of reasons:

(1) Whilst an extension of a valuer's duty beyond that ordinarily restricted to responsibility for the valuation being wrong is (as made clear in the authorities) conceptually possible, it is improbable that this duty would come into existence without some clear understanding between the parties, most likely expressed within the instructions to the valuer. There is no evidence of any communication between the parties which could even arguably give rise to such an extended duty;

(2) there is no evidence about Mr Mussett's (or the Defendant's) particular knowledge of the Claimants' business model. It cannot be gleaned or inferred from the correspondence which evidence Mr Mussett's dealings with Mr Pieri, which have been set out earlier in this judgment. There is nothing to suggest, for example, that any of the valuers used by the Claimants (including Savills) were provided with particular details of the Claimants' business model such as the LTV, or the relevant interest rates, or were told that the sole criteria upon which a decision to lend would be made was to be their valuation. Whilst Mr Nicol may contend that Mr Mussett has not given evidence, the Claimants have come nowhere close to raising a prima facie case in this regard. Indeed, neither factual witness called on behalf of the Claimants give any evidence of Mr Mussett's understanding of their business model and the importance of that in the context of the assumption of responsibility they considered the valuer to be undertaking;

(3) an understanding that this was to be a short term bridging loan is, of itself, incapable of extending the valuer's duty to include a responsibility for all the consequences of entering into the bridging loan, even in circumstances where it may be that in the context of such a business the importance of the valuation is elevated;

(4) similarly, a low LTV is not of itself determinative. It might be noted that the LTV in *Charles B Lawrence* was 20%.

(5) as a matter of fact, the valuation did, or should have according to the Claimants' own criteria, have played just a part of the overall decision making. Notwithstanding the insistence by Mr Sealey in his oral evidence that the only thing that mattered was the valuation, on the basis both of the Claimants' documented procedures and Hope's internal communications, the following matters were or should objectively have been of relevance to Hope's decision to enter the commercial transaction (and to its ability to secure the institutional funding from Triple Point) and were matters in relation to which the Defendant played no part:

(a) the Claimants' Core Lending Criteria. This included:

(i) personal guarantees of all directors of limited companies (and, by extension, the strength of those guarantees) (linked to the existence of the borrower's asset and liability statement, a condition precedent to the Loan Facility Terms). Whether or to what extent the Claimants sought a personal guarantee, and if so the strength of such a covenant, was entirely a matter for the Claimants;

(ii) different LTVs for different categories of property, and 'special LTV can be considered for 'closed' bridges'. The consideration of an appropriate LTV for a particular transaction was for the Claimants based upon its particular appetite for and perception of risk;

(iii) in relation to adverse credit, '*each application would be considered on its own merits and subject to detailed explanations*

as to the adverse credit entry'. Mr Sealey's evidence was that '*Hope would perform credit checks…if a prospective borrower had a poor credit rating* [as Mr Pieri did] *then Hope may increase the interest rate offered to account for the increased credit risk*'. Consideration of the credit rating of the borrower was a risk consideration for the Claimants and a determinant of the basis upon which it would be prepared to lend and, if so, at what rate;

(iv) for refurbishments/conversions, '*experienced applicants who can be shown to have done similar deals*'. Assessing the ability of an applicant to realise an exit strategy was a matter for the Claimants;

(v) '*The above sets out the core lending policy of the board, however there has always been the ability to be flexible and commercial*'. Flexibility in assessing particular conditions is a matter for the Claimants.

(b) an assessment of the borrower's exit plan. As set out within the chronology above, Ms Carr, underwriter for the Claimants, in communication with the Claimants' solicitors stated that the Claimants would '*…We would also need to understand the proposed exit if no lease was granted or if the lease would only be granted to Mr Pieri individually*'. The existence or absence of an exit plan was relevant to the likelihood of having to call on the security, with the attendant costs and risks, and this was a matter for the Claimants to evaluate. Mr Penman, the Claimants' lending expert, agreed that the existence or type of exit strategy may be linked to the ability to realise the security, and as such may give rise to a concern for a lender. This is not something the valuer advised upon or considered, it was a matter solely for the Claimants;

(c) the existence of a s.146 Notice, and the risk of whether works were undertaken during the currency of the loan which may give rise to the imposition of a further section 146 Notice. The investment paper produced by Hope had, as matter for solicitor confirmation, '*Confirmation that the previous Section 146 on the previous own has been complied with and how this would affect us if a Section 146 was served during own loan*. The stated response was '*Section 146 sign off received*', which was not, as identified above, entirely accurate. However, even if it was, the second part ('how this would affect us ….') does not seem to have been considered at all. The Defendant's valuation was explicitly made on the assumption that all works required to discharge the first s.146 Notice were undertaken and did not take into account what might happen if a second s.146 notice was served. It is plain that the valuer was not undertaking the risk that the value may be affected if the works required were not undertaken, or that there were works subsequent to entering into the transaction which triggered a further s.146 Notice;

(d) the character/probity of the borrower. Both lending experts agreed that, even in the context of bridging finance with a low LTV, they would not

lend to an applicant who had been dishonest in their application (as Mr Pieri appeared to have been on his statement of assets and liabilities). Indeed, Mr Penman accepted to do so would be imprudent. Whether to lend in these circumstances was entirely a matter for the Claimants and unrelated to the valuation.

160. Notwithstanding the potentially increased weight the LTV has in a bridging loan context when compared with traditional lending where serviceability of the loan will play an important part, it remains clearly the case that (echoing the words of Lord Hoffman in *SAAMCO*) ART was not privy to the other considerations which the Claimants in fact took, or objectively would have been considered to be taking, into account, such as how much money it has available, how much the borrower needed to borrow, the strength of his covenant, the attraction of the rate of interest or the other personal or commercial considerations which may have induced Claimants to lend. This is demonstrated not least by the actual considerations which the Claimants' own criteria and/or terms and, indeed, common sense, required the Claimants to consider.

161. It follows that the purpose of the valuation was to protect the Claimants in relation to the value of the security, and not all other foreseeable risks attendant upon entering into the transaction.

In light of the scope of the Defendant's duty, what is the total actionable loss in this case?

162. It is clear on the evidence the loss of value in security, from what I have found it to be (OMV valuation of £2,750,000 and a 180 day valuation of £2,475,000) to the eventual sale price of £1,400,001 was caused, as a matter of fact, by the combination of the imposition of the second s.146 Notice, the delay in resolving it, and the effects of COVID.

163. The starting point for this is the valuation experts' joint view that (at paragraph 2.5 of their revised joint statement) '*Market conditions between February 2018 and March 2019 were broadly the same for the non-residential value of the Property*'. It follows from this that, but for other factors considered below, the value of Cedar House, and the security for the Claimants' loan, remained at £2,475,000 on a 180 day valuation basis through until around the spring of 2019.

164. Accounting for the eventual sale price, the Claimants' valuation expert, Mr Mackernan, put it this way following his description of the effects of COVID:

> '*I am therefore of the opinion that the Market Value would be reduced dramatically, in what I would colloquially call a 'fire sale', i.e. at a very discounted price and to a cash buyer only. The market would be extremely limited.*

> *At the time, I was somewhat surprised with the low price achieved (£1,400,000) compared to Savills' marketing, rental offers and our valuations undertaken in 2016. However the market had unprecedently collapsed and, but that point in time, Cedar House had a chequered history….*
>
> *Market conditions were clearly much worse in 2020 and I noted that the property was placed into an auction at the end of March 2020 with an asking price of £2,000,000. However the Property was withdrawn due to the lockdown on the advices of the Claimants' advisor as it was considered that as the property was not openly marketed for sale, the property could not be inspected by prospective purchasers because of lockdown and the 'auction was online only with acceptance from only pre-registered bids. …*

165. The Defendant's valuation expert, Mr Rusholme, broadly agreed (albeit in the context of describing the drop in value to £1,400,001 from a different starting point to my determination of the valuation):

> '*The main difference has occurred because of the COVID pandemic which severely restricted the property market from early 2020 onwards. Any property sold at auction – the most restrictive of sale methods – in 2020 was doomed to achieve only bargain prices. This is because of the unwillingness of banks to lend on real estate projects and the general negative market sentiment. There were few potential buyers in 2020 and those that were prepared to […] would do so only at hugely discounted prices.*
>
> *The Property itself became more difficult to sell as time went by. The repeated efforts by the owners to sell from 2017 onwards must have put off many potential buyers. The failure to achieve a renegotiation with the National Trust, the uncertainty as to whether the Property was a restaurant/hotel proposition or a residential conversion opportunity was compounded by the owners change of use to restaurant whilst still marketing the Property as a residential prospect did nothing but confuse and restrict the market.*
>
> *The Property underwent some works after the s146 works in 2017 had been completed. This I suspect lead to the National Trust requiring flooring to be remediated. And other works in November 2018 to rectify works which had been unlawfully completed. It probably also prejudiced the good relations needed in order to amicably negotiate a revised lease. An action which was vital to securing the best price for the Property.*
>
> *I have of course acknowledged that the unprecedented events around the COIVD —19 situation have impacted the ability of many Property owners to sell in the current climate. It is clear that throughout 2019, residential developers were prepared to commit and lose substantial option deposits on a range of options at prices at and around £2,375,000 without, as I understand it, any discount to allow for the National Trust lease.*
>
> *The lack of a sale during 2018 and 2019 effectively blighted the property. My conversations with local selling agents confirm this view. Most local develops and agents were aware that this had become a 'problem property'. There was little appetite for a straightforward unconditional sale'.*

166. At the point of default, Cedar House was, as a matter of fact, not readily realisable as security within 180 days (the assumption behind the relevant valuation) because of the unlawful works which had been undertaken by Mr Pieri and the resulting second s.146 Notice. Whilst it would be wrong in my judgment to criticise the Claimants for the reasonable decisions they took post-default in trying to sell Cedar House for the best price (and without the benefit of hindsight), the chronology serves to demonstrate, as set out above, that the factual reason the value of security was not realised in the sum of £2,475,000 within 180 days of the default was the conduct of the borrower.

167. This is recognised by the Claimants' own lending expert, Mr Penman, whose evidence was that '*The subsequent notice from the NT and received by the receivers later in November 2018 effectively, in my opinion, limited the ability of the Receiver and Hope as the main credit to pursue a quick exit.*'

168. In turn, the delays caused during 2019 to the sale of the Cedar House whilst the position with the National Trust was sought to be regularised led directly to the Property still being on the market when it crashed in dramatic form due to COVID. It is likely that the difficulties with the National Trust would have reduced the value irrespective of COVID, and also contributed to the property's perception by 2020 as one with a '*chequered past*' or one blighted as a '*problem property*'. On the basis of the valuation experts' evidence, which I accept, it is these issues coupled with the '*unprecedented collapse*' of the market due to COVID which led to the drop in value from the 2018 position (in my judgment, £2,475,000) to the sale price of £1,400,001.

169. But for the combination of these factors, and in light of the joint expert evidence as to the lack of movement in the market between February 2018 and March 2019, I find as a matter of fact that there is no reason why, upon default, Cedar House would not have realised its 180 day value as I have found it to have been at February 2018, namely £2,475,000. The capital loaned was £2,215,440, lower than both the correct OMV valuation of £2,750,000 and the 180 day valuation of £2,475,000. It follows that had it not been for the combination of the borrower's conduct rendering the security incapable of quick realisation and the subsequent effects of COVID on the market, the Claimants would not have suffered any loss of capital advanced. The actual net costs of extraction/realisation were £461,805.04, but this was so high because of the complexity and duration of the sale process, caused by the combination of factors identified above in respect of which no duty was owed. I accept the evidence of Mr Penman that, in general terms, one might pro-rate these costs so that, but for the complexity and duration of the sale process, the cost of extraction/realisation would have been around £100,000. The capital advanced and extraction/realisation costs would, together, still have been less than the amount of security based upon the true 180 day valuation.

170. By analogy with the reasoning of the Privy Council in the case of *Charles B Lawrence* which I accept, as Mr Asquith submits, is apposite, the loss caused by the breach of relevant duty is nil, as it would have been in *Charles B Lawrence* if the value of the land (excluding the title issue) had been, say £3,500,000 instead of £2,375,000. The duty of the valuer did not in the circumstances of this case extend to protecting the lender against the consequences of unlawful acts of the borrower or dramatic collapses in the market.

171. Mr Nicol urges upon the Court an analysis based upon a counter-factual. He contends that the whole driver for Hope's loss is making a loan against a negligent valuation of £4,000,000. If that had been the true value of Cedar House, the drop in value caused by the lack of readily realisable security and COVID could have occurred and, given the low LTV, Hope would still have been left with security which exceeded the loan and no loss would have been caused. As a counter-factual scenario, that is quite possibly correct (although given the COVID effects on the market as described by the valuation experts, it is far from certain). However, the authorities make clear that this is not the correct analysis where, as here, the lender's duty extends, by reference to its purpose, only to protecting the lender against the true value of the security. In this case, as in *Charles B Lawrence*, the counter-factual is an unhelpful siren call which, if followed, leads the analysis onto the rocks. This is because it ignores the importance of focussing on questions (2) and (5) set out by the Supreme Court in *MBS.* In particular, question 5 requires the Court to ask whether there is a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care. That nexus does not exist where no loss would have been suffered by reason of the negligent over-valuation when considered in isolation from the effects of those matters for which no duty was owed (here, the conduct of the borrower coupled with COVID).

172. For these reasons, the Claimants' actionable loss is nil.

173. I should add that, were this analysis to be wrong, I would not reduce the total actionable loss to take account of the higher than normal costs of extraction/realisation of security. Whilst they were higher than what might normally be expected, the additional costs were caused, as set out above, by the very things (e.g. difficulty in realising the security/COVID) which my analysis concludes are irrecoverable as they were not legally caused by the breach of relevant duty. However, in circumstances where, contrary to my analysis, recoverable loss includes losses attributable the actions of the borrower and COVID, it follows that these losses, too, would be recoverable in principle. Therefore, if the Claimants' legal analyses were correct, I would have found (subject to the application of contributory negligence) that the total actionable loss would be £875,401.40 plus statutory interest at 3.5% above base.

<u>(9) Were the Claimants contributorily negligent so far as any loss that they have suffered and, if so, should such negligence impact the damages recoverable by them?</u>

174. In light of the foregoing analysis, this is no longer relevant. However, had it been I would have found that Hope contributed to its losses by reason of the following acts of negligence:

(1) lending to Mr Pieri when there was no or no viable exit strategy for the loan, which made the need to call upon the security inevitable (in essence, paragraph 29(i) of the Defence). The Defendant's lending expert, Mr Griffiths, gave evidence that understanding the exit strategy is a fundamental consideration (see paragraph 4.35 of his Report). Mr Penman, the Claimant's expert gave evidence that it was '*important*' (see Day 5 page 103). There was no basis to consider that a change to residential use would have been viable in circumstances where the owner was a limited company and residential use

would only be granted to an individual. Having, in these circumstances, rightly considered that, *'We ... need to understand the proposed exit if no lease was granted or if the lease would only be granted to Mr Pieri individually'* the Claimant simply took no steps to understand what the exit strategy was as a prudent lender should have done;

(2) lending to Mr Pieri when he had both a poor credit rating and little or no investigation appeared to be undertaken in his historical ability to carry out the work on a National Trust property to convert it into residential property, which it is plain he intended to do (in essence, paragraphs 29(a), (c)-(e) of the Defence). It is not relevant in this respect that the prospective residential value formed no part of the analysis of valuation sought by the Claimants; it is relevant because, absent credibility on the part of the borrower in this regard, work undertaken by the borrower to achieve the conversion could (as in fact in due course happened) materially damage the realisability and/or value of the security. Coupled with this there were (put at its lowest) serious doubts as to whether he had been honest in his application, and where no proper explanation was sought for his grossly exaggerated statement of assets and liability. Mr Penman, the Claimants' lending expert, accepted that lending in these circumstances was '*imprudent*' (see Day 5 page 139) and '*a poor lending decision*' (see Day 5 page 140). Mr Griffiths was of the same view (see paragraphs 4.68-4.70).

(3) failing to monitor the ongoing construction works, post loan, as the Facility Loan Terms suggested would happen (in essence, paragraphs 29(m) of the Defence). It is clear from the evidence as set out above that the Claimants were aware that conversion works were ongoing and it is obvious (particularly in the context of works to a Grade II listed house owned by the National Trust) that the nature of the works could affect the realisability and value of the security. Accepting as I do Mr Griffiths' evidence at paragraph 4.89 of his Report, taking no steps to seek any kind of comfort in relation to the compliance of the works being undertaken was imprudent lending.

175. In assessing the percentage of contributory negligence to the losses, it is necessary for me to balance blameworthiness and culpability with causative potency. In this regard, I would certainly have in mind that the negligence of the Defendant by reference to the extent to which the valuation was overstated was significant. However, balanced against that on the Claimants' side were acts of imprudence which led, in terms of causation, to the security being incapable of swift realisation, the very risk a prudent lender would take reasonable steps to avoid. I would, had it been necessary to do so, assess contributory negligence of the Claimants at 50%.

176. It follows that if the Claimants' legal analysis had been correct I would have found that the total recoverable loss after contributory negligence would have been £437,700.70 plus statutory interest at 3.5% above base rate.

<u>(10) Did the Claimants actionably fail to mitigate any loss that they have suffered?</u>

177. These allegations were not pursued by the Defendant in Closing.

G. Conclusion

178. I have found that, notwithstanding the (ultimately) admitted negligence of the Defendant, the Claimants have suffered no actionable loss. As a result, the claim is dismissed.